No. 17A570

IN THE

Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, ET AL.

RESPONSE TO 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

DIRECTED TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

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INTRODUCTION

The government's stay application and the accompanying petition for mandamus are an extraordinary attempt to get this Court to intervene on issues on which the courts below have yet to rule.

As a threshold matter, the government has failed to comply with Supreme Court Rule 23.3, which requires an applicant for a stay first to seek relief in the lower courts. Defendants try to sidestep such review by relying almost exclusively on new declarations never presented to the district court or the court of appeals. Defendants also failed to first seek modification or appellate review of the district court's order extending the time for completion of the administrative record for the Administrative Procedure Act ("APA") claims until December 22.

With respect to the separate issue of discovery in service of non-APA claims, whether the requested discovery on the non-APA claims is too burdensome, whether depositions should go forward, and whether questions at those future depositions may call for privileged material are all matters that the district court must resolve in the first instance, with initial review in the court of appeals. But these issues have never been presented to the district court at all, nor to the court of appeals. This Court should not entertain the stay application because of these fatal defects.

The stay application should also be denied because the three district court rulings the government identifies are not clearly erroneous as a matter of law, and therefore do not justify the extraordinary remedy of mandamus. *First*, the district court and court of appeals both correctly concluded that the complete administrative

record in this case cannot plausibly include only the 14 publicly available documents the government produced. Indeed, the district court's order closely tracks longstanding Department of Justice guidance regarding the required contents of an administrative record in APA cases—guidance that was rescinded on the same day the government filed its mandamus petition in the court of appeals. The government's view that it has unfettered discretion to omit materials from the administrative record is contrary to the plain language of the APA and would frustrate meaningful judicial oversight of agency action.

Second, there is no merit to the government's assertion that the district court required documents protected by the "deliberative process" privilege to be included in the record. On the contrary, the district court conducted a document-by-document *in camera* review of the documents over which the government claimed deliberative process privilege to determine whether the privilege was appropriately asserted and whether a showing of need overcame that qualified privilege, and agreed with the government that the majority of those documents should not be disclosed. This careful deliberation was appropriate and cannot support mandamus review.

Third, the district court's review of the government's privilege claims regarding documents to be included in the administrative record was balanced, even though the government never properly asserted privilege. For example, while the government points to a "memorandum from the White House Counsel to the President himself," it fails to mention that the document in question was located in the files of the Acting Secretary of Homeland Security and it described the document

as a "draft" to the district court and court of appeals, and did not identify the sender or recipient. Notably, the government has never requested an opportunity to further substantiate its privilege claims in the six weeks since the district court issued its rulings.

Finally, the stay application should be denied because the government has failed to identify any irreparable harm that will result absent a stay. Rather, as the government's newly produced declarations reveal, the purported "harm" amounts to little more than routine litigation inconvenience, and is either speculative, avoidable, or insufficient as a matter of law to warrant the extraordinary relief the government seeks here. Moreover, the balance of equities strongly favors plaintiffs—while the government primarily faces administrative inconvenience as a result of its own unilateral and arbitrary deadline to terminate the Deferred Action for Childhood Arrivals ("DACA") program, plaintiffs are at risk of losing the ability to reach a final ruling on the merits of their constitutional, statutory, and equitable claims before March 5, when thousands of DACA recipients will start losing their status and suffer irremediable harms.

For each of these reasons, the stay application should be denied.

STATEMENT

1. Since 2012, DACA has enabled nearly 800,000 young people who were brought into the United States as children to become contributing members of society and pursue the American Dream. DACA recipients have relied on the program to access higher education, serve in the U.S. military, open businesses, start families,

and make numerous other life changing decisions. *See, e.g.*, No. 17-cv-5380 D.Ct. Dkt. 1 ¶¶ 37, 41, 48–98. Yet on September 5, 2017, the government abruptly announced it would rescind DACA, telling beneficiaries that "DACA was fundamentally a lie." D.Ct. Dkt. 121-2 at 1869.

DACA was established on June 15, 2012 by a memorandum issued by then-Secretary of Homeland Security Janet Napolitano. D.Ct. Dkt. 64-1 at AR 1–3.[1] Under DACA, individuals brought to the United States as children and who met specific criteria could request deferred action for two years, subject to renewal. *Id.* DACA also enabled recipients to obtain work authorization and a social security number, apply for "advance parole" to travel overseas and lawfully return to the United States, and obtain other benefits. *See* D.Ct. Dkt. 121-1 at 1787–88; D.Ct. Dkt. 1-2 at 18–19.

To apply for DACA, eligible individuals were required to provide the government with sensitive personal information, submit to a rigorous DHS background check, and pay a considerable fee. D.Ct. Dkt. 1-2 at 4–5, 7. Applicants then were evaluated on a case-by-case basis. *See* Pet. App. 49a. The government launched an extensive outreach program to promote DACA and promised applicants that the information they provided would not be used for immigration enforcement purposes absent special circumstances. D.Ct. Dkt. 1-2 at 7, 16–17; D.Ct. Dkt. 121-1 at 1764, 1772. Even after the change in administrations, the government sought to reassure DACA recipients they could continue to rely on the program. For example,

[1] All citations to "D.Ct. Dkt." refer to the electronic docket for *Regents of the Univ. of Cal. v. Department of Homeland Security*, Case No. 3:17-cv-05211 (N.D. Cal. filed Sept. 8, 2017), unless otherwise noted.

in February 2017, then Secretary of Homeland Security John Kelly repealed a broad range of prior immigration directives and DHS memoranda, but specifically exempted DACA. D.Ct. Dkt. 64-1 at AR 229–34. Shortly thereafter, he characterized the program as a "commitment . . . by the government towards the DACA person." D.Ct. Dkt. 121-1 at 1842. On April 21, 2017, President Trump emphasized that "dreamers should rest easy" and confirmed that the "policy of [his] administration [is] to allow the dreamers to stay." *Id*. at 1852–53.

2. But the government abruptly changed course. On September 4, 2017, Attorney General Sessions sent a one-page letter to Acting Secretary of Homeland Security Elaine Duke summarily concluding that "DACA was effectuated by the previous administration through executive action, without proper statutory authority," and "was an unconstitutional exercise of authority by the Executive Branch." D.Ct. Dkt. 64-1 at AR 251. On September 5, 2017, the Attorney General announced the government's decision to end DACA. *See* D.Ct. Dkt. 1-3. In so doing, the Attorney General asserted that DACA was "vulnerable to the same legal and constitutional challenges that the courts recognized with respect to the [Deferred Action for Parents of Americans and Lawful Permanent Residents ('DAPA')] program." *Id*. at 1–2.

Later that same day, Acting Secretary Duke issued a memorandum formally rescinding DACA ("the Rescission"). Pet. App. 61a–69a. The Rescission referred to the Attorney General's one-page letter from the prior day and stated that the threat of litigation by several state attorneys general prompted the decision to terminate

DACA. *See* Pet. App. 67a. Noticeably absent from the Rescission was any analysis of the purported litigation risk or any cost-benefit analysis of the DACA program's widespread benefits, and the foreseeable harms of Rescission to the hundreds of thousands of DACA recipients, their families, employers, communities, as well as the local, state, and national economy. The Rescission provided that DHS would continue to process DACA applications received by September 5, 2017 and issue renewals for recipients whose permits expire before March 5, 2018, provided they applied for renewal by October 5, 2017. *Id.* at 67a–69a. The Rescission also reduced protections for sensitive personal information provided with DACA applications. *See* No. 17-cv-5380 D.Ct. Dkt. 1 ¶ 125.

3. Within days of the Rescission, plaintiffs, in five now-related actions, sued defendants in the Northern District of California. In addition to their claims under the Administrative Procedure Act, plaintiffs assert constitutional, statutory, and equitable claims seeking to enjoin the Rescission and to prevent the government from breaking its promises.

a. On September 21, 2017, the district court held a case management conference to address pressing scheduling matters created by the government's arbitrary March 5, 2018 deadline for the Rescission. Defendants agreed and represented to the court that getting "to final judgment quickly makes a lot of sense in this case." Opp. Add. at 18. As part of that effort, defendants agreed to produce an administrative record in early October, *id.* at 17, before dispositive motions were due to be filed on November 1.

Although defendants initially suggested that any discovery related to the non-APA claims would be premature, the district court pointed to the impending March 5 deadline and stated that defendants "should respond to [plaintiffs'] discovery requests if they're reasonable," assuring defendants that if discovery "gets going too far sideways, I'll put a stop to it." *Id.* at 22. Defendants offered no other objections to pursuing discovery on these claims and instead proposed limits on the number of written discovery requests that might be served, "[i]n the interests of streamlining the discovery process, as well as ensuring that there's equality on all sides, including for any affirmative discovery that the Government might serve." *Id.* at 55:10–25.

The next day, the court issued a case management order reflecting the parties' agreement on the schedule for dispositive motions and discovery. It set a dispositive motion hearing for all parties on December 20, 2017, and, if necessary, a bench trial to begin on February 5, 2018. Pet. App. at 21a–25a. The court further ordered defendants to produce the administrative record by October 6, and pursuant to defendants' request, limited discovery relating to the non-APA claims to 20 interrogatories and 20 requests for production and "a reasonable number of depositions." *Id*. at 22a.

Consistent with the court's case management order, plaintiffs served consolidated written discovery on their non-APA claims, including a limited set of requests for production of documents, requests for admission, and interrogatories. Defendants, however, have not responded to that discovery and have not produced any responsive documents. Defendants have made six witnesses available for

deposition, and plaintiffs noticed additional depositions that have yet to take place, and are currently on hold. Although defendants now ask this Court for additional relief beyond the discovery stay currently in place through noon on December 22, 2017, to date, defendants have not moved in the district court for a protective order limiting discovery. Indeed, defendants did not challenge the six depositions that already took place, nor have they challenged the magistrate judge's order entitling plaintiffs to a limited deposition of former Acting Secretary Duke. *See* D.Ct. Dkt. 94. Defendants are not subject to any order compelling discovery.

The limited discovery plaintiffs have obtained, however, has called into serious question whether the stated reason for rescinding DACA—"litigation risk"—is pretextual. As but one example, the initial drafter of the Rescission Memorandum testified that a governmental policy of reacting to litigation threats would be "craz[y]" because "you could never do anything if you were always worried about being sued." C.A. Dkt. 13 at Add. 180.

b. On October 6, defendants filed a 256-page administrative record, consisting of just fourteen publicly available documents, the bulk of which were published judicial decisions. *See* D.Ct. Dkt. 64, 64-1. Defendants did not submit a privilege log. The record excluded any documents that, according to the government, Acting Secretary Duke did not personally review. As a result, documents her staff or others who directly advised the Acting Secretary on the Rescission considered were excluded from the record. Two days later, Plaintiffs moved for an order directing defendants to complete the administrative record. D.Ct. Dkt. 65. The district court

then ordered defendants to file a privilege log and to bring to the hearing a hard copy of "all emails, internal memoranda, and communications with the Justice Department on the subject of rescinding DACA." D.Ct. Dkt. 67 at 1. Defendants thereafter submitted a privilege log containing 84 documents considered by the Acting Secretary but not included in the administrative record. *See* Pet. App. at 40a.

After a hearing, on October 17, 2017, the district court granted in part the motion to complete the administrative record and found that plaintiffs had demonstrated "by clear evidence" that defendants had failed to include "documents that were considered, directly or indirectly, by DHS in deciding to rescind DACA." Pet. App. at 26a–44a. The court ordered defendants to complete the record to include the following categories of information:

> (1) all materials actually seen or considered, however briefly, by Acting Secretary Duke in connection with the potential or actual decision to rescind DACA (except as stated in the next paragraph below), (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.

Id. at 42a–43a.

As to defendants' privilege claims, the court held that defendants waived attorney-client privilege by placing the withheld legal analysis directly at issue, given that litigation risk is the only claimed justification for rescinding DACA. *Id.* at 39a.

After reviewing *in camera* the 84 documents, the court determined that the qualified deliberative process privilege did not apply to 35 documents. *Id*. at 40a, 43a. The court directed that any additional materials over which defendants claimed privilege would "each" be reviewed *in camera*. *Id*. at 43a.

c. On October 20, 2017, defendants filed a petition for a writ of mandamus and emergency motion for administrative stay in the court of appeals. The court of appeals granted the request for a stay of all "discovery and record supplementation in the district court pending the resolution of the petition for writ of mandamus." C.A. Dkt. 14 at 1.

On November 16, 2017, the court of appeals denied the government's mandamus petition and lifted the stay, ruling that the district court's determination that "DHS failed to comply with its obligation under the APA to provide a complete administrative record to the court" was "not clearly erroneous as a matter of law" and that its October 17 order "represents a reasonable approach to managing the conduct and exigencies of this important litigation—exigencies which were dictated by the government's March 5, 2018 termination date for DACA." D.Ct. Dkt. 48 at 3, 5, 17.

The panel majority (Wardlaw & Gould, JJ.) upheld the district court's determination that "the presumption of regularity that attaches to the government's proffered record is rebutted," agreeing that "the notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people based solely on 256 pages of publicly available documents is not credible." D.Ct. Dkt. 48 at 6–7 (footnote omitted). Citing to governing precedent, the

majority rejected the government's argument that "materials considered by subordinates who then brief the Acting Secretary" were properly omitted from the record. *Id*. at 10–13. The majority also rejected the government's privilege arguments, reasoning that there is no "categorical bar against requiring DHS to either include White House documents in a properly-defined administrative record or assert privilege individually as to those documents." *Id.* at 14–15. The majority also held that that the district court did not clearly err in requiring a privilege log and conducting an *in camera* review of the documents over which defendants claimed deliberative process privilege. *Id.* at 15–16.

Judge Watford dissented. Although he conceded that "the decision to rescind DACA will profoundly disrupt the lives of hundreds of thousands of people, and a policy shift of that magnitude presumably would not have been made without extensive study and analysis beforehand," Pet. App. at 16a, he concluded that the district court erred in finding that plaintiffs "made the showing necessary to trigger" expansion of the administrative record, *id*. at 18a. According to Judge Watford, plaintiffs have not yet shown "bad faith or improper behavior on the part of the Acting Secretary" or "shown any likelihood that factual information considered by the Acting Secretary and relevant to her decision has been omitted from the record" because the only justification the Acting Secretary asserted was litigation risk. *Id*. at 18a–19a.

d. Shortly after the Ninth Circuit vacated its stay, on November 16, the district court ordered defendants to file the "complete administrative record" by November 22. D.Ct. Dkt. 188 at 1. In response, and in connection with its stated

intention to file a petition for mandamus or a writ of certiorari with this Court, defendants filed emergency stay motions, first in the court of appeals and then in the district court.

On November 17, defendants filed an emergency motion in the Ninth Circuit for a stay of that court's November 16 order. C.A. Dkt. 36. In setting a briefing schedule for the motion, the court of appeals requested that the parties "address whether this court has jurisdiction to grant a stay of proceedings, or whether the motion for a stay should instead be filed in the district court." C.A. Dkt. 37 at 2. On November 21, the court dismissed the government's stay motion, explaining that that "[a]s the order denying mandamus relief was effective immediately upon its issuance . . . jurisdiction now lies with the district court, and not with this court." Appl. Add. at 2. The court further explained that "[i]f the government seeks further relief from this court, it must do so in a new petition for mandamus." *Id*.

After filing its stay motion in the court of appeals, on November 19, the government filed an emergency motion in the district court to stay discovery and record completion pending this Court's resolution of its anticipated petition. D.Ct. Dkt. 191. The government did not submit any declarations or other evidence describing any purported burdens in completing the administrative record or complying with discovery obligations related to plaintiffs' non-APA claims.

