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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

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

*Plaintiffs*,

v.

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

*Defendants*.

CASE NO. 17-CV-05211-WHA (SK)

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS PENDING RESOLUTION OF PETITION FOR WRIT OF MANDAMUS**

Judge: Honorable William Alsup

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| STATE OF CALIFORNIA, STATE OF MAINE, STATE OF MARYLAND, and STATE OF MINNESOTA,<br>*Plaintiffs*,<br>v.<br>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,<br>*Defendants*. | CASE NO. 17-CV-05235-WHA (SK) |
| CITY OF SAN JOSE, a municipal corporation,<br>*Plaintiffs*,<br>v.<br>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,<br>*Defendants*. | CASE NO. 17-CV-05329-WHA (SK) |
| DULCE GARCIA, MIRIAM GONZALEZ AVILA, SAUL JIMENEZ SUAREZ, VIRIDIANA CHABOLLA MENDOZA, NORMA RAMIREZ, and JIRAYUT LATTHIVONGSKORN,<br>*Plaintiffs*,<br>v.<br>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,<br>*Defendants*. | CASE NO. 17-CV-05380-WHA (SK) |

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; and 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-5813-WHA

## INTRODUCTION

Defendants created the urgency in this case by arbitrarily setting a March 5, 2018 date for the end of the DACA program. Given the sweeping implications of that decision—which already has upended the lives of hundreds of thousands of young people—this Court and the parties in these related cases committed to an expedited schedule that "was designed to reach a decision on the merits and to allow appellate review by the March 5 deadline." Dkt. 79 at 2.[1] But rather than proceed as ordered, Defendants have frustrated the schedule and compounded this urgency by producing a wholly inadequate administrative record. Indeed, despite having requested an extra week to produce the administrative record (Dkt. 52, CMC, Sept. 21, 2017, Tr. at 17:3–16), and having been specifically admonished not to withhold relevant materials by both the Court and Plaintiffs (e.g., *id.* at 17:17–18:8), Defendants produced only a handful of publicly available documents and an inadequate privilege log (Dkts. 64-1, 71-2.). As Magistrate Judge Orenstein observed just last week in the parallel cases pending in the Eastern District of New York, "[t]here's lot of running out the clock going on here." *See* Oct. 11, 2017, Tr. at 31:23–24, *Vidal v. Baron*, No. 16-CV-4756 (E.D.N.Y.).

The government's arbitrary decision to terminate DACA will impose significant harm on each of the plaintiffs. And it will needlessly punish hundreds of thousands of Dreamers, who relied on the government's promises and organized their lives around the program. Indeed, in announcing the rescission of DACA, the Secretary of Homeland Security told the nation that the DACA program was "fundamentally a lie."[2]

Plaintiffs in these cases brought suit immediately, alleging constitutional, statutory, and equitable claims in an effort to hold the government to its promises. Given the looming deadline set by Defendants, the Court set a schedule that would allow the case to be decided on the merits with a (compressed) timetable for appellate review before the March 5, 2018 deadline. But rather than permit this case to be fairly decided on the merits, Defendants severely and artificially limited the

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[1] References to docket numbers herein refer to the docket in Case No. 17-cv-05211-WHA (SK).

[2] Statement from Acting Secretary Duke on the Rescission Of Deferred Action For Childhood Arrivals (DACA) (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/statement-actingsecretary-duke-rescission-deferred-action-childhood-arrivals-daca.

record of documents underlying their decision, and put at risk this Court's ability to timely adjudicate the critical issues presented.

Just yesterday, this Court ordered that Defendants "immediately begin compiling the supplemental materials ordered [on October 17, 2017] for the administrative record," and explained that "Defendants shall do so regardless of whether or not they may seek a writ of mandate" because, "[e]ven if defendants seek relief from the court of appeals, that court may wish to review *in camera* the supplemental materials, or if that court orders supplementation in full or partial compliance with [the October 17, 2017] order, the supplemental materials will be ready to use." Dkt. 80. Against the reasonableness and pragmatism underlying the Court's order, Defendants now seek to bring this litigation to a complete stop, laying bare their strategy of withholding key facts and seeking to run out the clock, so that neither this Court nor the Ninth Circuit will have access to the information required for prompt resolution of these cases. Defendants cannot manufacture arbitrary deadlines and create delays and then decry the hardships that follow from them. And, ultimately, the timing and burden problems alleged by Defendants could be largely if not entirely relieved if they were to extend the end of the DACA program. The motion to stay should be denied.

## LEGAL STANDARD

A court may stay proceedings as part of its inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). The factors regulating the issuance of a stay are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "The first two factors of the traditional standard are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009).[3]

[3] Defendants' suggestion that an alternative standard may apply relies on a misreading of *American Hotel & Lodging Association v. City of Los Angeles*, 2015 WL 10791930 (C.D. Cal. Nov. 5, 2015). There, the court was confronted with an alternative vehicle for appellate review—28 U.S.C. § 1292(b)—and held that the standard to stay an action pending interlocutory appeal under that provision *also* applied to a request for stay pending interlocutory appeal of a denial of a

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34. "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." *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979).

**ARGUMENT**

The defendants meet none of the requirements for a stay. *First*, Defendants fail to show any error in the Court's rulings—let alone a "clear" one—as is required for mandamus. *San Jose Mercury News, Inc. v. U.S. Dist. Court-N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999). *Second*, Defendants have raised nothing more than a *possibility* of harm from having to supplement the administrative record, which is insufficient as a matter of law to demonstrate irreparable harm. *Third*, Plaintiffs will be severely prejudiced if discovery in this case must await a ruling from the Ninth Circuit at some undetermined future date even as the expiration of DACA is mere months away. *Fourth*, the public interest does not favor a stay; on the contrary, the public interest is served by full and prompt judicial review of government decisions that deprive hundreds of thousands of individuals of their fundamental rights.

## I. DEFENDANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS

Defendants have failed to "ma[k]e a strong showing that [they are] likely to succeed on the merits" because doing so requires "[m]ore than a mere possibility of relief . . . ." *Nken*, 556 U.S. at 434 (citations and internal quotation marks omitted). Far from making such a showing, Defendants ignore the high bar for obtaining mandamus—a remedy that the Supreme Court has described as "drastic and . . . reserved for really extraordinary causes," such as "exceptional circumstances amounting to a judicial usurpation of power" or a "clear abuse of discretion." *Cheney v. District Court*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted). This is telling, as Defendants' likelihood of success on their mandamus motion is remote under this strict standard.

