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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

YANIRA YESENIA OLDAKER; et al.,

Petitioners-Plaintiffs,

v.

THOMAS P. GILES, et al.,

Respondents-Defendants.

Case No.: 7:20-cv-00224-WLS-MSH

MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PETITION FOR WRITS OF HABEAS CORPUS AD TESTIFICANDUM

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INTRODUCTION

Detained Petitioners Jane Doe #8, Jane Doe #22, Jane Doe #6, Yanira Yesenia Oldaker, Jane Doe #15, Tatyana Alekseyevna Solodkova, Lourdes Terrazas Silas, Luz Adriana Walker, and Jane Doe #5 ("Detained Petitioners"), along with many others, have suffered and witnessed abuse at the hands of Respondents. Respondents subjected them to invasive, nonconsensual, and unnecessary gynecological and other medical procedures while they were detained at Irwin County Detention Center ("ICDC"). They referred women to an abusive gynecologist even when they did not have gynecological issues; were deliberately indifferent to their medical needs; and did not intervene to stop their medical abuse. Then, they attempted to silence and retaliate against Petitioners who spoke out about their mistreatment. Although they continue to face the threat of retaliation, Petitioners have come forward in this Court, on behalf of themselves and others similarly situated, in order to hold Respondents accountable for their egregious and shocking misconduct.

In light of Respondents' ongoing campaign of retaliation against the women who have come forward, Petitioners seek this Court's intervention to ensure they are able to fully and fairly litigate their claims. Accordingly, Petitioners now move for a temporary restraining order enjoining all forms of retaliation against them, including, but not limited to: use of force, solitary confinement, denial of privileges, or deportation. The detained Petitioners also petition the Court for writs of habeas corpus *ad testificandum* ordering Respondents to make Petitioners available for any hearings deemed necessary by the Court, including trial. In the alternative, they request that the Court order their release during the pendency of this case to prevent further retaliation and ensure their ability to participate in all proceedings.

FACTUAL BACKGROUND

Detained Petitioners are victims of and witnesses to multiple acts of medical abuse, including non-consensual, medically unindicated, and invasive gynecological procedures performed on them and on others while detained at ICDC. *See* Ex. H.5 (Decl. of Jane Doe #15) ¶¶ 15-37; Ex. H.9 (Decl. of Jane Doe #22) ¶¶ 26-39; Ex. H.6 (Decl. of Jane Doe #8) ¶¶ 19-54; Ex. H.7 (Decl. of Lourdes Terrazas Silas) ¶¶ 26-37; Ex. H.4 (Decl. of Luz Walker) ¶¶ 14-99; Ex. H.10 (Decl. of Jane Doe #5) ¶¶ 14-41; Ex. H.8 (Decl. of Jane Doe #6) ¶¶ 11-25; Ex. H.3 (Decl. of Tatyana Alekseyevna Solodkova) ¶¶ 8-26; Ex. G.1 (Decl. of Yanira Oldaker) ¶¶ 10-34. These procedures included unnecessary, life-changing surgery under general anesthesia and invasive, painful, and unnecessary examinations. *Id.* The abuse Petitioners suffered is part of a disturbing pattern of inhumane medical neglect and mistreatment at ICDC. Ex. H.2 (Decl. of Keynin Jackelin Reyes Ramirez) ¶¶ 22-27; Ex. G.2 (Decl. of Mbeti Ndonga) ¶¶ 5-16; Ex. J.7 (Decl. of Jane Doe #20) ¶¶ 19-24; Terrazas Silas Decl. ¶¶ 21-38; Walker Decl. ¶¶ 116-127; Jane Doe #6 Decl. ¶¶ 52-59; Oldaker Decl. ¶¶ 35-40. For years, immigrants at ICDC and their attorneys have reported abysmal conditions there,[1] including specific complaints against the gynecologist since as early as 2018.[2] DHS itself has documented ICDC's serious violations of health and safety standards.[3] Despite this, ICDC and ICE continued to allow nonconsensual medical procedures to

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[1] *See* AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, PRISONERS OF PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA 85, 89–91 (2012), https://www.acluga.org/sites/default/files/field_documents/prisoners_of_profit.pdf

[2] *See* Ex. J.3 (Decl. of Jane Doe #35) ¶¶ 12-13, 21; Ex. J.1 (Decl. of Jane Doe #25) ¶¶ 21, 24-27.

[3] *See* U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, Office of Professional Responsibility, Inspections and Detention Oversight Division, Compliance Inspection, Enforcement and Removal Operations, ERO Atlanta Field Office, Irwin County Detention Center, Ocilla, Georgia (Mar. 3–5, 2020) at 10, https://www.ice.gov/doclib/foia/odo-compliance-inspections/irwinCoDetCntr_OcillaGA_Mar3-5_2020.pdf (noting that the lack of cleanliness and hygiene at ICDC is a "repeat deficiency"); *id.*

proceed; refused to provide adequate care; and repeatedly retaliated against detainees who spoke out. Reyes Ramirez Decl. ¶¶ 28-34; Oldaker Decl. ¶¶ 81-85; Walker Decl. ¶¶ 107-115; Ex. L.6 (Decl. of Angela Rojas Fañas) ¶¶ 9-12.

On September 14, Dawn Wooten, an ICDC nurse and early whistleblower, reported the alarming rate at which non-consensual and invasive unnecessary gynecological procedures were being performed on immigrant women at ICDC. Soon after her report, multiple federal agencies opened investigations into medical abuses at ICDC.[4] In October, a team of independent medical professionals reviewed the medical records of 19 women detained at ICDC, including some of the Petitioners. *See* Ex. B (Executive Summary of Findings by the Independent Medical Review Team Regarding Medical Abuse Allegations at the Irwin County Detention Center). Their report described what Petitioners already knew: that people detained at ICDC are treated inhumanely and have been and may in the future be subject to nonconsensual and unnecessary medical procedures without their informed consent. *Id.* at 1–5. Medical experts, after reviewing Petitioners' medical records, have also concluded that the procedures Petitioners underwent, or

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at 15 ("ODO inspected medical equipment in the examination rooms and found patient examination tables are torn beyond repair, making cleaning and decontamination impossible. Additionally, cabinets, drawers, and doors were broken and held together with tape.")