Also on November 19, plaintiffs moved the district court for a stay of discovery and record completion, but pending decisions on the government's motion to dismiss and plaintiffs' motion for provisional relief, which are set for argument on December

20. Opp. Add. at 69–79. Plaintiffs explained that a limited stay would be appropriate because resolution of those motions "will either moot or clarify the issues on which Defendants have indicated they will seek emergency review in the Supreme Court," including whether the district court has subject matter jurisdiction and whether the claimed justification for rescinding DACA was pretextual. Opp. Add. at 72.[2]

On November 20, the district court issued a tentative order extending the deadline for filing the administrative record until December 22 and staying discovery until that date. D.Ct. Dkt. 193, 193-1. The court invited the parties to respond with "any critique" of the tentative order. Defendants' sole critique was that they "will be required to continue to compile the administrative record during the pendency of the stay." Opp. Add. at 81.

Later that same day, the district court adopted its tentative order and otherwise denied the parties' emergency motions for stay. Appl. Add. at 3–4. The government has not sought reconsideration of the November 20 order or relief from the court of appeals.

ARGUMENT

"To obtain a stay pending the filing and disposition of a petition for a writ of mandamus, [the government] must show a fair prospect that a majority of the Court will vote to grant mandamus and a likelihood that irreparable harm will result from

[2] Plaintiffs requested that the district court make "specific findings on the issue of pretextuality" in ruling on plaintiffs' motion for provisional relief. *See* Opp. Add. at 73; *see also* Plaintiffs' Motion for Provisional Relief, D.Ct. Dkt. 111 at 29–31.

the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). During a recent eight-year period, this Court received more than 1,900 applications for extraordinary writs and did not grant any.[3]

In the alternative, the government seeks a stay pending the disposition of a petition for a writ of certiorari, which 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." *Id.* "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent" in deciding whether to grant a stay. *Id.* The government bears a "heavy burden" in justifying such "extraordinary" relief. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). Indeed, "[r]elief is not warranted" unless *all* of the factors "counsel in favor of a stay." *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers).

Here, the government has failed to make the demanding showing necessary to justify a stay. As an initial matter, the government has failed to establish that the relief it seeks was requested in the courts below. It has also failed to show that it has a clear and indisputable right to a writ of mandamus or certiorari, or that it will suffer

[3] Stephen M. Shapiro, et al., Supreme Court Practice § 11.1 at 661 n.9 (10th ed. 2013).

irreparable harm without this extraordinary relief. Finally, the balance of the equities and the public interest weigh strongly against granting a stay in this case.

I. The government has failed to satisfy Rule 23.3

In seeking a stay of the district court's November 20 Order, and relying on declarations never submitted to the district court or the court of appeals, the government seeks to bypass review by the courts below. This is prohibited by Supreme Court Rule 23.3, which requires that, "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below." Rule 23.3 also requires that "[a]n application for a stay . . . set out with particularity why the relief sought is not available from any other court." The government does not and cannot meet these requirements. This Court should not entertain the government's application for a stay.

The government claims to have complied with Rule 23.3 by filing its November 19, 2017 request for a stay of discovery and the orders requiring completion of the administrative record in the district court, Pet. App. at 4–5, but this does not satisfy the Rule. After the district court, on November 20, denied the government's request for a stay, ordered the government to file its administrative record on December 22, and stayed discovery until that date, the government did not seek relief from the court of appeals, and instead filed an application for a stay with this Court. But there is no reason why relief would not have been available from the court of appeals, nor has the government explained, as it must, why such relief is unavailable. *See* Sup.

Ct. R. 23.3. Indeed, in denying the government's November 17 request for a stay on jurisdictional grounds, the court of appeals noted the government may file a "new petition for mandamus" to seek relief from the Ninth Circuit. Appl. Add. at 2.

But instead of petitioning the Ninth Circuit for relief from the district court's November 20 Order, the government filed this stay application with this Court. This is reason alone to deny the application. *See Conforte v. Commn'r of Internal Revenue*, 459 U.S. 1309, 1312 n.2 (1983) (Rehnquist, J., in chambers) ("Applicant's failure to seek a stay in the Court of Appeals provides an alternative ground for denial of the stay."); *Dolman v. United States*, 439 U.S. 1395, 1398 (1978) (Rehnquist, J., in chambers) (denying application for a stay and "requir[ing] applicants to apply to the Court of Appeals for the Ninth Circuit for a stay pending this Court's disposition of their petition for certiorari"); Shapiro et al., Supreme Court Practice § 17.8 at 888 (10th ed. 2013) ("Before seeking a stay from the Supreme Court or from a single Justice, a stay must first be requested from the court below or a judge thereof. Rule 23.3 is mandatory as to this.").

The government's inappropriate circumvention of the Ninth Circuit's review is made more stark because it submitted two new declarations with its application—testimony never presented to the courts below. These declarations from the Chief of Staff for the Office of the General Counsel at DHS, Appl. Add. at 18–28 (Declaration of David J. Palmer), and the Director of E-Discovery, FOIA, and Records at DOJ, *id*. at 29–38 (Declaration of Allison C. Stanton), describe the status of DHS's document search, collection, and review efforts, *id*. at 18–38. Among other details, the

declarations specify the volume of documents collected and yet to be reviewed and the purported burden these orders have on the expenditure of government resources and attorney time. *See, e.g.*, *id*. at 20–21, 31–32, 35–36. This testimony was unknown to the respondents, and to the courts below, until it was filed with this Court.

The government relies almost exclusively on these new declarations, both dated December 1, to support its argument that it will suffer irreparable harm absent a stay. *See* Appl. at 25–30. The declarants detail the government's purported burden in a manner that should be subject to testing in the district court and review in the court of appeals before being presented to this Court. *E.g.*, *id*. at 29 (citing Palmer Decl., Appl. Add. at 24–25; Stanton Decl., Appl. Add. at 34–35). These government employees (or others who are similarly competent to testify) were surely available to provide timely updates to the courts below before December 1. The government could and should have presented this evidence to the district court, and, if necessary, sought reconsideration from that court and review from the court of appeals before filing its application with this Court.

With respect to discovery on the non-APA claims, the government could and should have moved for a protective order for relief from any burden. The government has *never* sought such relief in the district court. Because no discovery dispute has ever been presented to the district court, the court of appeals has never ruled on any discovery dispute in this case. Instead, the government is asking this Court to oversee the process of discovery in the first instance, thereby subverting the district court, where such disputes belong. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S.

100, 106 (2009) (noting that "district court judges" "play a 'special role' in managing ongoing litigation"); *Graves v. Barnes*, 405 U.S. 1201, 1204 (1972) (Powell, J., in chambers) (crediting judgment and "careful attention" of the judges on the lower court who "were 'on the scene' and more familiar with the situation than the Justices of this Court" in denying motion for a stay).

Because the lower courts have not had an opportunity to either weigh the new evidence on which defendants rely, or address defendants' arguments on the scope of discovery, it is speculation to argue that the government's requested relief "is not available from any other court." Sup. Ct. R. 23.3.

Nor has the government shown that the "most extraordinary circumstances" exist to excuse the government's failure to comply with Rule 23.3. To the contrary, the current deadlines set in the district court are weeks away, providing ample time for the government to cure its procedural misstep, file motions for reconsideration and a protective order with the district court, and, if necessary, seek a stay of the district court's orders in the Ninth Circuit.

This Court should deny the application for failure to comply with Rule 23.3.

II. The rulings of the district court and court of appeals are not clearly erroneous as a matter of law

The government asserts that the district court's rulings are clearly erroneous as a matter of law in three respects: (1) in ruling that the administrative record must be expanded; (2) in directing that allegedly "deliberative" materials be included in the record; and (3) in ruling on the government's claims of privilege. Contrary to the government's assertions, the district court's rulings were correct, and therefore do not

justify the extraordinary remedy of mandamus, let alone a stay. For the same reasons, the government has not shown a likelihood that the Court will grant certiorari in this case.

1. The district court correctly concluded that the administrative record the government produced is inadequate. The APA requires courts to review agency action on the basis of "the whole record," 5 U.S.C. § 706, which must be sufficient to permit the judiciary to conduct the "thorough, probing, in-depth review" of the agency's reasoning called for by the APA. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). By preparing the "whole record," the agency enables the courts to evaluate, for example, whether the agency has "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The courts of appeals therefore have held that the administrative record "consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (citation omitted) (emphasis in original); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (same).

Moreover, the DOJ has since 1999 promulgated guidance to agencies regarding the required contents of an administrative record. *See* United States Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the

Administrative Record (Jan. 1999), available at http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf. The guidance states that the administrative record should "[i]nclude all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even though the final decision-maker did not actually review or know about the documents and materials." *Id.* at 3. It further provides that the record should include "communications the agency received from other agencies . . . documents and materials that support or oppose the challenged agency decision . . . minutes of meetings or transcripts thereof . . . [and] memorializations of telephone conversations and meetings, such as a memorandum or handwritten notes." *Id.* at 3–4 (emphasis in original). The record ordered by the district court and the court of appeals closely tracks this guidance. In fact, the district court's order was *narrower* than the guidance, because the order was limited to materials considered by those who provided the Acting Secretary with written or verbal input, and explicitly excluded "materials below [such] agency levels." Pet. Add. at 42a–44a. Notably, the government rescinded its 1999 guidance in a memorandum issued *the same day* that it filed its mandamus petition in the court of appeals in this case. But the government cannot credibly claim that the district court committed "clear and indisputable" error, *Perry,* 558 U.S. at 190, by ordering the government to produce an administrative record in compliance with its own decades-old guidance.

Here, the record supplied by the government not only violates its 1999 guidance, but also is inadequate on its face. It consists, in its entirety, of 14 documents, totaling 256 pages, all of which were already publicly available on the Internet. The record omits, for example, any communications with the state attorneys general whose threat of suit purportedly required the rescission of DACA—communications the government has admitted occurred. The record omits any studies or analysis of the consequences of the Rescission, and any interagency communications other than a single one-page letter. It omits any documents relating to the government's decision in February 2017 to *retain* DACA, even though the APA "ordinarily demand[s] that [the agency] display awareness that it *is* changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original). The district court and the court of appeals both correctly concluded that this sparse record was incomplete and required it to be supplemented with the omitted materials. *See* Pet. App. at 6a–7a ("[T]he notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people based solely on 256 pages of publicly available documents is not credible.") (footnote omitted).

The government claims that it was error for the district court to consider these deficiencies in the record before determining whether it had jurisdiction. Appl. at 22. Yet the government *agreed* to the schedule that involved the simultaneous briefing of its motion to dismiss with plaintiffs' motion for provisional relief and/or summary judgment—all *after* the filing of the administrative record. Opp. Add. at 22, 34, 51.

The government did so even though the district court offered the option of an early motion to dismiss. *Id*. at 23.

The government's assertions that the judiciary lacks power to evaluate the rescission of DACA plainly lack merit. The government invokes 8 U.S.C. § 1252(g), which provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to *commence proceedings, adjudicate cases, or execute removal orders*." (Emphasis added). This provision is inapplicable to this case, which does not challenge any decision to commence proceedings, any adjudication of an immigration case, or any removal order. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (narrowly limiting section 1252(g) to the three enumerated actions). And the government's own cases reject its assertion that the creation or rescission of deferred action programs is the type of unreviewable action "committed to agency discretion by law." *See Texas v. United States*, 809 F.3d 134, 164 (5th Cir. 2015), *aff'd by an evenly divided court*, 136 S. Ct. 2271 (2016).

At bottom, the government's view is that it has unlimited discretion to omit materials from the administrative record, with the only available remedy a "remand to the agency for additional investigation or explanation." Appl. at 21 (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) and *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam)). But the two cases the government cites are inapposite. Neither relates to the situation where the government produces an incomplete "administrative record" that omits materials that were before the agency at the time

of decision. Instead, both cases relate to the quite different circumstance where the agency has produced the whole administrative record "already in existence," *Fla. Power & Light*, 470 U.S. at 743, but that existing record provides insufficient basis for review. Under *those* circumstances, it is the agency rather than the courts that should undertake the "additional investigation or explanation," *id.* at 744, required to support judicial review.

With respect to the circumstances *here*, where record materials exist but were improperly omitted from the administrative record, the only reasonable course is to require the record to be completed with the omitted materials. *See Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984) (directing the record to be completed with additional documents). The government's assertion that the courts must be satisfied by whatever record is "supplied by the agency," Appl. at 21, is inconsistent with the APA's express requirement that the agency provide "the whole record," 5 U.S.C. § 706, and would gravely impair judicial review.

Under such a regime—which this Court has never endorsed—the government would produce only documents that support the decision under review and omit materials that do not. Such an incomplete record would require the courts to conduct their review based on a "fictional account of the actual decisionmaking process," *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977), and would impair meaningful judicial oversight of agency action. The government's approach would also permit agencies to give reasons that are only partial or even pretextual to avoid

providing the courts with documents that were considered but do not support the stated reasons.

Finally, as the government acknowledges, it is appropriate to supplement a record presented by an agency when there is "a strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420. Plaintiffs have asserted that the purported basis for the Rescission—that the program was illegal or presented an unmanageable litigation risk—is pretextual. D.Ct. Dkt. 111 at 29. Although the court of appeals has already described the sparse record filed by the government as "not credible," Pet. App. at 7a, the district court has not yet ruled on plaintiffs' request for a finding of pretext. That issue is presented in plaintiffs' pending motion for provisional relief. If such a finding is made, it would undoubtedly enable plaintiffs to obtain the full record ordered by the district court and more. The possibility of such a finding is an additional reason why this Court should not intervene in the lower court proceedings mid-stream.

2. The government incorrectly asserts that the district court committed a clear and indisputable error by requiring the inclusion of "deliberative" materials in the record. But the district court did not require that documents protected by the "deliberative process" privilege be added to the record. Instead, it conducted a document-by-document *in camera* review of the 84 documents over which the government claimed deliberative process privilege to determine the applicability of that qualified privilege and whether a showing of need overcame it, and found that

49 of the documents at issue should not be disclosed; that 2 documents were partially protected by the privilege; and that 33 documents were not protected by the privilege.

This nuanced review is consistent with established legal principles. It is well-established that the "deliberative process" privilege extends only to documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (citation omitted), and not to factual or analytical materials. The deliberative process privilege is also qualified and can be overcome by a showing of need. *See FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

To the extent the government asserts that *all* "pre-decisional" documents, Appl. at 23, are categorically outside the scope of an administrative record, that sweeping proposition is incorrect. The government relies principally on the court of appeals' ruling in *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir. 1986) (en banc), but the "deliberative materials" in that case were transcripts of actual deliberations among the members of a multi-member agency board. *See id.* at 44. The court of appeals correctly distinguished those circumstances, stating that where "an agency is headed by a multi-member board, the deliberations among those members are analogous to the internal mental processes of the sole head of an agency, and thus are generally not within the scope of the administrative record." Pet. App. at 14a.

The government cites cases that generally preclude inquiry into the "mental processes" of an agency, Appl. at 23, but these cases relate to literal inquiries into those processes—*i.e.*, depositions of decisionmakers and production of transcripts of their deliberations—rather than production of "pre-decisional" documents. *See Morgan v. United States*, 304 U.S. 1, 18 (1938) (testimony of Secretary of Agriculture regarding process by which he "reach[ed] his conclusions"); *Overton Park*, 401 U.S. at 420 (testimony of decisionmakers "explaining their action"); *Mothers for Peace*, 789 F.2d at 44 (production of transcripts of deliberations). None of these cases protects the government from producing "pre-decisional documents informing the Acting Secretary's policy and legal analysis." Appl. at 23.[4] Indeed, if all "pre-decisional documents" were omitted from the administrative record, the courts could not perform their obligation to evaluate whether agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

The government asserts that it can limit the scope of the administrative record because agency action can be sustained only based on "the reasons that the Acting Secretary herself gave." Appl. at 24. This assertion is inconsistent with fundamental principles of administrative law. It is true that a court must "judge the propriety of

[4] Depositions of even high-ranking agency officials are appropriate in certain circumstances, such as where "the official has first-hand knowledge related to the claim being litigated." *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007); *see also In re United States*, 624 F.3d 1368, 1372-74 (11th Cir. 2010). Plaintiffs made clear in the parties' discovery letter brief that the deposition of Acting Secretary Duke was warranted in this case, at least for the non-APA claims. D.Ct. Dkt. 88 at 1-5 and n.3. The magistrate judge authorized a limited deposition of Acting Secretary Duke in light of this authority, and the government has yet to challenge that decision in the district court. *See* D.Ct. Dkt. 94 at 1.