Moreover, this is not a case where "a disclosure order 'amount[s] to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice." *Mohawk Indus., Inc.*

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preliminary injunction. *Id.* at *2–3. Defendants' arguments, which are geared around the *Nken* factors, effectively concede that *Nken* governs, and not the standard described in *American Hotel*.

*v. Carpenter*, 558 U.S. 100, 111 (2009). On the contrary, this Court has taken pains to craft "practical limits" on its order to complete the administrative record, consistent with controlling Ninth Circuit authority, which requires specific categories of documents and communications directly or indirectly considered in connection with Defendants' abrupt reversal of course and the decision to rescind DACA. Dkt. 79 at 13.

Because Defendants "argue that DHS had to rescind DACA because it exceeded the lawful authority of the agency" (*id.* at 9), this Court overruled Defendants' assertions of attorney-client privilege, holding that Defendants "cannot . . . simultaneously refuse to disclose the legal research that led to that conclusion." *Id*. The Court also personally reviewed *in camera* all documents withheld on the basis of the "deliberative process privilege" and made individualized determinations about whether this qualified privilege was overridden, based on the Ninth Circuit's standards for such determinations. *Id*. at 10–11 (citing *FTC v. Warner Commc'ns Inc*., 742 F.2d 1156, 1161 (9th Cir. 1984)). The Court also stated that it will review *in camera* all claims of privilege over withheld documents. *Id*. at 13.

Defendants also argue that a stay is appropriate because "this Court has indicated that it will allow the deposition of the Acting Secretary Duke to proceed." Dkt. 81 at 8. This is both incorrect and an insufficient justification to stay the entire proceedings. Here, Defendants are arguing both that Acting Secretary Duke was the sole decision-maker (and therefore only documents directly considered by her should be produced in the administrative record) and that she should not be deposed regarding that decision. These irreconcilable positions cannot be sustained.

Defendants' cursory arguments that they are likely to succeed on the merits are easily dismissed.

***First***, Defendants' claim that 8 U.S.C. § 1252(g) bars judicial review of the decision to end the DACA program is easily rebutted. Contrary to Defendants' assertion, 8 U.S.C. § 1252(g) "does not bar 'all claims relating in any way to deportation proceedings.'" *Wong v. United States*, 373 F.3d 952, 964 (9th Cir. 2004) (quoting *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc)). Rather, as the Supreme Court and the Ninth Circuit have repeatedly explained, § 1252(g) is "narrowly construed" and "'applies only to three discrete actions . . . to *commence*

proceedings, *adjudicate* cases, or *execute* removal orders.'" *Wong*, 373 F.3d at 963–64 (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) ("*AADC*")) (emphases added in *AADC*). Here, Plaintiffs are not challenging any of the "discrete actions" that are specifically enumerated in the statute. *AADC*, 525 U.S. at 482; *see also Madu v. U.S. Att'y Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006) (while § 1252(g) "bars courts from reviewing certain exercises of discretion by the attorney general, it does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions"). Indeed, two district courts have recently rejected the government's effort to use this same statutory provision to circumvent judicial review of decisions related to DACA. *Coyotl v. Kelly*, 2017 WL 2889681, at *9 (N.D. Ga. June 12, 2017) (8 U.S.C. § 1252(g) did not eliminate jurisdiction to consider challenge to revocation of DACA); *Gonzalez Torres v. U.S. Dep't of Homeland Sec.*, 2017 WL 4340385, at *4 (S.D. Cal. Sept. 29, 2017) (holding government "misconstrue[s]" § 1252(g), which "applies only to three discrete actions").

Furthermore, the government's half-hearted assertion that "*denial* of deferred action and [its] attendant benefits" is "committed to agency discretion by law and unreviewable" similarly misses the mark. Dkt. 81 at 5 (emphasis added). Here, Plaintiffs are not challenging any "denial" of deferred action, but rather the government's unlawful and unconstitutional decision to terminate the DACA program and to revoke constitutionally protected interests from hundreds of thousands of DACA beneficiaries. In any event, the termination of DACA was not an exercise of prosecutorial discretion (but rather a broad-brush constriction of discretion), and the Rescission Memo does not purport to rescind DACA as an exercise of prosecutorial discretion; the government cannot now offer *post hoc* justification for its unlawful and unconstitutional conduct *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

***Second***, Defendants assert that the Court erred when it ordered them to complete the administrative record and retrieve a narrow category of documents from DOJ and the White House. Dkt. 81 at 6. But these claims are nothing more than a re-hashing of the arguments that the Court has already rejected, in part (*see* Dkt. 79 at 13)—including an unexplained assertion that the rescission of DACA is an unreviewable "policy," an argument that fails for reasons similar to those given above regarding judicial review. They offer virtually no fresh arguments.

Defendants contend that Plaintiffs were required to make a showing of bad faith or impropriety in order to supplement the record. But as the Court correctly explained in its Order, "[o]ur court of appeals has repeatedly recognized other grounds for requiring supplementation, including where it appears the 'agency relied on documents not [already] included in the record.' *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982); *Fence Creek Cattle Co. v. United States Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010); *see also Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005)." Dkt. 79 at 4.

The Court also properly rejected "[D]efendants' contention that it need only produce documents directly considered by the Acting Secretary . . . ." *Id.* at 4. As this Court observed, a "'document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record.'" *Id*. at 3 (quoting *California ex rel. Lockyer v. U.S. Dep't of Agric.*, Nos. C05-3508 & C05-4038, 2006 WL 708914, at *2 (N.D. Cal. Mar. 16, 2006) (quoting *Miami Nation of Indians of Ind. v. Babbitt*, 979 F. Supp. 771, 777 (N.D. Ind. 1996)). Ninth Circuit authority is clear 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, 555–56 (9th Cir. 1989). Thus, "[d]ocuments reviewed by subordinates, or other agencies who informed her on the issues underlying the decision to rescind DACA, either verbally or in writing, should be in the administrative record." *Id*. at 4.

