No. 17A-_____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE UNITED STATES OF AMERICA, ET AL.

APPLICATION FOR A STAY PENDING DISPOSITION
OF A PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Petitioners (defendants in the district court, and mandamus petitioners in the court of appeals) are the United States of America; Donald J. Trump, President of the United States; the United States Department of Homeland Security; Elaine C. Duke, Acting Secretary of Homeland Security; and Jefferson B. Sessions III, Attorney General of the United States.

Respondent in this Court is the United States District Court for the Northern District of California. Respondents also include the Regents of the University of California; Janet Napolitano, President of the University of California; the State of California; the State of Maine; the State of Maryland; the State of Minnesota; the City of San Jose; Dulce Garcia; Miriam Gonzalez Avila; Saul Jimenez Suarez; Viridiana Chabolla Mendoza; Norma Ramirez; Jirayut Latthivongskorn; the County of Santa Clara; and Service Employees International Union Local 521 (collectively plaintiffs in district court, and real parties in interest in the court of appeals).

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the President of the United States, the Department of Homeland Security (DHS), the Acting Secretary of Homeland Security, and the Attorney General, respectfully applies for a stay of orders entered by the United States District Court for the Northern District of California on September 22, 2017 (Pet. App. 21a-25a), October 17, 2017 (Pet. App. 26a-44a), and November 20, 2017 (Pet. App. 45a-46a), pending the disposition of the government's petition for a writ of mandamus, filed concurrently with this application, and any further proceedings in this Court. Petitioners request that these orders be stayed to the extent they require the government, in these five related suits for judicial review of agency action under the Administrative Procedure Act (APA), to (1) "promptly locate and compile" for inclusion in an expanded administrative record, or for in camera review, thousands of "additional

materials" that were considered by persons "anywhere in the government" who gave written or oral advice to the Acting Secretary about the challenged agency action; (2) publicly file the "augmented administrative record" and a privilege log describing all withheld documents by December 22, 2017, and provide copies of all withheld documents for in camera review; (3) publicly file 35 documents that are protected by multiple privileges, including White House documents subject to executive privilege, on December 22, 2017; and (4) resume pending discovery, including broad document discovery and depositions of senior government officials and advisors, on December 22, 2017. Pet. App. 45a-46a; see id. at 21a-44a. Petitioners also request an immediate administrative stay pending the Court's consideration of this stay application.

The five related suits at issue here were brought by respondents in the United States District Court for the Northern District of California in order to challenge the Acting Secretary's decision to wind down the discretionary enforcement policy known as Deferred Action for Childhood Arrivals (DACA). Under that policy, DHS had determined, as an exercise of prosecutorial discretion, to forbear for a particular period from seeking removal of certain undocumented aliens brought to this country as children. After the Attorney General informed the Acting Secretary that he believed the DACA policy was unlawful and likely to be imminently enjoined by the same federal courts that had enjoined materially

indistinguishable policies, see Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex.), aff'd, 809 F.3d 134 (5th Cir. 2015), aff'd by an equally divided Court, 136 S. Ct. 2271 (2016) (per curiam), the Acting Secretary chose to wind down the policy in an orderly fashion, rather than risk having a court order bring it to an immediate and potentially chaotic end. As explained in the government's motion to dismiss pending in district court, judicial review of the Acting Secretary's discretionary enforcement decision to wind down the DACA policy is precluded by both the APA, see 5 U.S.C. 701(a)(2); Heckler v. Chaney, 470 U.S. 821, 831 (1985), and the Immigration and Nationality Act (INA), see 8 U.S.C. 1252(g); Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 483-485 & n.9 (1999) (AADC).

Even if the Acting Secretary's decision were reviewable, however, the mode of judicial review in an APA action is well established. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam). If "the record before the agency does not support the agency action," the proper course is "to remand to the agency for additional investigation or explanation." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). And because it is "not the function of the court to probe the mental processes" of the agency, Morgan v. United States, 304 U.S.

1, 18 (1938), deliberative materials form no part of the administrative record and, except in rare circumstances indisputably not established here, are also not subject to discovery.

On October 20, 2017, the government filed a petition for a writ of mandamus in the court of appeals seeking reversal of the first two district court orders cited above, which authorize broad discovery and order a vast expansion of the administrative record. The government also sought an emergency stay of those orders pending mandamus review. On October 24, the court of appeals granted the government's request for an emergency stay. 10/24/17 C.A. Order. On November 16, however, a divided panel of the court of appeals (Wardlaw & Gould, JJ.; Watford, J., dissenting) denied the mandamus petition and lifted the previous stay. See Pet. App. 1a-20a. The district court immediately issued an order directing the government to file the expanded administrative record and privilege log by November 22. See D. Ct. Doc. 188 (Nov. 16, 2017).[1]

On November 19, 2017, in accordance with Supreme Court Rule 23.3, the government moved in district court for a further stay of

[1] Citations are to the district court docket in Regents of the University of California v. United States Department of Homeland Security, No. 17-cv-5211 (N.D. Cal.).

discovery and record expansion pending disposition of a petition to be filed in this Court, or alternatively, for an administrative stay pending the filing of a stay application in this Court.[2] Unusually, respondents then advanced their own request for a stay, which they indicated was intended to obviate this Court's review. In response, the district court entered an order that stays discovery only until December 22, 2017 and "allow[s] the government an additional month [i.e., until December 22] to compile and to file the augmented administrative record." Pet. App. 45a-46a. The court directed the government, in the meantime, to "promptly locate and compile the additional materials and be ready to file the fully augmented record by December 22," ibid., and otherwise denied a stay, see id. at 46a.

The standards for granting a stay are readily met in this case. As explained in the government's petition for a writ of mandamus (at 18-32), the district court's orders mandating discovery and expansion of the administrative record were in excess of the district court's authority under the APA and violate fundamental principles of administrative law. As Judge Watford recognized, these orders "constitute[d] 'a clear abuse of

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[2] In addition, on November 17, 2017, the government moved in the court of appeals for a stay of that court's November 16 order pending this Court's review. The court of appeals dismissed the motion, concluding that its "order denying mandamus relief was effective immediately upon its issuance" and that jurisdiction "now lies with the district court." Addendum, infra (Add.), 2.

discretion'" and present a "classic case [for] mandamus relief." Pet. App. 16a, 20a (citation omitted).

The balance of harms weighs strongly in favor of an immediate stay. Unless this Court stays the district court's orders, the government will be forced to continue processing and undertaking "careful and methodical page-by-page review" of hundreds of thousands of documents collected from the Departments of Homeland Security and Justice and the White House itself, including a large number of deliberative or otherwise privileged materials. Addendum, infra, (Add.) 33; see also id. at 20-21, 23-25. In just three weeks (i.e., on December 22), the government must not only file an expanded administrative record and a privilege log pertaining to potentially thousands of documents, but also furnish in camera all such privileged materials. Moreover, on December 22, the government must publicly disclose 35 privileged documents -- including several documents originating in the White House, see id. at 26 -- as to which the district court summarily overruled or disregarded all applicable privileges, including deliberative-process, attorney-client, and executive privileges, without even providing an opportunity for briefing or argument.

Absent a stay, the government will also be required to respond to respondents' pending discovery requests, which to date (in conjunction with requests in related litigation) have not only implicated the collection for potential review of roughly 1.6

million documents from DHS and 90,000 documents from DOJ, see Add. 20, 32, but also have included demands upon multiple senior government officials, including the Acting Secretary herself, to sit for depositions designed to probe the mental processes informing the Acting Secretary's decision. Given the immediate record-compilation burdens imposed by the district court's orders, and in light of the looming December 22 deadline for record expansion, discovery, and public disclosure of privileged documents, an immediate stay is warranted pending this Court's further review.

STATEMENT

1. As explained in the petition (at 2), the INA charges the Secretary of Homeland Security "with the administration and enforcement" of federal immigration laws. 8 U.S.C. 1103(a)(1); see also 6 U.S.C. 202(3) and (5). As a practical matter, the government cannot remove every removable alien, and a "principal feature of the removal system is the broad discretion exercised by immigration officials." Arizona v. United States, 567 U.S. 387, 396 (2012). Like other agencies exercising enforcement discretion, DHS thus must engage in "a complicated balancing of a number of factors which are peculiarly within its expertise." Heckler v. Chaney, 470 U.S. 821, 831 (1985).

2. On June 15, 2012, DHS announced the policy that has since become known as Deferred Action for Childhood Arrivals, or DACA.

See Pet. App. 47a-51a. DACA made "deferred action" available to "certain young people who were brought to this country as children." Id. at 47a. Deferred action is a practice in which the Secretary exercises discretion, "for humanitarian reasons or simply for [her] own convenience," to notify an alien of a non-binding decision to forbear from seeking his removal. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 484 (1999) (AADC). Under DACA, following a background check and other review, an alien could receive deferred action for a period of two years, subject to renewal. Pet. App. 49a-51a.

DHS later expanded DACA and also created a similar policy known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). See Pet. App. 52a-60a. Texas and 25 other States brought suit in the United States District Court for the Southern District of Texas seeking to enjoin DAPA and the expansion of DACA, and the district court issued a nationwide preliminary injunction after finding a likelihood of success on claims that DAPA and the expansion of DACA violated the APA. Texas v. United States, 86 F. Supp. 3d 591 (2015). The Fifth Circuit affirmed the injunction, concluding that DAPA and expanded DACA likely violated both the APA and the INA, Texas v. United States, 809 F.3d 134 (2015), and this Court affirmed by an equally divided Court, United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam).

In June 2017, Texas and other plaintiff States from the Texas case announced their intention to amend their complaint to challenge the original DACA policy if it was not rescinded. On September 5, 2017, faced with the prospect of litigation attacking DACA on essentially the same grounds that succeeded in Texas, the Acting Secretary decided to wind down the remaining DACA policy in an orderly fashion. See Pet. App. 61a-69a (Rescission Memo). The Rescission Memo states that "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation," as well as the Attorney General's advice that DACA was unlawful and that further litigation would "likely * * * yield similar results," "it is clear that the June 15, 2012 DACA program should be terminated." Id. at 66a-67a. The Rescission Memo states, however, that in light of "complexities associated with winding down the program," DHS will continue to "adjudicate certain requests for DACA." Id. at 67a. Among other things, DHS has continued to "adjudicate -- on an individual, case by case basis -- properly filed pending DACA renewal requests * * * from current beneficiaries that have been accepted by the Department as of [September 5, 2017], and from current beneficiaries whose benefits will expire between [September 5, 2017] and March 5, 2018 that have been accepted by the Department as of October 5, 2017." Id. at 67a-68a. In addition, DHS has "[w]ill not terminate the grants of previously issued deferred action" for the remaining

periods of those grants solely based on the Rescission Memo. Id. at 68a.

3. Respondents brought these five suits in the Northern District of California challenging the rescission of DACA. Collectively, respondents allege that the termination of DACA is unlawful because it violates the APA's requirements for notice-and-comment rulemaking; is arbitrary and capricious; violates the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.; denies respondents due process and equal protection; and violates principles of equitable estoppel. Similar challenges have also been brought in district courts in New York, Maryland, and the District of Columbia.[3]

a. As explained in greater detail in the petition (at 6), the government explained at the outset of these actions that the suits were subject to threshold dismissal and that no discovery

[3] The litigation in New York has resulted in a similar series of district court orders authorizing immediate discovery and directing expansion of the administrative record. See Batalla Vidal v. Duke, No. 16-cv-4756, 2017 WL 4737280 (E.D.N.Y. Oct. 19, 2017). The government filed a petition for a writ of mandamus in the Second Circuit, and on October 24, 2017, a panel of that court stayed discovery and record expansion pending both the district court's adjudication of threshold "issues of jurisdiction and justiciability" and, in turn, the court of appeals' decision on the mandamus petition. Order, In re Duke, No. 17-3345 (2d Cir.). On November 9, 2017, the district court granted in part, denied in part, and reserved decision in part on the government's motion to dismiss, see Batalla Vidal v. Duke, No. 16-cv-4756, 2017 WL 5201116 (E.D.N.Y.), and the court of appeals has scheduled argument on the mandamus petition for December 14, 2017.

would be appropriate in these suits. The district court overruled the government's objections and entered an order authorizing immediate expedited discovery, including depositions, document requests, requests for admission, and interrogatories. Pet. App. 21a-25a.