[agency] action solely by the grounds invoked by the agency," and not on *post hoc* grounds articulated during litigation. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). But that does not mean that the "whole record" includes only documents supporting the agency action. To the contrary, the "whole record" must include documents sufficient to evaluate, for example, whether the agency "failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. This evaluation depends on the production of pre-decisional documents relating to the agency's decision-making process, and simply cannot be conducted if the agency is permitted to launder the record to include only documents supporting the agency's decision and rationale.

3. Finally, the government claims that "the district court summarily overrode multiple privileges." Appl. at 24. That is incorrect. The district court received the government's privilege log and evaluated the privilege claims based on a document-by-document *in camera* review, sustaining a significant majority of them. Although the government apparently disagrees with some of the district court's privilege rulings, it does not challenge the district court's process for making those rulings, which was well within the bounds of its discretion.

The district court's process was deferential to the government. Ordinarily, a government privilege—such as deliberative process or executive privilege—"must be formally asserted and delineated in order to be raised properly." *Kerr v. U.S. Dist.*

Ct. for N. Dist. of Cal., 511 F.2d 192, 198 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976). A proper privilege assertion must include:

> (1) a formal claim of privilege by the 'head of the department' having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, along with an explanation of why it properly falls within the scope of the privilege.

Landry v. F.D.I.C., 204 F.3d 1125, 1135 (D.C. Cir. 2000). Government privilege assertions must at least be made by "supervisory personnel . . . of sufficient rank to achieve the necessary deliberativeness in the assertion." *Id.* at 1136. The government has never properly asserted privilege and the record is bereft of any claim of privilege by supervisory agency personnel based on any consideration. Moreover, the government has never requested an opportunity to provide additional substantiation of its privilege claims, or briefing or argument, in the six weeks since the district court issued its rulings.

The government's reference to "a memorandum from the White House Counsel to the President himself," Appl. at 24–25 (emphasis in original), is illustrative of its approach to privilege claims. The document at issue was identified in the government's privilege log as a document located in the files of the Acting Secretary, not the files of any White House personnel. Dkt. 71-2 at 5. Moreover, the document was not described this way to the court of appeals; it appears on the privilege log as a "Draft White House memorandum regarding litigation related to DACA," *id.*, without any reference to the sender or recipient. Having failed to describe this document or properly claim privilege in the district court or court of appeals, and

having failed to bring its omission to the attention of either court, it is improper for the government to seek mandamus relief from this Court.

Moreover, that a document originates in the White House does not necessarily mean the document is privileged or that it should be excluded from the administrative record. *See Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548–49 (9th Cir. 1993) (ordering *ex parte* communications from White House added to the record). The APA requires the preparation of "the whole record" before the agency, 5 U.S.C. § 706, regardless of where the record materials originated. If the government has concerns about documents originating in the White House that implicate the executive privilege, the proper course is to bring those concerns to the attention of the lower courts, which can analyze those concerns in light of the Court's guidance in *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004).

The district court's finding that the government has placed attorney-client communications "at issue" and therefore waived the privilege, Pet. App. at 37a, is equally well-supported. The court found that the government, by justifying the rescission of DACA entirely based on a legal analysis of the program conducted by the Attorney General, placed at issue the underpinnings of that analysis. This finding is consistent with established legal principles preventing a party from using privileged legal advice as a sword—here, to justify the Rescission—while using the attorney-client privilege as a shield—here, to prevent inquiry into the reasonableness of the Rescission. *See, e.g.*, *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350,

361 (2d Cir. 2005) (stating that DOJ cannot make repeated public references to internal OLC legal analysis "when it serves the Department's ends but claim the attorney-client privilege when it does not"); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) ("The privilege which protects attorney-client communications may not be used both as a sword and a shield.").

The district court, moreover, did not hold "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," Appl. at 25. Instead, the district court determined that, under the unique circumstances of this case, where the government put forth a legal opinion as the sole basis for agency action, the government could not withhold from scrutiny the basis for that opinion. Pet. App. at 37a–39a. A contrary rule, which would permit the government to enact policy based on legal evaluations without any scrutiny of their underpinnings, would undermine APA review, and the government cites no cases supporting such a result.

III. The government has not demonstrated irreparable harm absent the extraordinary relief it seeks

The government claims that, absent its requested stay, it will suffer "multiple harms that are immediate and irreparable." Appl. at 25. Not so.

First, the government claims that, absent a stay, it "will be forced in three weeks' time to publicly file 35 documents furnished in camera that"—in the government's view—"are protected by the deliberative-process privilege, executive privilege, and/or other privileges." Appl. at 27. In reality, the government has not even explored the many ways that such "forced" public disclosure might be averted.

For example, the government could—but did not—seek permission from the district court to file the documents under seal or produce redacted versions to plaintiffs' counsel while this Court considers and disposes of the petition. The government could—but did not—request a protective order limiting the disclosure of these documents. *See* Fed. R. Civ. P. 26(c); *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 326 (10th Cir. 1981) (noting trial court has discretion to implement "appropriate safeguards . . . by means of a protective order" when sensitive information is to be disclosed); *cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34–35 (1984) (discussing the use of protective orders to permit discovery while limiting harms from disclosure).

Indeed, in its November 20 order, the district court specifically invited the parties to provide "any critique" to the court's tentative order regarding completion of the administrative record. D.Ct. Dkt. 193. But rather than request additional time to complete the record or offer proposals to mitigate the "irreparable harm" now professed in its stay application, the government vaguely asserted that the court's "proposed relief [did] not fully address all of Defendants' substantial concerns." Op. Add. at 80–82. The government's failure to simply ask the district court for the relief it seeks in this Court—even in response to the district court's specific request—demonstrates that the stay request is, at best, premature.

Further, the government has not yet made proper claims of privilege before the district court, supported by declarations from appropriate officials and a meaningful privilege log. The government's privilege log must provide sufficient detail to "test

the merits of the privilege claim," *EEOC v. BDO USA, L.L.P.*, --- F.3d ---, 2017 WL 5494237 (5th Cir. 2017) (internal quotation marks and alterations omitted), and invocations of the deliberative process privilege require a formal assertion and explanation from the "head of the department" having control over the information, *e.g.*, *Landry*, 204 F.3d at 1135. The district court's case management order requires that privilege logs contain sufficient detail to justify the privilege. *See* D.Ct. Dkt. 23 at 5. Yet the log the government submitted did not describe the bases for the privilege assertions, a formal assertion of privilege by an appropriate official, or sufficient factual information to evaluate the asserted privileges. *See* D.Ct. Dkt. 71-2. As the Ninth Circuit noted in rejecting the government's privilege arguments, the government "has provided little in the way of argument regarding the specific documents ordered disclosed by the district court." Pet. App. at 12a n.8.

The government offers no reason why it failed to take the steps that are legally required to support its privilege assertions over the past several weeks. This is an issue for the district court to consider in the first instance, with the benefit of briefing and a proper record.[5] Instead of proceeding in this fashion, and giving the district court and the court of appeals opportunities to rule in the ordinary course, the government has instead pursued "piecemeal, prejudgment appeals"—an approach that, as this Court has recognized, "undermines 'efficient judicial administration' and

[5] Any concerns about new materials over which the government may claim privilege are premature, as the district court has ruled that it will review any documents for which privilege is claimed "*in camera*, and withhold from public view those that require withholding." D.Ct. Dkt. 85 at 3.

encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk Indus.*, 558 U.S. at 106 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)). As a result, any purportedly irreparable and unavoidable harm posed by the potential of disclosure of these documents would be "self-inflicted, and self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago, Ill.*, 333 F.3d 846, 850 (7th Cir. 2003).

Second, and relatedly, the government repeatedly references the harm posed by the potential release of "several [specific] documents from the White House that are [purportedly] subject to executive privilege," Appl. at 12, as well as additional "potentially responsive documents [that] will exist at the White House," *id.* at 26. But again, for the four documents that are purportedly subject to executive privilege and that the district court ordered to be included in the administrative record, as explained above, defendants can seek to file those documents under seal (or seek other protection) pending this Court's disposition of the mandamus petition. The universe of other "potentially responsive" documents is actually quite narrow: The district court only ordered that defendants include the materials considered by individuals who gave the Acting Secretary (not the President) written or verbal input on the Rescission. Pet. App. at 42a–43a. The district court specifically stated that defendants did not need to "scour the Department of Justice and the White House for documents . . . except to the limited extent that DOJ or White House personnel fall within [this] category." *Id.* at 43a–44a. The limited nature of the district court's

order, which applies only to a handful of White House officials to the extent they participated in a regulatory process governed by the APA, distinguishes this case from *Cheney*, where "the Vice President . . . [was] the subject[] of the discovery order," 542 U.S. at 381, and the plaintiffs requested "everything under the sky," *id.* at 387. Moreover, this narrow order is appropriate in this unique case, given "evidence" that the White House was "involved in the decision to end DACA, including the President's own press release taking credit for the decision." Pet. App. at 7a.

Third, the government's purported burden in completing the administrative record and responding to discovery in this suit does not "strongly militate[] in favor of a stay." Appl. at 28. As to the administrative record, the government "estimates" that "absent a stay, . . . more than 6,000 documents" will have to be reviewed for responsiveness and privilege. *Id.* at 27. But even assuming that all of those documents are ultimately included in the record, suits challenging agency action regularly require the government to review and produce in the administrative record tens if not hundreds of thousands of documents. *See, e.g.*, *Georgia ex rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th Cir. 2016) (per curiam) (administrative record for EPA rule was "more than a million pages long"); *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 184 (5th Cir. 1989) (600,000 page administrative record for EPA rule setting pollution limits); *Aluminum Co. v. Bonneville Power Admin.*, 903 F.2d 585 (9th Cir. 1989) (30,000 page administrative record for Federal Energy Regulatory Commission's energy rate decision); *see also Citizens for Smart Growth v. Sec'y of Dep't of Transp.*, 669 F.3d 1203, 1208 (11th Cir. 2012) (10,000 page administrative

record for bridge construction project). The notion that the burden in reviewing these documents constitutes irreparable harm cannot be reconciled with this authority.

Moreover, the government's declarations—submitted for the first time with the stay application—establish that there is no undue burden here because the vast majority of the work has already been completed. Appl. at 29. Specifically, DHS has already identified the universe of documents as potentially responsive to the district court's October 17 Order on the administrative record, and of those documents, just 5,195 require "further, second-level review" for responsiveness. *See* Appl. Add. at 23. Only 3,798 of the DHS documents require privilege review, and the government itself acknowledges that not all of these documents are exempt in their entirety. *Id.* At DOJ, only 1,700 documents have been identified as potentially within the scope of the October 17 Order, and less than half (700) of these are potentially privileged in whole or in part. *See id.* at 35–36. As of November 19, defendants' counsel represented to plaintiffs' counsel that they needed just three more weeks from that date to complete the administrative record, plus an additional week to prepare a privilege log. Opp. Add. at 74. After the court extended the deadline to complete the administrative record to December 22, defendants have the time they said they needed. Thus, any burden in reviewing these remaining documents for inclusion in the record is far from "undue," or anywhere approaching the irreparable harm required to warrant a stay.

The government's arguments regarding its discovery obligations are no more compelling. As an initial matter, the discovery burdens about which the government complains involve responding to discovery obligations in *different* cases in New York

and to discovery related to the *non*-APA claims in this case. Appl. at 10 n.3. Given the existence of plaintiffs' non-APA claims—including constitutional claims and statutory claims unrelated to the administrative record—it is perfectly reasonable for plaintiffs to request "materials extending well beyond even the expansive concept of the administrative record formulated by the district court." Appl. at 28.

But even where "the burden of defending [a] proceeding will be substantial," this Court has rejected the argument that a party's "expense and disruption of defending itself . . . constitutes irreparable harm." *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980). "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). And just as there is little that remains to complete the administrative record, much of the "substantial" work in responding to the discovery requests has already been completed. While the government repeatedly references "the collection for potential review of approximately 1.6 million [DHS] documents from 147 custodians," Appl. at 29, the government has already completed "initial processing and deduplication of these records"—presumably electronically—and thereby reduced this figure by eight times, leaving only "197,035 documents to review for responsiveness to discovery requests," Appl. Add. at 20. And only 78,000 of these potentially responsive DHS documents have yet to be reviewed, *id.* at 25, suggesting that a large number of documents are already *ready for production*. DOJ has also identified less than 100,000 documents to review for responsiveness to discovery requests and privilege, *id.* at 32, although the government does not indicate whether

these documents have undergone "initial processing and deduplication." The government's discovery obligations do not rise to the level of irreparable harm, particularly in a case involving important rights of hundreds of thousands of people. *See Conkright*, 556 U.S. at 1403 ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."). And any claim of undue burden should be resolved by the district court in the first instance.

Fourth, the government appears to suggest that irreparable harm may ensue if certain unspecified depositions are allowed to proceed because "respondents will likely call for testimony regarding numerous privileged matters." Appl. at 30. But given that no depositions are currently scheduled, and no discovery orders have been entered, such harm is speculative at best, and a far cry from "a *likelihood* that irreparable harm [will] result from the denial of a stay," *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (emphasis added). As to the potential deposition of Acting Secretary Duke, the government claims that it has not bothered to appeal to the district court the magistrate judge's order on the deposition because the government speculates that any such effort would be futile. *See* Appl. at 30 n.6 (asserting that district court has purportedly "made clear its view that the Acting Secretary should be deposed"). But the government cannot manufacture irreparable harm by failing to take the basic procedural safeguard of seeking district court review of the magistrate's decision.

In any event, the mere "likel[ihood]" that plaintiffs will "call for [certain] testimony" does not create a likelihood of imminent or irreparable harm. Appl. at 30. As with any deposition, if counsel for the government believes that a line of questioning is likely to seek privileged information, the appropriate response is to object *once such a question has actually been asked*, and direct the witness not to answer—not to seek extraordinary relief from this Court (in the first instance) to halt all as-yet-unscheduled depositions. Allowing Supreme Court review of unasked deposition questions at unscheduled depositions would open wide the floodgates of piecemeal appeals and review.

The government has not demonstrated irreparable harm. But even if the Court finds that any of the government's purported harms are irreparable (and it should not, for the reasons discussed above), and that all of the remaining factors required for a stay have been shown, any such relief should be narrowly limited to the discrete harms that have actually been demonstrated.

IV. The balance of equities strongly favors plaintiffs

Even if the Court considers the question to be "close," which then requires the Court to "balance the equities and weigh the relative harms" to the parties, *Perry*, 558 U.S. at 190, that balance strongly favors plaintiffs here.

A potentially protracted stay of the completion of the administrative record and all discovery—including discovery wholly unrelated to the APA claims or the government's privilege concerns—"risks," as the district court found, "allowing [the March 5] deadline to pass without a decision on the merits, and therefore poses a

substantial threat to [plaintiffs] and to DACA enrollees." D.Ct. Dkt. 85 at 3; *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979) ("A stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court."); *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315 (1983) (Blackmun, J., in chambers) ("[A] district court's conclusion that a stay is unwarranted is entitled to considerable deference.").