Defendants do not meaningfully contest the fact that the administrative record is incomplete, nor could they. The record lacks, among other material: (1) numerous categories of documents drawn from the Department of Justice's own guidance regarding the appropriate contents of an administrative record, including documents and materials "available to the decision-maker, even though the final decision-maker did not actually review or know about the documents and materials," (Dkt. 79 at 5) (citation and internal quotation marks omitted); (2) any documents from the DOJ other than the Attorney General's one-page September 4th letter relied on by DHS in its rescission memorandum, "[d]espite th[e] critical and publicly disclosed role [of the DOJ] in the decision," (*id.* at 6); (3) any documents from the White House, despite "the President's direct role in decisions

concerning DACA" and White House staff's significant role, (*id.* at 6–7); (4) any documents from the Secretary's subordinates, even though the government's counsel "represented that she had likely received verbal input," and "[t]he government's in camera submission confirm[ed] that she did receive substantial DACA input," (*id.* at 7); and (5) all but two documents related to then Secretary of Homeland Security John Kelly's February 2017 memorandum in which he "expressly declined to rescind DACA," (*id.*). And while it ordered inclusion of these categories of documents in the administrative record, the Court took pains to cabin the inconvenience to Defendants in compiling this record. The Court held that Defendants were not obligated to "scour" the DOJ or White House or search below the applicable agency levels in "a bonecrushing expedition to locate needles in haystacks." Dkt. 79 at 13.

Defendants now argue that (a) the DOJ "cannot as a matter of law be the 'decisionmaker' for a policy that it did not administer" and (b) that the White House is "not subject to the provisions of the Administrative Procedure Act." Dkt. 81 at 6. But the question is not whether the DOJ was the decision-maker here. Rather, the question is what DACA-related documents and materials individuals from the DOJ reviewed prior to giving written or verbal input to the Secretary. Dkt. 79 at 12–13. As the Court held, the approach urged by Defendants "would allow agencies to contrive a record that suppresses information actually considered by decision-makers and by those making recommendations to the decision-makers, information that might undercut the claimed rationale for the decision." *Id.* at 8; *see Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) ("An incomplete record must be viewed as a fictional account of the actual decisionmaking process. . . . If the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless." (internal quotation marks omitted)).

This is not an idle concern. During his deposition on October 17, 2017, Acting USCIS Director James McCament described an August 24, 2017 meeting at the White House where a tentative decision was reached to rescind DACA. The meeting lasted approximately 60 to 90 minutes and was attended by, among others, Acting Secretary Duke, White House Chief of Staff Kelly, Attorney General Sessions, White House Advisor Stephen Miller, White House Counsel Don

McGahn, White House Deputy Chief of Staff (and Secretary of Homeland Security nominee) Kierstjen Nielsen, White House Secretary Rob Porter, DOJ official Rachel Brand, Office of Management and Budget Director Mick Mulvaney, and Deputy Secretary of State John Sullivan. Gabriel Decl., Ex. A (Dep. of J. McCament), Tr. 73:15–74:10. A one-page agenda was distributed at the meeting, and White House Chief of Staff Kelly led the discussions. (*Id.* at 78:4–25.) The Acting Secretary and the Attorney General both spoke as well, as did "Don McGahn [and] Stephen Miller" in particular. (*Id.* at 79:21–25.) A "tentative decision" on DACA's rescission was reached at this meeting, yet Defendants' position here would prevent the production or review of *any* of the materials considered by those who discussed the DACA rescission with Acting Secretary Duke at this meeting. Further compounding this problem, Defendants' counsel instructed Mr. McCament not to answer any questions regarding the substance of this meeting during his deposition. *Id*. at 84: 1–10.

Moreover, irrespective of whether the President's actions are "reviewable for abuse of discretion under the APA," *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992), White House documents are not categorically shielded from inclusion in the administrative record. *See, e.g.*, *Portland Audubon Soc'y*, 984 F.2d at 1547-48 (administrative record excluding communications with the White House was incomplete where press reports indicated that the agency relied on communications with White House staff in reaching its decision); *see also id.* at 1548 (noting that the court's "decision is fully consistent with *Franklin*").

The other case Defendants rely upon, *Cheney v. District Court*, 542 U.S. 367 (2004), further "explains why separation of powers issues are not implicated in this case." *Citizens for Responsibility & Ethics in Wash. v. Cheney*, 580 F. Supp. 2d 168, 180 (D.D.C. 2008) (denying government's motion for stay pending petition for writ of mandamus). Unlike here, the information being sought in *Cheney* included "everything under the sky." 542 U.S. at 387–88. The Supreme Court specifically distinguished targeted requests that would "safeguard against unnecessary intrusion into the operation of the Office of the President." *Id.* at 387. The Court's Order here is likewise narrow and explicitly does not require Defendants to "scour" the White House "for everything under the sky." Dkt. 79 at 13; *Cheney*, 542 U.S. at 388.

***Third***, Defendants do nothing more than rehash their arguments regarding attorney-client privilege and deliberative process privilege. (Dkt. 81 at 6.). And Defendants' objection to producing a privilege log is meritless; courts routinely require privilege logs where agencies withhold portions of the administrative record, and even in jurisdictions that do not require privilege logs in all cases, logs are nonetheless required in such instances. *See* Dkt. 79 at 12.

Consistent with this Court's ruling, it is black-letter law that "parties are not permitted to advance conclusions that favor their position in litigation, and at the same time shield the information that led to those conclusions from discovery." *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). Put differently, '[t]he privilege which protects attorney-client communications may not be used both as a sword and a shield.' *Ibid.*" Dkt. 79 at 9. Thus, Defendants cannot argue that "DHS had to rescind DACA because it exceeded the lawful authority of the agency" (*id.* at 9) or, alternatively, "the agency's legal worry was 'reasonable' even if wrong" (*id.*), and at the same time refuse to produce the documents underlying those positions.