[4] *See* Adolfo Flores, *ICE is Trying to Deport Immigrant Women Who Witnessed Alleged Misconduct by Gynecologist, Attorneys Say*, BUZZFEED NEWS (Nov. 11, 2020), https://www.buzzfeednews.com/article/adolfoflores/ice-deporting-gynecologist-witnesses; Nomaan Merchant, *Migrant Women to No Longer See Doctor Accused of Misconduct*, ASSOCIATED PRESS (Sept. 22, 2020), https://apnews.com/article/georgia-archive-immigration-f3b1007a9d2ef3cb6d2bd410673eae83 (confirming ongoing investigation by the Department of Homeland Security Office of the Inspector General); Teo Armus, *Congressional Dems Say Women in ICE Custody Who Blew Whistle on Gynecologist Should Be Able to Apply for Special Visas*, WASH. POST (Nov. 19, 2020), https://www.washingtonpost.com/nation/2020/11/19/georgia-ice-deportation-immigration-doctor/.

were pressured to undergo, were not medically indicated and caused or put them at risk of harm.[5] Mental health experts, based on interviews with Petitioners, have documented the distress and trauma caused by the procedures to this day.[6]

In response to conditions at ICDC, Petitioners and other women detained there spoke out by protesting, going on hunger strike, speaking with press, attempting to speak with federal investigators and members of Congress, and filing the present lawsuit. Respondents retaliated against them for these First-Amendment-protected activities by accelerating their deportations, monitoring and/or cutting off their phone access, depriving them of food and water, and openly threatening them. Because of Respondents' aggressive and widespread retaliation against them, the Petitioners still detained at ICDC now seek the intervention of this Court to ensure their ability to fully and fairly litigate their claims of egregious government misconduct and to vindicate their constitutional rights.

ARGUMENT

A. This Court Should Issue A Temporary Restraining Order Prohibiting Any Further Retaliation Against Petitioners.

A court may grant a temporary restraining order where a petitioner demonstrates: (1) she has a substantial likelihood of success on the merits; (2) she will suffer irreparable injury unless the injunction issues; (3) the threatened injury to the petitioner outweighs any damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be

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[5] Ex. O (Decl. of Margaret G. Mueller, MD, FACS, FACOG, November 18, 2020) ¶¶ 6-12; Ex. L.4 (Decl. of Andrea Shields, MD, MS, November 22, 2020) ¶¶ 6-14; Ex. L.4 (Decl. of Geoffrey Schnider, MD, November 22, 2020) ¶¶ 6-14; Ex. L.5 (Decl. of Julia Geynisman-Tan, MD, FACOG, December 10, 2020) ¶¶ 6-15; Ex. L.3 (Decl. of Julia Geynisman-Tan MD, FACOG, December 10, 2020) ¶¶ 7-12; Ex. L.2 (Decl. of Margaret G. Mueller, MD, FACS, FACOG, December 14, 2020 ¶¶ 6-19; Ex. L.6 (Declaration of Meredith B. Turner, December 16, 2020, CNM, PhD) ¶¶ 8-11. *See also,* Exs. L.1–L.12; M.1–M.5.

[6] *See* Exs. L.1–L.12; M.1–M.5.

adverse to the public interest. *See id.*; *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006). Petitioners demonstrably meet these factors for each of their claims.

1. **Petitioners are likely to succeed on the merits of their claims**

Petitioners are likely to succeed on the merits of their claims of First Amendment retaliation, conspiracy to deter participation in federal judicial process, and certain violations of the Administrative Procedure Act ("APA"). They have produced extensive evidence documenting Respondents' unlawful retaliation against them and other ICDC detainees for engaging in First Amendment protected speech and attempting to participate in federal judicial process. This retaliation includes violence, threats, intimidation, and attempts to expedite Petitioners' deportation. Such conduct is in gross violation of the First Amendment and is unlawful under 42 U.S.C. § 1985(2). Further, Respondents have deported multiple victims of abuse at ICDC during the pendency of judicial and agency investigations, in violation of their own policy. This is unlawful under the *Accardi* doctrine, under which agencies are required to follow their own rules and regulations. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

a. **First Amendment retaliation**

Respondents have engaged in an extensive and ongoing campaign of retaliation against Petitioners for their speech protesting their mistreatment and abuse at ICDC. The First Amendment prohibits government officials from "subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *see also Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998) (retaliation for speech "offends the Constitution [because] it threatens to inhibit exercise of the protected right."). To establish First Amendment retaliation, plaintiffs must show that (1) their speech or act was constitutionally protected; (2) the petitioner suffered adverse action such that the retaliatory conduct would likely deter a person of

ordinary firmness from engaging in such speech; and (3) there is a causal connection between the retaliatory actions and the adverse effect on speech. *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008). Detained Petitioners are likely to establish each of these elements.

i. ***Detained Petitioners engaged in First Amendment protected conduct***

Detained Petitioners engaged in First Amendment protected conduct by protesting about their treatment at the hands of the government, speaking to journalists, and participating or seeking to participate in law enforcement and congressional inquiries into conditions and misconduct at ICDC. The First Amendment shields these actions from government retaliation, particularly where, as here, their goal is to criticize government misconduct. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034-35 (1991).