On October 6, 2017, the government filed the administrative record, consisting of all non-deliberative materials considered by the Acting Secretary in reaching her decision to rescind DACA. D. Ct. Doc. 64. Respondents promptly moved to "complete" the administrative record, demanding the production of "[a]ll documents and communications" concerning DACA that were "circulated within DHS or DOJ" or exchanged by those agencies with "the White House"; that "evaluat[ed] the costs and benefits" or "discuss[ed] policy alternatives to rescinding DACA"; or that contained "notices, minutes, agendas, list[s] of attendees, [or] notes" relating to internal meetings about DACA. D. Ct. Doc. 65, at 9-10 (Oct. 9, 2017).

On October 10, 2017, the district court ordered the government to file a "privilege log" by October 12, and to produce for in camera review on October 16 "hard copies of all emails, internal memoranda, and communications with the Justice Department on the subject of rescinding DACA." D. Ct. Doc. 67. The government accordingly filed a privilege log listing the privileged documents from the Acting Secretary's files and briefly identifying the bases

for privilege, see D. Ct. Doc. 71-2 (Oct. 12, 2017), and submitted copies of those documents for in camera review. When the district court later indicated that its order was intended to require in camera submission of "anything in the world that the agency has on the subject of rescinding DACA, whether it was with the Justice Department or not," 10/16/17 Tr. 10, the government explained that it had not interpreted the order in that matter and that complying with such an order "would have been impossible" due to the "enormous" volume of materials involved, id. at 12.

On October 17, 2017, the district court granted respondents' motion in substantial part. See Pet. App. 26a-44a. The court held that the administrative record submitted by DHS was inadequate because it lacked materials from the White House and the Department of Justice, and from subordinates at DHS, reflecting the details of the government's internal deliberative processes. Id. at 32a-34a. The district court also held that the government had categorically "waived attorney-client privilege over any materials that bore on whether or not DACA was an unlawful exercise of executive power." Id. at 39a. And the court summarily ruled, without briefing, that 35 of the privileged documents submitted for in camera review must be filed on the public docket, including several documents from the White House that are subject to executive privilege. Id. at 43a; see Add. 26-27 (describing several of these documents).

"Based on the foregoing," the district court ordered the government to "complete the administrative record by adding to it all emails, letters, memoranda, notes, media items, opinions and other materials directly or indirectly considered in the final agency decision to rescind DACA," including "(1) all materials actually seen or considered, however briefly, by Acting Secretary Duke in connection with" the challenged decision (except for documents already reviewed in camera and not ordered released); "(2) all DACA-related materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with written advice or input regarding the actual or potential rescission of DACA"; "(3) all DACA-related materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with verbal input regarding the actual or potential rescission of DACA"; "(4) all comments and questions propounded by Acting Secretary Duke to advisors or subordinates or others regarding the actual or potential rescission of DACA and their responses"; and "(5) all materials directly or indirectly considered by former Secretary of DHS John Kelly leading to his February 2017 memorandum not to rescind DACA." Pet. App. 35a, 42a-43a (emphases added). The district court further directed that if the government "redacts or withholds any" of these materials as privileged, the government must submit a second privilege log and "simultaneously lodge full copies of all such

materials" with the court to allow it to "review and rule on each item." Id. at 43a. In response to this order directing additions to the administrative record, DHS and DOJ to date have identified over 21,000 documents for initial review, and of that number, the government estimates that more than 6,000 will require further review to ascertain whether they fall within the expanded record as conceived by the district court and whether they are privileged. Add. 23, 35-36.

In the interim, as explained in the petition (at 11-12), respondents also served numerous demands for discovery upon the government, including requests for production of documents, requests for admission, interrogatories, and notices of depositions, including of the Acting Secretary herself.[4] The government's efforts in responding to discovery in these and other DACA-rescission cases required DHS components to undertake an immediate and drastic reassignment of attorney, staff, and technology resources, impairing the performance of essential programmatic functions. See Add. 5-17.

[4] Respondents also previously indicated an intent to pursue depositions of the Attorney General, the current White House Chief of Staff, other current senior White House advisers, and various current senior officials and advisers at DHS. In addition, respondents have issued subpoenas for the testimony of two former White House officials (Stephen K. Bannon and Reince Priebus), the Attorney General of Texas, and the Kansas Secretary of State.

b. On October 20, 2017, the government filed a petition for a writ of mandamus in the Ninth Circuit and a request for an emergency stay. The court of appeals promptly granted the latter request and stayed all "discovery and record supplementation in the district court pending the resolution of th[e] petition for writ of mandamus." 10/24/17 C.A. Order. On November 16, however, a divided panel of the court of appeals denied the government's mandamus petition and lifted its prior stay. Pet. App. 1a-20a.

The panel majority (Wardlaw & Gould, JJ.) upheld the district court's determination that DHS failed to "provide a complete administrative record." Pet. App. 3a. The majority dismissed the government's explanation that the allegedly omitted documents were deliberative materials that form no part of the administrative record, id. at 13a-15a, and failed to acknowledge (much less apply) the settled principle that review in APA cases is limited to the "record the agency presents to the reviewing court," Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). The majority also discounted the substantial "separation-of-powers concerns" raised by the orders under review. Pet. App. 3a.

Judge Watford dissented, concluding that the district court's orders "constitute[d] 'a clear abuse of discretion.'" Pet. App. 16a (citation omitted). He explained that the district court's orders "violate[d] two well-settled principles governing judicial review of agency action": (1) "a court ordinarily conducts its

review 'based on the record the agency presents to the reviewing court,'" ibid. (citation omitted), and (2) "documents reflecting an agency's internal deliberative processes are ordinarily not part of the administrative record," id. at 17a. Judge Watford also observed that respondents had made no showing of "'bad faith or improper behavior' on the part of agency decision-makers," such as would potentially justify a departure from ordinary record-review principles. Id. at 18a (citation omitted). Judge Watford further noted the "burdensome and intrusive" nature of the district court's orders, and concluded that this is a "classic case in which mandamus relief is warranted." Id. at 20a.

Hours after the court of appeals' dissolution of its stay, on November 16, the district court issued an order directing the government to file the "complete administrative record" by November 22. D. Ct. Doc. 188. Expressing its intention to seek emergency relief from this Court, the government filed motions in both the court of appeals and the district court for a stay pending this Court's resolution of the government's forthcoming petition. Both of those requests were denied. Add. 1-2, 3-4.

Remarkably, after having sought and obtained rulings ordering immediate record expansion and authorizing discovery, and after vigorously opposing the government's mandamus petition, respondents then filed their own motion in district court to stay all expansion of the administrative record and all discovery until

the district court ruled on both respondents' motion for provisional relief and the government's motion to dismiss. D. Ct. Doc. 190 (Nov. 19, 2017). Respondents were explicit that they sought this relief to "obviate Defendants' efforts to obtain a stay from the Supreme Court." Id. at 6.

On November 20, 2017, the district court entered an order "allow[ing] the government an additional month to compile and to file the augmented administrative record" and staying discovery during the same period. Pet. App. 45a-46a. The court directed, however, that the government "must promptly locate and compile the additional materials and be ready to file the fully augmented record by December 22." Ibid. The court otherwise denied the requested stay. Id. at 46a.

ARGUMENT

The government respectfully requests that this Court grant a stay of the district court's orders pending this Court's review of the government's petition for a writ of mandamus (or, in the alternative, certiorari). The government also respectfully requests an immediate administrative stay pending the Court's ruling on this application for a stay. The Ninth Circuit entered a stay in this case pending its consideration of the government's mandamus petition, and the Second Circuit has likewise issued a stay pending its consideration of a mandamus petition directed to similar orders expanding the administrative record and authorizing

discovery in a parallel suit challenging the rescission of DACA. See p. 10 n.3, supra. The same relief is warranted here.

A stay pending the disposition of a petition for a writ of mandamus is warranted if there is (1) "a fair prospect that a majority of the Court will vote to grant mandamus" and (2) "a likelihood that irreparable harm will result from the denial of a stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). A stay pending the disposition of a petition for a writ of certiorari (which the government seeks in the alternative) is appropriate if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." Ibid. All of those requirements are met here.

1. As Judge Watford explained in dissent, this is a "classic case in which mandamus relief is warranted." Pet. App. 20a. In upholding the district court's orders, the court of appeals endorsed a view of the required contents of the administrative record that is far in excess of the authority of a reviewing court under the APA. The lower courts' errors are particularly remarkable inasmuch as the agency action at issue here is a statement of discretionary enforcement policy that requires no particular factual support or evidentiary record. The court of

appeals also summarily upheld the district court's dismissive rejection of deliberative-process and other privileges, including the executive privilege pertaining to White House documents. The district court's actions thus reflect multiple "departures from settled principles" governing the role of courts under the APA, and the denial of relief here would raise "sensitive separation-of-powers concerns" and cause "immediate and irreparable" harm to the government. Ibid. (Watford, J., dissenting).

Moreover, there is at least a reasonable probability that four Justices of this Court will consider the issues presented in this petition sufficiently meritorious to grant certiorari. As explained below and in the petition, the district court's orders conflict with the decisions of this Court in multiple respects. And as Judge Watford recognized in dissent, the majority's reasoning also cannot be reconciled with decisions of the D.C. Circuit holding that "documents reflecting an agency's internal deliberative processes," such as "memos or emails containing opinions, recommendations, or advice," are "ordinarily not part of the administrative record." Pet. App. 17a; see, e.g., San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Comm'n, 789 F.2d 26, 44-45 (D.C. Cir.) (en banc), cert. denied, 479 U.S. 923 (1986).

2. There is also a "fair prospect" that a majority of this Court will decide either to issue a writ of mandamus directly to

the district court or to reverse the Ninth Circuit's denial of mandamus relief. Perry, 558 U.S. at 190. A court may issue a writ of mandamus when a party establishes that "(1) 'no other adequate means [exist] to attain the relief he desires,' (2) the party's 'right to issuance of the writ is "clear and indisputable,"' and (3) 'the writ is appropriate under the circumstances.'" Ibid. (quoting Cheney v. United States Dist. Court, 542 U.S. 367, 380-381 (2004)) (brackets in original). Each of the prerequisites for mandamus relief is readily met here, and the court of appeals plainly erred in concluding otherwise.

a. As noted in the petition (at 18), absent review on mandamus, the district court's orders will be effectively unreviewable on appeal from final judgment. The White House, DHS, and DOJ will have been required to collect, review, and make privilege determinations as to thousands of additional documents; numerous deliberative materials will have been made public; various privileges, including executive privilege, will have been breached based on the district court's existing erroneous privilege rulings (and any more that follow); and high-ranking government officials will have been deposed. The government indisputably has "no other adequate means" of protecting its interests aside from this petition. Perry, 558 U.S. at 190 (citation omitted).

b. The government's right to a writ of mandamus is also "clear and indisputable." Perry, 558 U.S. at 190 (citation omitted). As explained in the petition (at 18-32), the orders at issue violate multiple fundamental principles of judicial review of agency action.

First, the district court erred by ordering the government to "complete" the administrative record with, among other things, "all DACA-related materials considered by persons (anywhere in the government)" who advised the Acting Secretary concerning the potential rescission of DACA. Pet. App. 42a-43a. In agency-review cases, "[t]he APA specifically contemplates judicial review" on the basis of "the record the agency presents to the reviewing court." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); see Camp v. Pitts, 411 U.S. 138, 143 (1973) (per curiam). If the record supplied by the agency is inadequate to support the agency's explanation, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Florida Power & Light Co., 470 U.S. at 744.[5] The district court's sweeping expansion of the

[5] Although this Court has suggested that a district court "may require the administrative officials * * * to give testimony explaining their action" in the rare circumstances where an agency provides entirely no explanation for its decision or where a plaintiff makes "a strong showing of bad faith or improper behavior," Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), those circumstances indisputably have not

administrative record, reaching well beyond the "record already in existence" to intrude upon the highest offices in the Executive Branch, id. at 743, directly contradicts this Court's decisions. See Cheney, 542 U.S. at 385, 389 (explaining that judicial demands for White House documents raise "special considerations" regarding "the Executive Branch's interests in maintaining the autonomy of its office," with the result that "coequal branches of the Government are set on a collision course").