Defendants are incorrect that plaintiffs "will suffer no harm from a stay." Appl. at 31; *see also id.* at 25.[6] The Rescission is already causing catastrophic and irreparable harm to DACA recipients, as the threat of deportation—to countries where they have not lived since they were children—forces them to make wrenching choices now of whether to leave their schools, jobs, and even their U.S. citizen children and other family members, as well as to their loved ones, employers, schools, and

[6] Defendants repeatedly point to plaintiffs' request of a brief stay in the district court. But plaintiffs requested that stay to allow the court to make findings and issue rulings on pending motions that would "eliminate [the government's] concern that the [district court] should rule on subject matter jurisdiction before requiring production of the complete Administrative Record or permitting additional discovery," and further would "moot or clarify" the issues on which the government seeks emergency review here. Opp. Add. at 72. "Apparently no good deed goes unpunished," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 31 (2008), as the government mischaracterizes plaintiffs' effort to address its concerns as an "acknowledg[ment] that consideration of [plaintiffs'] pending claims requires no immediate discovery or expansion of the administrative record." Appl. at 25. Plaintiffs never "acknowledged" anything of the sort, but instead took steps to ensure that both the district court and the court of appeals can reach a decision on the merits with the benefit of a "substantial and complete record" before thousands of DACA beneficiaries lose their work authorization and become subject to removal beginning on March 5. D.Ct. Dkt. 85 at 2.

communities, who themselves must grapple with the loss of these valued individuals. D.Ct. Dkt. 1 ¶¶ 13–14; D.Ct. Dkt. 111; No. 17-cv-5380 D.Ct. Dkt. 1 ¶¶ 128–32. For the district court to fully resolve whether the Rescission was unlawful or unconstitutional, the discovery record should be complete.

There is no urgent need for this Court to intervene at this stage, a reality made all the more apparent by the government's relatively sluggish pace in seeking this Court's intervention. *See Ruckelshaus*, 463 U.S. at 1317–18 (the Government's "failure to act with greater dispatch tends to blunt [its] claim of urgency and counsels against the grant of a stay."); *United States v. Wash. Post Co.*, 446 F.2d 1327, 1329 (D.C. Cir. 1971) (en banc), *aff'd sub nom. N. Y. Times Co. v. United States*, 403 U.S. 713 (1971) (government sought stay in this Court contemporaneously with its court of appeals merits briefing in the Pentagon Papers case). Moreover, as discussed above, the government's failure to exhaust its remedies from the lower courts demonstrates that this case is not yet ready for this Court's review.

Given the stakes for plaintiffs and the government's responsibility for the position it finds itself in, the balance of harms weighs decidedly against granting the government's requested stay. *See Perry*, 558 U.S. at 190.

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that the Court deny the government's application for a stay.

Respectfully submitted,

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ADDENDUM

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
Before The Honorable William H. Alsup, Judge

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

Plaintiffs,

VS. **NO. C 17-05211 WHA**

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

Defendants.

STATE OF CALIFORNIA, STATE OF MAINE, STATE OF MARYLAND, and STATE OF MINNESOTA,

PlaintiffS,

VS. **NO. C 17-05235 WHA**

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

Defendants.

San Francisco, California
Thursday, September 21, 2017

TRANSCRIPT OF PROCEEDINGS

(CAPTION AND APPEARANCES CONTINUED ON NEXT PAGE)

Reported By: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
Official Reporter

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

CITY OF SAN JOSE, a municipal corporation, Plaintiff, VS. 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.	**NO. C 17-05329 WHA**
DULCE GARCIA, MIRIAM GONZALEZ AVILA, SAUL JIMENEZ SUAREZ, VIRIDIANA CHABOLLA MENDOZA, NORMA RAMIREZ and JIRAYUT LATTHIVONGSKORN, PlaintiffS, VS. UNITED STATES OF AMERICA; DONALD J. TRUMP in his official capacity as PRESIDENT of the United States; and ELAINE C. DUKE in her official capacity as Acting Secretary of the Department of Homeland Security, Defendants.	**NO. C 17-05380 WHA**

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

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Thursday - September 21, 2017 **10:28 a.m.**

P R O C E E D I N G S

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THE CLERK: Calling Civil Case Number 17-5211, 17-5235, and 17-5329, Regents of the University of California versus U.S. Department of Homeland Security, State of California versus U.S. Department of Homeland Security, and the City of San Jose versus Donald Trump.

Will counsel please step forward and state your appearances for the record?

MR. DETTMER: Your Honor, if I may interrupt, we represent the Garcia plaintiffs, which is another case that was related yesterday. Ethan Dettmer from Gibson Dunn on behalf of the Garcia plaintiffs.

THE COURT: That's case 17-5380; right?

MR. DETTMER: Yes, I believe that's correct.

THE COURT: Okay. Well, then we call that case too.

MR. DETTMER: Thank you.

THE COURT: Appearances, please.

MR. DAVIDSON: Good morning, Your Honor. Jeffrey Davidson, Covington & Burling, on behalf of the University of California.

THE COURT: Okay. Welcome to you.

MR. ZAHRADKA: Good morning, Your Honor. James Zahradka with the California Attorney General's Office. I'm

appearing today on behalf of the State of California as well as the states of Maine, Maryland, and Minnesota.

THE COURT: Great. Welcome to you.

MR. ZAHRADKA: Thank you.

MS. FINEMAN: Good morning, Your Honor. Nancy Fineman of Cotchett, Pitre & McCarthy for the City of San Jose.

THE COURT: All right. Welcome again.

MR. LYNCH: Good morning, Your Honor. Mark Lynch from Covington & Burling for the Board of Regents of the University of California.

THE COURT: Thank you. Welcome.

MR. LYNCH: Thank you.

MR. BERENGAUT: Good morning, Your Honor. Alex Berengaut with Covington also for the Regents, Your Honor.

MR. DETTMER: And, Your Honor, I introduced myself, Ethan Dettmer from Gibson Dunn on behalf of the individual plaintiffs in the Garcia case.

THE COURT: Again, welcome.

MR. ROSENBAUM: And good morning, Your Honor. Mark Rosenbaum from Public Counsel on behalf of the Garcia plaintiffs.

THE COURT: Okay. Thank you.

And over here?

MS. WINSLOW: And, Your Honor, Sara Winslow from the U.S. Attorney's Office, and I have with me Brett Shumate, who's

the Deputy Assistant Attorney General, and Brad Rosenberg, who's the Senior Trial Counsel, both with the Federal Programs Branch at the Department of Justice's Civil Division, for the defendants.

THE COURT: Okay. Welcome to all of you. Thank you. Everybody have a seat.

And we need to come up with a plan to manage the cases so that we get the decisions that you need done and also that they are done with such a record that the Court of Appeals can appreciate and all in time for -- to be done before, I believe, March 5th. Is that the date that the DACA program expires? Is that it?

MR. SHUMATE: Yes, Your Honor.

THE COURT: Okay. So we're working against a clock. That's why I called you in so quickly. Normally we wouldn't even have had this conference until sometime in December.

So I have some thoughts of my own, but before I even -- maybe they're not any good, so I want to hear from you first, and then we will -- I want to hear, you know, from lawyers in all four cases.

Now, are you-all on the same case?

MR. ZAHRADKA: No.

THE COURT: Okay.

MR. ZAHRADKA: One at a time?

THE COURT: Who's going to go first? Who represents

the Regents?

MR. DAVIDSON: I represent the Regents, Your Honor.

THE COURT: Okay. You get to go first. And then after I hear from you, I want to hear from the Government, and then we're going to go kind of back and forth and see what the various ideas are for managing the case.

Okay. The Regents get to go first.

MR. DAVIDSON: Thank you, Your Honor.

There's an initial issue that may need to be the subject of TRO practice, which would be more rapid than the rest of the schedule, and that is the following --

THE COURT: Well, wait. Don't say TRO. Say preliminary injunction. TROs are too fast for something this important, but maybe -- I can't rule it out, but preliminary injunction provisional relief I recognize is a possibility but -- okay. But what is that? What is it that's so urgent that needs a TRO?

MR. DAVIDSON: So that issue is the following:

The federal government has said that it will not accept DACA renewal applications beginning October 5th. The problem is the individual DACA recipients have been receiving letters in the ordinary course telling them that they have 120 to 150 days to renew. That information that they've been getting by letter is not correct according to the policy, and so that may be an issue that needs relief prior to October 5th.

The Government has --

THE COURT: These are -- help me out here. These would be DACA people who have signed up already, they're on the books of the DHS --

MR. DAVIDSON: Correct.

THE COURT: -- but their -- is it two years or three years?

MR. DAVIDSON: Two years.

THE COURT: -- their two years have run out. So they would in the normal course re-up --

MR. DAVIDSON: Correct.

THE COURT: -- for another two or three -- is it two or three years? I can't remember.

MR. DAVIDSON: Two years.

THE COURT: Two years. All right.

So then they re-up for another two years, sign up more paperwork, and so forth. And so that process is being interrupted by what? Tell me again.

MR. DAVIDSON: The announcement rescinding DACA said the renewal applications would no longer be processed after October 5th. So it's possible that someone could receive a letter yesterday saying, "As in the ordinary course, you have 120 days to renew," but they don't have 120 days to renew according to the policy. They've got 15 days to renew.

THE COURT: All right. So just hold that thought.

I'm going to come right -- I don't want to interrupt for more than a minute, but is that correct, that on October 5 renewal applications will no longer be entertained? You need to come to the microphone here and say your name again.

MR. SHUMATE: Sure. Brett Shumate from the Department of Justice, Your Honor.

I want to be very precise about what the policy says. October 5th is a deadline for filing renewal applications for individuals whose DACA benefits expire between September 5th and March 5th. So this is what DHS precisely said in the --

THE COURT: Hold on. You're going too fast.

MR. SHUMATE: Sorry.

THE COURT: Say that -- there's too many dates in there. Please say it again slowly.

MR. SHUMATE: If I can read from the policy memorandum.

THE COURT: All right, but slowly.

MR. SHUMATE: (reading)

"DHS 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 by the Department as of the date of this memorandum and from current beneficiaries whose benefits will expire between the date of this memorandum and

March 5th, 2018, that have been accepted by the Department as of October 5th, 2017."

So that is the October 5th deadline that plaintiffs' counsel has referred to.

THE COURT: I'm just not quite -- it doesn't quite seem like you're both -- you're referring to the same thing.

Explain to me again what the Regents -- explain to me what's about to expire, please.

MR. DAVIDSON: I think an example may be helpful. So suppose there's a DACA recipient whose status would expire in the ordinary course as of November 1. They have received a notice from the United States Government sometime ago saying "You have 120 days to renew" aimed at that November 1 date.

Under current policy, as articulated, if they actually file their renewal on November 1, the Government will reject that application because of this new deadline they've created, which is October 5th.

THE COURT: All right. Let's just pause.

Is that correct?

MR. SHUMATE: That's correct.

THE COURT: Okay. Well, then, that's a concrete example of possibly an imminent problem.

All right. You can have a seat and let me continue hearing from the Regents, and then we're going to come back to you.

MR. SHUMATE: May I address one other thing on the October 5th deadline, Your Honor?

THE COURT: All right. Please.

MR. SHUMATE: We have another case in the Eastern District of New York, and the plaintiffs in that case had asked that the Government consider extending that October 5th deadline in light of the hurricanes that had impacted Texas and Florida. And I represented to the Court in that case that DHS is actively considering whether to extend that deadline, and DHS continues to consider how to handle applications from individuals who are affected by the hurricane.

So I just wanted to make sure the Court has the most up-to-date information.

THE COURT: Well, that's good to know, but that would only affect the hurricane victims. There might be people in California who would be affected that wouldn't have anything to do with those hurricanes.

MR. SHUMATE: Right, Your Honor. We discussed this with plaintiffs' counsel this morning, and they raised the concern about these individuals who received these notices, and we assured them that we would take this issue back to DHS for their consideration.

THE COURT: Well, good, but you see their problem. Their problem is that if DHS is considering it in good faith

but they haven't made a decision, at some point they've got to say, "We've got to go to the judge and ask for an order." And then it will all be on a hurry-up basis. So can you give us an idea of when you're going to decide?

MR. SHUMATE: I can't give the Court an idea when DHS may decide.

I would like to point out, though, that DHS made this decision on September 5th. It was not immediately effective. DHS effectively granted the six-month stay to wind down DACA in an orderly manner. And so DHS committed to continuing to adjudicate applications for renewal that were already on file and set a reasonable deadline of October 5th, which was 30 days after September 5th, to require individuals to file renewal applications for the subset of individuals whose DACA benefits expire between September 5th and March 5th.

So as of now, the deadline currently stands, but --

THE COURT: That could be a large group. That could be -- I don't know, I'm guessing -- 20,000 people. So that could be a large number.

Okay. You have a seat.

All right. So let's put on the mental list the possibility of dealing with the October 5 problem.

Okay. What else is on your agenda?

MR. DAVIDSON: So our overall view of the most efficient way to get to a ruling and some appeals from that

ruling is that we would file a motion for preliminary injunction.

The -- in order to --

THE COURT: Why would you do that rather than just get this adjudicated so that it can go to the Court of Appeals on a final record as opposed to a preliminary -- you know, preliminary injunction record, it goes up to the Court of Appeals on a much looser standard. Why can't we get it adjudicated in time to have your -- you would then be up in the Court of Appeals before March 5th.

MR. DAVIDSON: There's a few reasons, Your Honor. First is that, as we all read in the newspapers, there's the potential for a legislative process that nobody in -- that nobody wants to interfere with, and so we --

THE COURT: Nobody wants to interfere with the what?

MR. DAVIDSON: If there's going to be a congressional -- if there's going to be an act of Congress signed by the President that resolves on a permanent basis the immigration status of DACA recipients, that would be preferable for all concerned.

THE COURT: Of course.

MR. DAVIDSON: And we would like to have breathing --

THE COURT: Of course. But how does that translate to a preliminary injunction? Just the politics of it, I even saw on TV the President himself wants the DACA thing to be enacted

by Congress; right?

MR. DAVIDSON: Yes, he says that.

THE COURT: The leadership in Congress says that's what they want, and I think the world is hoping that happens, but we have seen snafus before in Congress so it might not happen.

MR. DAVIDSON: Indeed.

THE COURT: And somebody could say, "Well, yeah, we all want DACA, but we also want a big wall," and then they can't agree on that and then nothing gets passed. That is a live possibility.

So I think in the meantime we've got to do this according to the rules that govern us, meaning the courts. I am not a politician. I am a judge. I've got to go according to the law, and I think we can have a decision on the merits and have you in the Court of Appeals in time so that the Court of Appeals has a good record before March 5. That's my view. I think we could do it.

Now, it's conceivable that we would have to do some of this on preliminary injunction. I understand that possibility, but --

MR. DAVIDSON: Yes.

THE COURT: See, if you were to win a preliminary injunction, then you never want a trial and they want a trial. On the other hand, if you lose the preliminary injunction, then

you want a trial immediately and they don't. I've seen -- you know, I've been on the job a long time. That's always the way it works on preliminary injunction; whoever wins does not want to go -- they want to just rest on that.

So I think we can decide it on the merits, can't we? Do we need -- let me ask this: Do we need discovery in this case?

MR. DAVIDSON: Your Honor, there is -- some of our claims are Administrative Procedure Act claims. In order to adjudicate those, it's going to be necessary to have an administrative record prepared.

On the timing of that, we've discussed that with the Government, they anticipate they can produce the administrative record by October 13th. We've had discussions about it being even earlier, October 6th, but they were not in a position to commit to that this morning.

Assuming that that administrative record is full and satisfactory and there's not a dispute about its contents -- and one can always hope -- that may largely alleviate the need for document discovery from the Government, although there may be need for other types of discovery. But from our perspective, once we see what's in the administrative record and that's settled, we'll be in a much better position to know how much more discovery may be required.