In response to their mistreatment at ICDC, numerous detained women spoke out by protesting, going on hunger strike, speaking with the press, or attempting to speak with federal investigators and members of Congress. *See, e.g.,* Oldaker Decl. ¶¶ 53-59. Every detained Petitioner seeking emergency relief has attempted to speak out about or protest their mistreatment.[7] Their actions and speech are indisputably protected by the First Amendment. *See Bridges v. Wixon*, 326 U.S. 135, 162 (1945). And since they involve matters of prominent public concern, they are entitled to heightened protection. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)

[7] *See* Oldaker Decl. ¶¶ 73-78 (spoke with federal investigators); Walker Decl. ¶¶ 13,102-103, 107 (participated in hunger strike; submitted prior declaration; expressed desire to participate in federal investigation); Jane Doe #5 Decl. ¶ 54 (signed papers requesting to speak with congressional investigators); Jane Doe #6 Decl. ¶¶ 5-7 (participated in hunger strike over conditions at ICDC); Jane Doe #8 Decl. ¶¶ 55-57 (attempted to speak about medical mistreatment); Jane Doe #15 Decl. ¶ 7 (spoke with volunteers about mistreatment); Solodkova Decl. ¶¶ 27-31 (wanted to participate in congressional investigation and participated in hunger strike); Jane Doe #22 Decl. ¶¶ 40, 47 (requested medical records and informed investigators she has information relevant to abuses); Jane Doe #5 Decl. ¶ 42 (spoke with federal investigators).

(Speech on "public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (citation marks omitted)).

ii. ***Respondents engaged in a campaign of retaliation against Detained Petitioners and others for engaging in this protected speech***

Respondents have undertaken a campaign of widespread intimidation, abuse, and expedited deportation to retaliate against women at ICDC who speak up against medical abuse. In response to hunger strikes and growing public scrutiny, Respondents and their employees aimed to silence women detained at ICDC.

Respondents openly threatened Petitioners for speaking up about their abuse, including telling them they would have to "pay" for coming forward about Dr. Amin's misconduct. Jane Doe #5 Decl. ¶ 21. When one woman displayed a poster protesting her medical abuse, guards threatened to send her to the medical unit as punishment. Ndonga Decl. ¶¶ 6-8. They moved other women to isolation for similar conduct and threatened them to "be quiet or go into isolation." *See* Solodkova Decl. ¶ 32; Reyes Ramirez Decl. ¶¶ 9-10. When women went on hunger strike, Respondents limited their water access, took money out of their commissary accounts, and limited or cut off their access to phones, tablets, video calls and email. *See* Jane Doe #6 Decl. ¶¶ 7, 8; Oldaker Decl. ¶ 82; Walker Decl. ¶¶ 108-111. In some cases, Respondents acted directly to prevent Petitioners from sharing their abuse with the outside world, by monitoring phone calls and cutting the line when detained women mentioned the hunger strike, their health, or their abuse by Dr. Amin and medical staff. Jane Doe #6 Decl. ¶ 19; Jane Doe #8 Decl. ¶¶ 55-57; Jane Doe #5 Decl. ¶ 16; Walker Decl. ¶ 115. Respondents also withheld medical records from Petitioners. *See, e.g.,* Reyes Ramirez Decl. ¶ 28. Finally, Respondents used the most effective means at their disposal to silence dissent: they accelerated, or threatened to accelerate, the deportations of women who spoke up, in some cases successfully removing them.

See Oldaker Decl. ¶¶ 55-56, 59, 62, 68; Walker Decl. ¶¶ 15, 105, 110, 111, 114; Ndonga Decl. ¶ 18; Jane Doe #5 Decl. ¶ 24; Reyes Ramirez Decl. ¶¶ 33-34; Ex. G3 (Decl. of Jaromy Jazmín Floriano Navarro) ¶ 25; Ex. G4 (Decl. of Jane Doe #31) ¶¶ 49-60.

Unquestionably, Respondents' actions were sufficiently severe to qualify as unlawful retaliation. *See Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005) ("A plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights."). Indeed, Respondents' retaliatory acts often achieved their goal of deterring Petitioners from speaking up. Because they feared retaliation and expedited deportation, many women were reasonably afraid to speak out. *See* Oldaker Decl. ¶ 55-60 (describing being "scared of participating in the federal investigation" because of retaliation, including beatings, placement in isolation, and the threat of expedited deportation); Solodkova Decl. ¶ 32 (stating that she knows that because Respondents can "easily retaliate against us"); Jane Doe #5 Decl. ¶ 24 (stating that she is afraid that Respondents will expedite consideration of her appeal and speed up her deportation if she speaks out); Jane Doe #15 Decl. ¶ 9 (stating that she would "speak out more about bad things that are happening [at ICDC]" but is "afraid to"); Jane Doe #6 Decl. ¶¶ 18-19; Jane Doe #8 Decl. ¶¶ 72-75; Walker Decl. ¶¶ 109-10, 112, 128 (describing how she and others ceased the hunger strike due to threats of prioritized deportation and expressing fear of "retaliation for writing this declaration and participating in a lawsuit against ICE and ICDC"); Reyes Ramirez Decl. ¶¶ 29-35 (stating that "we were all terrified to speak, but one by one we all gave each other the strength to open our mouths and speak the truth"); Ex. J11 (Decl. of Jane Doe #28) ¶ 3 ("I feel scared to speak up, but

I want to tell the truth of what happened to me."). Respondents will continue to retaliate against detained Petitioners if this Court does not act to halt them.[8]

If not enjoined, Respondents' retaliation threatens to silence detained petitioners completely. Once deported, most Petitioners will no longer be able to participate in this lawsuit or the ongoing investigations into their medical abuse and Respondents' culpability. *See* Oldaker Decl. ¶ 91; Solodkova Decl. ¶¶ 28, 33; Floriano Navarro Decl. ¶ 52; Walker Decl. ¶ 106. Respondents' past retaliatory conduct, ongoing efforts to lift judicial shields against removal, and refusal to adjudicate stays of removal pending litigation show a clear likelihood that they will continue to seek the expedited deportation of detained Petitioners who have spoken out against their abuse. Without this Court's protection, the looming threat of retaliatory deportation will continue to frighten Petitioners, chilling the exercise of their First Amendment rights, as it would to persons of ordinary firmness *See Bennett*, 423 F.3d at 1251 (retaliatory government conduct violates the First Amendment where it would chill or silence a person of ordinary firmness from continuing protected activity).