The district court's sweeping expansion of the record not only is beyond the court's authority, but also is particularly anomalous because of the nature of the agency action at issue: a policy determination by the Acting Secretary to wind down a previous policy of prosecutorial discretion that itself created no substantive rights. As the government has explained in its pending motion to dismiss in district court, judicial review of the Acting Secretary's discretionary decision to withhold deferred action is not only precluded from review by the INA, see 8 U.S.C. 1252(g); Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 483-485 & n.9 (1999) (AADC), but also committed to agency discretion by law, see 5 U.S.C. 701(a)(2); Heckler v. Chaney, 470 U.S. 821, 831 (1985). See Pet. 20-21. And even assuming the determination were not entirely unreviewable, it is still a

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been established here. See Pet. App. 17a-19a (Watford, J., dissenting).

discretionary enforcement policy decision that would be subject only to narrow arbitrary-and-capricious review, and would not need to be supported by a developed factual record or include any extensive administrative record at all.

Respondents cannot evade these principles by pointing to their constitutional claims. See Pet. 23. Constitutional challenges to final agency action, like other such challenges, are governed by the APA, see 5 U.S.C. 706(2)(B), and limitations on discovery have particular force where, as here, the claim rests on allegations that enforcement decisions -- especially in the immigration context -- were motivated by discrimination. See United States v. Armstrong, 517 U.S. 456, 463-464, 468 (1996); AADC, 525 U.S. at 489-491.

Second, as the petition explains (at 27-31), the district court's orders cannot be reconciled with the principle that deliberative materials do not form part of the administrative record. The only apparent purpose for the district court's demands for, inter alia, "emails, letters, memoranda, notes * * * [and] opinions," Pet. App. 42a, is to consider pre-decisional documents informing the Acting Secretary's policy and legal analysis. But it is well-settled that it is "not the function of the court to probe the mental processes" of the agency. Morgan v. United States, 304 U.S. 1, 18 (1938) (per curiam); see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

As Judge Watford explained, "[a]n agency generally has no obligation to include documents that were prepared to assist the decision-maker in arriving at her decision, such as memos or emails containing opinions, recommendations, or advice." Pet. App. 17a; see United States v. Morgan, 313 U.S. 409, 422 (1941) ("Just as a judge cannot be subjected to such a scrutiny, * * * so the integrity of the administrative process must be equally respected."); San Luis Obispo Mothers for Peace, 789 F.2d at 44-45. Rather, the lawfulness of the Acting Secretary's discretionary decision to wind down the DACA enforcement policy is reviewable, if at all, on the reasons that the Acting Secretary herself gave.

Third, as elsewhere explained (Pet. 31-32), the district court summarily overrode multiple privileges, including deliberative-process, executive, and attorney-client privileges. Despite receiving no briefing regarding any specific assertion of privilege, the district court ordered disclosure of 35 predecisional and deliberative documents with no explanation other than its conclusory statement that "[t]he undersigned judge has balanced the deliberative-process privilege factors and determined in camera" that the "need for materials and accurate fact-finding" outweighed the deliberative-process privilege, and its erroneous assertion that the documents implicated no other privileges. Pet. App. 40a-43a & n.7. Some of those materials originated in the White House, including a memorandum from the White House Counsel

to the President himself. Add. 26. Those materials are plainly subject to executive privilege, a privilege that is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683, 708 (1974).

The district court further held that "[d]efendants have waived attorney-client privilege over any materials that bore on whether or not DACA was an unlawful exercise of executive power and therefore should be rescinded." Pet. App. 39a. The court premised that extraordinary, categorical ruling on the fact that the Acting Secretary's decision followed consideration of litigation risk and legal advice from the Attorney General. But the Acting Secretary included the Attorney General's letter in the administrative record, and in any event, neither this Court nor any court of appeals has ever held that an agency waives its attorney-client privilege on a categorical basis simply by weighing legal risks or announcing a particular view of the law.

3. Absent the requested stay, the government will suffer multiple harms that are immediate and irreparable. See Perry, 558 U.S. at 190. In contrast, the relief requested will cause no harm to respondents, who -- by seeking a stay in district court that was expressly meant to "obviate" this Court's review -- have freely acknowledged that consideration of their pending claims requires no immediate discovery or expansion of the administrative record.

a. The district court has directed the government to immediately compile, and to publicly file or submit in camera by December 22, 2017, a vast number of internal DHS, DOJ, and White House documents that are not properly part of the administrative record. These documents include "all DACA-related materials," including "emails, letters, memoranda, notes, media items, opinions and other materials," that were "considered by persons (anywhere in the government)" who "gave verbal or written input to the Acting Secretary." Pet. App. 42a-44a. To the extent the government claims privilege as to these documents, it must "simultaneously lodge full copies of all such materials" with the district court, with proposed redactions and a "log justification for each." Id. at 43a. And the court earlier directed that if the government fails to identify and assert all relevant privileges within the time available, all privileges will automatically be waived. See D. Ct. No. 23, at 5 (Sept. 13, 2017).

As explained in the accompanying declarations, the government initially identified over 21,000 documents within the custody of DHS and DOJ requiring review to determine whether they fall within the court-ordered additions to the administrative record. Add. 23, 35-36. Other potentially responsive documents will exist at the White House. Compliance with the district court's orders requires those agencies and the White House to review those documents, "page-by-page," to determine whether they in fact fall

within the district court's concept of the administrative record and, if so, identify whether they contain any privileged material. Id. at 33; see also id. at 21, 23-25. Based on initial reviews performed to date, and absent a stay from this Court, the government estimates that more than 6,000 documents from DHS and DOJ will require further review to ascertain whether they fall within the expanded record as conceived by the district court and whether they are subject to one or more privileges, including the deliberative-process, attorney-client, and work-product privileges. Add. 23, 35-36. This additional review is required in order to ensure accuracy in the identification of documents for both responsiveness and privilege. Id. at 23, 35-38. Performing that review would require reassignment of resources from other essential programmatic functions. Id. at 23-24, 34.

Moreover, absent a stay, the government will be forced in three weeks' time to publicly file 35 documents furnished in camera that are protected by the deliberative-process privilege, executive privilege, and/or other privileges. Pet. App. 43a; Add. 26-27. Among those materials are several White House documents obtained from the Acting Secretary's files. Add. 26-27. The district court did not deny that those documents were covered by the deliberative-process privilege, but summarily held that the privileges were outweighed by an unspecified "need for materials and accurate fact-finding," and inexplicably declared in a

footnote that they were not protected by the executive privilege at all. Pet. App. 40a; see id. at 40a n.7. It is well established in even routine cases that the "forced disclosure of privileged material" causes "irreparable harm," In re Perrigo Co., 128 F.3d 430, 437 (6th Cir. 1997), and that principle applies with particular force where, as here, a district court that has already exceeded the scope of its authority under the APA has gone on to overrule numerous governmental privileges in summary fashion. See Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 110 (2009) (recognizing appropriateness of mandamus where "litigants [are] confronted with a particularly injurious or novel privilege ruling").

The looming resumption of discovery also strongly militates in favor of a stay. Absent relief from this Court, the government's obligation to respond to respondents' pending discovery requests will automatically be reinstated on December 22, 2017. Among other demands, respondents have requested the government to produce "[a]ny and all documents and communications considered or created" anywhere within DHS or DOJ "as part of the process of determining whether to continue, modify, or rescind DACA" -- a category of materials extending well beyond even the expansive concept of the administrative record formulated by the district court -- as well as "[a]ny and all documents relating to" numerous, unrelated deferred-action programs dating back to "the

Eisenhower Administration." Add. 42, 45-46 (footnote omitted). Even if subsequently narrowed, further discovery is extremely likely to impose considerable burdens and thereby impair the performance of other essential DHS and DOJ functions. Id. at 24-25, 34-35. DHS estimates, for example, that it would take at least 2,000 hours to respond to pending document requests alone. Id. at 25.

The extraordinary efforts undertaken prior to the court of appeals' October 24 stay are illustrative of the burdens that the government may face if discovery is permitted to resume. Initial searches conducted by DHS components in response to document requests in these cases and those pending in New York resulted in the collection for potential review of approximately 1.6 million documents from 147 custodians. Add. 20. Until stays were entered by the Second and Ninth Circuits, all full-time employees in the DHS Headquarters litigation group were "assigned to review documents in the various DACA cases" for either discovery or record-expansion purposes, and lawyers were also diverted from five other practice areas; such assignments may again be required if discovery is permitted to resume. Id. at 9-10; see also id. at 23-24. Customs and Border Protection and Citizenship and Immigration Services were forced to redirect all or substantially all of their e-discovery technology resources, and Immigration and Customs Enforcement pulled agency counsel and personnel from

immigration court appearances and other regular duties to assist with document review. Id. at 6, 12-13, 15. Those efforts were "completely unprecedented," id. at 16, and hindered the ability of DHS components to meet important programmatic obligations, including responding to other court deadlines. See also id. at 24-25.

Moreover, prior to the October 24 stay, respondents in these cases took the depositions of six government officials and advisers, and they have noticed depositions for at least six others, including the Acting Secretary herself.[6] If those depositions are allowed to proceed, respondents will likely call for testimony regarding numerous privileged matters. Indeed, respondents have announced their intent to seek to re-open prior depositions in order to inquire into the substance of privileged communications, including attorney-client communications subject to categorical waiver of privilege under the district court's order. As the many appellate decisions reversing ordered depositions of high-level government officials have recognized, mandamus review exists precisely to ensure that such compelled

[6] The magistrate judge overruled the government's objection to the Acting Secretary's deposition. Although the government has not yet appealed that decision to the district court due to intervening stays of discovery, the district court previously made clear its view that the Acting Secretary should be deposed. See 10/16/17 Tr. 35 ("[M]y own view is I would order that deposition pronto.").

examinations of the government's mental processes can effectively be prevented. See, e.g., In re McCarthy, 636 Fed. Appx. 142 (4th Cir. 2015); In re United States, 542 Fed. Appx. 944 (Fed. Cir. 2013); In re Cheney, 544 F.3d 311 (D.C. Cir. 2008) (per curiam); In re United States, 197 F.3d 310 (8th Cir. 1999).

b. In contrast, respondents will suffer no harm from a stay. Respondents have already filed a motion for provisional relief arguing on multiple grounds that the Acting Secretary's decision to rescind DACA was unlawful. See D. Ct. Doc. 111 (Nov. 1, 2017). Briefing on that motion and on the pending motion to dismiss will be completed by December 8, and a hearing on those motions is scheduled for December 20. Respondents have identified no need for adding to the administrative record or for discovery in order to adjudicate their pending claims. To the contrary, by affirmatively seeking a stay of discovery and record expansion pending a ruling on the current motions -- in a declared effort to "obviate" this Court's review, D. Ct. Doc. 190, at 6 (Nov. 19, 2017) -- respondents have conceded the absence of any immediate need for an expanded administrative record or discovery.