THE COURT: All right. That's a very good point. Let's hold that thought.

Let's hear from the Government on the administrative record point. What do you say to that?

MR. SHUMATE: We agree with what the plaintiff -- plaintiffs' counsel has represented, that we will make every effort to have the administrative record finished by October 13th. We'll go as quick as we can.

I just want to reiterate --

THE COURT: October 13th? I mean, we've got a deadline of March 5.

MR. SHUMATE: Your Honor, we are --

THE COURT: Why can't you do it sooner than that?

MR. SHUMATE: We can certainly take that back to our clients and push them along and ask them.

THE COURT: How about if I order it?

MR. SHUMATE: Then we will meet with the Court's order.

THE COURT: I think October 6th sounds like it ought to be done. Now, e-mails and everything.

You know, I used to work in the Justice Department years ago, and I learned one thing about administrative records. The Government always puts in there what helps them and they leave out what hurts them, like memos -- in those days it was memos. They didn't have e-mails.

But if there's an e-mail that hurts your case, it's got to go in there. It's got to be in the administrative record. It

can't just be the select stuff that supports your side. So you've got to do a good job on it, but it can be done.

You know, you're the one -- the Government is the one that has created the urgency by putting a deadline, and we've got to take that and I respect your deadline, but at the same time you've got to respect the fact that I've got to get the case done. So October 6 is when you ought to give everybody the administrative record.

MR. SHUMATE: Yes, Your Honor. We think your suggestion to get to final judgment quickly makes a lot of sense in this case. We're prepared to brief this case quickly.

If I could throw out a suggested briefing schedule.

THE COURT: No, no, no, not yet. Not yet.

MR. SHUMATE: Okay.

THE COURT: Because I'm going to give you that chance.

MR. SHUMATE: Okay.

THE COURT: But October 6th is going to be -- October 6th, administrative record.

All right. So now let's go back. So let's say we get the administrative record on October 6. Then what? Then what do we do?

MR. DAVIDSON: May I make one more suggestion on the administrative record?

THE COURT: Sure.

MR. DAVIDSON: In order to avoid a dispute about the

contents of the administrative record, which can slow things down, which we don't want to do, our request would be that we be permitted to serve a targeted set of requests for production which would set out what we as the plaintiffs think ought to be in the administrative record and set the parameters for that discussion.

THE COURT: Here, give me a couple of examples.

MR. DAVIDSON: So, for example, there may be a question as to whether -- General Kelly, when he was the Secretary of Homeland Security, he issued a memorandum rescinding a number of other deferred action programs but leaving DACA in place.

Our view is that the decision-making around that decision ought to be part of the administrative record, and so we would serve document requests that would say "Produce all records in connection with the decision whether or not to rescind DACA beginning from inauguration day forward," so that we would all have something to look at and the Government --

THE COURT: You mean if they referred to DACA or whether it just referred to deferred action of any type?

MR. DAVIDSON: We would have to think about what a reasonable scope would be. There's a number of deferred action programs, you know, for example, dealing with widows and widowers, you know, that wouldn't be related to this decision.

THE COURT: But they got terminated?

MR. DAVIDSON: A number of them did. There may be some that are still in place.

THE COURT: Well, conceivably that's an excellent idea to take some discovery. I think at the end here I was going to give both sides a chance to take some discovery and reduce by half the time.

But here's the thing: If you do what big firms do, which is a bone-crushing set of document requests with huge number of instructions followed by huge number of definitions and then subparts galore, you know it's going to be a problem. You need to be very reasonable and directed at the discovery that you take or you ask for.

MR. DAVIDSON: Yes.

THE COURT: All right. So let's say that -- all right. So let's say we get the administrative record and we've got some problems with it but they are manageable problems. And then what do we do?

MR. DAVIDSON: So our proposal -- and this is a view shared by at least the City of San Jose plaintiffs and the Garcia plaintiffs -- is that we would aim as quickly as we get the administrative record to start preparing our preliminary injunction papers. We'd start the legal part today but --

THE COURT: Why couldn't it be a summary judgment motion? If you have the -- you know, in all the other cases that I get with the Government, they got the administrative

record, they both cross-move for summary judgment.

MR. DAVIDSON: It's possible it could take that form, Your Honor. There are other claims other than APA claims that are constitutional claims as well, and so I don't think we're all the way down the road as far as, you know, figuring out whether all of the facts are undisputed.

So our thought process had been that we'd file --

THE COURT: I think you should -- I think -- maybe it should be in the alternative, but I'm -- in other words, summary judgment and/or preliminary injunction in case there are fact issues. I can see posing it in that fashion. That would be a cautious thing to do.

But if it turns out that there are no fact issues, I don't see the point in doing a preliminary injunction if the Court could grant summary judgment based on an undisputed record, and then it could go to the Court of Appeals.

MR. DAVIDSON: Your Honor, that is very helpful, and there may be pure legal issues that are very amenable to summary judgment, and I think we would give a lot of consideration to including those merits summary judgment issues in a paper. We've been thinking about it as a preliminary injunction motion, but that's helpful.

THE COURT: All right. Let's hold your thought.

Now, let's hear from the Government on your view of what I've heard so far.

MR. SHUMATE: Thank you, Your Honor.

We understand the plaintiffs have concerns about what will go in the administrative record, but we think discovery at this point would be premature and unnecessary and really inappropriate.

The Government should have an opportunity to prepare the administrative record, and we're willing to receive any suggestions from the plaintiffs about what specifically they think should go --

THE COURT: Let me interrupt you on that. If we had all day and all year -- okay? -- I'd agree with you; but I think you should respond to their discovery requests if they're reasonable even if it's not going to be in the administrative record.

MR. SHUMATE: Our concern, Your Honor, is that it will likely be a fishing expedition; and if we start going down the road of discovery, we're going to take this litigation sideways and the Court won't be in a position to make a quick decision. So --

THE COURT: Well, if it gets going too far sideways, I'll put a stop to it, but reasonable discovery I think is okay because I know what's going to happen. You're just going to put in the things you want into the administrative record. So this is kind of a thing that helps keep you honest to show some of the things you don't want the Court to see maybe.

And then there will be a separate question of whether it should have been in the administrative record, so I'm going to let them have some discovery on this.

But let's go to your broader point about what do you think should be briefed in this case and what should be the schedule?

MR. SHUMATE: So, Your Honor, we believe that the Government has a very strong motion to dismiss, and so our view coming into the hearing was that we should be permitted to file a motion to dismiss quickly within 30 days to test the allegations.

THE COURT: 30 days is not quickly. It would have to be a lot quicker than that.

MR. SHUMATE: In the alternative, Your Honor, we are comfortable with the suggestion that we do cross-motions for summary judgment. So I do think that the Court could get to final judgment very quickly.

So one approach that we've just been considering over here is we could do opening cross-motions for summary judgment due on December 1st, the second brief due January 15th, the third brief due January 29th -- excuse me -- February 15th, and then a fourth brief due sometime in the end of February.

THE COURT: No way. By then the March 5 will have come and gone, and then we would have to almost certainly have to have some kind of preliminary injunction in place. We can't let the program expire without a decision; right?

Maybe you win. Maybe you win totally. I don't know what the answer is on the merits, but I don't like the idea that we're fiddling while Rome burns and then suddenly the program is expired. I think we've got to have a decision well in advance of March 5 so that this can go to the Court of Appeals.

Maybe you win and go to the Court of Appeals. Maybe you lose and go to the Court of Appeals. I don't know that yet, but this is -- see, you-all are approaching this like big law firms and long-winded.

You can do this on a fast basis. You can work hard and get it done to get this briefed and well briefed in time, then, to put the burden on me. I have to go through it all, but I'm worried about the people involved. The DACA people are looking for a decision. They don't want to wait till March 5.

MR. DAVIDSON: Your Honor, our suggestion was for a quicker schedule that I think would be acceptable to the Government while still leaving some breathing room for the legislature, which I don't want to pass up.

But we were thinking of filing a preliminary injunction motion and motion for summary judgment November 1st. That may seem slower than Your Honor would prefer. There's reasons for it.

THE COURT: Give me your schedule.

MR. DAVIDSON: Okay. Our opening brief November 1st, the Federal Government's response December 6th.

THE COURT: That's a Wednesday; right?

MR. DAVIDSON: That is a Wednesday.

THE COURT: Okay, Wednesday.

All right. And their response when?

MR. DAVIDSON: December 6th.

THE COURT: That's too far out.

MR. DAVIDSON: That was their request. We're happy for that to be as short as possible.

THE COURT: Then what?

MR. DAVIDSON: And then our reply December 20th.

THE COURT: Too far out. And then the poor judge gets on Christmas Eve -- you want me and my staff to be going through all of your paperwork over the Christmas holidays while you-all go off to have fun.

See, did you think about that? I mean, I will be here working on a lot of things, but December 20 all the briefing is done; right?

MR. DAVIDSON: Your Honor, we certainly were not expecting the Court or its staff to be working over Christmas.

THE COURT: We will work on it, but we're going to have a more compact schedule than that.

MR. DAVIDSON: We're happy to have that, Your Honor.

THE COURT: All right. Okay. I've got -- I'm going to give each of you a chance to say one more thing, and then I want to hear from some of the lawyers, and then you'll come

back and I'll let you have more to say. So you get to say one more thing, please, on case management.

MR. DAVIDSON: This is -- there are some claims in this case which relate to due process in the context of information sharing. So under the DACA program, applicants were assured that the information they provided in support of their applications would not be used in connection with immigration enforcement; that is, the Government would not use that information to deport them or their families.

In the order rescinding the DACA program, there were some changes made to the language that the Government used to describe the circumstances under which information would be shared with the enforcement arms of the Government.

We have asked the Government about that in the context of our meet-and-confer discussions, and they were able to confirm this morning that their understanding is that the policy related to the use of information provided with applications has not changed. And that representation, we think, is important to put on the record.

THE COURT: Is that true?

MR. SHUMATE: That's correct, Your Honor. Our understanding is that the information-sharing policies remain the same. They have not changed, but I would just want to be very clear that even the old policy said clearly that it could be changed, suspended, or revoked at any time. So I just want

to make sure that's clear on the record.

THE COURT: Are you trying to say that they are changing it now, or do you -- what is the policy of the Government now with respect to when that information can be shared with other law enforcement agencies?

MR. SHUMATE: I want to be very precise, so if I can get my notebook, I can point the Court to precisely where that is.

But questions 19 and 20 on USCIS's website, it's archived, it explains clearly when information can be shared but it's very clear in saying these policies can be changed/revoked at any time. It doesn't create any --

THE COURT: But it hasn't been revoked yet?

MR. SHUMATE: No. It is our understanding that it has not been revoked and that the current Administration is following the same policy as the prior Administration.

THE COURT: All right. Does that satisfy you?

MR. DAVIDSON: It does, Your Honor.

THE COURT: All right. Thank you.

Okay. Let's hear -- you get to say one more thing.

MR. SHUMATE: Thank you, Your Honor.

Just we would want to make sure that however much time the plaintiffs have to file an opening brief, we would have an equal amount of time for the Government.

And the other thing I would just say is, since we do have

four sets of plaintiffs, that we're concerned about duplicative briefing. We think it makes a lot of sense for the --

THE COURT: Maybe we'll have joint briefing of some sort, but I don't know about -- okay. All right. We'll come to a schedule.

All right. Who would like to speak next, please?

MR. ZAHRADKA: Good morning, Your Honor. James Zahradka representing the states of California, Maryland, Maine, and Minnesota.

THE COURT: Great. Go ahead. What's your view?

MR. ZAHRADKA: Your Honor, we share your desire to have this decided in a prompt manner. Clearly there is a lot of uncertainty out there that's really causing possibly unnecessary grief.

We do share both -- the counsel for UC's belief that there should be some possibility for the legislative process to go forth. We obviously share your view that that is something you cannot rely on nor take to the bank in any way.

And our view is that having this case resolved in an expeditious manner while allowing some time for that process to play out is -- there's an appropriate balance to be struck there, and we think that having some time not getting a decision -- not getting a ruling before year's end is important to allow that process to play out.

So we're amenable to the vehicle that you discussed,

cross-summary judgment motions --

THE COURT: I suspect that if we did anything close to the schedule I just heard, the decision would be in January, maybe even February, but I doubt that it would be by year's end --

MR. ZAHRADKA: That seems appropriate.

THE COURT: -- unless it was a request for provisional relief. Then I might have to act more promptly.

MR. ZAHRADKA: Right. That seems appropriate to us, Your Honor.

And let me just -- I think this -- I hope this is clear, that the very first issue that was brought up and the term "TRO" was used, not a term you favor, but that specific issue is for a very discrete group of folks. So that anything that came out of that would not apply --

THE COURT: As we talked about it, I think I understood that. Even then, I think you could cast it in terms of a preliminary injunction motion on that limited issue.

MR. ZAHRADKA: I'll also say -- may I speak to discovery briefly?

THE COURT: Of course.

MR. ZAHRADKA: So we agree with the idea of helping to craft what the administrative record looks like and/or additional documents pertinent that may not have made their way into that record via some discovery requests. We also think

that it may well be necessary for us to probe further into the administrative record, or what was not in the administrative record, with some other discovery mechanisms -- you know, requests for admissions, interrogatories, requests for production, and possibly depositions.

Because of some of the issues at play here, which involve some issues of what the decision-makers were reviewing when they made the decision, how they reviewed those materials, those are decisions that could not be reflected in the administrative record but are important to determine whether a claim that the decision was arbitrary and capricious would succeed or not.

So as we make this schedule, we think it's important to consider that that may be necessary. It's very hard for us to say at this point without having an administrative record, but we want to leave that possibility open.

THE COURT: Okay. Thank you.

MR. ZAHRADKA: And with that, I think for now that's all I'd like to say. Thank you.

THE COURT: All right. Who's next?

MS. FINEMAN: Good morning, Your Honor. Nancy Fineman.

I wasn't sure when you made the comment about large firms, you were including Cotchett, Pitre & McCarthy. We like to think of ourselves as large in stature but we're small in

numbers.

THE COURT: You're getting larger and larger --

MS. FINEMAN: We are, Your Honor.

THE COURT: -- but you don't use all those bone-crushing instructions and bone-crushing definitions, I hope.

MS. FINEMAN: I think what -- we spent yesterday with the plaintiffs' group getting together, and I can represent to the Court it's a group that's committed to working quickly to solve the problems that the decision has created.

I think from our viewpoint, and San Jose especially, we need the administrative record to see what it is. And we are going on from yesterday and the November 1st schedule on an October 13th date; and today when we were talking -- we met with the defendants this morning, so we've talked out many of these issues to try to make this more efficient, and I think we'll be able to work very cooperatively with the Government.

That October 6th date will help, but we want to make sure that we have enough time between the time we get the administrative record and any first filing that we don't have to say, "Your Honor, hold off. We have kind of the issue." So we thought about a three-week time before we filed would be fine. So the November 1st date we thought was a realistic efficient date.

And then I know the problem is Thanksgiving, which isn't a

problem for lawyers, but if you have something that's due either right before or right after, it really does affect the staffs of the attorneys and it's a little bit harder to ask them to give up their Thanksgiving holiday. So that's why we were reasonable with the December date, but I think that can be crunched to get it done.

But the last thing to consider is there is a lot of work through a lot of the groups involved in this case with the legislative solution and pointing that, and we don't want Congress to be able to say, "Well, Judge Alsup is resolving that. We don't have to do anything."

So making sure --

THE COURT: Well, I had thought about that very problem, honestly. I don't like being in the position where somebody could blame me and say, "Well, now it's in the courts. Let's just let the courts decide it." Okay. I have worried about that.

MS. FINEMAN: And that's --

THE COURT: But here's the flip side of that: If we go slow somehow because for that reason, then we could easily wind up with a March 5 deadline coming and going with no decision because it's not a foregone conclusion that you would get a preliminary injunction. You have to earn it and show that you're entitled to it.

