

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY  
Louisville Division

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
v. ) Civil Action No. 3:17-cv-00432-DJH  
)  
RUSTY THOMAS, JAMES SODERNA, )  
THOMAS RADDELL, DAVID GRAVES, )  
LAURA BUCK, CHRIS KEYS, )  
JAMES ZASTROW, EVA EDL, )  
EVA ZASTROW, and DENNIS GREEN, )  
)  
Defendants. )  
\_\_\_\_\_)

**MOTION FOR LEAVE TO WITHHOLD PATIENT’S IDENTITY AND PREVENT  
DISCLOSURE OF IDENTIFYING INFORMATION AND RECORDS**

Pursuant to this Court’s Joint General Order 08-01, and the attached Notice Regarding Electronic Availability of Official Court Transcripts and the Redaction Responsibilities of Counsel and Parties (collectively, “Joint General Order 08-01”), the United States hereby respectfully moves this Court for leave to withhold witness Patient Doe’s identity, and to redact any identifying information from the record of the hearing scheduled for July 24, 2017, at 9:30 a.m. The United States seeks further leave to prevent disclosure of information and records that would tend to identify Patient Doe.

In support hereof, the United States incorporates herein its complaint, the Affidavit of Paul Sparke filed with the Court, and the attached memorandum of law in support of the present motion.

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**CERTIFICATE OF SERVICE**

On July 24, 2017, the forgoing was filed with the Court and served on opposing counsel through the Court's CM/ECF system, and a copy was mailed to the following:

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**MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES OF AMERICA’S  
MOTION FOR LEAVE TO WITHHOLD PATIENT’S IDENTITY AND PREVENT  
DISCLOSURE OF IDENTIFYING INFORMATION AND RECORDS**

The United States alleges in this action that Defendants, by physical obstruction, intentionally interfered with patients of the EMW Women’s Surgical Center (“EMW”) in Louisville, Kentucky, and/or attempted to do the same. Specifically, the United States alleges that Defendants entered EMW’s property, sat down with their backs against EMW’s doors, and refused to move from the entrance. During this time, patients were not able to access the entrance to EMW. Patient Doe, whose identity the United States is withholding pending the outcome of this motion, reports that she sought reproductive health services at EMW on May 13, and was unable to access the facility via the public entrance due to Defendants’ physical blockade. The government informer’s privilege entitles the United States to shield Patient Doe’s identity.

Pursuant to this Court's Joint General Order 08-01, and the attached Notice Regarding Electronic Availability of Official Court Transcripts and the Redaction Responsibilities of Counsel and Parties (collectively, "Joint General Order 08-01"), the United States moves the Court for leave to withhold Patient Doe's identity, and to redact any identifying information from the record of the hearing scheduled for July 24, 2017, at 9:30 a.m. The United States seeks further leave to prevent disclosure of information and records that would tend to identify Patient Doe.

**I. STATEMENT OF FACTS**

The EMW Women's Surgical Center provides reproductive health services. *See* Aff. of Paul Sparke ¶ 5, Dkt. No. 3-2 (July 18, 2017). The United States alleges that on May 13, 2017, Defendants entered EMW's property, sat down with their backs against EMW's doors, and refused to move from the entrance. Compl. ¶ 19, Dkt. No. 1 (July 18, 2017). During this time, patients were reportedly unable to access the entrance to EMW. *Id.* ¶ 20.

Patient Doe reports to the United States that she sought reproductive health services at EMW on May 13, and was unable to access the facility via the public entrance due to Defendants' physical blockade. Patient Doe has agreed to testify on this Court's hearing on July 24, 2017, about her experience on May 13.

Patient Doe currently attends a graduate studies program, and will shortly be seeking employment in her chosen field. Patient Doe believes that, if her identity is revealed, media and social media accounts of her testimony will deter future employers from considering her for employment. According to Patient Doe, revealing her identity in this case would end her career.

Defendants intentionally subjected themselves to arrest and prosecution by their actions on May 13, 2017. *See* Aff. of Paul Sparke ¶¶ 35-36, 41-42. Defendant Thomas has stated that he and others with whom he associates are prepared to “cross similar lines, to the point of jail.” *Id.* ¶ 23.

## **II. LEGAL ARGUMENT**

### **A. Applicable Law**

This Court’s Joint General Order 08-01 requires a party to seek leave of the Court to redact from the record information that does not fall within several enumerated categories.<sup>1</sup> As explained below, the United States expects to submit testimony that is subject to the government informer’s privilege. Accordingly, the United States is seeking leave to shield the witness’s identity and to refer to the witness anonymously, so that the record of this Court’s proceeding will not reflect the witness’s identity.