CONCLUSION

For the foregoing reasons, this Court should stay the district court's orders to the extent they require the government to (1) locate and compile additional materials for inclusion in the expanded administrative record or for in camera review; (2) file

an expanded administrative record and privilege log, and submit privileged documents for in camera review, by December 22, 2017; (3) publicly file the 35 privileged documents referenced in the district court's October 17, 2017 order; and (4) participate in resumed discovery on or after December 22, 2017, all pending the disposition of the government's petition for a writ of mandamus (or certiorari) and any further proceedings in this Court. Petitioners also request that this Court enter an immediate administrative stay pending its consideration of this stay application. If this Court grants such an administrative stay but thereafter denies a full stay, we respectfully request that the Court provide for postponement of compliance with the district court's orders for 30 days.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2017

ADDENDUM

Court of appeals order denying motion for stay (9th Cir. Nov. 21, 2017) 1

District court's one-month continuance of due date for augmented administrative record and temporary stay of discovery (N.D. Cal. Nov. 20, 2017) 3

Declaration of Vijai Chellappa (N.D. Cal. Oct. 12, 2017).....5

Declaration of David J. Palmer (N.D. Cal. Oct. 12, 2017).....8

Declaration of James W. McCament (N.D. Cal. Oct. 12, 2017).....11

Declaration of Raymond Milani (N.D. Cal. Oct. 12, 2017).....14

Declaration of David J. Palmer (Dec. 1, 2017).....18

Declaration of Allison C. Stanton (Dec. 1, 2017).....29

Exhibit A.....39

FILED

NOV 21 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA; DONALD J. TRUMP; U.S. DEPARTMENT OF HOMELAND SECURITY; ELAINE C. DUKE,

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UNITED STATES OF AMERICA; DONALD J. TRUMP; U.S. DEPARTMENT OF HOMELAND SECURITY; ELAINE C. DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO,

Respondent,

REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, In her official capacity as President of the University of California; STATE OF CALIFORNIA; STATE OF MAINE; STATE OF MINNESOTA; STATE OF MARYLAND; CITY OF SAN JOSE; DULCE GARCIA; MIRIAM GONZALEZ AVILA; VIRIDIANA CHABOLLA

No. 17-72917

D.C. Nos. 3:17-cv-05211-WHA
3:17-cv-05235-WHA
3:17-cv-05329-WHA
3:17-cv-05380-WHA
3:17-cv-05813-WHA
Northern District of California, San Francisco

ORDER

MENDOZA; NORMA RAMIREZ; COUNTY OF SANTA CLARA; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521; JIRAYUT LATTHIVONGSKORN; SAUL JIMENEZ SUAREZ,

Real Parties in Interest.

Before: WARDLAW, GOULD, and WATFORD, Circuit Judges.

Before the court is the government's emergency motion for a stay of our order of November 16, 2017, which denied the government's petition for a writ of mandamus and lifted a temporary stay that we had previously imposed. As the order denying mandamus relief was effective immediately upon its issuance, *see Ellis v. U.S. Dist. Court*, 360 F.3d 1022, 1023 (9th Cir. 2004) (en banc), jurisdiction now lies with the district court, and not with this court. *Compare Daimler-Benz Aktiengesellschaft v. U.S. Dist. Court*, 805 F.2d 340, 341–42 (10th Cir. 1986) (ordering a stay of district court proceedings *before* any order denying or granting mandamus had issued). If the government seeks further relief from this court, it must do so in a new petition for mandamus. The government's emergency motion for a stay is therefore DISMISSED.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and JANET NAPOLITANO, in her official capacity as President of the University of California,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY and ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security,

Defendants.
/

No. C 17-05211 WHA
No. C 17-05235 WHA
No. C 17-05329 WHA
No. C 17-05380 WHA
No. C 17-05813 WHA

ONE-MONTH CONTINUANCE OF DUE DATE FOR AUGMENTED ADMINISTRATIVE RECORD AND TEMPORARY STAY OF DISCOVERY

After consideration of all briefing, the Court stands by its tentative order.

The previous schedule is hereby modified to allow the government an additional month to compile and to file the augmented administrative record, which due date will now be **DECEMBER 22, 2017, AT NOON**. Although the government need not file until that date, it must promptly locate and compile the additional materials and be ready to file the fully augmented record by December 22, this caution being necessary in order to have a realistic opportunity to reach a final decision on the merits before the March 5 termination date. Additionally, all discovery is hereby **STAYED** until **DECEMBER 22, 2017, AT NOON**.

Meanwhile, we will proceed with the motion to dismiss and competing motion for provisional relief as scheduled. If the motion to dismiss is denied, then we will promptly set a practical schedule to reach the merits with the benefit of the augmented record.

Except to the foregoing extent, both emergency motions for stay are **DENIED**.

IT IS SO ORDERED.

Dated: November 20, 2017.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

REGENTS OF UNIVERSITY OF CALIFORNIA and JANET NAPOLITANO, in her official capacity as President of the University of California, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY and ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security, Defendants.	Hon. William Alsup Case No. 17-cv-05211-WHA

DECLARATION OF VIJAI CHELLAPPA

I, Vijai Chellappa, do hereby declare and state:

1. I am an E-Discovery Digital Forensic Analyst with U.S. Customs and Border Protection (CBP), E-Discovery Team, Security Operations, Cyber Security Directorate, Office of Information Technology (OIT). I have 15 years of experience in the Information Technology field, and I have worked for CBP, OIT since 2009. I have been an E-Discovery Digital Forensic Analyst since 2011.

2. I am aware of the Court Order dated October 10, 2017, Dkt. No. 67, Order Shortening Time for Briefing Motion to Complete the Administrative Record. I make the following statements based on my personal knowledge and upon information furnished to me in the course of my official duties.

3. In CBP's efforts to respond to discovery requests in this and related cases, I have assisted in the ongoing process of searching, collecting, reviewing, and analyzing documents

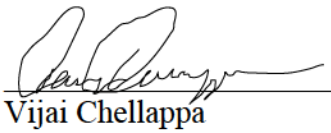
based on searches of more than 70 GB of data (90,219 electronic files) acquired from searches of 12 network drives and approximately 29 workstations.

4. Additionally, I developed and executed the search of CBP's e-mail mailbox journal servers which consisting of approximately 200 TB of data from CBP e-mail mailboxes to locate potentially responsive e-mail messages.

5. CBP, OIT has dedicated significant hours and all of the E-Discovery computer search resources to accelerate the total time needed to respond to pending discovery. To date, I have already expended approximately 48 hours in this effort, to include the searches, data transfers, and refining process for potential discovery material in this and related matters. Additionally, the Agency has experienced impacts to agency function and mission, as all E-Discovery computer server resources were reassigned and diverted to address the search for documents responsive to current discovery requests in the various pending DACA cases. Specifically, all of our work for other cases and court deadlines was put on hold to perform discovery tasks in this and related matters in order to expend the entire resource of E-Discovery's computer server in response to production of this discovery request. As a result, the agency is already more than a week behind in other litigation obligations and has also fallen behind on an ongoing critical surveillance operation.

6. Similar burdens would likely be incurred to immediately locate any additional materials that I understand Plaintiffs assert should be part of the administrative record.

I declare that to the best of my current knowledge the foregoing is true and correct. Executed on this 12th day of October 2017.



Vijai Chellappa

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

REGENTS OF UNIVERSITY OF CALIFORNIA and JANET NAPOLITANO, in her official capacity as President of the University of California, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY and ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security, Defendants.	Hon. William Alsup Case No. 17-cv-05211-WHA

DECLARATION OF DAVID J. PALMER

I, David J. Palmer, do hereby declare and state:

1. I am the Chief of Staff for the Office of the General Counsel in the United States Department of Homeland Security. In this capacity, I supervise attorneys and other professional staff who are coordinating efforts at DHS Headquarters to respond to court orders and discovery requests in this case and other related actions. I make the following statements based on my personal knowledge and upon information furnished to me in the course of my official duties.

2. I am aware of the Court Order dated October 10, 2017, Dkt. No. 67, Order Shortening Time for Briefing Motion to Complete the Administrative Record.

3. I have reviewed the Plaintiff's Motion to Complete the Administrative Record (*Regents of University of Cal. v. U.S. Dep't of Homeland Security*), Case No. 17-cv-5211, Dkt.

No. 65) ("Motion") and their interpretation of the "administrative record," on pages 9 and 10 of Plaintiffs' motion.

4. If DHS Headquarters were required to search, review, and compile documents based on Plaintiffs' interpretation of the contents of the proposed administrative record as defined in their Motion, DHS Headquarters would not have been able to search, collect, review, or provide the documents by October 6, 2017, nor would it be able to do so by October 12, 2017, due to the level of effort necessary and the complexity of the undertaking.

5. In response to the discovery requests served in the various DACA cases pending here and in the Eastern District of New York, DHS Headquarters is in the process of searching, collecting, reviewing and analyzing documents from more than 30 custodians which includes a collection of at least 30,118 documents from DHS Headquarters custodians alone, and likely far more given potential DHS Headquarters equities in documents that may be in the possession, custody or control of its component agencies. Similar burdens would likely be incurred to locate the materials Plaintiffs assert should be part of the administrative record.

6. We have dedicated a significant number of staff and hours to the efforts. For example, to date we have already expended more than 150 hours on compiling documents for potential discovery in the various DACA cases. We would experience impacts to agency functions and mission, as resources and personnel would have to be reassigned and diverted to address compiling the administrative record pursuant to Plaintiff's interpretation. For example, we have already diverted staff from normal operational duties such as preventative maintenance of information technology systems and resolving customer issues. Litigation attorneys recruited to review and analyze documents in this action and other related actions also have full dockets of other litigation matters with pending briefing and discovery deadlines. All full time employees

on the DHS Headquarters litigation team have been assigned to review documents in the various DACA cases and there is no prospect of reassigning or rebalancing their work in other cases. In order to accomplish the review and analysis of documents, DHS Headquarters has also diverted attorney resources from five other legal practice areas.

7. Even with these diverted resources, given the careful review that must be conducted, the volume of the records, and prevalence of privilege issues, the agency would require substantial time and a significant expenditure of resources to identify and assess properly documents within the Plaintiffs' definition of administrative record.

8. The agency, however, is taking extraordinary steps to devote the resources necessary to accelerate the total time needed to respond to pending discovery. Given the number and complexity of documents at issue, the multiple layers of review required, and the difficulty of the issues presented, the agency's best, good faith analysis is that the agency would not have been able to search, collect, review, or provide the documents by October 6, 2017 nor by October 12, 2017 that would fit Plaintiffs' definition of an administrative record.

I declare that to the best of my current knowledge the foregoing is true and correct. Executed on this 12 day of October 2017.

DAVID J. PALMER

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

REGENTS OF UNIVERSITY OF CALIFORNIA and JANET NAPOLITANO, in her official capacity as President of the University of California, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY and ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security, Defendants.	Hon. William Alsup Case No. 17-cv-05211-WHA

DECLARATION OF JAMES W. McCAMENT

I, James W. McCament, do hereby declare and state:

1. I am the Deputy Director of U.S. Citizenship and Immigration Services. I make the following statements based on my personal knowledge and upon information furnished to me in the course of my official duties.

2. I am aware of the Court Order dated October 10, 2017, Dkt. No. 67, Order Shortening Time for Briefing Motion to Complete the Administrative Record.

3. I have reviewed the Plaintiff's Motion to Complete the Administrative Record (*Regents of University of Cal. v. U.S. Dep't of Homeland Security*, Case No. 17-cv-5211, Dkt. No. 65) ("Motion") and their interpretation of the "administrative record," on pages 9 and 10 of Plaintiffs' motion.

4. If we were required to search, review, and compile documents in our agency based on Plaintiffs' interpretation of the contents of the administrative record as defined in their Motion, our agency would not have been able to search, collect, review, or provide the documents by October 6, 2017 nor by October 13, 2017 due to the level of effort and complexity of the undertaking.

5. In response to the discovery requests served in the various DACA cases pending here and in the Eastern District of New York, USCIS is in the process of searching, collecting, reviewing and analyzing documents from more than approximately 70 custodians, including more than 260,000 emails in addition to documents from approximately 30 shared drives or hard drives. We have dedicated significant staff and hours to the efforts and thus have diverted staff from meeting critical agency goals. For example, to date, I understand that we have already expended more than an estimated 290 hours on identifying and coordinating with custodians, and searching and compiling documents for potential discovery in this and related matters. Similar burdens would likely be incurred to locate the materials Plaintiffs assert should be part of the administrative record.

6. We would experience impacts to agency function and mission as resources and personnel would have to be reassigned and diverted to address compiling Plaintiff's interpretation of the administrative record. For example, as part of the ongoing efforts to respond to discovery requests in the various pending DACA cases, the Office of Information Technology (OIT) team has made responding to discovery requests in the various pending DACA cases its exclusive focus to meet the Court deadline. As a result, OIT postponed several other jobs, including three projects and two investigations that have been put on hold to support this and related case matters. The U.S. Citizenship and Immigration Services Office of the Chief

Counsel had to shift personnel to respond to discovery requests and the majority of assigned Counsels time is dedicated to discovery, whereas in their normal course of business, they would have been providing legal guidance on a wide array of issues. Finally, various reporting requirements and requests have had to be delayed so that resources could be reallocated to the discovery in this case and related case matters.