iii. ***There is a causal nexus between detained Petitioners' protected speech and Respondents' retaliation***

Finally, there is a causal connection between detained Petitioners' protected speech and Respondents' adverse actions and threats to remove women who speak up about their experiences. To prove causation, petitioners must show that protected speech "was a substantial or motivating factor in the allegedly retaliatory decision." *Gattis v. Brice*, 136 F.3d 724, 726 (11th Cir. 1998) (internal quotation marks omitted); *see also Smith*, 532 F.3d at 1278 ("The

[8] Even in proceedings before this Court, ICE has fought aggressively to preserve its unchecked authority to engage in retaliatory deportations by seeking to renege on a signed and filed consent agreement. *See* ECF 39, 45, 47, 50.

causal connection inquiry asks whether the defendants were subjectively motivated to discipline because [petitioner] complained of some of the conditions of his confinement."). Respondents' conduct shows a clear causal nexus between speech and retaliation.

First, Respondents' widespread and persistent pattern of retaliation shows causation. *See supra* pages 7-9; *Abella v. Simon*, 522 F. App'x 872, 874 (11th Cir. 2013) (widespread pattern of abuse weighed in favor of showing causal nexus in First Amendment retaliation claim). This is further supported by the close temporal proximity between protected speech and retaliatory acts. *See Akins v. Fulton Cty., Ga.*, 420 F.3d 1293, 1305 (11th Cir. 2005) (change in working conditions shortly after meeting supported finding causal nexus between protected conduct and retaliation). In some cases, mere hours or days passed between Petitioners engaging in protected speech and Respondents attempting to deport them or beginning the deportation process. *See* Floriano Navarro Decl. ¶¶ 3-4; Oldaker Decl. ¶¶ 55-56, 59, 62, 68; Walker Decl. ¶¶ 103-105; Ndonga Decl. ¶ 18. That many of these women had been detained for months or years before Respondents initiated their deportations further strengthens the causal connection between protected speech and retaliatory deportation.

Second, Respondents monitored detainees' phone calls and disconnected them as soon as women reported mistreatment, protests, or their medical condition. Jane Doe #6 Decl. ¶ 19; Jane Doe #8 Decl. ¶¶ 55-59; Jane Doe #5 Decl. ¶¶ 14-17; Walker Decl. ¶ 115. Petitioners report that after the news about Dr. Amin broke, if Petitioners were speaking with lawyers and were late to a meal, they were denied food, when previously even those late to a meal would still be fed. Reyes Ramirez Decl. ¶ 32.

Finally, Respondents' own words show causation: Respondents directly threatened detainees who spoke up. Respondents told Petitioners they would "pay" for drawing attention to

their treatment at ICDC. Jane Doe #5 Decl. ¶ 21. They openly threatened to accelerate the deportations of women who participated in protests, Walker Decl. ¶¶ 109-112 (direct threats by ICDC staff to deport hunger strikers). And Respondents and their employees or contractors openly discussed Petitioners' protest and participation in investigations in the context of accelerating their removal. *See* Oldaker Decl. ¶¶ 46-47 (ICDC staff stated that they suspected she participated in the Dr. Amin investigation shortly before steps were taken to expedite her deportation).

For all the foregoing reasons, Detained Petitioners are likely to succeed on the merits of their First Amendment claims.

b. **Conspiracy to deter Petitioners from participating in federal judicial process**

Petitioners are also likely to prevail on their claim that Respondents conspired to deter them, via retaliation and threat thereof, from participating in pending federal investigations and judicial proceedings. 42 U.S.C. § 1985(2) provides a private right of action against persons who engage in a conspiracy to deter any party or witness from attending or testifying in a pending federal court proceeding.[9] The statute was enacted in order to protect federal court process from improper outside influence. *See Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340, 348 (5th Cir. 1981); *Kush v. Rutledge*, 460 U.S. 719, 726-27 (1983). To prove a § 1985(2) claim, a plaintiff must show that (1) two or more people conspired (2) to deter a witness from testifying in a pending federal proceedings, which (3) resulted in injury to the plaintiff. *Northrup v. Conseco Fin. Corp.*,

[9] Injunctive relief is available under § 1985. *See Mizell v. N. Broward Hosp. Dist.*, 427 F.2d 468, 473 (5th Cir. 1970). It is well established that Federal government officials and private individuals may be held liable under § 1985. *See Hobson v. Wilson*, 737 F.2d 1, 55-56 (D.C. Cir. 1984); *Peck v. United States*, 470 F. Supp. 1003, 1011 (S.D.N.Y. 1979); *Kenyatta v. Moore*, 623 F. Supp. 224, 228 (S.D. Miss. 1985).

141 F. Supp. 2d 1372, 1374-75 (M.D. Ga.), *aff'd,* 281 F.3d 1285 (11th Cir. 2001). Detained Petitioners are likely to successfully prevail on this claim.

i. ***Respondents conspired to deter Petitioners from participating in federal investigations and judicial process***

Respondents' statements and conduct show that they conspired to deter or prevent Respondents from participating in federal investigations and pending court proceedings. A conspiracy is an "agreement between parties to inflict a wrong against or injury upon another, and an overt act that results in that damage." *Aque v. Home Depot U.S.A., Inc.*, 629 F. Supp. 2d 1336, 11345-46 (N.D. Ga. 2009) (citation omitted)). Because conspiracy "is rarely proven by direct evidence that the conspirators formally entered or reached an agreement," it may be inferred from circumstantial evidence. *United States v. Glinton*, 154 F.3d 1245, 1258 (11th Cir. 1998) (quotation marks and citation omitted). Such evidence includes "the relationship of the parties, their overt acts and concert of action, and the totality of their conduct." *Myers v. Bowman*, 713 F.3d 1319, 1332 (11th Cir. 2013) (quotation marks omitted); *see also Hobson*, 737 F.2d at 55-56 (affirming in part jury verdict finding § 1985 conspiracy where circumstantial evidence showed "communication between [individual agents] coupled with patterns of similar activity on their part").