Nor can Defendants shield their flawed and arbitrary decision-making process behind the deliberative-process privilege. Where Defendants rest their decision to upend the lives of 800,000 young people on conclusory assertions of unlawfulness and litigation risk, "[t]here can be no doubt that . . . pre-decisional deliberative communications . . . go to the heart of the question of whether an agency action was arbitrary and capricious, an abuse of discretion or otherwise inconsistent with the law under Section 706(2) of the APA." *Desert Survivors v. US Dept. of the Int.*, 231 F. Supp. 3d 368, 382 (N.D. Cal. 2017). Further, because "the issues involved [here] are alleged violations of federally-protected civil rights . . . [the] need [for deliberative materials] is heightened and the privilege is outweighed." *L.H. v. Schwarzenegger*, 2007 WL 2009807, at *8 (E.D. Cal. July 6, 2007). Indeed, the Court carefully reviewed *in camera* the materials that Defendants withheld on the basis of the deliberative-process privilege and entered on their privilege log, ultimately ordering disclosure of some, but not all, of the withheld documents. Dkt. 79 at 13. That thoughtful approach was entirely in keeping with the qualified nature of the privilege, which "will yield when the need for materials and accurate fact-finding 'override the government's interest in non-disclosure.' *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)." Dkt. 79 at 10–11.

***Fourth***, Defendants assert that the Court has "constructively" ruled that Secretary Duke is subject to deposition. Dkt. 81 at 6 (citing CMC, Sept. 21, 2017, Tr. 50:23 –24, 51:2–3). But this is not a reason to stay all proceedings in this matters. Indeed, Defendants' contradictory position is that only documents actually reviewed by Secretary Duke are subject to inclusion in the administrative record, but that Secretary Duke—whom they assert was the sole decisionmaker—cannot be subject to questioning. In any event, it is clear that Acting Secretary Duke has "firsthand-knowledge of important, relevant, and material facts," including those the bear directly on Plaintiffs' constitutional claims. *In re Transpacific Passenger Air Transp. Antitrust Litig.*, 2014 WL 939287, at *2 (N.D. Cal. Mar. 6, 2014). She is therefore subject to deposition regarding her direct personal knowledge of discoverable factual information, including how she came to issue the rescission memorandum. *See, e.g.*, *Green v. Baca*, 226 F.R.D. 624, 648 (C.D. Cal. 2005).

***Fifth*****,** although Defendants refer the Court to the recent stay order issued in *Institute for Fisheries Resources v. Price*, No. 16-cv-1574 (N.D. Cal., May 3, 2017), that decision does not support Defendants' arguments, it undermines them. While the *Price* court issued an order staying the matter without making findings, the defendant's (*i.e.*, government's) brief is instructive, as it indicated that absent a stay, it would take the FDA "far in excess of a year" to comply with the discovery order at issue, diverting resources from its health-related priorities, and that it would "cost over $2 million dollars for [the] reviewers (i.e., not including scientific and other reviewers brought on to assist) to review the documents of just three of 17 (or more) custodians whose records have been collected so far." (*Id.* at Opp. 9, 10.) Here, however, Defendants acknowledge that they can comply with the Court's Order in the absence of a stay. (Dkt. 81 at 4.) And the burdens that Defendants claim are caused, in substantial part, by the fact that they involved so many people in different executive branches in the decision-making process. Gabriel Decl., Ex. A, Tr. 73:15–74:10.

## II. DEFENDANTS WILL NOT BE IRREPARABLY HARMED ABSENT A STAY

Defendants claim they will be irreparably harmed on two grounds: (1) compliance with this Court's order "will result in the irretrievable disclosure of privileged documents," and (2) "complying with the Order will impose enormous burdens and costs on Defendants." Dkt. 81 at 7. Both claims are easily dismissed.

As an initial matter, "'[a] stay is not a matter of right, even if irreparable injury might otherwise result.'" *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). It is instead "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.* (quoting *Virginian Ry. Co.*, 272 U.S. at 672–73)). "Some possibility" of irreparable injury is insufficient. *Id.* at 434.

Defendants will not be irreparably harmed by the disclosure of privileged documents absent a stay. First, the Court's October 17th order explicitly allows the defendants to seek *in camera* review of all documents that they claim to be protected by some privilege. Dkt. 79 at 13. The Court stated that it "will review and rule on each item" identified as privileged. *Id.* The Court's efforts will give Defendants substantial protections against "irretrievable disclosure" of actually privileged material. Dkt. 81 at 7.

Moreover, "[f]or a moving party to be considered 'irreparably injured' for the purposes of a motion to stay, that injury must be 'categorically irreparable.'" *Guifu Li v. A Perfect Franchise, Inc.*, 2011 WL 2293221, at *4 (N.D. Cal. June 8, 2011) (citing *Nken*, 556 U.S. at 435). "[S]imply showing *some* '*possibility* of irreparable injury' is insufficient." *Id.* (emphasis added). Here, the defendants are merely claiming *some possibility* of irreparable injury if the Court were to disclose—after a document-by-document *in camera* review—certain materials that Defendants consider privileged. Defendants' request for a stay would deprive the Court of even an opportunity to assess whether these documents are privileged or not. Moreover, appellate courts can mitigate harm from improper disclosure. *See Mohawk Industries v. Carpenter*, 558 U.S. 100 (2009).

Defendants' assertion that they "will suffer irreparable harm as a result of the staggering burden that compliance with the Court's Order will impose" should be disregarded. Dkt. 81 at 7. "Many courts [ ] have concluded that incurring litigation expenses does not amount to an irreparable harm." *Guifu Li*, 2011 WL 2293221, at *4 (citing cases); *see also Nat. Res. Def. Council, Inc., v. U.S. Food & Drug Admin.*, 884 F. Supp. 2d 108, 124 (S.D.N.Y. 2012) (*citing Graphic Comm'ns Union v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985), for the proposition that "costs incurred as consequence of compliance with court order do not show irreparable harm"). This is

especially true for the federal government, which has enormous resources (including tens of thousands of attorneys) at its disposal. And in any event, in its October 17th Order, this Court carefully crafted a limiting principle that cabined the materials that must be included in the administrative record. Dkt. 79 at 12–13.

Defendants also should not be allowed to shield Secretary Duke from deposition, in a matter in which her knowledge is directly at issue, under a blanket assertion that she is busy and her deposition therefore would be burdensome. Here, Secretary Duke "has personal knowledge that is directly relevant to the claims and defenses" at issue, and she "alone has precise knowledge of what factors [s]he considered and how they influenced [her] ultimate decision, so that information must come from [her], not from third parties." *Sherrod v. Breitbart*, 304 F.R.D. 73, 76 (D.D.C. 2014). And any "statements the Secretary chose to make cannot possibly substitute for the answers to questions specifically directed to [her] underlying reasoning" regarding the decision to fundamentally reverse course and rescind DACA. *Id.* Defendants have repeatedly asserted throughout this litigation that Secretary Duke was the relevant decisionmaker. They cannot in fairness seek to prevent her deposition, which is crucial to this case and is certain to inform the proceedings and discovery going forward.