7. Even with these diverted resources, given the careful review that must be conducted and the volume of the records at issue, the agency would require substantial time and a significant expenditure of resources to find documents within the Plaintiffs' definition of administrative record.

9. The agency, however, is taking extraordinary steps to devote the resources necessary to accelerate the total time needed to respond to pending discovery. Given the number and complexity of documents at issue, the multiple layers of review required, and the difficulty of the issues thereby presented, the agency's best, good faith analysis is that the agency would not have been able to search, collect, review, or provide the documents by October 6, 2017 nor by October 13, 2017 that would fit Plaintiffs' definition of administrative record.

I declare that to the best of my current knowledge the foregoing is true and correct. Executed on this 12 day of October 2017.

James W. McCament

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

REGENTS OF UNIVERSITY OF CALIFORNIA and JANET NAPOLITANO, in her official capacity as President of the University of California,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY and ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security,

Defendants.

Hon. William Alsup

Case No. 17-cv-05211-WHA

DECLARATION OF RAYMOND MILANI

I, Raymond Milani, do hereby declare and state:

1. I am an Associate Legal Advisor with the Office of the Principal Legal Advisor (OPLA), U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security (DHS). OPLA is charged by statute with representing the agency in civil immigration proceedings before the nation's immigration courts and with providing specialized legal advice to agency personnel. 6 U.S.C. § 252(c). I make the following statements based on my personal knowledge and upon information furnished to me in the course of my official duties.

2. In my position, I assist OPLA's legal divisions during the entire eDiscovery lifecycle, to include the distribution and monitoring of preservation notices, coordinating with ICE's Office of the Chief Information Officer (OCIO) to collect electronically stored data in a defensible manner, process, analyze, and search electronically stored information, set up

documents for review and redaction, and produce reviewed documents in a format and manner agreed to by opposing counsel/parties and in compliance with the Federal Rules of Civil Procedure. I am also involved in all aspects of the acquisition process for eDiscovery software and supporting systems (market research, statement of work, proposal evaluations, contract awards); responsible for the administration and configuration of eDiscovery software; am a liaison to OCIO on all issues related to eDiscovery and the support and maintenance of the application; and a point of contact assisting other DHS components with their eDiscovery implementation and acquisition. I have performed these functions since February 2008.

3. I am aware of the Court Order dated October 10, 2017, Dkt. No. 67, Order Shortening Time for Briefing Motion to Complete the Administrative Record.

4. I have reviewed Plaintiffs' Motion to Complete the Administrative Record (*Regents of University of Cal. v. U.S. Dep't of Homeland Security*), Case No. 17-cv-5211, Dkt. No. 65) ("Motion") and their interpretation of the "administrative record," on pages 9 and 10 of Plaintiffs' motion.

5. In the course of responding to discovery requests in this and related litigation initiated against the federal government related to Deferred Action for Childhood Arrivals (DACA), ICE is in the process of searching, collecting, reviewing, and analyzing documents from 26 custodians, including more than 872,000 documents.

6. For context, in less than five days, ICE has already expended more than 220 hours on compiling documents for potential discovery in this and related DACA litigation. Similar burdens would likely be incurred to locate the materials Plaintiffs assert should be part of the administrative record.

7. Consequently, an effort to satisfy Plaintiffs' "administrative record" interpretation would impose severe impacts upon agency function and mission, with resources and personnel reassigned and diverted to address compiling Plaintiff's interpretation of the administrative record. For example, ICE has delayed and put at risk other case deadlines in an effort to respond to discovery requests in the various pending DACA matters. Work on those non-DACA matters had to be halted to address discovery in this and related matters. ICE has pulled agency counsel and personnel from immigration court appearance responsibilities and other regular duties, essentially, having to devote 1 out of every 14 attorneys in ICE's legal offices across the country to handle the discovery in this and related DACA lawsuits filed against the federal government. And, even with such diverted resources, which are currently focused on general discovery obligations arising incident to such litigation, the careful review required to comb through the volume of records at issue and identify those that specifically satisfy Plaintiffs' "administrative record" interpretation would likely require substantial additional time.

8. Based on my experience, the efforts ICE has undertaken to respond to this and related DACA litigation is completely unprecedented, in terms of devotion of resources necessary to accelerate discovery production efforts. In responding to DACA-related discovery, ICE began its collection late Wednesday, October 4, and all potentially responsive records were assembled for processing by Friday morning, October 6. ICE's OCIO assigned 2 Active Directory Exchange (ADEX) personnel to work on the collection of documents from 26 custodians. ICE personnel spent a combined total of 220 hours on the project from early Wednesday evening, October 4, until late Monday afternoon, October 9. These efforts included substantial overnight and (holiday) weekend work. This size of this data pull was approximately 872,000 documents and 196 GB of data.

9. The agency has also devoted 82 individuals, the vast majority of whom are attorneys, to review the data collected to date. The discovery responses alone have impacted ICE's mission. One example is the delay in document review in another important district court class action suit. ICE placed that entire discovery project on hold for more than three business days to accommodate the DACA litigation discovery effort.

I declare that to the best of my current knowledge the foregoing is true and correct. Executed on this 12th day of October 2017.

Raymond Milani

No. 17A-____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE UNITED STATES OF AMERICA, ET AL.

DECLARATION OF DAVID J. PALMER
IN SUPPORT OF APPLICATION FOR A STAY
PENDING DISPOSITION OF A PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

I, David J. Palmer, do hereby declare and state:

1. I am the Chief of Staff for the Office of the General Counsel in the U.S. Department of Homeland Security (DHS). In this capacity, I supervise attorneys and other professional staff who are coordinating efforts at DHS Headquarters to respond to court orders and discovery requests in these cases and other related actions. I am also a senior leader in the DHS Office of the General Counsel and, in that role, DHS component agency Chief Counsels, their subordinates, and their staff keep me apprised of their day-to-day activities as appropriate, including efforts by the component agencies to respond to court orders and discovery requests in these cases and related actions. I make the following

statements based on my personal knowledge and upon information furnished to me in the course of my official duties.

2. I am aware that DHS has been named a defendant in multiple lawsuits pending in the United States District Court for the Northern District of California (Northern District of California)[1] and the United States District Court for the Eastern District of New York (Eastern District of New York)[2] challenging the September 5, 2017 decision of the Acting Secretary of Homeland Security to rescind the June 15, 2012 DACA Memorandum.

3. I am aware of and have reviewed the following orders:

a. Order re Motion to Complete Administrative Record (D. Ct. Doc. 79), dated October 17, 2017, in Regents of University of California, et al. v. United States Department of Homeland Security, et al., No. 17-cv-5211 (N.D. Cal.) (the Oct. 17 AR Order).

b. Order Denying Petition for Writ of Mandamus (D. Ct. Doc. 35), dated November 16, 2017, in In re United States of America, et al., No. 17-72917 (9th Cir.).

c. Order to File Completed Administrative Record and Propose Schedule (D. Ct. Doc. 188), dated November 16, 2017, in Regents of University of California, et al. v. United States Department of Homeland Security, et al., No. 17-cv-5211 (N.D. Cal.) (the Nov. 16 AR Order).

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[1] Regents of University of California, et al. v. United States Department of Homeland Security, et al., No. 17-cv-5211; State of California et al. v. U.S. Department of Homeland Security et al., No. 17-cv-5235; City of San Jose v. Trump, et al., No. 17-cv-5329; Garcia v. United States of America, et al., No. 17-cv-5380; County of Santa Clara, et al. v. Trump, et al., No. 17-cv-5813.

[2] Batalla Vidal, et al. v. Duke, et al., No. 16-cv-4756; State of New York, et al. v. Trump, et al., No. 17-cv-5228.

d. One-Month Continuance of Due Date for Augmented Administrative Record and Temporary Stay of Discovery (D. Ct. Doc. 197), dated November 20, 2017, in Regents of University of California, et al. v. United States Department of Homeland Security, et al., No. 17-cv-5211 (N.D. Cal.).

4. DHS has been served with discovery requests in the Northern District of California and the Eastern District of New York cases. Due to the extremely expedited nature of proceedings in both of these sets of cases, DHS and its components have retrieved documents for purposes of responding to potential discovery in both sets of cases.

General Discovery

5. In collecting documents for purposes of responding to discovery requests in the Northern District of California and Eastern District of New York cases, DHS collected a total of 1,595,073 documents from a total of 147 custodians across all of DHS, including from DHS Headquarters (DHS HQ) (32 custodians) as well as from DHS component agencies U.S. Customs and Border Protection (CBP) (12 custodians), U.S. Customs and Immigration Enforcement (ICE) (at least 25 custodians), and U.S. Citizenship and Immigration Services (USCIS) (79 custodians). Following initial processing and deduplication of these records, at this time DHS has identified a total of 197,035 documents to review for responsiveness to discovery requests.

6. In order to identify custodians with potentially responsive information for purposes of responding to discovery requests, DHS and its components identified custodians who were most likely to have responsive information and retrieved documents by conducting searches of their electronically stored information and, where applicable, through manual collection. DHS has dedicated a significant amount of time and resources in responding to the discovery requests served in the various DACA cases pending in both the Northern District of California and the Eastern District of New York. DHS has diverted staff from normal operational duties such as preventative maintenance of information technology systems and resolving customer issues to assist in the collection of data on an expedited basis. Approximately 110 attorneys across DHS have worked on reviewing documents for general discovery in the various DACA cases.

Administrative Record Orders

7. In response to scheduling orders issued in both the Eastern District of New York and Northern District of California cases, DHS submitted an administrative record that includes documents reviewed and considered by the Acting Secretary of Homeland Security in connection with her decision to rescind DACA. DHS identified those records by consulting with the Acting Secretary of Homeland Security and members of her staff, conducting a manual collection of documents, and conducting a search of

electronically stored information. The records were also reviewed for responsiveness. DHS submitted the administrative record in both the Eastern District of New York and the Northern District of California on October 6, 2017.

8. On October 17, 2017, the U.S. District Court for the Northern District of California ordered an expansion of the administrative record to include additional materials, and further ordered that this expanded administrative record be filed within ten days, by October 27, 2017. See Oct. 17 AR Order. To comply with the Oct. 17 AR Order, DHS expanded the scope of its document collection and review to include documents of additional custodians who had not been identified for purposes of responding to discovery requests.

9. Following receipt of the Oct. 17 AR Order, DHS identified 22 custodians with potentially responsive documents for purposes of inclusion in the Northern District of California administrative record. DHS selected these custodians by attempting to identify DHS personnel who provided written or verbal advice or input to the Acting Secretary. These custodians include some of the most senior leaders in the agency, including Acting Secretary Elaine Duke; Acting General Counsel Joseph Maher; Deputy General Counsel Dimple Shah; and heads of DHS component agencies including James McCament, former Acting Director of USCIS; Craig Symons, Chief Counsel of USCIS; Thomas Homan, Acting Director of ICE; and Kevin

McAleenan, Acting Commissioner of CBP. Custodians also include senior officials within the Office of the Secretary, including the Acting Chief of Staff Chad Wolf, Deputy Chief of Staff Elizabeth Neumann, and former Senior Counselor Gene Hamilton.

10. In order to comply with the Oct. 17 AR Order, DHS needed to expedite the review of certain documents that had already been collected for purposes of general discovery, and also collect documents from certain custodians whose documents had not previously been collected. DHS ultimately ended up with a total collection of approximately 18,671 documents from the 22 custodians to review for purposes of responsiveness to the Oct. 17 AR Order. Of that number, approximately 5,195 documents have been identified so far as needing further, second-level review to ascertain whether they should, in fact, be included in the expanded administrative record. Additionally, after segregating all of the responsive documents, separating privileged information from non-privileged information (for example, deliberative versus non-deliberative information) there are also currently 3798 records that would require a careful and methodical page-by-page review of each document, as in some circumstances only portions of a document may be subject to privilege and thus would need to be redacted, rather than withheld in full.