So I don't like being in that position either, so we've

got to -- I think a prudent thing to do is to get this case decided before March 5 comes, and then let the legislature do whatever it's going to do.

You know, the problem is broader. As I understand it, you-all are trying to reinstate the DACA program, but the DACA program doesn't even apply to everybody who is in that category. There are date problems, there are date deadlines; and if you're not a certain age at a certain time, you don't even qualify for the program you're trying to save. So there's a broader legislative problem than just -- as important as DACA is, there's a broader legislative problem. So maybe they'll look at this in a broader context.

Anyway, I see what you're saying on that, but my view is I didn't ask for this case, but I got it and I'm going to move it along so that I think I do my job, which is to get a decision before the program expires.

MS. FINEMAN: The City of San Jose thanks you for that, and I and my firm and the rest of the plaintiffs' counsel, I think the Government, are committed to do whatever.

I think we were thinking preliminary injunction first, though I think we've been writing notes and the plaintiffs' side is thinking that your idea of a summary judgment and preliminary injunction together is a good idea.

THE COURT: I think that's the way to go because you can imagine a scenario where it could be that under the law,

you lose.

MS. FINEMAN: Absolutely. We've thought about that.

THE COURT: It could be under the law, you have raised a fact question where you would win if it was a certain scenario, but we don't know what, so that we have to get more discovery and maybe even have a trial, but in the meantime possibly there would be a preliminary injunction because you might meet the standard.

But you've got to meet the standard, and we don't have any of that now. So my thinking is that you would get the administrative record and move for summary judgment and/or in the alternative for preliminary injunction on some schedule reasonably close to what you-all told me. I'll give you some dates in a minute. And so that I -- with enough time for me to decide well before March 5 and with some discovery in the meantime.

MS. FINEMAN: Thank you, Your Honor. San Jose completely agrees with you.

THE COURT: All right. Let's hear from -- who else is over -- wait. Wait. Wait. The Government gets to respond to what I just heard. I'm sorry.

MR. SHUMATE: Thank you, Your Honor. Just one quick thing.

The Government is happy to move as quickly as the Court would like, but since you did raise the idea of discovery, I

think that is inconsistent with the Court's goal of moving quickly here.

And what the plaintiffs are basically alleging is that the Government is presumed to act in good faith in preparing the administrative record, and we need discovery to test and make sure the Government puts what's --

THE COURT: My own experience has been exactly that, that the Government maybe in good faith leaves out things that they should have put in there.

MR. SHUMATE: And we can address that after the fact, and the plaintiffs --

THE COURT: No, no. After the fact will be too late. I think they ought to get some discovery along the way, and then when you're sitting there saying, "Does this go in the administrative record? No. Well, I don't know. Maybe not. Well, they might ask for it, so let's put it in there anyway," so I think it's better to let them have I'm not saying bone-crushing discovery; I'm saying limited, narrowly directed, reasonable discovery is, I think, in order here.

MR. SHUMATE: Your Honor, I think we can accomplish that goal by allowing the plaintiffs just to offer precise suggestions about what they think should be in the administrative record by letter, and we proposed that to them.

THE COURT: And you would reject their suggestions.

MR. SHUMATE: We're happy to consider them.

THE COURT: Yeah, you would consider them. Yeah, that's worth something, but it's not as good as they get the document to show me and say, "Look what they left out."

Look, I've just had too much experience in the real world. I think limited reasonable discovery keeps both sides honest, and we're going to do it. So you're not going to talk me out of that.

MR. SHUMATE: Thank you, Your Honor.

THE COURT: All right. Who's next?

MR. DETTMER: Thank you, Your Honor. Ethan Dettmer. I'm at Gibson Dunn. I'm a partner at a large law firm, but I do promise --

THE COURT: Yeah, that firm, I've heard of them.

MR. DETTMER: But, Your Honor, I will say I'm not a fan of bone-crushing discovery, and I think that Your Honor is exactly right, that limited and focused discovery in this case makes a lot of sense.

And I will give as an excuse for what I'm about to say that we've only been in this case since January -- I'm sorry, January -- Monday -- I've been thinking about these issues since January. But what Your Honor said this morning reminded me very much of what your former colleague Judge Walker said at the beginning of the Prop. 8 trial when we filed that complaint and all thought we would have a PI motion, and he said something very similar to what Your Honor said this morning,

which is, "Why not develop a real record so that when this matter goes up on appeal, the Court of Appeal has the full benefit of a full record?"

So I think -- and I've conferred with some of my colleagues as we were talking this morning -- but I think -- and the UC is, I think, on board with this, as is San Jose -- perhaps what we do is have, as Your Honor says, focused discovery following the completion of the administrative record on October 6th and then have a summary judgment slash PI briefing schedule.

And what I was going to propose was November 1st for an opening brief or set of opening briefs, which we will keep as focused as possible; November 22 for an opposition, which is the day before Thanksgiving; and December 8 for a reply, which gives us a couple extra days just given the holiday; and a hearing, if it's amenable to Your Honor's calendar, on December 15th.

And then if there are fact issues -- and that would resolve, I think, the APA claims.

And if there are fact issues and our case --

THE COURT: But, wait. I thought you were talking about every -- no way. So that would just be for the APA statutory? It would not be the remaining claims?

MR. DETTMER: Well, I guess what I would say, Your Honor, is the APA claims, I believe -- I don't believe you

have trials on APA matters, and so I think the APA claims would have to be resolved via some sort of briefing. I think the other claims may or may not be depending on what the parties think is appropriate on those claims.

THE COURT: What do we do about the other claims?

MR. DETTMER: Well, Your Honor, I was going to propose that if there are limited fact issues that remain -- and, frankly, our case is -- in many ways is a reliance case, our own plaintiffs, our own clients' reliance on what the Government has told them over the years and what the Government has promised them. If live testimony makes sense, we have a short bench trial at some point in late January or early February if there are issues that remain to be resolved following the completion of the briefing and the hearing.

THE COURT: So give me one example. Are you one of the plaintiffs that have constitutional claims? I can't remember.

MR. DETTMER: My clients, yes, they are the individual dreamers and they are raising due process and equal protection claims.

THE COURT: Are each of them already signed up under DACA?

MR. DETTMER: Yes, Your Honor.

THE COURT: So they're registered now?

MR. DETTMER: Correct.

THE COURT: Okay. So just take one of your claims, constitutional claims, and in a paragraph tell me how it would work. The constitutional claims is what I'm interested in, and just pick one. You don't have to pick them all.

MR. DETTMER: Sure. So my clients, each one of them, has changed the way they're living their lives. They have gotten clients. One of them's a lawyer. They are working on getting a medical degree and having medical -- you know, having patients. Some of them are teachers and have changed their lives to teach their students in underprivileged areas. And they've taken all these steps. They've gotten these licenses. They've borrowed money. They've taken all sorts of steps in order to carry out those careers.

And if DACA is revoked and if their reliance on it -- their reliance on what the Government has told them over the years is disappointed, they will not be able to do those things. They will -- their reliance interests will be frustrated by the Government's rescission of this program.

THE COURT: That would violate what part of the Constitution?

MR. DETTMER: The due process clause of the Fifth Amendment.

THE COURT: Okay. And it's not a class action. You have six individuals; right?

MR. DETTMER: Correct, Your Honor.

THE COURT: All right. So I would like to hear what the Government says to the -- what's your view going to be on the enrollment? Is that substantive due process or procedural? I don't know, but one of those two. What do you say on that issue?

MR. SHUMATE: So our position on the constitutional claims, Your Honor, is that they fail on their face and that they're subject to dismissal on a motion to dismiss. So we would like to test the allegations in the complaint and move to dismiss.

I think --

THE COURT: You can do that on your summary judgment motion.

MR. SHUMATE: Right, Your Honor.

And in the schedule -- what was the date for the reply? I didn't catch that.

MR. DETTMER: December 8th.

MR. SHUMATE: So we are comfortable with the schedule that the plaintiffs have proposed with one tweak, Your Honor, is that we would like to cross-move for summary judgment. So under the proposed schedule, we would only get one brief. We would like two briefs so we would have the last word on a reply to your opposition to our --

THE COURT: My thought is that on the opening day, whatever it was -- November 1? -- November 1, each side would

file a motion, and so we would have two different sets of motions going at once.

MR. SHUMATE: I think that makes sense.

THE COURT: So then you'd get the last word on your motion.

MR. SHUMATE: I think that makes sense.

THE COURT: All right. But what do you say -- but why does the constitutional claim fail on its face? I mean, all these people have relied on what the Government has said, so now the Government is going to say something different. So what do you -- how do you answer that?

MR. SHUMATE: So I understand the claim that's being raised is a due process claim. It was very clear in 2012 when Secretary Napolitano created the program at the very end of that memorandum creating the program and said, "This memorandum does not create any substantive right in any individual."

So what I anticipate we will argue in opposition to the constitutional claim is that there is no due process right and, therefore, the claim fails on its face.

THE COURT: Okay. Hang on a minute.

I've got the June 15th, 2012, right here, signed by Janet Napolitano.

MR. SHUMATE: Look at page 3, Your Honor, right above the signature.

THE COURT: All right. Read it out loud.

MR. SHUMATE: (reading)

"This memorandum confers no substantive right, immigration status, or pathway to citizenship. Only the Congress acting through its legislative authority can confer these rights."

THE COURT: Okay. So I guess your key sentence is "This memorandum confers no substantive right..." Let's just stop there.

So what is your answer to the caveat that Secretary Napolitano put in the memorandum that you rely on?

MR. DETTMER: Your Honor, in our complaint we quote high Government officials of both parties that have over the years said over and over again that the dreamers, as my clients are typically referred to in the media, can rely on this program and that they should rely on this program.

I will point you to paragraphs 41 through 47 of our complaint, and --

THE COURT: I'm interested. I haven't read it yet. I've read a lot of this stuff but not that. Read out loud for everyone's benefit one of the key people's statements to that effect.

MR. DETTMER: The most recent one is paragraph 47 in our complaint, and I'll quote (reading):

"On April 21, 2017, President Trump said that his Administration is," quote, "'not after the dreamers' and

suggested that," quote, "'the dreamers should rest easy.' When he was asked if the policy of his Administration is to allow the dreamers to stay, President Trump answered yes."

That's the most recent of these statements, and there are a number of them both in writing and orally and in tweets. And I'll give you an example. One of my clients, who is a lawyer down in San Diego, she has been expanding her practice. Earlier this year, based in large part upon these types of representations that she's heard from President Trump and Paul Ryan, Senator Lindsey Graham, and others, and as well as the memorandum that Secretary Kelly issued earlier this year which rescinded all immigration policies of the Obama Administration, except for DACA, she took out a five-year lease on a new office space because she was expanding her business and she thought, "I don't have anything to worry about. This program is going to keep continuing."

So that's a very specific example of the type of reliance that we're talking about based on the representations of high Government officials in our Government.

And our position is that it just can't be that the Government can make promises like that to people who live in this country and then yank the rug out without warning and without reason.

MR. SHUMATE: Your Honor, the plaintiffs' due process

claim is really an *estoppel* claim, that once the Government established the policy, they can never change it because people tend to rely on the established policy.

We all know the *estoppel* does not generally run against the Government; and so, you know, if the plaintiffs are right, that the Government --

THE COURT: But "generally" is not the same thing as "always." So --

MR. SHUMATE: Well, I hope they can cite a case where *estoppel* runs against the Government from ever changing a policy. I don't think they'll be able to do that. And if they're right, the Government could never change course, it could never change policy if it's true that they have a due process right on the continuation of a Government policy and that it can never change. That just can't possibly be right, and we're prepared to brief that, Your Honor.

THE COURT: Okay. What do you say to the point that if you're right, then the Government can never change a policy?

MR. DETTMER: Your Honor, I can't cite a case to you right now. I will be able to. There is doctrine that says if the Government says something -- if the Government treats something as a right, then it is a right regardless of the label they apply to it.

And this is not to say that the Government can't ever change its policies, but it certainly can't change its policies

as to the people who have relied upon that policy to change their whole living situation, their whole lives.

THE COURT: All right. Well, these are -- this is a preview of things to come.

But let's continue to pause over the -- what -- again, on the constitutional issues, are they going to be part of the briefing that you-all want to do starting November 1 or is that for later? I think you answered that already, but I can't remember your answer.

MR. DETTMER: And, Your Honor, it was -- and I'm sorry for this -- a somewhat of a hedging answer. I don't know yet. It's going to depend somewhat on the record we have and what we can develop in the next six weeks or so to determine what exact claims we'd move for summary judgment on.

THE COURT: Well, consider this possibility: Let's say we had a whole thing going on the administrative record and just the statutory claim under the APA and did not deal with the constitutional issues. And let's assume the worst case for you and you lose on the APA claims, no preliminary injunction, no nothing. So then where are we on the constitutional claims? Will that be impossible to decide in the time before March 5?

MR. DETTMER: Your Honor, I think we're going to have -- and, again, this is something where, you know, I think we're all sort of talking about this and we have been talking about it for the past couple of days and working through how

this is going to get presented; but I think there would be, after all that briefing is done and Your Honor has looked at it and made a decision, presumably at some point in January, then I think there could be a limited trial on specific issues to the extent Your Honor has left things open where there are factual issues that need to be resolved.

I don't know that there will be any; but if there are, you know, we could have a limited bench trial, have a few witnesses come in, if that is appropriate based on Your Honor's summary judgment argument -- I'm sorry -- ruling.

THE COURT: Honestly, I don't know what the law here is on whether or not that your theory that somebody who relies on statements of Lindsey Graham on the TV, whether or not that's good enough to create a right when the document says it doesn't create rights. I don't know the answer to this, but I've got to get educated on it and tee up. If we get to that point where the constitutional claims matter, I don't want to have to do it on a hurry-up basis.

MR. DETTMER: So, Your Honor, I think we -- I think it is likely that we would bring those claims as a part of that briefing. And, you know, I just don't want to say that conclusively given where we are right now, but I think it is likely we would bring those claims in that briefing.
Your Honor would be fully informed about the law and the facts related to that in that summary judgment briefing and then

could hear argument on it in December and decide it shortly thereafter.

THE COURT: Is your thought on the summary judgment motion that you want to bring on the Government's side that it would include all claims including constitutional claims? That you would be moving for summary judgment in your favor on all of that?

MR. SHUMATE: I think it's kind of a hybrid motion for summary judgment/motion to dismiss. I think we would want to in our first brief raise all of the arguments we have why these claims should be dismissed under either a 12(b) --

THE COURT: Of course, you could -- I mean, if you're entitled to dismissal -- I don't know. But you could do it as a hybrid motion; but, nevertheless, would you be addressing the constitutional claims?

MR. SHUMATE: Yes, I think we would, Your Honor.

THE COURT: All right. So if we got to the end of it and let's say that I thought that it should not be dismissed, a constitutional claim should not be dismissed, that's not the same as plaintiffs win on the merits. It just means they live to fight another day.

So I am worried that maybe what we need is whatever the most good faith motion that the plaintiffs' side could bring on the constitutional claims running in parallel to the administrative claims on this same schedule. And it could

easily be that at the end it's impossible to decide on that record, but you would have to make a record. You would have to put in your declarations by your -- they would have to be subject to cross-examination at depositions about their law practice and what -- you know, the reliance, and then -- and all other things that you would be relying on, the Government could take depositions to try to poke holes in that story.

All right. Here, I think we ought to be looking at this schedule -- wait a minute. Have I given everyone their chance to talk? I've lost track. There's so many lawyers. Who has not had a chance to talk?

MR. ZAHRADKA: I've spoken, Your Honor, but I did want to address a couple points very briefly, if that's okay, on this.

THE COURT: All right. Go ahead.