At bottom, the timing and burden problems claimed by Defendants are within their power to solve, as they could be largely if not entirely relieved if they were to extend the end of the DACA program. Defendants' arguments about harm and burden are meritless.

## III. PLAINTIFFS WILL BE PREJUDICED BY A STAY

Because Defendants are not likely to succeed on the merits of their mandamus petition, and because they would not be irreparably harmed if a stay is denied, there is no need to address the remaining two factors. *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 558 (9th Cir. 1996); *Morse v. Servicemaster Glob. Holdings, Inc.*, 2013 WL 123610, at *4 (N.D. Cal. Jan. 8, 2013). Nevertheless, granting a stay would undoubtedly and severely prejudice the plaintiffs.

Defendants recognize that DACA's rescission will take place a mere "four months from now" (Dkt. 81 at 8) but ignore the crippling uncertainty, confusion, and fear that already have disrupted the

lives of hundreds of thousands of DACA recipients, and the friends, family members, coworkers, students, patients, and clients who rely on them.

Given that Plaintiffs' opening brief on the merits is due on November 1, 2017—less than two weeks from today—even a very short stay of the litigation would make it extremely challenging—and perhaps impossible—to properly adjudicate Plaintiffs' claims before Defendants' arbitrary deadline, thus subjecting hundreds of thousands of people to irreparable harm within mere months.

Defendants provide no compelling reason why this Court should delay these proceedings and wait for the Ninth Circuit to act even as Defendants' arbitrary March 5th deadline nears. Even if the Ninth Circuit greatly expedited its consideration of Defendants' not-yet-filed mandamus petition, any delay in these proceedings would prevent Plaintiffs, the Court, and the public from learning the truth about DACA's rescission and make appropriate resolution of these proceedings on a full record impossible in advance of Defendants' arbitrary deadline.

## IV. THE PUBLIC INTEREST DOES NOT FAVOR A STAY

At bottom, Plaintiffs' claims in these actions ask whether Defendants' actions in rescinding DACA were lawful and constitutional. As this Court recognized, the law requires Defendants to produce the complete record of the information and decisions leading up to those actions. Dkt. 79 at 12–14. Having that complete record will allow this Court and any reviewing court to answer that question correctly. And the answer to that question will determine the fate of hundreds of thousands of young people.

A stay would harm the public interest by hiding from scrutiny the record of information that led to the decision that will so disrupt the Dreamers' lives and communities. It would also harm the public interest by making it difficult, if not impossible, to appropriately adjudicate the legality of Defendants' actions in advance of their artificial March 5th deadline. None of these consequences serves the public interest.[4]

[4] In contrast, the "harms to the public interest" that Defendants briefly identify in their motion are self-inflicted. Dkt. 81 at 9. Specifically, the resource constraints that they claim are a result of the arbitrary and accelerated deadline put in place by Defendants themselves. And to the extent the record that Defendants now need to gather is extensive, that is a result of Defendants' involvement of many people in the decisionmaking process that led to this decision. It cannot be that the government can insulate a decision from scrutiny by creating a short artificial deadline

## CONCLUSION

For the foregoing reasons, Defendants' motion to stay these proceedings should be denied.

and then asking for a stay of discovery because of the amount of work necessary to assemble the legally required administrative record.

Dated: October 19, 2017

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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

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

*Plaintiffs*,

v.

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

*Defendants*.

CASE NO. 17-CV-05211-WHA (SK)

**DECLARATION OF JESSE S. GABRIEL IN SUPPORT OF PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS PENDING RESOLUTION OF PETITION FOR WRIT OF MANDAMUS**

Judge: Honorable William Alsup

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

*Plaintiffs*,

v.

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

*Defendants*.

CASE NO. 17-CV-05235-WHA (SK)

CITY OF SAN JOSE, a municipal corporation,

*Plaintiffs*,

v.

DONALD J. TRUMP, President of the United States, in his official capacity, ELAINE C. DUKE, in her official capacity, and the UNITED STATES OF AMERICA,

*Defendants*.

CASE NO. 17-CV-05329-WHA (SK)

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 (SK)

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; and 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-5813-WHA

**DECLARATION OF JESSE S. GABRIEL**

I, Jesse S. Gabriel, declare and state as follows:

1. I am an attorney at law and member of the Bar of this Court. I am a senior associate with the law firm of Gibson, Dunn & Crutcher LLP, attorneys of record for Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn, plaintiffs in the action *Garcia, et al. v. United States of America, et al.*, No. 17-cv 05380-WHA (the "Garcia Action") filed in this District on September 18, 2017. I make this declaration of my own personal knowledge, and if called upon to do so, I could and would testify to the matters stated herein.

2. I make this declaration in support of Plaintiffs' concurrently filed Memorandum in Opposition to Defendants' Motion to Stay All Proceedings Pending Resolution of Petition for Writ of Mandamus.

3. On October 17, 2017, James McCament, Acting Director of U.S. Citizenship and Immigration Services, was deposed in this matter. A true and correct copy of an excerpt from his deposition transcript is attached hereto as Exhibit A.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed at Los Angeles, California on October 19, 2017.

Jesse A. Gabriel

Jesse S. Gabriel

# Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

| | |
|---|---|
| THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and JANET NAPOLITANO, in her official capacity as President of the University of California, Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY and ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security, Defendants. AND RELATED CASES. | Case No. 17-CV-05211-WHA |

- - -

Tuesday, October 17, 2017

- - -

Videotaped deposition of JAMES McCAMENT, taken at the offices of Gibson, Dunn & Crutcher, 1050 Connecticut Avenue NW, Washington, D.C., beginning at 9:14 a.m., before Nancy J. Martin, a Registered Merit Reporter, Certified Shorthand Reporter.