11. Complying with the Oct. 17 AR Order has required diverting substantial attorney resources, across all of DHS, from

other responsibilities. All full time employees on the DHS Headquarters litigation team, who also have full dockets of other litigation matters with pending briefing and discovery deadlines, have been assigned to review documents in these cases in response to the AR Orders. There is no prospect of reassigning or rebalancing their work in other cases. DHS Headquarters has also diverted attorney resources from five other legal practice areas to review and analyze documents in response to the AR Orders. In addition, CBP diverted four attorneys from other pressing litigation matters in order to perform review not only of its own documents, but to assist in the review of documents from DHS Headquarters. USCIS has assigned 11 attorneys to review documents for purposes of complying with the AR Order. ICE has pulled agency counsel and personnel from immigration court appearance responsibilities and other ordinary duties, at one point devoting 1 out of every 14 attorneys in ICE offices across the country to assist with the DACA cases for responding to the AR order.

12. Even with this intense dedication of resources across DHS, given the careful review that must be conducted, the volume of the records, and prevalence of privilege issues, DHS has required substantial time to identify and assess properly documents potentially within the scope of the administrative record pursuant to the Northern District of California's definition. Moreover, while DHS has been directing its resources

towards reviewing documents for purposes of the Northern District of California's deadlines for expanding the administrative record, it has made only limited progress in the review of the larger collection of documents for general discovery. DHS still has a total of more than 78,000 documents that would need to be reviewed for discovery. By current estimates, it would take at least 2,000 hours to review that volume of documents and prepare productions and privilege logs. Given the very large volume of outstanding documents to review, if discovery were to resume on December 22, DHS would again have to divert substantial attorney resources away from other responsibilities. For example, DHS Headquarters will likely need to assign all litigation attorneys to review documents in the Northern District of California DACA cases, without regard to other demands of their caseloads, and also divert resources from other legal practices to assist.

13. DHS strongly objects to disclosure of privileged materials that the Northern District of California has determined should be publicly released as part of the administrative record. The deliberative-process privilege protects the internal agency decision-making process by promoting open and frank discussions among agency personnel, thus encouraging those officials to be candid in their opinions when participating in the agency decision-making process. In the absence of the privilege, DHS officials would be less willing to engage in the free flow of information

and discussion out of concern that their pre-decisional thoughts and opinions would be subject to public scrutiny. Any diminishment in the flow of ideas, opinions, and recommendations would have a detrimental effect on DHS's ability to make informed and appropriate decisions.

14. The privileged documents identified in the Oct. 17 AR Order for public disclosure through their proposed inclusion in the expanded administrative record would reveal DHS's internal, deliberative decision-making process. For example, among the documents the Northern District of California has ordered disclosed are the Acting Secretary's handwritten notes on deliberations regarding the rescission of DACA, on legal advice she received, and on the wind-down of the policy, all on a copy of a draft, pre-decisional memorandum from the White House Counsel to the President that is subject to attorney-client, deliberative-process, and executive privileges.[3] Another document ordered disclosed is an internal, pre-decisional pre-briefing document for a meeting regarding the status and future of DACA.[4] This briefing paper, which is subject to the attorney-client, deliberative process, and work-product privileges, reflects a necessary tool for the Acting Secretary to organize and highlight facts, issues,

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[3] This document is identified in the October 17 AR Order as Tab 19 (Bates No. DACA_RLIT00000069).

[4] This document is identified in the October 17 AR Order as Tab 4 (Bates No. DACA_RLIT00000006).

and internal viewpoints that DHS officials believed should be considered when the Acting Secretary made her final decision. A third document is an email between the Acting Secretary, her Chief of Staff, and the White House Chief of Staff and Deputy Chief of Staff, regarding the potential rescission of DACA.[5] This email, which is subject to both the deliberative-process and executive privileges, reveals deliberations regarding the decision-making process concerning the rescission of DACA.

15. For all of these and the many similar documents, the consequence of release would be the reluctance or unwillingness of those participating in the decision-making process to voice their concerns and disagreements with proposed courses of action. This includes officials at the highest levels of government. There is a real danger that these officials will instead either significantly suppress the intensity of their opinions or objections (which could be misinterpreted by decision-making authorities as an indication of only minor resistance) or fail to raise their concerns at all. Such a result would greatly diminish the quality of decision-making of the government to the detriment of the general public.

[5] This document is identified in the October 17 AR Order as Tab 47 (Bates No. DACA_RLIT00000450).

I declare that the foregoing is true and correct. Executed on this 1st day of December, 2017.

DAVID J. PALMER

No. 17A-____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE UNITED STATES OF AMERICA, ET AL.

DECLARATION OF ALLISON C. STANTON
IN SUPPORT OF APPLICATION FOR A STAY
PENDING DISPOSITION OF A PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

I, Allison C. Stanton, do hereby declare and state:

1. I am the Director of E-Discovery, FOIA, and Records in the Office of the Assistant Attorney General, Civil Division, Department of Justice (DOJ). I joined DOJ in October 2010 after several years with Hogan & Hartson LLP (now Hogan Lovells). Throughout my 15-year legal career I have participated in and supervised response efforts for numerous high-profile and complicated discovery matters. Among other duties, I routinely provide legal and procedural advice to DOJ attorneys and to counsel at DOJ's client agencies on developing discovery and document-review plans. I speak and write extensively on electronic discovery and other discovery topics as well as teach a law school

course on the same subject. I have broad experience assessing discovery resources needs and plans for both private organizations and governmental agencies. In my capacity as Director of E-Discovery, FOIA, and Records, I am assisting in coordinating efforts at DOJ to respond to court orders and discovery requests in these cases and in other related actions challenging the September 5, 2017 rescission of the DACA policy. I make the following statements based on my personal knowledge and upon information furnished to me in the course of my official duties.

2. I am aware of the district court's Order Regarding the Motion to Complete the Administrative Record, entered in these cases on October 17, 2017. See 17-cv-5211 Docket entry No. 79 (October 17, 2017 Order). I am also aware of Plaintiffs' October 9, 2017 discovery requests under Fed. R. Civ. P. 34, entitled Plaintiffs' First Set of Requests for Production of Documents to Defendants ("discovery requests"). See Ex. A. I explain herein the volume and complexity of the documents collected within DOJ to date in response to the district court's October 17, 2017 Order requiring the government to expand the Administrative Record and the plaintiffs' discovery requests served in these and related matters as I currently understand them.

Document Search and Collection Efforts for Discovery Responses and Expansion of the Administrative Record

3. To date, DOJ has searched for and collected electronic and paper documents from more than 70 individuals in DOJ to respond to pending discovery requests in these and related matters. DOJ identified four individuals who are likely to have information to be included in the expanded Administrative Record contemplated by the district court's October 17, 2017 Order.

4. Document collection within DOJ to respond to discovery requests in these and related matters has required the identification and review of documents and correspondence of individuals at the highest levels of DOJ, including but not limited to the Attorney General of the United States, the Deputy Attorney General, the Associate Attorney General, their senior staff, and other DOJ leaders, attorneys, and personnel.

5. In particular, document collection within DOJ for expanding the Administrative Record pursuant to the district court's October 17, 2017 Order requires the identification and review of documents and correspondence of the Attorney General, the Associate Attorney General, and two members of their senior staff.

6. All document collection efforts have included discussions with personnel of varying rank and seniority within DOJ to identify the locations and types of potentially relevant or

responsive documents. This identification process necessitated that these individuals set aside normal tasks and work in order to assist in this matter. The document collection efforts also entailed electronic searches of correspondence (including email) and electronic documents (such as internal memoranda or draft pleadings). DOJ information technologists and other specialists diverted resources to search, collect, and export potentially relevant or responsive DOJ documents for attorney review.

7. More than 90,000 DOJ documents from more than 70 individuals may need to be reviewed for potential responsiveness to pending discovery requests and for privilege in these and the other related matters.

8. For the efforts to expand the Administrative Record pursuant to the standard outlined in the district court's October 17, 2017 Order, there are more than 3,000 DOJ documents from four individuals, including the Attorney General, the Associate Attorney General, and two of their senior staff. These documents have been and will continue to be carefully analyzed and reviewed for responsiveness to the district court's October 17, 2017 Order and for privilege.

9. DOJ is devoting significant staff and hours to these search and collection efforts. To date, DOJ has already expended more than 1,500 hours on the search, collection, processing, and management of documents for potential discovery responses and for

efforts to expand the Administrative Record pursuant to the standard outlined in the district court's October 17, 2017 Order.

Review of Documents for Discovery Responses and Expansion of the Administrative Record

10. The review and privilege logging efforts that would be required to comply with the district court's October 17, 2017 Order regarding the Administrative Record and to respond to the discovery requests are challenging here, because of the volume of documents to be reviewed, the complexity of the analysis, the sensitivity of many of the documents in question, and the Court's privilege-assertion process. Even after segregating all of the responsive documents, separating privileged information from non-privileged information (for example, deliberative versus non-deliberative information) in potentially thousands of documents requires a careful and methodical page-by-page review of each responsive document, because in some circumstances only portions of a document may be subject to privilege, and thus would need to be redacted, rather than withheld in full.

11. The DOJ has pulled counsel and personnel from other duties to assist in responding to the October 17, 2017 Order regarding the Administrative Record and to respond to discovery requests in these matters due to the breadth and extremely expedited response timeline. Across DOJ, attorneys, information

technology, litigation support, and other professional staff were reassigned to work on these cases and the related matters.

12. Even with these diverted resources, review will take time, and must be conducted thoroughly, given the sensitivity of the information from high-level custodians and the volume of the documents at issue. DOJ has required and will continue to require substantial time and expenditure of resources to analyze and log the documents specified in the district court's October 17, 2017 Order.

13. DOJ is devoting significant staff to document review in these matters. For example, to date more than 40 DOJ attorneys are and were involved in reviewing documents in these matters on an extremely expedited basis, both before and after the Ninth Circuit's stay was in effect, to identify documents that may be within the expanded Administrative Record contemplated by the district court's October 17, 2017 Order. These attorneys must continue to also handle other litigation matters and court deadlines, while also working to review documents for these and related matters.

14. Given the volume of documents that remain to be reviewed for responsiveness to the discovery requests, privilege, and for the actual production process, it is currently estimated that if discovery recommences on December 22, 2017 and Plaintiffs' existing document requests (Ex. A) must be responded to as they

currently exist, DOJ would have to expend more than 1,400 hours to review, redact, process, log, and produce DOJ documents.

15. Responding to these discovery requests requires considered effort because of (a) the identities of the potential custodians of documents (including very senior officials within the DOJ, up to and including the Attorney General of the United States), (b) the breadth of the discovery requests, see Ex. A, and (c) the volume of more than potentially 90,000 documents to analyze for potential responsiveness and for attorney-client privilege, attorney work-product protection, deliberative-process privilege, law-enforcement privilege, executive privilege, and any other potentially applicable governmental privileges. For example, each reviewer assigned to this project must be trained regarding the context and background of the litigation and the relevant documents in order to accurately determine a document's deliberative nature, or the deliberative process or processes to which individual documents potentially relate.

16. Expanding the Administrative Record pursuant to the standard outlined in the district court's October 17, 2017 Order presents similar challenges. There are more than 3,000 documents for review from four high-level DOJ individuals, including the Attorney General of the United States, the Associate Attorney General, and two members of their senior staff. These documents are being analyzed for potential inclusion in the Administrative

Record pursuant to the district court's October 17, 2017 Order, and also must be reviewed for privilege. A preliminary review revealed that more than 1,700 of these documents have been initially identified as potentially within the scope of the Administrative Record pursuant to the standard set forth in the district court's October 17, 2017 Order, with approximately 700 of those documents being potentially privileged, in whole or in part. Additional review will be needed to verify that the documents preliminarily identified are within the scope of the district court's order, and to make accurate privilege determinations.

17. Privileged documents would then need to be entered on a privilege log, a time-intensive process that requires significant manual, document-by-document attention. Pursuant to the district court's Supplemental Order to Order Setting Initial Case Management Conference in Civil Cases, privilege logs must, "at the time of assertion, identify a) all persons making or receiving the privileged or protected communication; b) the steps taken to ensure confidentiality of the communication, including an affirmation that no unauthorized persons have received the communication; c) the date of the communication; and d) the subject matter of the communication." 17-cv-5211 Docket entry No. 23, ¶ 18 (Sept. 13, 2017). This order also states that the privilege log "should indicate * * * the location where the document was found." Ibid. According to that order, "[f]ailure to furnish this information at

the time of the assertion will be deemed a waiver of the privilege or protection." Ibid. It is my understanding that these requirements apply to all privilege logs, including any privilege logs that the district court has ordered to be produced in conjunction with the expansion of the Administrative Record.