There is more than sufficient evidence here to infer conspiracy. *See Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1283–84 (11th Cir. 2002) (A plaintiff need not show a "smoking gun" to show a conspiracy but must provide "some evidence of agreement between the defendants"). Respondents and their employees worked together to expedite the deportations of women who spoke, or attempted to speak, to federal investigators. As with First Amendment retaliation, otherwise legal law enforcement activities may be unlawful under § 1985(2) if they are part of a conspiracy to infringe on petitioners' civil rights. *See Hobson*, 737 F.2d at 50-51.

Here, the close temporal proximity between detainees' interactions with federal investigators and subsequent attempts to deport them strongly suggests that ICDC staff worked in close coordination with ICE officials to procure the rapid deportation of several women who had participated or attempted to participate in investigations of Respondents' misconduct. For example, on November 25 and December 1, 2020, Ms. Walker, through counsel, informed government attorneys that she had information relevant to federal investigations and judicial proceedings related to medical abuse at ICDC. Walker Decl. ¶ 103. On December 3, 2020, an ICE agent came to ICDC to take her fingerprints and inform her that issuance of her travel documents was being expedited, which meant she would soon be deported. *Id.* ¶ 104. The close temporal proximity of these events establishes Respondents' intent to remove Mrs. Walker from the country in order to silence her speech.

Mrs. Walker's experience far from unique. Ms. Ndonga spoke with federal investigators on October 27, 2020. Only hours later, she was informed that the hold on her removal had been lifted and she would soon be deported. Ndonga Decl. ¶ 18. At the time, she had been detained for more than 19 months. *Id.* ¶ 18. Ms. Reyes Ramirez had a similar experience. After Ms. Reyes Ramirez's name was released to federal investigators, her commissary account was zeroed out and she was scheduled for the next day. Reyes Ramirez Decl. ¶ 33. Similarly, on October 26, 2020, Ms. Oldaker provided a declaration and list of victims to her lawyers, who shared these materials with federal investigators on November 5, 2020. Oldaker Decl. ¶ 59. Two days later, Ms. Oldaker's commissary account was zeroed out in preparation for her deportation on November 9, 2020, which was unusual given that her appeal to the BIA had been denied about a month before. *Id.* ¶ 59, 62. She would have been deported but for the last-minute intervention of her attorneys and members of Congress. *Id.* ¶¶ 68, 74. And on September 15, 2020, Ms. Floriano

Navarro admitted to ICDC staff and unnamed ICE Agents that she had spoken with her lawyer about medical abuse at ICDC. Floriano Navarro Decl. ¶ 3. She was deported within 24 hours of this admission. *Id.* ¶ 4. Prior to her deportation, ICDC employees and unnamed ICE Agents made statements suggesting that she was targeted for expedited deportation because she had helped expose misconduct at ICDC. *Id.* ¶ 30.

As the Petitioners' declarations show, these incidents represent a pattern: many women who spoke or tried to speak with investigators or members of Congress were retaliated against in similar ways.[10] *See, supra,* pages 7-9; Walker Decl. ¶ 105. Other evidence also shows that Respondents acted in concert. As discussed above, Respondents monitored and cut off phone calls when detainees mentioned subjects related to ongoing investigations of ICDC, medical abuse, or the hunger strikes. *See* Jane Doe #6 Decl. ¶ 19; Jane Doe #8 Decl. ¶¶ 55-57; Jane Doe #5 Decl. ¶ 16; Walker Decl. ¶ 115. In addition, during the Congress members' visit to ICDC, detention center staff relocated women who had been vocal about their claims from C Pod to the Golf ("G") Pod and did not allow Congress members to visit that pod or speak with the women detained there. Ex. J2 (Decl. of Jane Doe # 11) ¶¶ 48-56; Solodkova Decl. ¶ 27. For women who remained in C Pod, detention center staff told them to "keep quiet" and "go to our cell and go to sleep and not talk to them." Reyes Ramirez Decl. ¶ 29.

This evidence, taken together, is sufficient proof that Respondents conspired to deter detained Petitioners from participating in an ongoing federal investigation.[11]

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[10] This evidence further supports Petitioners' likelihood of success on their First Amendment retaliation claims, *supra*.

[11] Section 1985(2) requires the existence of a "pending federal proceeding." This includes participation in federal investigations conducted in advance of a court filing. *See McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1040 (11th Cir. 2000); *Hoopes v. Nacrelli*, 512 F. Supp. 363, 368 (E.D. Pa. 1981). *See also Aque*, 629 F. Supp. 2d at 1347-48 (citing *Shoultz v. Monfort*

ii. ***Respondents' acts to deter participation in federal process caused injury***

Respondents' deterrent actions caused "injury." Injury may be shown by harassment, intimidation, and threats aimed at deterring or retaliating for participation in federal process. *See McAndrew*, 206 F.3d at 1039-40. "The gist of the wrong at which § 1985(2) is directed is not deprivation of property, but intimidation or retaliation against witnesses in federal-court proceedings." *Haddle v. Garrison*, 525 U.S. 121, 125-26 (1998). As described above, detained Petitioners were subjected to harassment, threats, and actual efforts to remove them from the United States. *See supra* pages 12-14. This readily satisfies § 1985(2)'s harm requirement.