MR. ZAHRADKA: I'll just say -- and, again, this is all preview -- but just to say that boilerplate in the memo, in the Napolitano memo, is just that.

THE COURT: Lawyers always call it boilerplate whenever they don't like it. Whenever they do like it, it's the centerpiece.

MR. ZAHRADKA: Of course.

THE COURT: All right. But this doesn't say it's boilerplate.

MR. ZAHRADKA: Right. The D. C. Circuit has a strong

line of cases, though, that that type of boilerplate does not determine whether it creates a right or not. So just to say that.

THE COURT: All right.

MR. ZAHRADKA: And then the other preview is that on the *estoppel* issue, the Ninth Circuit does have a very strong strand of case law saying that *estoppel* against the federal government in the immigration context is permissible.

THE COURT: What's the name of that decision?

MR. ZAHRADKA: I don't have it in front of me, Your Honor, but I can --

THE COURT: All right.

MR. ZAHRADKA: There are a number of cases and we will brief them fully, but just to say, again, previewing that. Thank you.

THE COURT: So you're saying that the Ninth Circuit has said that the normal rule is *estoppel* against the Government does not apply?

MR. ZAHRADKA: That's correct.

THE COURT: There's a long-standing Supreme Court decision on that point?

MR. ZAHRADKA: That's correct.

THE COURT: And you're saying the Ninth Circuit has an exception in immigration cases that you think applies in this case?

MR. ZAHRADKA: I would say -- I would couch it in terms of following Supreme Court law, which does not rule out entirely the possibility of *estoppel* against the federal government in finding that in immigration contexts, given the incredible stakes, that they will recognize as appropriateness.

THE COURT: By maybe tomorrow send me a letter, no argument, just send me the citation to that decision. I'd like to read it.

MR. ZAHRADKA: Yes, Your Honor. It may be multiple citations. There's a few cases on point.

THE COURT: Well, you said there --

MR. ZAHRADKA: A line of cases. Sorry.

THE COURT: All right. Give me one or two along that line of cases, but make sure -- you said Court of Appeals; right?

MR. ZAHRADKA: Yes, sir.

THE COURT: All right. Yeah.

MR. ZAHRADKA: Very well. I will, Your Honor. Thank you.

THE COURT: By the way, I'm going to appoint Judge Sallie Kim to be your discovery referee and cut in half the time for responses on all discovery.

And both sides are subject to discovery. Like the six individuals, they've got to stand for deposition. It could be that Janet Napolitano, she was present at the creation, she

might be subject to deposition too if they want to take her deposition. So both sides are subject to possible depositions and discovery. I think that ought to be evenhanded, but the time for response is cut in half, and Sallie Kim will be your discovery master.

October 6 is the administrative record date. Both sides can move for summary judgment and/or preliminary injunction and/or to dismiss on November 1; reply -- I'm sorry -- oppositions, November 22; December 8th, reply. That only gives me a week with the materials.

We'll tentatively put it down for December 15th, but it may wind up being December 22 because your schedule only gives me a week to look at it. But possibly I'll want -- so don't make plans for December 22, but we'll see if we can do it on the 15th.

I think that we should have at least these tracks. Can the plaintiffs do this on a joint basis, or do you need -- can we do one joint brief?

MR. DAVIDSON: I think the plaintiffs have somewhat different claims from each other. I can certainly say that our intention is to file a joint brief and we will make best efforts to do it, and we can commit to not having overlapping arguments.

THE COURT: Well, I want you to do more than not have overlapping. I want you to have one joint brief and then if

you each have unique arguments in addition, then you can supplement with that.

MR. DAVIDSON: Like a Supreme Court opinion.

THE COURT: What?

MR. DAVIDSON: Like a Supreme Court opinion, we join as to --

THE COURT: Is that the way they do it?

MR. DAVIDSON: Yeah.

THE COURT: Okay. Well, then that's the way we need to do it. I see what you mean. Yes, that's what we need to do. Majority opinion, then you can have concurring opinions.

All right. But one thread is the statutory arguments under the APA, and then a second set is the constitutional arguments. Each can be styled as a motion for summary judgment and/or preliminary injunction.

Please try to honor the page limits. I will be generous on giving you more, but please try your best. But each of those have it. So you get 25 pages on the constitutional one, 25 pages on the statutory one.

Then there will be the opposition to both of those. So you'd be -- over on the Government's side, you'd be doing two sets of oppositions. If you wanted to file a single one, that would be okay.

Then we come to the replies would follow the same format. You would have the constitutional reply, then the statutory

reply.

Meanwhile, the Government -- I'm sorry. You go ahead and whisper in his ear. I want to make sure you understand.

Meanwhile, the Government has got its own thread going and you file your motion to dismiss and/or summary judgment.

And I know what he was about to say. He wants 50 pages on your one brief; right? That's what you were about to whisper in his ear because they're going to get 50 pages. I will just be generous to you because I think you should get the same number of pages as the other side gets on both the statutory and the constitutional issues.

Is that what you were trying to tell him or is it something else?

MR. ROSENBERG: It's Brad Rosenberg, Your Honor, from the Department of Justice.

Just to make sure that I understand, because we have four sets of plaintiffs and each set of plaintiffs except for the City of San Jose has multiple plaintiffs, that however the Court sets up its briefing with the number of pages, that we have a like number of pages to respond. So if there are a total number of 50 pages allowed for the plaintiffs, then the Government would receive 50 pages in response, or would it be 100?

THE COURT: In opposition. Yeah, so I was thinking that -- let's just go back to the opening motions by the

plaintiff. They're going to have one motion hopefully. In the best of all worlds, there would be one brief that's 25 pages long that they all subscribe to, all plaintiffs 25 pages. Then on your side, you get 25 pages to oppose that one motion.

Then, meanwhile, they get another 25 pages for their opening motion on the constitutional issues; and then you get another 25 pages, for a total of 50, to oppose that one.

MR. ROSENBERG: Consolidated amongst all of the plaintiffs 50 pages total, in other words?

THE COURT: That's what I'm asking for, but I also said I would give them concurring opinions, and I'm going to be generous in giving more pages if they need it just like I'll give you more pages if you need it.

But I want you-all to remember, you've got a lot of lawyers there and I've got a small team, and I don't have the luxury, so the fewer pages the better; but, on the other hand, this is important, and I don't want to -- I don't want anyone to miss out on an argument that they feel they've got to make.

Do you understand what I'm saying?

MR. ROSENBERG: Understood and I appreciate that, Your Honor.

THE COURT: Okay. Good.

So in the meanwhile, in addition to all of those pages, on your own motion you get to open -- you get your 25 pages to move to dismiss and/or for summary judgment. And what I'm

asking you is since that one motion is probably going to cover both constitutional and statutory -- see what I'm saying? -- your opening motion, maybe you get 50 pages if you really feel -- I'll just tell you now, if you need up to 50, I will give it to you, but I honestly think you could do it in less than -- I think you could do it probably in 25, but whatever you take, they're going to get in opposition. So there will be some duplicative briefing here. All right?

Go ahead.

MR. ROSENBERG: I did have one additional question and/or thought going back to the issue of discovery.

THE COURT: Sure.

MR. ROSENBERG: In the interests of streamlining the discovery process, as well as ensuring that there's equality on all sides, including for any affirmative discovery that the Government might serve, you know, we have four sets of plaintiffs again and the Government on the other side, and the federal rules provide for a limited number of interrogatories that the parties can serve. And I was wondering if the Court might consider reducing that number for both sides, as well as imposing limits to the number of requests for admissions, requests for the production of documents. So that in light of the limited amount of time that the parties have, the parties have an understanding as to the limited scope of discovery that may be necessary.

THE COURT: All right. That's a fair point to consider.

Let's say take all of you on the plaintiffs' side as a group, can you live with 20 document requests and 20 interrogatories? I don't know how many depositions. It wouldn't be 20. It would be a lot fewer than 20, but maybe even none, but how about 10 -- 20 and 20 for interrogatories and document requests?

MR. DAVIDSON: Your Honor, I see nods at our table, so that will be fine, Your Honor.

THE COURT: All right. So they like that number. How about on your side 20 and 20?

MR. ROSENBERG: I think that would work, Your Honor, without -- obviously the parties could reserve the right to seek leave of the Court but, yes.

THE COURT: All right. You can seek more, but I do want to make it clear that you are entitled to take depositions too and I think every single plaintiff can be deposed. That, to me, is just a normal thing. So the plaintiffs -- if you wanted to. You don't have to, but there you are.

MR. ROSENBERG: No, we appreciate that, Your Honor, and we'll give that some thought. I stepped aside to think for a moment. I'd lost track of just how many plaintiffs there are.

THE COURT: We've got six individuals, we've got the

University, we've got four or five states, and we've got the City of San Jose; right? Something like that. So there's a number of -- you can go above 10 if that's what you're worried about.

MR. ROSENBERG: All right.

THE COURT: Okay.

MR. ROSENBERG: Thank you.

THE COURT: All right. Now I've lost track of where I was.

Okay. Now, if we did need to have a trial, put down February 5 as the trial date. I don't know if that's likely, but we'd have to have a final pretrial conference that I would figure out a date for.

Please, on the plaintiffs' side, coordinate your discovery requests. I'm not -- unless you want me to, my thought is that we would not, quote, "consolidate" the cases *per se* but we would just keep them on -- four cases on a parallel track, but they might get consolidated -- they certainly would get consolidated for trial if we get that far, and they would be consolidated maybe for purposes of summary judgment and/or the big motion that's coming up in December. But between now and then, I just don't see the need to do any formal consolidation, and we'll just roll along with four related cases. Is that okay?

Nevertheless, on your side, please coordinate your

discovery requests and your briefing so that it has the benefit of consolidation.

MR. ROSENBAUM: Mark Rosenbaum on behalf of the Garcia plaintiffs.

Your Honor, if there are discovery disputes either as to conducting depositions or with respect to particular claims that are made, withholding documents, responding, taking privilege claims, I think the schedule that Your Honor has set out says we ought to have an expedited process to get those disputes resolved. So I think all parties would appreciate a matter so we can get it in front of the Court rapidly, have a quick meet and confer. If that doesn't work, get these matters resolved very quickly so that the schedule doesn't get delayed.

THE COURT: Yeah. I agree with that and Judge Sallie Kim is going to do that. Normally I would keep the discovery disputes for myself, but right now starting right in the middle of all this I have a huge trial, the Waymo v. Uber trial, so I would not have as much time to resolve your disputes so she's going to help me on this. Sallie Kim is going to help me on the discovery, and I will ask her to do it on an expedited basis.

MR. ROSENBAUM: Certainly. Thank you, Your Honor.

THE COURT: All right. Oh, one other thing I should have mentioned right at the outset. Have you done your initial disclosures under Rule 26? I doubt it, but don't you need to

do that promptly?

MR. DAVIDSON: We have not done it, Your Honor. We had been thinking that in the interest of time and because everything's moving so quickly and discovery requests are going to go out, that maybe the 26 disclosures would be swept in, but we're also happy to put them together.

THE COURT: Oh, no. You've got to do it. The rule says you've got to have a Rule 26 disclosure unless everybody agreed to just waive Rule 26 disclosures. I'll let you do it, but everybody would have to agree to that.

MR. ROSENBERG: You know, I'd need to think about that, Your Honor, but one possibility, I think from the Government's perspective, the submission of the administrative record would probably be the equivalent of Rule 26 disclosures.

THE COURT: Yeah, but how about on the constitutional claims, though? That's not -- I mean, if you want to rest on that, but I have a feeling later on you would say, no, there's more you want to put in.

MR. ROSENBERG: I suppose if the Court were to set -- we would be open probably to discussing with plaintiffs whether or not it makes sense to waive the requirement for Rule 26 disclosures. I think that's something we need to think about and it's a fair point.

Alternatively to the extent that the Court were to set a deadline, we would suggest that the Court set the same deadline

as for the submission of the administrative record.

THE COURT: October 6th. I'm going to say October 6th is when your Rule 26 disclosures are due on both sides.

MR. DAVIDSON: Very well, Your Honor.

THE COURT: Okay. That's initial disclosures. Initial disclosures. All right?

And please follow the rule and do it the way the rule specifies, Rule 26, not my rule, the big rule. Okay?

MR. DAVIDSON: Understood. Very well.

THE COURT: You're looking quizzical.

MR. DAVIDSON: I wasn't trying to be quizzical. We've heard in advance the Court's approach to Rule 26 disclosures and vigorously enforcing those.

THE COURT: Okay. Good.

All right. Let me look at my notes. I think I'm done but if anyone else has more to bring up, we'll let you do it.

MR. ROSENBAUM: Your Honor, one other matter.

THE COURT: Sure.

MR. ROSENBAUM: I know there will be requests on both sides for the submission of ***amicus*** briefs. Does the Court want to suggest some dates so we can tell the parties?

THE COURT: Well, here's the problem with the ***amicus*** briefs: If they come in, they should come in at the same time as the side they're supporting so that the other side can then respond, otherwise they don't get a chance to respond. You

know, the Supreme Court has a very practical rule on that. So you've got -- if somebody is going to submit an *amicus* brief, they're due on the same day as the brief that they're supporting.

MR. ROSENBAUM: That's perfect.

THE COURT: All right.

MR. DAVIDSON: One more -- one more matter, Your Honor.

On behalf of the University of California, it is likely that we'll want to amend our complaint to add some additional individual plaintiffs, and we had been thinking October 6th would be a reasonable target for doing that.

One issue that has come up --

THE COURT: Why shouldn't you do it sooner than that?

MR. DAVIDSON: The reason is we've been speaking with a number of individuals who may want to join. A principal concern that they have expressed is that by publicly joining the lawsuit, they would be subject or their families would be subject to retaliation and immigration consequences. So one thing they would hope to be able to do is to proceed under a pseudonym, and we've been discussing that possibility with everyone.

THE COURT: You know, I have allowed pseudonyms on rare occasion, but we are a public institution and the public has a right to know who it is that's seeking the relief of the

court. I won't say no to it, but that's not an automatic grant. I feel very strongly that we are a public institution and all those people out there have the right to know what goes on here and who it is it wants the court to do something.

So if they join in the case, they might have to do -- I don't know. Did the -- let me ask the Cotchett firm.

Aren't you -- who is the one that has the six people?

MS. FINEMAN: Not us.

MR. DETTMER: That's us, Your Honor.

THE COURT: Okay. Did you name your six people?

MR. DETTMER: Yes.

THE COURT: So they're out there taking that risk right now. So I don't know. I won't say no, but that's not a clear-cut winner for you.

MR. DAVIDSON: We understand the hurdles. I mean, to be concrete about it, they're worried that if they join this lawsuit and seek the relief that we think they're entitled to under the law, that the Government will retaliate by deporting their parents. So if we --

THE COURT: People file lawsuits all the time and they have to worry about that. They're not alone. And so I just cannot say yes to that now, and you take that into account. I won't say no to it either. You can make a formal motion to that effect.

Now, you're not thinking about amending to add new -- are

you thinking that you would add substantive new claims into your complaint?

MR. DAVIDSON: We're not expecting that right now, Your Honor. There are other claims that have been raised in the other cases and it's possible we would want to be able to assert those as well, but we're not anticipating that right now.

THE COURT: No, you can't do this to me. We can't have a -- we're off and running on a whole set of many -- a long list of claims, and here you are making it muddying the waters, and I don't know what the claims are going to be. I don't even have your final pleading yet.

So I would say October 6 is pretty late to be doing that. You should be doing it sooner than that. I'd say by the end of this month you should have whatever additional pleading you're going to have ready to propose. So that's my -- I won't say never. I'll just say that's my recommendation to you.

Okay?

MR. DAVIDSON: Very well.