18. The district court's October 17, 2017 Order also requires that, if the government redacts or withholds any materials on the basis of privilege, "it shall simultaneously lodge full copies of all such materials, indicating by highlighting (or otherwise) the redactions and withholdings together with a log justification for each." 17-cv-5211 Docket entry No. 79, at 13. This additional requirement requires significant manual technical work, even after all levels of review and the privilege log have been completed. Simultaneously, one set of documents (for filing on the district court's public docket) would require opaque redactions of text; while a second set of the exact same documents would have to prepared in highlighted (not opaque) form for in camera review. In addition, copies of all documents withheld in full as privileged would need to be prepared for production to the district court.

19. The DOJ's document review to respond to the district court's October 17, 2017 Order regarding the Administrative Record, and to respond to discovery requests in these matters, may

also require significant consultation with other Executive Branch entities that have equities, knowledge, or expertise in the underlying information to assist in determining responsiveness, privilege, and to ensure that the relevant equities are adequately considered in making these sensitive determinations on an expedited basis.

I declare that to the best of my current knowledge the foregoing is true and correct. Executed on December 1, 2017.

Allison C. Stanton

Exhibit A

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and JANET NAPOLITANO, in her official capacity as President of the University of California,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY and ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security,

Defendants.

CASE NO. 17-CV-05211-WHA

PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS

STATE OF CALIFORNIA, STATE OF MAINE, STATE OF MARYLAND, and STATE OF MINNESOTA, Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security, and the UNITED STATES OF AMERICA, Defendants.	CASE NO. 17-CV-05235-WHA **PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS**
CITY OF SAN JOSE, a municipal corporation, Plaintiffs, v. DONALD J. TRUMP, President of the United States, in his official capacity, ELAINE C. DUKE, in her official capacity, and the UNITED STATES OF AMERICA, Defendants.	CASE NO. 17-CV-05329-WHA **PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS**
DULCE GARCIA, MIRIAM GONZALEZ AVILA, SAUL JIMENEZ SUAREZ, VIRIDIANA CHABOLLA MENDOZA, NORMA RAMIREZ, and JIRAYUT LATTHIVONGSKORN, Plaintiffs, v. UNITED STATES OF AMERICA, DONALD J. TRUMP, in his official capacity as President of the United States, U.S. DEPARTMENT OF HOMELAND SECURITY, and ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security, Defendants.	CASE NO. 17-CV-05380-WHA **PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiffs in the above-captioned and related cases propound the following Requests for the Production of Documents to Defendants in the above captioned cases. Per Federal Rules of Civil Procedure, Rule 34(b)(2)(A) and the Court's Case Management Order For All DACA Actions In This District (Dkt. 49), Defendants shall have fifteen (15) days from the service of these Requests to respond. For each document withheld or redacted on the grounds of privilege, Defendants must comply with Judge Alsup's Supplemental Order To Order Setting Initial Case Management Conference In Civil Cases, paragraphs 15 and 18.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1:

Any and all documents and communications[1] considered or created by Department of Homeland Security ("DHS") or the Department of Justice ("DOJ") as part of the process of determining whether to continue, modify, or rescind DACA,[2] including, but not limited to, any documents and communications relating to the legality of DACA. This request includes, but is not limited to, documents and communications between DHS or DOJ and: any official at the White House or any other Executive Branch agency, members of the public, members of Congress and congressional staff members, and state government officials and their staff members. The documents and communications include, but are not limited to, any and all notices, minutes, agendas, list(s) of attendees, notes, memoranda, or other communications from meetings relating to the decision of whether to continue, modify, or rescind DACA; any and all evaluations of the costs and benefits, direct or indirect, of continuing, modifying, or rescinding DACA, and any materials relating to the internal review, inter-agency review, or experts'

[1] As used in these requests, "communications" includes any contact between two or more persons (including any individual, corporation, proprietorship, partnership, association, government agency or any other entity) by which any information or knowledge is transmitted or conveyed, or attempted to be transmitted or conveyed, and shall include, without limitation, written contact by means such as letters, memoranda, e-mails, text messages, instant messages, tweets, social networking sites, or any other document, and oral contact, such as face-to-face meetings, video conferences, or telephone conversations.

[2] "DACA" refers to the June 15, 2012 Memorandum from former Secretary of Homeland Security Janet Napolitano, titled "Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children," and any and all implementations of the Memorandum.

feedback regarding those evaluations; and any and all documents and communications discussing policy alternatives to rescinding DACA, including, but not limited to, any materials relating to the internal review, inter-agency review, or experts' feedback regarding those alternatives.

REQUEST FOR PRODUCTION NO. 2:

Any and all documents and communications, including, but not limited to, internal guidance documents, policies, FAQs, or directives—including those distributed to DHS enforcement agents and other federal employees—regarding the decisions to continue DACA in February 2017 and June 2017 and to rescind DACA in September 2017.

REQUEST FOR PRODUCTION NO. 3:

The templates for any and all documents and communications, including, but not limited to, forms, notices, and letters, sent to DACA recipients, from the beginning of the DACA program on June 15, 2012, to the present, regarding applying for, receiving, or renewing their deferred action status or work authorization under DACA.

REQUEST FOR PRODUCTION NO. 4:

Any and all documents related to any benefits for which DACA recipients are eligible.

REQUEST FOR PRODUCTION NO. 5:

Any and all documents and communications concerning the policies and practices, from June 15, 2012, until the present, for:

a. The adjudication of initial DACA applications;

b. The adjudication of renewals of DACA applications; and

c. Allowing DACA recipients who do not file for renewal before the expiration date stated on their Notice of Action to file for renewal without requiring them to file another initial DACA application.

REQUEST FOR PRODUCTION NO. 6:

Any and all documents referenced in, or relied on in drafting, Defendants' responses to Plaintiffs' First Set of Interrogatories and Plaintiffs' First Set of Requests for Admissions.

REQUEST FOR PRODUCTION NO. 7:

Any and all documents and communications concerning the development, preparation, or production of documents and remarks related to the announcement of the rescission of DACA, including, but not limited to:

a. Fact Sheet: Rescission of Deferred Action for Childhood Arrivals (DACA) (attached hereto as Exhibit A);

b. Frequently Asked Questions on the September 5, 2017 Rescission of the Deferred Action for Childhood Arrivals (DACA) Program (attached hereto as Exhibit B);

c. Talking Points – DACA Rescission and Talking Points – President Trump Directs Phased Ending of DACA (attached hereto as Exhibit C);

d. Top Five Messages (attached hereto as Exhibit D);

e. Attorney General Sessions' remarks at a press conference on the rescission of DACA on September 5, 2017. *See* Attorney General Sessions Delivers Remarks on DACA, Dep't of Justice, Office of Public Affairs (Sept. 5, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca.

f. President Trump's statement on the rescission of DACA on September 5, 2017. See White House Office of the Press Secretary, "Statement from President Donald J. Trump" (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump.

g. White House Press Release on the rescission of DACA on September 5, 2017. See White House Office of the Press Secretary, "President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration" (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law.

h. White House statement on rescission of DACA on September 7, 2017. See White House blog post, "Former Administration's Failed Record On Crime, Immigration And Security Are What's Cruel" (Sept. 7, 2017), https://www.whitehouse.gov/blog/2017/09/07/former-administrations-failed-record-crime-immigration-and-security-are-whats-cruel.

REQUEST FOR PRODUCTION NO. 8:

Any and all documents and communications concerning any policies, procedures, guidance, memoranda, or instructions, relating to how information provided by DACA applicants is maintained at U.S. Citizenship and Immigration Services ("USCIS"), including, but not limited to, how such information is protected from disclosure to U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE"), and how USCIS, ICE, and CBP use information provided by former DACA recipients whose deferred action has expired. The relevant time period for this request is June 15, 2012, to the present.

REQUEST FOR PRODUCTION NO. 9:

Any and all documents relating to the establishment, operation, continuation, modification, discontinuation, or rescission of previous parole, non-priority status, deferred action and/or extended voluntary departure programs, including, but not limited to, the Eisenhower Administration's parole of foreign-born orphans into the custody of U.S. military families seeking to adopt them; the Eisenhower Administration's parole of Hungarian refugees; the 1956 policy under which the Immigration and Naturalization Service ("INS") granted extended voluntary departure to aliens who were physically present in the United States and had filed a satisfactory Third Preference visa petition; the Cuban Refugee Program; the Hong Kong Parole Program; the routine grants of extended stays of departure by the INS District Director of New York between 1968 and 1972 where a Western Hemisphere alien was married to a resident alien; the grants of extended voluntary departure to Southeast Asian refugees starting in 1975; the grants of extended voluntary departure to nurses who were eligible for H-1 visas, starting in 1978; the grants of voluntary departure provided to certain Polish refugees in 1981; the 1987 Family Fairness Program and the 1990 expansion of that program; the grants of deferred enforced departure provided in 1990 to certain Chinese nationals after the Tiananmen Square protests; the Temporary Protected Status designation for certain Salvadorans starting in 1992; the Temporary Protected Status designation for certain Haitians starting in 1997; the deferred action program for self-petitioners under the Violence Against Women Act of 1994, starting in 1997; the deferred action program for applicants for nonimmigrant status or visas made available under the Victims of Trafficking and Violence Protection Act of 2000, starting in 2001; the automatic stays of removal provided to T visa

applicants starting in 2002; the deferred action or parole provided to U visa applicants starting in 2003; the 2005 deferred action program for foreign students affected by Hurricane Katrina; the 2007 deferred enforced departure program for certain Liberian nationals; the 2009 deferred action program for surviving spouses of U.S. citizens; and the grant of temporary protected status for nationals of Guinea, Liberia and Sierra Leone, starting in 2014. This request includes any and all documents and communications related to the consideration of whether the establishment, continuation, modification, discontinuation or rescission of the programs was subject to the Administrative Procedure Act. This request includes any and all templates for, or specimens of, forms, applications, and documents used by individuals to apply for or obtain deferred action, extended voluntary departure, non-priority status, parole or other similar benefits under the above programs.

Dated: October 9, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2017, I served a true and correct copy of **PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS** on the parties in this action by electronic mail transmission to the e-mail addresses listed below.

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This the 9th day of October, 2017

/s/ Mark H. Lynch

Mark H. Lynch

EXHIBIT A

U.S. Department of Homeland Security

Fact Sheet: Rescission Of Deferred Action For Childhood Arrivals (DACA)

Release Date: September 5, 2017

On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano issued a memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," creating a non-congressionally authorized administrative program that permitted certain individuals who came to the United States as juveniles and meet several criteria—including lacking any current lawful immigration status—to request consideration of deferred action for a period of two years, subject to renewal, and eligibility for work authorization. This program became known as Deferred Action for Childhood Arrivals (DACA).

The Obama administration chose to deploy DACA by Executive Branch memorandum—despite the fact that Congress affirmatively rejected such a program in the normal legislative process on multiple occasions. The constitutionality of this action has been widely questioned since its inception.

DACA's criteria were overly broad, and not intended to apply only to children. Under the categorical criteria established in the June 15, 2012 memorandum, individuals could apply for deferred action if they had come to the U.S. before their 16th birthday; were under age 31; had continuously resided in the United States since June 15, 2007; and were in school, graduated or had obtained a certificate of completion from high school, obtained a General Educational Development (GED) certificate, or were an honorably discharged veteran of the Coast Guard or Armed Forces of the United States. Significantly, individuals were ineligible if they had been convicted of a felony or a significant misdemeanor, but were considered eligible even if they had been convicted of up to two other misdemeanors.

The Attorney General sent a letter to the Department on September 4, 2017, articulating his legal determination that DACA "was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch." The letter further stated that because DACA "has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA."

Based on this analysis, the President was faced with a stark choice: do nothing and allow for the probability that the entire DACA program could be immediately enjoined by a court in a disruptive manner, or instead phase out the program in an orderly fashion. Today, Acting Secretary of Homeland Security Duke issued a memorandum (1) rescinding the June 2012 memo that established DACA, and (2) setting forward a plan for phasing out DACA. The result of this phased approach is that the Department of Homeland Security will provide a limited window in which it will adjudicate certain requests for DACA and associated applications for Employment Authorization Documents meeting parameters specified below.