Detained Petitioners are therefore likely to prevail on their § 1985(2) claims.

c. **Violation of the Administrative Procedure Act**

Detained Petitioners are also likely to succeed on the merits of their ICE Policy 10076.1 APA claim. ICE's own policies and regulations preclude deporting noncitizens who are seeking to vindicate legitimate civil rights claims or who are needed in criminal investigations. ICE nonetheless deported victims of egregious abuse at ICDC before they could fully participate in federal investigations. It continues to seek the deportation of Detained Petitioners even as those petitioners attempt to vindicate their rights before this Court. These clear departures from ICE's own rules and regulations is arbitrary and capricious agency action under the APA and must be enjoined.

It is well established that the APA requires federal agencies to follow their own rules. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 549 (2009) (holding that a fundamental principle of administrative law is that an "agency must follow its own rules" and may not depart

of Colorado, Inc., 754 F.2d 318, 322 (10th Cir. 1985)). Further, courts interpret the term "witnesses" in federal proceedings "liberally" to include not only witnesses already under subpoena but also witnesses the parties intend to call in federal proceedings. *Aque*, 629 F. Supp. 2d at 1347-48.

from them without explanation); *Morton v. Ruiz,* 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."); *Accardi*, 347 U.S. 260, 266. The failure to do so is arbitrary and capricious conduct, in violation of 5 U.S.C. § 706(2)(A), and must be enjoined. *Simmons v. Block,* 782 F.2d 1545, 1550 (11th Cir.1986).

Since 2011, it has been ICE's policy not to deport "individuals in the midst of a legitimate effort to protect their civil rights or civil liberties." *See* John Morton, Office of Dir., U.S. Immigration and Customs Enforcement, Policy Number 10076.1, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011) (stating that "it is . . . against ICE policy to remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties). This 2011 Morton Memo and ICE Policy Memorandum 10076.1 "remain[] in effect." Matthew T. Albence, Office of Dir., U.S. Immigration and Customs Enforcement, *Letter to Congress regarding U nonimmigrant status (U visa) cases* (Sept. 27, 2019). The Immigration and Nationality Act ("INA") and federal regulations also prohibit the departure of any noncitizen from the United States "if his departure would be prejudicial to the interests of the United States." 8 C.F.R. §§ 215.2(a). That includes, *inter alia*, any noncitizen "needed in the United States in connection with any investigation or proceeding being, or soon to be, conducted by any official executive, legislative, or judicial agency in the United States or by any governmental committee, board, bureau, commission, or body in the United States, whether national, state, or local." 8 C.F.R. § 215.3(h).

As described in detail above, Petitioners are engaged in ongoing efforts to vindicate their rights through multiple avenues, including this action, administrative complaints, medical grievances filed with state licensing authorities, cooperation with federal investigators from

DOJ, DHS OIG, and the FBI, and efforts to communicate with members of Congress and the media. ICE has deported or attempted to deport numerous victims of abuse at ICDC not only in spite of but *because of* their legitimate attempts to vindicate their civil rights. *See, supra,* Sections A(1)(a), (b); ICE Policy Number 10076.1. These actions clearly violate ICE's own policy against deporting legitimate civil rights claimants and noncitizens needed in connection with government investigations. *See* Policy Number 10076.1 Such conduct is arbitrary and capricious agency action and must be enjoined to avoid further harm to Petitioners. *Simmons*, 782 F.2d at 1550 (holding that "courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself").

2. **Petitioners will suffer irreparable harm absent issuance of a restraining order.**

Petitioners are likely to suffer irreparable harm if the Court does not issue a temporary restraining order requiring Respondents to immediately halt retaliatory and deterrent conduct, including deportations. Petitioners' protected speech has already been chilled by a pattern of retaliatory abuse and deportation. And if they are deported, or otherwise further deterred from participating in this proceeding and federal investigations, they will be unable to exercise their First Amendment right to access courts and petition for grievances. *See Wright v. Newsome*, 795 F.2d 964, 967 (11th Cir. 1986) (holding that filing lawsuits is protected by "the inmate's right of access to the courts, and the inmate's First Amendment rights" (citations omitted)); *Bridges v. Russell*, 757 F.2d 1155 (11th Cir. 1985) (inmate's First Amendment right to petition may be violated by retaliatory transfer)*; Schenck v. Pro-Choice Network Of W. New York*, 519 U.S. 357, 367-68 (1997) (irreparable harm cause by violations of § 1985 that infringe on plaintiffs' constitutional rights). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295-96 (5th Cir. 2012) (holding

that First Amendment harms satisfy the irreparable harm requirement). And absent an injunction, detained Petitioners may actually be subject to retaliatory deportation, which would almost certainly prevent them from continuing to exercise their rights to speak out against their mistreatment and access federal court. *See*, e.g., Oldaker Decl. ¶ 91, Solodkova Decl. ¶¶ 28, 33, Floriano Navarro Decl. ¶ 52; Walker Decl. ¶ 106 (all describing how, if deported, they will be unable to reliably access internet or otherwise participate in federal investigations and court proceedings).

3. **The balance of harms and the public interest strongly favor Petitioners.**

Finally, the balance of harms and the public interest strongly favor detained Petitioners. When the government is the opposing party, the balance of harms and public interest inquiries "merge." *See Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020). An order requiring Respondents to cease retaliatory action, including deportation, during the pendency of this proceeding would cause, at most, a delay in deportation. This cost is de minimis compared to the harms faced by detained Petitioners. *See Nken v. Holder*, 556 U.S. 418, 436 (2009) ("[T]here is a public interest in preventing aliens from being wrongfully removed" notwithstanding the general public interest in prompt execution of removal orders); *Argueta Romero v. Wolf*, No. 6:20-cv-53-Orl-40GJK, 2020 WL 1674276, at *2 (M.D. Fla. Feb. 4, 2020) (the government was "not harmed" by allowing a petitioner to remain in the United States during the litigation of her habeas petition).