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# I N D E X


| | PAGE |
|---|---|
| TESTIMONY OF JAMES McCAMENT | |
| BY MR. DETTMER | 9 |
| BY MS. CROWLEY | 232 |
| BY MR. LEE | 244 |
| BY MR. ROSENTHAL | 284 |
| BY MS. KHAN | 296 |


## E X H I B I T S


| NUMBER | DESCRIPTION | PAGE |
|---|---|---|
| Exhibit 6 | Statement of Michael Dougherty before the United States Senate, Committee on the Judiciary, October 3, 2017, 4 pages | 16 |
| Exhibit 7 | CQ Congressional Transcripts, 118 pages | 16 |
| Exhibit 8 | James McCament, Acting Director, U.S. Citizenship and Immigration Services, Experience and Achievements, 1 page | 26 |
| Exhibit 9 | U.S. Department of Homeland Security Organizational Chart, 25 pages | 53 |
| Exhibit 10 | Declaration of James W. McCament, 3 pages | 56 |
| Exhibit 11 | "How Do I Request Consideration of Deferred Action for Childhood Arrivals?" 3 pages | 137 |
| Exhibit 12 | DACA Overview, 32 pages | 151 |
| Exhibit 13 | "Don't Let Your Work Permit Expire," 2 pages | 171 |

E X H I B I T S
(CONTINUED)


| NUMBER | DESCRIPTION | PAGE |
|---|---|---|
| Exhibit 14 | DACA Frequently Asked Questions, 20 pages | 174 |
| Exhibit 15 | USCIS Number of Form I-821D, Request by Intake Biometrics and Case Status, 2 pages | 182 |
| Exhibit 15-A | Enlarged version of USCIS Number of Form I-821D, Request by Intake Biometrics and Case Status, 2 pages | 182 |
| Exhibit 16 | I-821D, Consideration of Deferred Action for Childhood Arrivals, 4 pages | 189 |
| Exhibit 17 | National Standard Operating Procedures, SOP, Deferred Action for Childhood Arrivals, DACA. | 215 |
| Exhibit 18 | Department of Homeland Security, statement from Acting Secretary Duke on rescission of deferred action for childhood arrivals, release date is September 5, 2017 | 217 |
| Exhibit 19 | Letter dated July 21, 2017 from the Office of the Attorney General of the State of California to the President of the United States | 257 |
| Exhibit 20 | Email string, DHS 7 - 9, 3 pages | 287 |
| Exhibit 21 | Question #20, DACA Adjurations 3, 2 pages | 292 |


EXHIBITS PREVIOUSLY MARKED


| NUMBER | PAGE |
|---|---|
| Exhibit 3 | 193 |

WASHINGTON, D.C., TUESDAY, OCTOBER 17, 2017; 9:14 A.M.

-OoO-

THE VIDEOGRAPHER: Good morning. We are going on the record at 9:14 on October 17, 2017. Please note that the microphones are sensitive and may pick up whispering and private conversations. Please turn off all cell phones or place them away from the microphones as they may interfere with the deposition audio. Audio and video recording will continue to take place unless all parties agree to go off the record.

This is Media Unit 1 of the video recorded deposition of James McCament in the matter of the Regents of the University of California and Janet Napolitano, in her official capacity as president of the University of California, V. United States Department of Homeland Security and Elaine Duke in her official capacity as acting secretary of the Department of Homeland Security and other related cases.

This is in the U.S. District Court, Northern District of California, San Francisco Division. This deposition is being held at Gibson, Dunn located at 1050 Connecticut Avenue, Northwest, Washington, D.C., 20036. My name is David Campbell from the firm

Veritext. And I'm the videographer.

The court reporter is Nancy Martin from the firm Veritext. I am not authorized to administer an oath. I'm not related to any party in this action, nor am I financially interested in the outcome.

Counsel, will you please identify yourselves for the record. Then the witness will be sworn in, and we can proceed.

MR. DETTMER: Ethan Dettmer from Gibson, Dunn on behalf of the plaintiffs in the Garcia action.

MS. MORRISON: Haley Morrisson from Gibson, Dunn on behalf of the Garcia plaintiffs.

MS. CROWLEY: Megan Crowley from Covington & Burling on behalf of the Regents of the University of California and President Napolitano.

MR. LEE: Ronald Lee with the California Attorney General's office on behalf of the State of California.

MR. NEWMAN: Michael Newman of the California Attorney General's office on behalf of the State of California.

MS. KHAN: Sania Khan from the New York Attorney General's office on behalf of plaintiff states and New York, et al.

MR. ROSENTHAL: Joshua Rosenthal of the

National Immigration Law Center on behalf of the plaintiffs, Batalla Vidal.

MS. TUMLIN: Karen Tumlin of the National Immigration Law Center on behalf of the Batalla Vidal plaintiffs.

MS. ZENGOTITABENGOA: Colleen Zengotitabengoa of USCIS.

MS. WESTMORELAND: Rachel Westmoreland of the United States Department of Justice.

MR. COX: Reid Cox, the General Counsel's Office of the Department of Homeland Security.

MR. GARDNER: Josh Gardner of the Department of Justice, and the witness will reserve the right to read and sign.

JAMES McCAMENT,

having been first duly sworn/affirmed,

was examined and testified as follows:

EXAMINATION

BY MR. DETTMER:

Q. Thanks for being here today, Mr. McCament. We met briefly off the record. My name is Ethan Dettmer, and I represent the plaintiffs in one of these cases, the Garcia case, which was filed in

San Francisco. So let's start. Can you give me -- give us your full name.

A. Certainly. James Wesley McCament.

Q. Are you a lawyer?

A. I am.

Q. All right. Have you ever been deposed before?

A. I have not.

Q. Ever given testimony in a trial or an arbitration?

A. No, I've not.

Q. All right. Given testimony before Congress; is that right?

A. I have.

Q. On how many occasions?

A. Once.

Q. And that was two weeks ago today, if I'm not mistaken?

A. That's correct.

Q. That was testimony for a hearing on the oversight of the administration's decision to end deferred action for childhood arrivals, and that was before the Senate committee on the judiciary; is that right?

A. Yes to both.

had or however you might have -- are you aware of people in the White House who were engaged on this issue on DACA?

A. From those E-mail conversations or --

Q. From any source.

A. Largely, those two sitting in one of the meetings or a meeting, and I remember those names. But I don't recall sort of a reference to an "X" person "wants this." And generally what I recall is if there was an ask, it was -- it may be "the White House is asking" type of question. Does that make sense?

Q. Yeah. So it sounds like, with respect to anything other than in-person -- it sounds like you had one in-person meeting on this issue while you were acting Secretary?

