

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF COLORED
PEOPLE (NAACP), THE AMERICAN
FEDERATION OF TEACHERS, AFL-
CIO, AND THE UNITED FOOD AND
COMMERCIAL WORKERS, AFL-CIO,
CLC,

Plaintiffs,

vs.

DONALD J. TRUMP, in his official
capacity as President of the United States,
JEFFERSON BEAUREGARD SESSIONS
III, in his official capacity as the Attorney
General of the United States, ELAINE C.
DUKE, in her official capacity as acting
Secretary of Homeland Security, U.S.
CITIZENSHIP AND IMMIGRATION
SERVICES; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT;
DEPARTMENT OF HOMELAND
SECURITY; AND THE UNITED STATES
OF AMERICA,

Defendants.

Case No.1:17-cv-01907

**PLAINTIFFS' MOTION FOR STATUS CONFERENCE AND ADOPTION OF A CASE
MANAGEMENT ORDER**

I. INTRODUCTION

This action was filed on September 18th, and served on the Defendants on September 25, 2017.¹ Notwithstanding that the United States normally is provided 60 days within which to respond to a complaint, the Plaintiffs ask that this Court schedule an early status conference and

¹ Plaintiffs amended the initial complaint on October 23, 2017 to add two new organizations with the Defendants' consent. Doc. 8. The amendments did not alter any causes of action.

enter a case management order to address the exigent circumstances giving rise to this action.

This case challenges the Defendants' announced intention to repeal the Deferred Action for Childhood Arrivals Program ("DACA") effective on March 5, 2018. Without expedited scheduling of the proceedings in this action, the Plaintiffs, whose members are among the registrants in the DACA Program, will be deprived of the opportunity to challenge the unlawful repeal of this Program on which they have relied for years. While the failure to expedite these proceedings will irreparably harm the Plaintiffs by denying their members the chance to contest Defendants' unlawful action before it becomes effective and they risk deportation, the adoption of an expedited case schedule will cause the Defendants no prejudice, as they are already subject to expedited schedules in several other pending cases that challenge the same action and seek the same or similar relief. Copies of a proposed Case Management Order and the Case Management Orders entered in two similar cases are attached.

II. FACTUAL BACKGROUND

On September 12, 2017, the Defendants announced rescission of the Deferred Action for Childhood Arrivals ("DACA") Program. In operation since 2013, the DACA Program provides that eligible persons who arrived as children in the United States in violation of immigration laws may qualify as lawfully present in this country, and be eligible to work and obtain an education. The program has over 800,000 people enrolled, including some who are members of the Plaintiffs' respective organizations. The Defendants' decision to terminate the program leaves the DACA registrants open to deportation, thereby losing their homes, livelihood, family, and communities. The effective end of the program is March 5, 2018, less than five months away.

This action was filed on September 18, 2017 and served on September 25, 2017. It

alleges violations of the Due Process Clause of the United States Constitution and violations of the Administrative Procedure Act and the Regulatory Flexibility Act. The action seeks declaratory and injunctive relief.

Other cases challenging the same conduct and seeking the same or similar relief are pending in the Northern District of California, captioned as *Regents of the University of California, et al., v. U.S. Dep't. of Homeland Security, et al*, C-17-05211 WHA (N.D.Ca.), in the Eastern District of New York, captioned as *State of New York et al v. Donald Trump, et al*, 1:17-cv-052280-NGG-JO (E.D.N.Y), and most recently in the District of Maryland, *Casa De Maryland et al v. U.S. Department of Homeland Security et al*, 8:17-cv-02942 (D.Md.) Copies of the expedited scheduling orders entered in the first two cases are attached as Exhibits A & B. The Maryland case, filed on October 5th, was set for an early case status conference on November 1, 2017. (Ex. C).

The Plaintiffs propose adoption of a Case Management Order with a schedule that is similar to the schedules adopted by the Courts presiding over the other, sister cases. The Plaintiffs originally proposed this approach to Defendants by voicemail on September 28, 2017 and, having received no response, enclosed a proposed schedule by email on October 13, 2017. Ex. D, (Oct. 13, 2017 email from D. McNamara to B. Rosenberg). On October 17, 2017, Defendants responded that they would not consent to an expedited schedule in this matter. Ex. E (Oct. 17, 2017 email from Bechenhauer to McNamara).

III. STANDARD

“Federal Rule of Civil Procedure 16 vests the district court with early control over cases ‘toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery.’” *In re Arizona*, 528 F.3d 652, 657 (9th Cir. 2009), *cert. denied*, 129 S.Ct.

2852 (2009) (quoting Fed.R.Civ.P. 16 advisory committee’s note, 1983 Amendment). The rule notes that the “purposes of a pretrial conference” can include “expediting disposition of the action,” “establishing early and continuing control so that the case will not be protracted because of lack of management,” and “discouraging wasteful pretrial activities.” Fed. R. Civ. P. 16(a).