The Government has a privilege to “withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.” *Roviaro v. United States*, 353 U.S. 53, 59 (1957). “[I]nformation, given by a private citizen [to executive officers about violations of the law], is a privileged and confidential communication . . . the disclosure of which cannot be compelled without the assent of the government.” *In re Quarles and Butler*, 158 U.S. 532, 535-536 (1895). The privilege furthers and protects “the public interest in effective law enforcement.” *Roviaro*, 353 U.S. at 59. By preserving the informant’s anonymity, the privilege encourages the reporting of knowledge about violations of the law. *Id.* Although “usually referred to as the informer’s privilege,” the privilege “is in reality the Government’s privilege” to assert. *Id.*

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<sup>1</sup> The categories are Social Security numbers, names of minor children, dates of birth, financial account numbers, and, in criminal cases, home addresses.

The government informer's privilege is applicable in both civil and criminal proceedings. *Holman v. Cayce*, 873 F.2d 944, 946 (6th Cir. 1989) ("Although originally applied in the context of criminal proceedings, the 'informer's privilege' is also applicable in civil cases."). "[W]hen the government properly invokes the informer's privilege, it trumps the common law right of access to judicial records as to the identity of the informant." *In re Search of 1638 E. 2nd Street*, 993 F.2d 773, 775 (10th Cir. 1993); *accord Holman*, 873 F.2d at 947 (emphasizing that Federal Rule of Civil Procedure 26 only permits "discovery regarding any matter, *not privileged*...").

Since the guilt or innocence of a criminal defendant may be viewed as 'qualitatively more significant' than the outcome of civil litigation, that difference in significance is a factor to be considered when the privilege is asserted in a civil proceeding. [T]his distinction ... does not, by itself, warrant our saying that a higher standard of justification must be satisfied in civil cases in order for an exception to the privilege to be recognized, since it cannot be said that all civil cases are less significant than all criminal cases. Nonetheless, while the standard is said to be no different whether the privilege is sought to be invoked in a civil or criminal proceeding, as a practical matter, consideration of the circumstances involved in civil litigation will usually mean that the privilege is less likely to give way in a civil action.

*Holman*, 873 F.2d at 946-947.

The Government may shield the informant's identity and, if disclosure of information that the confidential informant provided would reveal his or her identity, the Government may shield that information from disclosure as well. *See, e.g., Roviario*, 353 U.S. at 60.

"Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviario*, 353 U.S. at 60-61; *accord Holman*, 873 F.2d at 946 ("In the context of civil litigation, the emphasis shifts from consideration of whether disclosure is necessary to an accused's defense to whether disclosure is essential to the fair determination of a party's cause."). The Supreme Court refused to establish a "fixed rule with

respect to disclosure,” and instead charged courts with “balancing the public interest in protecting the flow of information [to law enforcement] against the individual’s right to prepare his defense.” *Roviaro*, 353 U.S. at 62. This test is fact-dependent, and takes into consideration the laws sought to be enforced, the possible defenses, the possible significance of the informer’s testimony, and other factors. *Id.*

“The burden [is on defendant] to show how disclosure of the informant would substantively assist his defense.” *United States v. Moore*, 954 F.2d 379, 381 (6th Cir. 1992). A defendant’s “[m]ere conjecture or supposition about the possible relevancy of the informant’s testimony is insufficient to warrant disclosure.” *United States v. Doxey*, 833 F.3d 692, 707 (6th Cir. 2016) (*quoting United States v. Sharp*, 778 F.2d 1182, 1187 (6th Cir. 1985) (per curiam)). Rather, “[a]n informant must be disclosed only upon a showing by the defendant that disclosure is essential to a fair trial.” *Moore*, 954 F.2d at 381; *accord Holman*, 873 F.2d at 946 (“In the context of civil litigation, the emphasis shifts [to] consideration of ... whether disclosure is essential to the fair determination of a party’s cause.”). “The government is entitled to assert the privilege without showing that reprisal or retaliation is likely.” *In re Search of 1638 E. 2nd St.*, 993 F.2d at 774 (citing *Dole*, 870 F.2d at 372).