A. That's what I recall. Acting director.

Q. Sorry. Acting director. Thank you.

A. Please clarify.

Q. I gave you a promotion.

A. That's right.

Q. So you remember one meeting while you were acting director with White House people on the topic of DACA?

A. Yes. I remember one meeting being held in

completion on discussion of DACA.

Q. Okay. That you attended?

A. That I attended.

Q. Okay. Are you aware of other meetings that you did not attend?

A. I'm not aware of other meetings that I did not attend, but there may well have been.

Q. Okay.

A. I mean that's not unusual.

Q. Understood. And obviously, I'm, you know, just trying to get what you know.

A. Sure.

Q. Okay. So let's talk, then, about that meeting. Do you remember when it happened?

A. I believe it was August 24.

Q. August 24. Where did it happen?

A. The Roosevelt Room.

Q. Okay. Which is where?

A. In the White House, west wing.

Q. Okay. Who was there that you remember?

A. That I recall, Acting Secretary Duke, General Kelly, the chief of staff, the attorney general, Jeff Sessions. I'm reflecting around the table. Rachel Brand with Department of Justice. OMB Director Mulvaney. Deputy Secretary of State Sullivan.

Stephen Miller. I think Rob Porter. I believe I have that name right.

Q. What's Mr. Porter's role?

A. He is the staff -- I was going to say executive secretary, but it's that staff secretary or -- I probably have misapplied the title, but, in essence, who handles correspondence, I believe, for the White House, but I may have the title wrong.

Don McGhan. Kierstjen Nielsen, the deputy chief of staff to -- or currently the deputy chief of staff. I believe John Bash.

Q. Who's John Bash?

A. He's, I think, special counsel, and I believe also -- I have to double-check the title. I believe special assistant to the President as well. Marc Short, who is -- I'm sorry.

Q. Who is Mr. Short?

A. The head of the legislative, White House legislative affairs operation. It may be a more expanded title, but I think that he is the head of legislative affairs.

Q. Anybody else you can remember?

A. Gene Hamilton, the senior counsel to the Secretary. I believe Chad Wolf. There may have been a couple of others as well. I'm just trying to kind

of think through. Danielle Cutrona.

Q. How do you spell Cutrona?

A. I believe C-u-t-r-o-n-a.

Q. And who is she?

A. She works for the attorney general directly.

Q. Anyone else you remember?

A. I believe Andrew Bremberg as well.

Q. Who is that?

A. He also, I believe, is a special assistant to the President, but I might have the title adjusted incorrectly. I think there may have been one or two others, but I'm just not recalling at the moment.

Q. Okay. Do you remember how long the meeting lasted?

A. Approximately.

Q. How long, about, did it last?

A. Approximately an hour to an hour and a half.

Q. How did you come to be there? Did you get an E-mail invitation? Did you get a phone call?

A. I did receive --

Q. Okay. From whom?

A. As I recall, from the chief of staff. DHS chief of staff.

Q. Okay. And do you remember what that said? What did the E-mail say?

A. I recall generally what it said.
Q. What did it say?
A. As I recall, that there would be a meeting in the EEOB, or White House. I'm not sure which was said since they're adjacent. And that I would be attending. That was how I knew that was the case.
Q. Okay. Anything else in that E-mail? Did you -- well, anything else on that E-mail?
A. What I recall is that it was to discuss DACA.
Q. Was there an agenda attached?
A. No, not to that E-mail.
Q. Did you ever receive an agenda for that meeting?
A. I don't recall receiving an agenda. I received an invite.
Q. Okay. Did you receive any E-mail, whatever you were going to call it, anything like an agenda, anything that set forth what was to be discussed?
A. I don't recall receiving the agenda or a read-ahead before the meeting.
Q. You got a package of information at the meeting of some kind?
A. I recall receiving at the meeting what we would say is the read-ahead, but the agenda. I don't recall receiving anything prior. Could have been. I

don't remember that.

Q. So you got a hard copy of it when you got there?

A. Yes, as I recall.

Q. What was that package? What did it look like?

MR. GARDNER: Objection. Vague.

Are you asking for the content? Just so I'm clear.

BY MR. DETTMER:

Q. I mean was it a sheet of paper? Was it a, you know, binder? What was it?

A. A sheet of paper.

Q. Okay. And did it -- I guess what I'm trying to get is the content in the sense of, you know, was it an agenda? Was it a bunch of data? What kind of information was it giving you?

MR. GARDNER: Objection. I'm not trying to be obstreperous. I will allow him to answer the question, but I don't want him to get into privileged testimony.

So to the extent you can answer his question without divulging privileged information, please go ahead and answer. Let's take it step by step.

MR. DETTMER: Sure.

THE WITNESS: Sure.
It was an agenda.
BY MR. DETTMER:
Q. Okay. And it was one sheet of paper?
A. As I recall, yes.
Q. And do you know who put that agenda together?
A. My understanding was that the White House did.
Q. Who led the meeting?
A. General Kelly. Yeah. Right.
Q. Okay. And who -- were there sort of presentations given during the meeting?
A. As I recall there were --
MR. GARDNER: I'm sorry. I'm going to lodge an objection at this point.
You can answer that question with a "yes" or "no," but the content of that information would be subject to privilege.
So again, we'll just take it step by step.
THE WITNESS: Would you ask your question again.
BY MR. DETTMER:
Q. Were there presentations given at the meeting?
A. I viewed that as more as discussions.

Q. Okay. So you said General Kelly led the meeting, which I take to mean he was sort of the moderator or the director of who was talking. Who sort of -- can you -- let me start over.

Who did the most talking at the meeting?

MR. GARDNER: Objection. At this point I do think we are getting into privileged information subject both to deliberative process privilege, potentially Presidential communications privilege.

MR. DETTMER: I'm not asking for any substance. I'm just asking for --

MR. GARDNER: The identity of an individual? Is that what you're asking for?

MR. DETTMER: Yeah. Who did the most talking.

MR. GARDNER: So you can answer as to the individuals.

THE WITNESS: Multiple people spoke.

BY MR. DETTMER

Q. Okay. Who spoke at the meeting?

A. General Kelly, Acting Secretary Duke, Attorney General Sessions. As I recall, Rachel Brand. I believe Deputy Secretary Sullivan, but I may be misremembering, I believe. Don McGhan, Stephen Miller. I think Marc Short as well. Multiple folks

spoke. So I may not be remembering someone.