IV. ARGUMENT

A. An Early Status Conference is Needed Due to the Approaching March 5th Deadline for the Repeal of the DACA Program

The imminent effective date for rescission of the DACA program makes expedition of this litigation necessary in order to afford Plaintiffs the opportunity adjudicate their claims and secure relief from the Defendants’ unlawful action before its effective date on March 5, 2018. The courts in which the other, similar cases are pending adopted expedited schedules for this very reason. *See, e.g.,* Ex. F, Hearing Tr. of Sept. 21, 2017, *Regents of the University of California, et al., v. U.S. Dep’t. of Homeland Security, et al*, C-17-05211 WHA at 22-24.

B. A Compressed Schedule, Permitting Some Discovery, Is Needed

The schedule the Plaintiffs propose here follows closely the schedules adopted in the other principal cases. In an effort to minimize duplication in any discovery needed in this action and in the briefing undertaken here, the attached schedule sets due dates for briefing in this action that follow by a brief period the dates on which briefs on the same subject are due in the sister cases. And the proposed Case Management Order would permit the parties in this action to use discovery conducted in the sister cases in order to reduce, and possibly eliminate, the need for discovery in this action. Moreover, the proposed order does not alter Defendants’ deadline for a response to the original complaint or a motion to dismiss. Since other courts have imposed discovery and motion deadlines that precede those proposed in Plaintiffs’ schedule, no prejudice to Defendants exist.

V. **CONCLUSION**

For the reasons stated above, the Court should issue the proposed Case Management Order and, to the extent necessary, convene a case management conference as soon as its schedule may permit.

October 24, 2017

Respectfully submitted,

/s/ Joseph M. Sellers

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2017, I electronically filed the above document with the Clerk of the Court using the ECF, who in turn sent notice to all registered ECF recipients in the above matter.

Dated: October 24, 2017

/s/ Julia A. Horwitz

Julia A. Horwitz

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF COLORED
PEOPLE (NAACP), THE AMERICAN
FEDERATION OF TEACHERS, AFL-
CIO, AND THE UNITED FOOD AND
COMMERCIAL WORKERS, AFL-CIO,
CLC,

Plaintiffs,

vs.

DONALD J. TRUMP, in his official
capacity as President of the United States,
JEFFERSON BEAUREGARD SESSIONS
III, in his official capacity as the Attorney
General of the United States, ELAINE C.
DUKE, in her official capacity as acting
Secretary of Homeland Security, U.S.
CITIZENSHIP AND IMMIGRATION
SERVICES; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT;
DEPARTMENT OF HOMELAND
SECURITY; AND THE UNITED STATES
OF AMERICA,

Defendants.

Case No.1:17-cv-01907

**REPORT REGARDING SCHEDULING AND CASE MANAGEMENT AND PROPOSED
TRIAL SETTING AND CASE MANAGEMENT ORDER**

In accordance with Federal Rule of Civil Procedure 26(f) and Local Rule 16.3, Counsel for Plaintiffs, the NAACP, the American Federation of Teachers (AFT), and the United Food And Commercial Workers (UFCW), and counsel for Defendants Donald J. Trump, in his official capacity as president of the United States, Jefferson Beauregard Sessions III, in his official capacity as the Attorney General of the United States, Elaine C. Duke, in her official capacity as

Acting Secretary of Homeland Security, U.S. Citizenship and Immigration Services; U.S. Immigration and Customs Enforcement; Department of Homeland Security; and the United States of America (“Defendants” and collectively, “the Parties”) participated in a teleconference as required by Fed. R. Civ. P. 26(f), on September 28, 2017, and then had subsequent communications. Plaintiffs prepared the following report, and invited Defendants’ input, but received none.

I. DESCRIPTION OF THE CASE

a. Plaintiffs’ Position:

Plaintiffs are organizations who count among their members registrants and applicants to the Deferred Action for Childhood Arrivals program (DACA). Plaintiff asserts that the President, his Department of Homeland Security, Attorney General, and immigration enforcement agencies failed to adhere to the Administrative Procedure Act, (APA), the Regulatory Flexibility Act (“RFA”), and the Due Process clause of the Constitution by suddenly discontinuing DACA. It contends that the rescission was unlawful due to 1) the continued cooperation and adherence to the program by DACA applicants and registrants; 2) the substantial reliance interests DACA applicants and enrollees have in the program, and that they acted upon when attending schools, buying cars and homes, and creating a life in the United States; 3) the absence of justification to ending the program; 4) the failure to give proper notice and comment before rescinding the program. The Defendants announced the rescission on September 12th, and the termination of DACA on March 5, 2018. As such, Plaintiffs propose a schedule to complete discovery and dispositive motions in advance of the impending date on which rescission of the DACA Program is scheduled to become effective.