An injunction would protect Petitioners' well-established right to file complaints, protest government misconduct, and participate fully in this lawsuit. Given that there is ongoing public concern over the abuses visited upon Petitioners at ICDC, allowing them to vindicate these rights weighs heavily in the public interest. In the alternative, the Court should order Detained Petitioners' release to ensure that they are no longer subject to retaliation or attempts to deter

them from participating in this proceeding. *See Ragbir v. Homan*, 923 F.3d 53, 75 (2d Cir. 2019), *cert. granted, judgment vacated on other grounds sub nom. Pham v. Ragbir*, No. 19-1046, 2020 WL 5882107 (U.S. Oct. 5, 2020) (release from immigration detention is an available remedy for egregious government retaliation).

B. This Court Should Issue A Writ of Habeas Corpus *Ad Testificandum* to Ensure Detained Petitioners' Availability for Proceedings Until Final Resolution of this Case.

Petitioners in detention during the course of this litigation, whether now or in the future, also request the issuance of writs of habeas corpus *ad testificandum* to ensure the availability of detained witnesses at trial and evidentiary hearings. Petitioners have presented credible evidence and allegations of shocking and unconstitutional conduct by Respondents as demonstrated by the declarations and expert medical and mental health evaluations submitted with this brief. *See* Exs. B, C, H, I, L–P. The testimony of detained witnesses at evidentiary hearings and trial will substantially further the resolution of their claims, does not present a security risk, and will not burden the government with unreasonable costs. Accordingly, the Court should issue writs of habeas corpus *ad testificandum* compelling the government to ensure the ongoing availability of the following Detained Petitioners, who are also witnesses, for testimony: Jane Doe #8, Jane Doe #22, Jane Doe #6, Yanira Yesenia Oldaker, Jane Doe #15, Tatyana Solodkova, Lourdes Terrazas Silas, Luz Adriana Walker, and Jane Doe #5. In the alternative, the Court should order their release from immigration detention to ensure their ongoing availability to testify.

1. Issuance of writs of habeas corpus *ad testificandum* is warranted to ensure the availability of all detained Petitioners for evidentiary hearings and trial.

A writ of habeas corpus *ad testificandum* is warranted here. Federal courts may order a custodian to make available a detained witness by issuing a writ of habeas corpus *ad testificandum*. *See* 28 U.S.C. §§ 2241(c)(1), (5); *Barber v. Page*, 390 U.S. 719, 724 (1968);

Ballard v. Spradley, 557 F.2d 476, 479-80 (5th Cir. 1977).[12] Issuance of these writs is warranted where a detainee's testimony will substantially further the resolution of the case and their presence would not cause unreasonable security risks. *See ITEL Capital Corp. v. Dennis Min. Supply & Equip., Inc.*, 651 F.2d 405, 407 (5th Cir. 1981).[13] Courts also consider costs to the government and whether the proceeding can be stayed until the witness is released. *Id.* Here, all relevant factors weigh heavily in favor of issuance of writs of habeas corpus *ad testificandum* for all detained petitioners. Each detained petitioner will present testimony that is relevant, necessary to resolution of this case and non-cumulative of other testimony. Their presence will not cause unreasonable security risks or costs to the government. And this case cannot be stayed until detained plaintiffs are released because, without this Court's intervention, detained petitioners are likely to be deported before the case is resolved. *See supra,* Section A(1).

a. **Detained Petitioners' testimony is necessary for resolution of individual and class claims**

The testimony of each detained Petitioner is necessary for resolution of both their individual claims, the claims of other Petitioners, and the claims of members of the putative damages class. Detained Petitioners raise individual claims of medical abuse, violations of their First Amendment right to speech and petition, punitive conditions of confinement, unlawful

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12 The power to issue writs of habeas corpus *ad testificandum* is also guaranteed by the All Writs Act, 28 U.S.C. § 1651, which gives federal courts the authority to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Under the All Writs Act, courts may enjoin "almost any conduct which, left unchecked, would have ... the practical effect of diminishing the court's power to bring the litigation to a natural conclusion." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1102 (11th Cir. 2004) (quotation marks and citation omitted).

13 In *Bonner v. City of Prichard, Ala.,* 661 F.2d 1206 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted as binding precedent all decisions rendered by the Fifth Circuit prior to September 30, 1981.

retaliation, and conspiracy to deter them from accessing federal courts. Compl. ¶¶ 528-625, 665-687. They also raise state law claims of gross negligence, medical battery, medical malpractice, and intentional and negligent infliction of emotional distress. *Id.* ¶¶ 722-774 To resolve each petitioner's claims, the Court will need to weigh their testimony against the conflicting testimony of Respondents, ICE agents, and ICDC staff. This will require probing questions and credibility determinations, making live testimony crucially important. *See United States v. Hammond*, 598 F.2d 1008, 1014 (5th Cir. 1979) (live testimony "especially important" when conflicting accounts of government misconduct puts credibility of witnesses directly at issue); *Morse v. Sun Int'l Hotels, Ltd.*, No. 98-7451-Civ., 2001 WL 34874967, at *3 (S.D. Fla. Feb. 26, 2001), *aff'd sub nom. Morse v. Sun Int'l Bahamas, Ltd.*, 277 F.3d 1379 (Table) (11th Cir. 2001) (live testimony "essential to a fair trial" where witness credibility pivotal to resolution of factual issues); *Kraese v. Jialiang Qi*, No. CV417-166, 2020 WL 4016250, at *2 (S.D. Ga. July 16, 2020) (citation omitted) (live testimony is "axiomatically preferred to depositions" and the party seeking to substitute deposition bears the burden of establishing the exception).

Petitioners were, in many cases, the sole witnesses to their abuse apart from named Respondents. Their testimony is therefore essential to proving individual claims of abuse and will not be cumulative of other testimony. *See Greene v. Prunty*, 938 F. Supp. 637, 639 (S.D. Cal. 1996) (citation omitted) (testimony is sufficiently important to warrant writ of habeas corpus *ad testificandum* if the petition avers facts which, "if true, would be relevant to any issue in the case"). For example, for the women who experienced medical abuse, while medical experts can draw independent conclusions about Petitioners' treatment, *see, e.g.*, Turner Decl. ¶ 7-8; Geynisman-Tan Decl. ¶¶ 6-15, only the victims themselves can explain whether they understood what was being done to them, whether there was an interpreter present, and the sequence of

events that led to their abuse.[14] This is particularly important here, where some of Respondent Amin's medical records are incomplete. *See, e.g.*, *id.* Further, each Petitioners' testimony will demonstrate different aspects of misconduct at ICDC, including individualized acts of retaliation.