Q. Did you speak at the meeting?

A. At the very end.

Q. Okay. For how long?

A. Less than a minute.

Q. Okay. Do you remember about how long the Attorney General spoke at that meeting? Can you approximate?

A. It's difficult to approximate, but I can explain that.

Q. Sure.

A. Multiple conversations, multiple times people spoke. It's just a bit harder for me to approximate time lines over that hour and a half --

Q. And I understand.

A. -- people spoke.

Q. You know, we've all been at meetings with a lot of people. Obviously, you and I are dominating this conversation for obvious reasons.

A. Right.

Q. You know, and we've all sort of seen meetings dominated by one person or another. Were there people who spoke for the bulk of the meeting at this meeting you were at, or was it sort of more evenly spread out among the participants?

A. I would say somewhere in between.
Q. Okay. And who were the people who spoke the most? The ones that you just identified?
A. I would say almost all of those spoke, not necessarily equally but quite a bit.
Q. And who talked the most? Obviously, General Kelly was leading the meeting. Who else?
A. General Kelly. Acting Secretary Duke, the attorney general. As I recall, Don McGhan, Stephen Miller. Marc Short, to your point, less so --
Q. Okay.
A. -- strategy. And Director Mulvaney.
Q. Less so?
A. As I recall, probably less so than those others.
MR. DETTMER: Okay. In the interest of time, I mean I gather from our exchange that you're going to assert the privilege objections to all my questions about what did each one of these people say.
MR. GARDNER: And just to be absolutely clear with you, that's right. I'm really trying to give you as much latitude as reasonably possible. We would assert both the attorney-client privilege, deliberative process privilege, and potentially the Presidential communications privilege over the subject

matter, the substance of the deliberative nature of that meeting. So that's correct.

MR. DETTMER: Okay. I appreciate that. Well, I don't appreciate that.

MR. GARDNER: We're not going to resolve this right here, I imagine, but I appreciate you understanding our position.

MR. DETTMER: Yeah. And I just want to make sure there's not going to be -- because obviously, this is, you know, going to have to go to the judge.

MR. GARDNER: Of course. Of course.

MR. DETTMER: You know I just -- in the interest of everybody's time --

MR. GARDNER: I appreciate that.

MR. DETTMER: -- there's not going to be any kind of waiver or argument that you guys are making for me not going through the motions of asking all these questions.

MR. GARDNER: No. In fact, if you want to ask the ultimate question of what substantively was decided, I can lodge the objections, instruct him not to answer, and you can him if he's going to follow my instruction, and I feel like that will really preserve your ability to bring this up should you choose to do so.

MR. DETTMER: Let us go through that process.
Q. So what was the -- actually, let me ask you a question I think you can answer within the scope of what your lawyer is telling you.
Was a decision actually reached at this meeting?
MR. GARDNER: You can answer that with a "yes" or a "no" without going into detail.
THE WITNESS: Not an ultimate decision. So I guess no to that.
BY MR. DETTMER:
Q. Okay. A tentative decision?
A. In part, yes.
Q. Okay.
MR. GARDNER: It's bigger than a bread box. It's two words.
THE WITNESS: Right. It's hard.
MR. GARDNER: We're in this together, my friend.
THE WITNESS: All three of us, actually.
BY MR. DETTMER:
Q. Okay. Well, then in order to preserve the fight for judicial resolution, what was the decision that was -- or the partial decision that was eventually reached at this meeting?

MR. GARDNER: Objection. The disclosure of that information would be subject to the attorney-client privilege, the deliberative process privilege, and potentially the Presidential communications privilege.

I instruct the witness not to answer.

BY MR. DETTMER:

Q. And sir, are you going to follow your attorney's instruction?

A. Yes.

Q. And just so we're clear, we're going to sort of wrap all of the sub questions into that.

MR. GARDNER: That's perfectly acceptable. I appreciate your professionalism.

MR. DETTMER: No. No. Likewise. And we'll get this worked out. See what Judge Alsup wants to do.

Q. So apart from -- I guess the way we got to that whole series of questions and answers and objections was asking you about communications at the White House. Apart from that meeting that I think we've explored as much as we can today, have you had any communications with -- actually, I'm going to have to clarify that.

I understand you've had communications with

the Department of Justice with respect to the various litigations that are going on about DACA.

A. Yes.

Q. So I want to put those to the side because those are likely privileged conversations.

A. Okay.

Q. Have you had conversations with the Department of Justice about DACA in your role as acting director outside of the context of those litigations?

A. And outside the context of the meeting. I know you said, but just to try to parse.

Q. Yeah.

A. I don't recall any with DOJ apart from that meeting.

Q. Okay. And when I say, "communications," I'm doing that broadly. E-mail, phone call, face to face.

A. Not that I recall.

Q. Okay. Let me ask the same question about members of Congress or Congressional staff. Have you, in your role as acting director of USCIS, had communications with Congress, either members or their staff, about DACA?

A. Yes.

Q. I take it from your answer that --

that's -- to the extent it's part of what they provide in their application itself, the DACA requester.

MS. KHAN: I think that's it for me.

THE WITNESS: Okay. Thank you.

MR. DETTMER: I guess we should just say that obviously, given the disputes that we talked about before, we're going to reserve rights to reopen.

MR. GARDNER: And we understand. We'll cross that bridge when we get there.

MR. DETTMER: Absolutely.

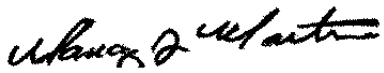
THE VIDEOGRAPHER: All right. If that is everything, this concludes today's questioning. We are going off the record on October 17, 2017 at 6:49 p.m.

(Witness excused.)

(Deposition concluded at 6:49 P.M.)

C E R T I F I C A T E

I do hereby certify that the aforesaid testimony was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deposition is a true and correct record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.



Nancy J. Martin, RMR, CSR

Dated: October 18, 2017

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ACKNOWLEDGMENT OF DEPONENT

I, JAMES McCAMENT, do hereby certify that I have read the foregoing transcript of my testimony taken on 10/17/17, and further certify that it is a true and accurate record of my testimony (with the exception of the corrections listed below):

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Signed under the pains and penalties of perjury this _____ day of _____, 20___.

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JAMES McCAMENT