THE COURT: All right. I have one other thought that you might think is a little odd, but I do it in other kinds of cases. It's kind of like a tutorial. I know a little bit about immigration law and immigration procedure but not a lot. It's what I've picked up over the years on immigration cases, and I wouldn't mind having a session sometime in the next month

on a date we could find that works for maybe a two-hour session where both sides get to help educate me without argument.

You know, it's not to give me argument. It's just to explain to me, for example, the history of deferred action, the history of how deportation works, and what the difference is between deportation and removal, for example, but the main points of the immigration process that have any bearing on this case, but it would not be an opportunity to argue. It's background kind of to help me get into the law.

Is that something you would be interested in doing?

MR. DETTMER: Yes, Your Honor.

MS. FINEMAN: Yes.

MR. ZAHRADKA: Yeah.

THE COURT: Ms. Winslow, you're not saying much?

MR. SHUMATE: The one question we had, Your Honor, is are you expecting testimony, or --

THE COURT: No, no, no. It would just be the lawyers presenting it. The lawyers would present it. You could have cartoons that would help me understand the process; you know, step one, step two, step three.

I'm telling you, I learn a lot in these tutorials and if I have to sift through it all -- if I have to go through voluminous briefing and it's all on a crunch basis and then in addition I've got to learn the immigration, you can see the problem. I would rather learn a little bit as we go so it

would help me. I'm just suggesting sometime in the next three weeks, four weeks we might have such a session.

MR. DETTMER: Your Honor, Ethan Dettmer.

I think that's a great idea. I just wanted to ask: What sort of format would be best? Would you like a PowerPoint and somebody just sort of going through the process and explaining it, or what --

THE COURT: No, no. A limited number of PowerPoints would be great, like five. Not -- you know, I don't know if you do patent cases. In the patent cases they just overwhelm me with 42 slides. I don't want that.

It would be three or four slides, maybe a big poster board where you would lay out here's the step one in the process, step two. You could -- another one would be how the DACA program itself has been -- I bet you, you both would almost stipulate to that, but I don't -- you-all know it. I don't know it yet. So how the DACA program has been implemented.

I'd come up with a list, and I think it could all be done in an hour and maybe each side does five to seven or eight slides and poster boards, and it would be tutorial in nature, not argument. It would not be part of the argument on the case, and you'd show each other what you're going to present beforehand so that if somebody had an objection, maybe you could work it out.

MR. DETTMER: We'd welcome the opportunity,

Your Honor.

THE COURT: What do you think of the idea lawyers doing it?

MR. SHUMATE: I think it's a good idea, Your Honor.

THE COURT: Okay. Good.

MR. DETTMER: Do you have a date in mind, Your Honor?

THE COURT: It depends a bit on the things that I don't want to get into right now but, yeah, it would be around three to four weeks from now. It would be roughly about -- a little bit before your first brief is due.

MR. DETTMER: Okay. Do you want to just send us an order on the date?

THE COURT: Yeah. I would give you an order on that.

MR. DETTMER: Okay.

MR. ROSENBAUM: You know what might be helpful, Your Honor? If the Court had specific questions --

THE COURT: You've got to come up here. The court reporters can't -- yeah, it would be helpful if I knew what the specific questions were, but I don't yet know.

MR. ROSENBAUM: Well, if you develop questions about the questions and present it to us, that would also help us focus.

THE COURT: Of course. I will definitely do that. I've been reading up on immigration law in the last couple of days trying to -- for example, one of the questions I have:

What was the origin of the phrase "deferred action"? Well, it has a history, and I'm still trying to learn that history. It's not the -- this is not the only kind of situation where the former INS has used deferred action.

But there are other phrases like that. I can't remember what it was. I had another one that had me going for a while. So I will give you a list of some things, but in general it's how the immigration process, the removal process, the -- here's another one I had.

Is it true -- somewhere I read that someone like a dreamer who is in this country, if they got deported, they couldn't come back for 10 years. Is that right? Is that the way it works? See, I don't -- but that's what it seemed to be saying.

MR. ROSENBAUM: So we'll present the information as we think will be instructive to the Court, but any questions that Your Honor has along the way, we'd be pleased to answer as well as that.

THE COURT: Okay. Does anyone even know the answer to that thing that I just said? If a dreamer were to be deported today --

MR. ROSENBAUM: That's correct; Your Honor.

THE COURT: What?

MR. ROSENBAUM: That's correct.

THE COURT: It would be a 10-year bar; is that right? Does the Government know?

MR. SHUMATE: I can't speak to that, Your Honor.

THE COURT: All right.

MR. ROSENBAUM: Your Honor is correct.

THE COURT: Okay. I read that, but I said that's pretty harsh. Maybe -- but it didn't say "dreamer." It just said -- it was a neutral statement.

Okay. So we might have a tutorial.

All right. I think I've done all the damage I can do for today, and I'll get out an order that summarizes what we've done. Good luck to both sides. Thank you very much.

ALL: Thank you, Your Honor.

(Proceedings adjourned at 11:52 a.m.)

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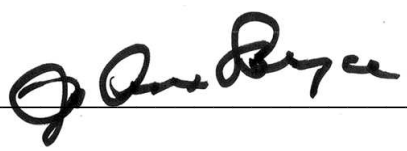
CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Friday, September 22, 2017



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UNITED STATES DISTRICT COURT
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.

CASE NO. 17-CV-05211-WHA

PLAINTIFFS' MOTION TO STAY IMPLEMENTATION OF THE COURT'S OCTOBER 17, 2017 AND NOVEMBER 16, 2017 ORDERS IN ORDER TO RESOLVE THE PENDING MOTIONS WITHOUT FURTHER INTERLOCUTORY APPEALS BY DEFENDANTS

Judge: Honorable William Alsup
Hearing: December 28, 2017, 8:00 a.m.

STATE OF CALIFORNIA, STATE OF MAINE, STATE OF MARYLAND, 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
CITY OF SAN JOSE, a municipal corporation, Plaintiff, 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
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
County of Santa Clara and Service Employees International Union Local 521, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, JEFFERSON BEAUREGARD SESSIONS, in his official capacity as Attorney General of the United States; ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security; and U.S. DEPARTMENT OF HOMELAND SECURITY, Defendants.	CASE NO. 17-CV-05813-WHA

NOTICE OF MOTION AND MOTION TO STAY IMPLEMENTATION OF THE COURT'S OCTOBER 17, 2017 AND NOVEMBER 16, 2017 ORDERS IN ORDER TO RESOLVE THE PENDING MOTIONS WITHOUT FURTHER INTERLOCUTORY APPEALS BY DEFENDANTS

Please take notice that on December 28, 8:00 a.m., at 450 Golden Gate Avenue, San Francisco, California, Courtroom 8, or such other time as the Court deems appropriate, Plaintiffs in the above-captioned actions will, and hereby do, move for a stay of the Court's October 17, 2017 Order RE Motion to Complete the Administrative Record and the portion of the Court's November 16, 2017 Order requiring Defendants to file and serve their augmented record by November 22. This motion is based on the memorandum of points and authorities, and exhibits hereto, and such additional arguments the parties may make.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants have filed in the Court of Appeals an Emergency Motion for Stay of the Court of Appeals' Order denying the Defendants' Petition for Mandamus (Exhibit 1). That motion also states that Defendants "will file an application seeking a further stay of all discovery and record expansion pending a petition for mandamus or writ of certiorari from the Supreme Court no later than November 20, 2017." Defendants also have informed Plaintiffs that they intend to file a similar motion seeking a stay pending Supreme Court review in this Court. At the same time, there are pending in this Court Plaintiffs' Motion for Provisional Relief and Defendants' Motion to Dismiss, which will be fully briefed by December 8 and heard by this Court on December 20, 2017. Defendants' continued pursuit of interlocutory review of the Court's well-founded October 17 and November 16 Orders is unfortunate and distracts from this Court's effort to reach a prompt judgment on the merits. However, the immediate and vital issue before the Court is Plaintiffs' Motion for Provisional Relief, as that motion, if granted, will enjoin the Rescission of DACA and thereby avoid disruption in the lives of hundreds of thousands of people.

In order to remove the distraction of further interlocutory appellate proceedings and to permit the Court and the parties to focus on the paramount issue of whether the DACA Rescission should be enjoined, Plaintiffs move this Court to stay Defendants' obligation to file and serve an amended

administrative record in compliance with the Court's October 17 and November 16 Orders until the Court rules on Plaintiffs' Motion for Provisional Relief and Defendants' Motion to Dismiss. Plaintiffs anticipate that the Court's rulings on those motions will either moot or clarify the issues on which Defendants have indicated they will seek emergency review in the Supreme Court.

First, the stay requested by the instant motion, and a ruling on the Motion to Dismiss, will moot Defendants' contention that this Court must assess and find subject matter jurisdiction before ordering completion of the Administrative Record or permitting discovery. The jurisdictional issues have been squarely raised in Defendants' Motion to Dismiss, will be fully briefed by December 8 and will be heard by this Court on December 20. A decision on those issues will eliminate Defendants' concern that the Court should rule on subject matter jurisdiction before requiring production of the complete Administrative Record or permitting additional discovery.

Second, the requested stay, and further briefing and rulings by this Court, will clarify the issues on review. Defendants argue—and the dissenting judge in the Court of Appeals agreed—that it is improper to require expansion of the Administrative Record, beyond what is presented by Defendants, unless there is a finding of bad faith or improper conduct by Defendants. Although Plaintiffs disagree, the issue of bad faith is squarely presented in Plaintiffs' Motion for Provisional Relief. (Dkt. 111, pp. 29-31.) In that motion, Plaintiffs set forth clear and convincing evidence that the stated reason for the DACA Rescission—the Attorney General's view that DACA was established without statutory authority and was an unconstitutional exercise of authority by the Executive Branch and therefore is at risk of being overturned by the courts—was not only unsupported, but also a pretext. Evidence demonstrating this fact is described in Plaintiffs' pending Motion for Provisional Relief:

- The very same day as the Rescission, the President tweeted: "Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can't, I will revisit this issue!"[1] But if the rationale for the Rescission were a genuine belief that DACA was illegal, there would be no basis to "revisit this issue" and possibly reinstate an illegal policy.

[1] *See* Donald J. Trump (@realDonaldTrump), Twitter (Sept. 5, 2017, 8:38 PM), https://twitter.com/realDonaldTrump/status/905228667336499200.

- DHS did not immediately terminate DACA. Instead, it announced that it would continue processing renewal applications for an additional month for benefits that expired between September 5, 2017 and March 5, 2018, and would recognize DACA grants already conferred, leaving the program in place for at least an additional six months. If DACA were illegal, DHS would have no basis to leave it in place for months and years.

- On October 18, 2017, the Attorney General testified to Congress that DACA could be legal under *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), if it were implemented "on an individualized basis." *Oversight of the U.S. Department of Justice: Hearing before the S. Comm. on the Judiciary*, 115th Cong. (2017) (testimony of Jefferson B. Sessions, Att'y Gen. of the United States), *available at* goo.gl/MgT97u. But the government did not implement, or apparently even consider, an alternative program that by their own admission is legal.

- The Senior Counselor to the Acting Secretary of DHS, who *drafted* the Rescission, undercut the litigation risk justification when he testified that a policy of reacting to litigation threats would be the "craziest policy you could ever have" because "you could never do anything if you were always worried about being sued." App. at 1929 (Hamilton Dep. 208:5-11).

- In their Motion to Dismiss, Defendants contend that the rescission of DACA is not reviewable under the APA and that the notice and comment requirement, 5 U.S.C. § 553, does not apply to the Rescission. However, if Defendants really believed that the *Texas* decision presented an unmanageable litigation risk, they also must believe that the *Texas* decision correctly held that a program like DACA is reviewable and that the notice-and-comment requirement applies.

- On October 8, 2017, President Trump sent a letter to Congressional leaders setting forth the "Immigration Principles and Policies" that he said "must be included as part of any legislation addressing the status of [DACA] recipients." App. at 1990-99 (Policies and Principles). The *New York Times* described the "Principles and Policies" as "a long list of hard-line immigration measures," including funding for a border wall. App. at 2004 (*NYTimes*). This evidence, linking the Rescission to the administration's legislative strategy, suggests that the decision to rescind DACA was an effort to make DACA recipients a bargaining chip to secure support for immigration legislation from members of Congress who support DACA recipients, and would not otherwise support the administration's immigration agenda.

Defendants will have their opportunity to contest this evidence when they file their opposition to Plaintiffs Motion for Preliminary Injunction on November 22, and the Court will be in a position to decide the issue of pretextuality when it rules on Plaintiffs' motion. Plaintiffs respectfully request that the Court make specific findings on the issue of pretextuality in that ruling.[2] If the Court finds that the stated reason for the Rescission was a pretext, there is no dispute—even under the dissenting judge's view of the law—that expansion of the Administrative Record and discovery of DHS is appropriate.

[2] If the Court would prefer that Plaintiffs make a separate motion on the issue of pretextuality, Plaintiffs will do so.

Furthermore, Defendants' counsel have informed Plaintiffs that they need approximately three more weeks to complete the Administrative Record and an additional week beyond that to complete the log of documents that will be withheld from the Administrative Record on grounds of privilege. Thus, if the Court's October 17 and November 16 Orders are not stayed, there will be another distracting battle about whether Defendants can comply with the Court's schedule and perhaps over what the repercussions should be if they do not, and the issues may not be resolved until the pending motions are under submission in any event.

Finally, in order to obviate Defendants' efforts to obtain a stay from the Supreme Court, Plaintiffs agree not to recommence discovery pending the Court's rulings on Plaintiffs' Motion for Provisional Relief and Defendants' Motion to Dismiss. Nonetheless, the parties will continue to meet and confer to develop a discovery plan in the event the Court rules that it has subject matter jurisdiction, including by proposing how and when to present any discovery disputes for adjudication.

CONCLUSION

For the reasons stated above, the Court should stay Defendants' obligation to file and serve an amended administrative record in compliance with the Court's October 17 and November 16 Orders pending its rulings on Plaintiffs' Motion for a Preliminary Injunction and Defendants' Motion to Dismiss. Such a stay will eliminate any need for emergency review of the October 17 and November 16 Orders by the Supreme Court, and the Court's rulings on the pending motions may further confirm the correctness of that Order and moot Defendants' objections to it.

Dated: November 19, 2017

Respectfully submitted,

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ATTESTATION

I, Jeffrey M. Davidson, hereby attest, pursuant to Civil L.R. 5-1, that I have received authorization to electronically sign and file this document from each of the persons identified in the signature block.

Dated: November 19, 2017

/s/ Jeffrey M. Davidson
Jeffrey M. Davidson

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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.

No. 3:17-cv-05211-WHA
No. 3:17-cv-05235-WHA
No. 3:17-cv-05329-WHA
No. 3:17-cv-05380-WHA
No. 3:17-cv-05813-WHA

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO STAY (ECF NO. 190) AND TENTATIVE ORDER OF THE COURT (ECF NO. 193)

Judge: Honorable William Alsup

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO STAY AND TENTATIVE ORDER OF THE COURT

While Defendants appreciate the suggested relief provided in the Court's tentative order, the proposed relief does not fully address all of Defendants' substantial concerns. Absent additional relief either from this Court or the Supreme Court, Defendants will be required to continue to compile the administrative record during the pendency of the stay. For the reasons set forth in Defendants' prior filings, Defendants believe that the Court's prior Orders regarding discovery and the scope of the Administrative Record are improper. *See, e.g.*, Order re Motion to Complete the Administrative Record, ECF No. 79; Motion to Stay Pending Petition for Writ of Mandamus, ECF No. 81.

Although Defendants are engaging in discussions with Plaintiffs to potentially address some of these concerns, absent additional relief Defendants reserve their right to promptly seek review of the Ninth Circuit's denial of their Petition for a Writ of Mandamus with the Supreme Court.

Dated: November 20, 2017

Respectfully submitted,

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