Effective immediately, DHS:

- Will adjudicate—on an individual, case-by-case basis—properly filed pending DACA initial requests and associated applications for Employment Authorization Documents that have been accepted as of the date of this memorandum.
- Will reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum.
- Will adjudicate—on an individual, case-by-case basis—properly filed pending DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries that have been accepted as of the date of this memorandum, and from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted as of October 5, 2017.
- Will reject all DACA renewal requests and associated applications for Employment Authorization Documents filed outside of the parameters specified above.
- Will not terminate the grants of previously issued deferred action or revoke Employment Authorization Documents solely based on the directives in this memorandum for the remaining duration of their validity periods.
- Will not approve any new Form I-131 applications for advance parole under standards associated with the DACA program, although it will generally honor the

stated validity period for previously approved applications for advance parole. Notwithstanding the continued validity of advance parole approvals previously granted, U.S. Customs and Border Protection will—of course—retain the authority it has always had and exercised in determining the admissibility of any person presenting at the border and the eligibility of such persons for parole. Further, U.S. Citizenship and Immigration Services will—of course—retain the authority to revoke or terminate an advance parole document at any time.

- Will administratively close all pending Form I-131 applications for advance parole filed under standards associated with the DACA program, and will refund all associated fees.
- Will continue to exercise its discretionary authority to terminate or deny deferred action for any reason, at any time, with or without notice.

It should be noted that DACA was not intended to be available to persons who entered illegally after 2007. Thus, persons entering the country illegally today, tomorrow or in the future will not be eligible for the wind down of DACA.

Topics: Border Security (/topics/border-security), Deferred Action (/topics/deferred-action)

Keywords: DACA (/keywords/daca), Deferred Action for Childhood Arrivals (/keywords/deferred-action-childhood-arrivals)

Last Published Date: September 5, 2017

EXHIBIT B

U.S. Department of Homeland Security

Frequently Asked Questions: Rescission Of Deferred Action For Childhood Arrivals (DACA)

Release Date: September 5, 2017

En español (https://www.dhs.gov/news/2017/09/05/preguntas-frecuentes-anulaci-n-de-la-acci-n-diferida-para-los-llegados-en-la)

The following are frequently asked questions on the September 5, 2017 Rescission of the Deferred Action for Childhood Arrivals (DACA) Program.

Q1: Why is DHS phasing out the DACA program?

A1: Taking into consideration the federal court rulings in ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that program should be terminated. As such, the Acting Secretary of Homeland Security rescinded the June 15, 2012 memorandum establishing the DACA program. Please see the Attorney General's letter and the Acting Secretary of Homeland Security's memorandum for further information on how this decision was reached.

Q2: What is going to happen to current DACA holders?

A2: Current DACA recipients will be permitted to retain both the period of deferred action and their employment authorization documents (EADs) until they expire, unless terminated or revoked. DACA benefits are generally valid for two years from the date of issuance.

Q3: What happens to individuals who currently have an initial DACA request pending?

A3: Due to the anticipated costs and administrative burdens associated with rejecting all pending initial requests, USCIS will adjudicate—on an individual, case-by-case basis—all

properly filed DACA initial requests and associated applications for EADs that have been accepted as of September 5, 2017.

Q4: What happens to individuals who currently have a request for renewal of DACA pending?

A4: Due to the anticipated costs and administrative burdens associated with rejecting all pending renewal requests, USCIS adjudicate—on an individual, case-by-case basis—properly filed pending DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries that have been accepted as of September 5, 2017, and from current beneficiaries whose benefits will expire between September 5, 2017 and March 5, 2018 that have been accepted as of October 5, 2017. USCIS will reject all requests to renew DACA and associated applications for EADs filed after October 5, 2017.

Q5: Is there still time for current DACA recipients to file a request to renew their DACA?

A5: USCIS will only accept renewal requests and associated applications for EADs for the class of individuals described above in the time period described above.

Q6: What happens when an individual's DACA benefits expire over the course of the next two years? Will individuals with expired DACA be considered illegally present in the country?

A6: Current law does not grant any legal status for the class of individuals who are current recipients of DACA. Recipients of DACA are currently unlawfully present in the U.S. with their removal deferred. When their period of deferred action expires or is terminated, their removal will no longer be deferred and they will no longer be eligible for lawful employment.

Only Congress has the authority to amend the existing immigration laws.

Q7: Once an individual's DACA expires, will their case be referred to ICE for enforcement purposes?

A7: Information provided to USCIS in DACA requests will not be proactively provided to ICE and CBP for the purpose of immigration enforcement proceedings, unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance (www.uscis.gov/NTA (http://www.uscis.gov/NTA)). This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended

to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.

Q8: Will USCIS share the personal information of individuals whose pending requests are denied proactively with ICE for enforcement purposes?

A8: Generally, information provided in DACA requests will not be proactively provided to other law enforcement entities (including ICE and CBP) for the purpose of immigration enforcement proceedings unless the requestor poses a risk to national security or public safety, or meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria. This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.

Q9: Can deferred action received pursuant to DACA be terminated before it expires?

A9: Yes. DACA is an exercise of deferred action which is a form of prosecutorial discretion. Hence, DHS will continue to exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate.

Q10: Can DACA recipients whose valid EAD is lost, stolen or destroyed request a new EAD during the phase out?

A10: If an individual's still-valid EAD is lost, stolen, or destroyed, they may request a replacement EAD by filing a new Form I-765.

Q11: Will DACA recipients still be able to travel outside of the United States while their DACA is valid?

A11: Effective September 5, 2017, USCIS will no longer approve any new Form I-131 applications for advance parole under standards associated with the DACA program. Those with a current advance parole validity period from a previously-approved advance parole application will generally retain the benefit until it expires. However, CBP will retain the authority it has always exercised in determining the admissibility of any person presenting at the border. Further, USCIS retains the authority to revoke or terminate an advance parole document at any time.

Q12: What happens to individuals who have pending requests for advance parole to travel outside of the United States?

A12: USCIS will administratively close all pending Form I-131 applications for advance parole under standards associated with the DACA program, and will refund all associated fees.

Q13: How many DACA requests are currently pending that will be impacted by this change? Do you have a breakdown of these numbers by state?

A13: There were 106,341 requests pending as of August 20, 2017 – 34,487 initial requests and 71,854 renewals. We do not currently have the state-specific breakouts.

Q14: Is there a grace period for DACA recipients with EADs that will soon expire to make appropriate plans to leave the country?

A14: As noted above, once an individual's DACA and EAD expire—unless in the limited class of beneficiaries above who are found eligible to renew their benefits—the individual is no longer considered lawfully present in the United States and is not authorized to work. Persons whose DACA permits will expire between September 5, 2017 and March 5, 2018 are eligible to renew their permits. No person should lose benefits under this memorandum prior to March 5, 2018 if they properly file a renewal request and associated application for employment authorization.

Q15: Can you provide a breakdown of how many DACA EADs expire in 2017, 2018, and 2019?

A15: From August through December 2017, 201,678 individuals are set to have their DACA/EADs expire. Of these individuals, 55,258 already have submitted requests for renewal of DACA to USCIS.

In calendar year 2018, 275,344 individuals are set to have their DACA/EADs expire. Of these 275,344 individuals, 7,271 have submitted requests for renewal to USCIS.

From January through August 2019, 321,920 individuals are set to have their DACA/EADs expire. Of these 321,920 individuals, eight have submitted requests for renewal of DACA to USCIS.

Q16: What were the previous guidelines for USCIS to grant DACA?

A16: Individuals meeting the following categorical criteria could apply for DACA if they:

- Were under the age of 31 as of June 15, 2012;
- Came to the United States before reaching their 16th birthday;
- Have continuously resided in the United States since June 15, 2007, up to the present time;
- Were physically present in the United States on June 15, 2012, and at the time of making their request for consideration of deferred action with USCIS;
- Had no lawful status on June 15, 2012;
- Are currently in school, have graduated, or obtained a certificate of completion from high school, have obtained a General Educational Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
- Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

Topics: Border Security (/topics/border-security), Deferred Action (/topics/deferred-action)

Keywords: DACA (/keywords/daca), Deferred Action for Childhood Arrivals (/keywords/deferred-action-childhood-arrivals)

Last Published Date: September 5, 2017

EXHIBIT C

Talking Points - DACA Rescission

BACKGROUND

On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano issued a memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," establishing an administrative program that permitted certain individuals who came to the United States as juveniles and met several criteria-including lacking any lawful immigration status-to request consideration of deferred action for a period of two years, subject to renewal and eligibility for work authorization.

Recognizing the complexities associated with terminating the program, the Department will provide a limited window during which it will adjudicate certain requests for DACA and associated applications meeting certain parameters specified below.

TALKING POINTS: President Trump Directs Phased Ending of DACA

- Acting Secretary Duke issued a memo rescinding the June 15, 2012 memorandum that created the Deferred Action for Childhood Arrivals (DACA) program.

- President Donald J. Trump, in close coordination with the Department of Homeland Security and the Department of Justice, considered a number of factors, including the legality of the DACA program, the likely outcome of imminent litigation, and the administrative complexities associated with ending the program.

- We are a nation of laws. DACA was an unconstitutional, unwarranted exercise of authority by the Executive Branch. Only the U.S. Congress has the authority to pass legislation to provide immigration benefits to individuals.

- President Obama noted repeatedly in the months and years leading up to the creation of DACA that the President of the United States does not have the authority to create such a an open-ended, wide-ranging program without Congressional authorization.

- DACA will be phased out. All DACA benefits are provided on a two-year basis, so individuals who currently have DACA will be allowed to retain both DACA and their work authorizations (EADs) until they expire.

- U.S. Citizenship and Immigration Services will adjudicate-on an individual, case-by- case basis-properly filed pending DACA initial requests and associated applications for Employment Authorization Documents that have been accepted as of September 5, 2017.

- USCIS will adjudicate-on an individual, case-by-case basis-properly filed pending DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries that have been accepted as of the date of this memorandum, and from current beneficiaries whose benefits will expire between September 5, 2017 and March 5, 2018 that have been accepted as of October 5, 2017.

- Individuals who have not submitted a request by September 5th, for an initial grant under DACA may no longer do so. All requests for initial grants received after September 5th will be rejected.

- In general, individuals who will no longer have DACA will not proactively be referred to ICE and placed in removal proceedings unless they satisfy one of the Department's enforcement priorities.

- The Department of Homeland Security urges DACA recipients to use the time remaining on their work authorizations to prepare for and arrange their departure from the United States-including

proactively seeking travel documentation-or to apply for other immigration benefits for which they may be eligible.

- As of September 4, 2017, there are 689,821 individuals with current valid DACA.

- It should be noted that DACA was not intended to be available to persons who entered illegally after 2007. Thus, persons entering the country illegally today, tomorrow or in the future will not be eligible for the wind down of DACA.

EXHIBIT D

TOP FIVE MESSAGES

1. The Obama Administration instituted an unconstitutional program. The Attorney General sent a letter to the Department of Homeland Security on September 4, 2017, articulating his legal determination that DACA "was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch." The letter further stated that because DACA "has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA."

2. Given the Attorney General's findings on the legality of the DACA program, the President had two stark options. He could: 1) Do nothing and allow for the probability that the entire DACA program could be immediately enjoined by a court in a disruptive manner or 2) phase out the program in an orderly fashion.

3. All current DACA beneficiaries are eligible to retain their benefits at least until March 5, 2018. Deferred action is always temporary in nature. The DACA program only gave recipients the ability to defer action on their immigration case for two-year increments with the potential for renewal. Should Congress decide to develop a permanent legislative solution for current beneficiaries while addressing the need for immigration enforcement, this action will allow them time to do so.

4. Individuals who have properly filed DACA initial requests and associated applications for Employment Authorization Documents that have been accepted as of the date of this memorandum, will have their applications adjudicated.

5. Properly filed DACA renewal applications and associated applications for Employment Authorization Documents from current beneficiaries whose benefits will expire between September 5, 2017 and March 5, 2018 that have been accepted as of October 5, 2017 will be adjudicated.