**B. The United States in This Case Retains a Privilege to Shield the Identity of a Confidential Informer, Patient Doe**

Patient Doe reported to the United States that she was unable to access the public entrance to the EMW Women’s Surgical Center on May 13, due to Defendants’ physical blockade. Patient Doe thus reported to the Government that Defendants, by physical obstruction, intentionally did interfere or attempted to interfere with her because she was obtaining reproductive health services, in violation of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248. Patient Doe thereby “furnish[ed] information of violations of law to officers



charged with enforcement of that law,” *Roviaro*, 353 U.S. at 59, and the Government has a privilege to withhold Patient Doe’s identity. *See id.*

**C. To the Extent Defendants Seek Disclosure of Patient Doe’s Identity, Defendants’ Argument Fails Because Patient Doe’s Identity Is Not Relevant, and Certainly Not “Essential” to a Fair Trial**

To the extent Defendants seek disclosure of Patient Doe’s identity, they cannot overcome their “burden ... to show how disclosure of the informant would substantively assist [their] defense.” *Moore*, 954 F.2d at 381. To overcome their burden, Defendants would have to show that Patient Doe’s identity would be so important to their defense that it outweighs the public interest in protecting the flow of information to Government agents charged with preserving access to clinics. *See Roviaro*, 353 U.S. at 62; *accord Holman*, 873 F.2d at 946 (in civil litigation, disclosure of the informer’s identity must be “essential to the fair determination of a party’s cause”).

Patient Doe’s identity is irrelevant to Defendants’ defenses, much less “essential,” and thus should not be disclosed. Patient Doe is testifying that Defendants’ physical obstruction of EMW’s entrance on May 13 interfered with her access to reproductive health services. The United States submits that Defendants, by physical obstruction of EMW’s entrance, intended to interfere with any and all patients of EMW that morning – *regardless of the patients’ respective identities*. Having chosen their victims exclusively because they were attempting to obtain or provide reproductive health services, Defendants cannot now be heard to argue that the patients’ identities, outside of their May 13, 2017 healthcare choices, are relevant to the determination of this matter.

Meanwhile, revealing Patient Doe’s identity could easily prevent the flow of information about FACE Act violations to the Government. Patient Doe expects to seek employment in her

field of graduate studies soon. According to Patient Doe, revealing her identity in this case would end her career. Patients in Doe's position will not likely provide information about FACE Act violations if Patient Does suffers these consequences because her identity is revealed.

Further, although "[t]he government is entitled to assert the privilege without showing that reprisal or retaliation is likely," *In re Search of 1638 E. 2nd Street*, 993 F.2d 773, 774 (10th Cir. 1993), reprisal or retaliation is in fact likely here, and should weigh against disclosure of Patient Doe's identity as one of the "other factors" mentioned in *Roviaro*. Defendants in this action have intentionally subjected themselves to arrest and prosecution in the name of their cause, and Defendant Thomas states that others are willing to do the same. Legal norms did not prevent Defendants from blockading EMW, and Patient Doe should have reason to fear that legal norms would not prevent retaliation against her for her testimony before this Court.

**D. The Court Should Shield Patient Doe's Identity and Any Documents and Information that Would Tend to Reveal her Identity**

"The scope of the privilege is limited by its underlying purpose." *Roviaro*, 353 U.S. at 60. "[W]here the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged." *Id.* Here, the United States seeks the Court's leave to withhold only Patient Doe's identity and those information and documents that would tend to reveal her identity. *See id.*

**III. CONCLUSION**

For the foregoing reasons, this Court should grant the United States leave to withhold Patient Doe's identity in this case, and to redact any identifying information from the record of the hearing scheduled for July 24, 2017, at 9:30 a.m. The Court should further grant the United States leave to prevent disclosure of information and records that would tend to reveal Patient Doe's identity.

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**[PROPOSED] ORDER GRANTING LEAVE TO WITHHOLD PATIENT’S IDENTITY AND PREVENT DISCLOSURE OF IDENTIFYING INFORMATION AND RECORDS**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2017 at the hour of \_\_\_\_\_, upon consideration of the Motion of The United States of America for Leave to Withhold Patient’s Identity and Prevent Disclosure of Identifying Information and Records; and the Court having considered the United States’ Memorandum of Law in Support thereof, this Court hereby GRANTS the United States leave to withhold the identity of witness referred to anonymously as “Patient Doe,” and to redact any identifying information from the record of the hearing scheduled for July 24, 2017, at 9:30 a.m. The Court further GRANTS the United States leave to prevent disclosure of information and records that would tend to identify Patient Doe.

BY THE COURT:

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Hon. David J. Hale  
United States District Court  
for the Western District of Kentucky