Writs of habeas corpus *ad testificandum* will also ensure that all Petitioners, including those who currently are not detained, benefit from this testimony. In addition to witnessing their own mistreatment, detained Petitioners witnessed the mistreatment of other Petitioners and misconduct that affected the class as a whole, including the medical abuse of women who have been deported and may not be locatable to testify. *See* Jane Doe #5 Decl. ¶ 53; Jane Doe #8 Decl. ¶¶ 49-54; Jane Doe #15 Decl. ¶¶ 4; Walker Decl. ¶¶ 69-81; Terrazas Silas Decl. ¶¶ 3-15; Solodkova Decl. ¶ 29; Oldaker Decl. ¶¶ 32, 34; Jane Doe #6 Decl. ¶¶ 29-35, 38-39; Jane Doe #22 Decl. ¶¶ 40-46. Their availability to testify will ensure the fairness of this proceeding. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-73 (1982) (holding that, in criminal proceedings, deportation of witnesses may violate the Due Process Clause of the Fifth Amendment where that witness's testimony is material, favorable, and non-cumulative); *United States v. One 1982 Chevrolet Crew-Cab Truck VIN 1GCHK33M9C143129*, 810 F.2d 178 (8th Cir. 1987) (applying *Valenzuela-Bernal* to civil forfeiture proceedings).

b. **Security and cost concerns also weigh in Petitioners' favor**

Neither security nor cost concerns weigh against issuance of writs of habeas corpus *ad testificandum*. Detained Petitioners are held in civil immigration custody and ensuring their ability to appear before this Court does not pose any security concerns. Though cost is a relevant factor, it does not weigh against release under appropriate conditions of supervision or transfer

[14] *See* Ex. O (Decl. of Margaret G. Mueller, MD, FACS, FACOG, December 20, 2020) ¶¶ 11-12.

where, as here, a detainee's presence is essential. *See Hawks v. Timms*, 35 F. Supp. 2d 464, 468 (D. Md. 1999); *see also Greene*, 938 F. Supp. at 640 ("the possibility that a lack of transportation funds or personnel will develop is not a justification for refusing to issue the writ" of habeas corpus *ad testificandum*.). To the extent the Court does consider costs of detaining or transporting witnesses, those may be mitigated by releasing eligible Petitioners on bond or under reasonable conditions of supervision during the course of these proceedings.

2. **Petitioners' immigration status militates in favor of issuance of writs.**

Finally, it is no barrier to issuance of writs of habeas corpus *ad testificandum* that Petitioners' participation in evidentiary hearings and trial might incidentally require ICE to delay the execution of removal orders against them. Courts routinely issue writs in these circumstances to ensure the availability of witnesses whose testimony will substantially further the resolution of the case. *See United States v. Baltazar-Sebastian*, 429 F. Supp. 3d 293, 308 (S.D. Miss. 2019) (discussing issuance writ of habeas corpus *ad prosequendum* directing ICE to present defendant for a change of plea hearing);[15] *Rangolan v. Cty. of Nassau*, 370 F.3d 239, 249 (2d Cir. 2004) (noting issuance of writ ordering "federal immigration officials . . . to deliver [the witness] to [the United States Marshals Service] for trial"); *United States v. Ruiz-Cortez*, No. 2:19-CR-831, 2019 WL 5578841, at *2 (S.D. Tex. Oct. 29, 2019) (noting issuance of writ ordering ICE processing center to deliver non-citizen in removal proceedings to the U.S. Marshals for a pretrial hearing and trial); *United States v. Mejia*, 376 F. Supp. 2d 460, 464 (S.D.N.Y. 2005) (observing that the government had obtained a writ that had prevented a witness's deportation for

15 Writs of habeas corpus *ad testificandum* are available in both criminal and civil proceedings, subject to the same analysis used to determine whether to issue writs of habeas corpus *ad prosequendum*. *See Muhammad v. Warden, Baltimore City Jail*, 849 F.2d 107, 114 (4th Cir. 1988); *Nunnery v. Luzada*, No. 2:11-cv-00874, Doc. 25 (E.D.Cal. January 4, 2013).

purposes of testifying at trial); *United States v. Seijo*, 595 F.2d 116, 118 (2d Cir. 1979) (observing that the lower court had issued the writ "in order to prevent deportation of the witnesses").

Indeed, detained Petitioners' immigration status weighs in favor of issuance of writs of habeas corpus *ad testificandum*. Without such relief, they face imminent deportation, which will deprive the Court and other petitioners of their essential testimony. And, as discussed above, this result is required by ICE's own policy against deporting "individuals in the midst of a legitimate effort to protect their civil rights or civil liberties."

Compelling the presence of detained Petitioners at all further evidentiary hearings and trial is necessary to protect this Court's process, will ensure the fairness of this proceeding, and is consistent with ICE policy and DHS regulations. This Court should therefore issue writs of habeas corpus *ad testificandum* compelling ICE to ensure detained Petitioners' availability for all further proceedings in this case, including evidentiary hearings and trial.

CONCLUSION

For the foregoing reasons, this Court should order Respondents to cease any form of retaliation against detained Petitioners, including deportation, pending the resolution of this lawsuit; and issue writs of habeas corpus *ad testificandum* compelling ICE to ensure the availability of detained Petitioners for any further proceedings, including trial, or in the alternative, order the release of detained Petitioners during the pendency of this lawsuit.

Respectfully submitted on this 21st day of December,

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