b. Defendants’ Position:

II. MATTERS RELATED TO LOCAL RULE 16:

(1) Whether the case is likely to be disposed of by dispositive motion; and whether, if a dispositive motion has already been filed, the parties should recommend to the Court that discovery or other matters should await a decision on the motion.

a. Plaintiffs' Position:

Plaintiffs seek the administrative record on which the Defendants rely to support rescission of the DACA Program. In addition, Plaintiffs seek to use in this action discovery produced by the Defendants in other, similar cases challenging the same action and seeking the same or similar relief and, to the extent necessary, may seek limited additional discovery of the grounds and factors considered in directing rescission of the DACA Program prior to proceeding with any dispositive motion practice. The schedule adopted in *Regents of the University of California and Janet Napolitano, v. United States Department of Homeland Security and Elaine Duke*, No. 3:17-cv-05211-WHA (ND Cal.), in which similar claims are pending, is attached, as it provides for the same kind of sequencing of discovery and motion practice that the Plaintiffs propose here. (See attachment A).

b. Defendants' Position:

(2) The date by which any other parties shall be joined or the pleadings amended, and whether some or all the factual and legal issues can be agreed upon or narrowed.

a. Plaintiffs' Position:

Plaintiffs moved to amend the complaint to add The AFC-CIO and the UFCW on October 23, 2017. Plaintiffs do not plan any further amendments as to parties. If fact discovery

provides support to additional claims, Plaintiffs will seek leave to amend the complaint within five days of discovery and before November 17, 2017.

b. Defendants' Position:

(3) Whether the case should be assigned to a magistrate judge for all purposes, including trial.

a. Plaintiffs' Position

Plaintiffs oppose such a transfer.

b. Defendants' Position:

(4) Whether there is a realistic possibility of settling the case, and (5) Whether the case could benefit from the Court's alternative dispute resolution (ADR) procedures (or some other form of ADR).

a. Plaintiffs' Position:

While the Plaintiffs are willing to explore a settlement of this case, any such discussions should occur while this litigation proceeds.

b. Defendants' Position:

(6) Whether the case can be resolved by summary judgment or motion to dismiss; dates for filing dispositive motions and/or cross-motions, oppositions, and replies; and proposed dates for a decision on the motions.

a. Plaintiffs' Position:

Plaintiffs believe summary judgment may provide a possible means for resolving the case and sets forth below a proposed schedule.

b. Defendants' Position:

(7) Whether the parties should stipulate to dispense with the initial disclosures required by Fed. R. Civ. P. 26(a)(1), and if not, what if any changes should be made in the scope, form or timing of those disclosures.

a. Plaintiffs' Position:

Plaintiffs would not stipulate to dispensing with initial disclosures, and can provide such disclosures within a week of entry of the scheduling order.

b. Defendants' Position:

(8) The anticipated extent of discovery, how long discovery should take, what limits should be placed on discovery; whether a protective order is appropriate; and a date for the completion of all discovery, including answers to interrogatories, document production, requests for admissions, and depositions.

a. Plaintiffs' Position:

In addition to the administrative record compiled by the Defendants to support its repeal of the DACA Program, Plaintiffs seek access to and use of discovery responses provided by the Defendants in other cases advancing the same or similar claims and seeking similar relief and, to the extent necessary, the opportunity to conduct limited discovery not to exceed 20 Interrogatories and 20 Document Requests. This includes the basis for the decision to terminate DACA, the deadlines created by the Defendants, and the identity of persons involved in those decisions.

b. Defendants' Position:

(9) Whether the requirement of exchange of expert witness reports and information pursuant to Fed. R. Civ. P. 26(a)(2), should be modified, and whether and when depositions of experts should occur.

a. Plaintiffs' Position:

In light of the imminence of March 5th deadline to rescind the program, the schedule for disclosure of any expert witness reports should be truncated consistent with the proposed schedule.

b. Defendants' Position:

(10) In class actions, appropriate procedures for dealing with Rule 23, Fed .R. Civ. P. proceedings, including the need for discovery and the timing thereof, dates for filing a Rule 23 motion, and opposition and reply, and for oral argument and/or an evidentiary hearing on the motion and a proposed date for decision. (11) Whether the trial and/or discovery should be bifurcated or managed in phases, and a specific proposal for such bifurcation.

a. Plaintiffs' Position:

This case is not a class action.

b. Defendants' Position:

(12) The date for the pretrial conference (understanding that a trial will take place 30 to 60 days thereafter).

a. Plaintiffs' Position:

Plaintiffs propose the pretrial conference occur on January 26, 2018.

b. Defendants' Position

(13) Whether the Court should set a firm trial date at the first scheduling conference or should provide that a trial date will be set at the pretrial conference from 30 to 60 days after that conference.

a. Plaintiffs' Position:

In light of the imminent deadline to rescind DACA Program effective on March 5, 2018, Plaintiffs propose that the Court schedule a bench trial within a period less than 30 days after the pretrial conference and proposes the week of February 12, 2018.

b. Defendants' Position:

(14) Such other matters that the parties believe may be appropriate for inclusion in a scheduling order.

a. Plaintiffs' Position:

None

b. Defendants' Position:

III. PROPOSED SCHEDULE

A. Plaintiffs' Proposed Schedule

Action	Proposed Deadline
Discovery Requests from Plaintiff (if any)	November 1, 2017
Defendants' responses to discovery requests	November 10, 2017
Deadline for Adding Claims	November 17, 2017
Defendants' Motion to Dismiss or Answer to the Complaint	November 24, 2017
Cross-Motions for Summary Judgment	December 1, 2017
Opposition to motions	November 30, 2017
Reply to motions	December 8, 2017
Final Pretrial Conference	January 26, 2018
Bench Trial	February 12, 2018

B. Defendants' Proposed Schedule

Dated: October 24, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2017, I electronically filed the above document with the Clerk of the Court using the ECF, who in turn sent notice to all registered ECF recipients in the above matter.

Dated: October 24, 2017

/s/ Julia A. Horwitz

Julia A. Horwitz

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

**CASE MANAGEMENT
ORDER FOR ALL DACA
ACTIONS IN THIS DISTRICT**

After a case management conference at which counsel in all four cases spoke and with the benefit of some agreements, the Court now sets the following case management schedule for all DACA cases in this district:

1. The four above-numbered civil actions in this district all challenge the rescission of the DACA program by the United States Department of Homeland Security. All of these related cases will be coordinated (and possibly later consolidated for trial) as follows.
2. The four sets of plaintiffs are referred to collectively herein as “all plaintiffs,” and various defendants in the four cases are referred to collectively herein as “all defendants.”

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3. All parties shall serve their initial disclosures under FRCP 26, and all defendants shall file and serve the administrative record by **NOON ON OCTOBER 6, 2017**. After a party makes its FRCP 26 disclosure, it may take discovery. All plaintiffs shall be permitted to serve up to a combined total of **TWENTY INTERROGATORIES** and **TWENTY DOCUMENT REQUESTS**, all narrowly directed, plus a reasonable number of depositions. All defendants may serve an equal number of interrogatories and document requests plus a reasonable number of depositions. The time to respond to all discovery requests is cut in half. All discovery disputes are hereby **REFERRED** to **MAGISTRATE JUDGE SALLIE KIM** to be heard and determined on an expedited schedule.
4. A tutorial on DACA, the history of “deferred action,” the history of APA rulemaking for deferred action programs and for analogous contexts, and immigration procedure generally is set for **OCTOBER 3, 2017, AT 8:00 A.M.** One or more counsel for each side shall present. Please avoid argument and adhere to updating the judge on the historical and administrative context.
5. Motions for summary judgment, provisional relief, or to dismiss are due by **NOON ON NOVEMBER 1, 2017**. All plaintiffs shall file one joint brief on their statutory claims, and another on their constitutional claims, each brief limited to **25 PAGES**. A plaintiff may, if truly essential, add a very short supplemental brief on any point unique to that plaintiff. All defendants may file a joint brief in support of their own motion of up to **50 PAGES** but the Court would prefer that the briefing be divided between two memoranda, one devoted to statutory claims and one devoted to constitutional claims, both adding to fifty or fewer pages. Any amicus brief must be filed on the same date as the

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brief it supports, each limited to **15 PAGES**. Amici may not submit evidentiary material, so their briefs should include everything within their 15 pages.

6. Summary judgment and provisional relief motions must be supported by proper declarations under oath. Simply attaching exhibits to briefs will not do. Foundation must be laid under oath. Motions to dismiss, however, need only be directed to the complaints, but if extraneous matter is referenced, then it too must be supported by declaration.
7. Oppositions are due by **NOON ON NOVEMBER 22, 2017**. The oppositions shall be organized to mirror the organization of the openings. No brief shall exceed the length of the relevant opening brief. All plaintiffs shall file a single joint opposition, and all defendants shall file a single joint opposition, each party being permitted to file a short individual supplement to the extent truly needed for issues unique to that party.
8. There will be no page limit on declarations and exhibits, but please be reasonable. All exhibits for a side should be included in that side's joint and tabbed appendix of exhibits (the tabs should protrude for ease of reference). The "individual" exhibits should be included in the joint appendix as well. The exhibits should be numbered. The appendix, however, should not include any item already in the administrative record. Please highlight in yellow any cited passage. Declarations laying foundation for admissibility may simply refer to the exhibits by tab number.
9. Reply briefs are due by **NOON ON DECEMBER 8, 2017**. The replies shall be organized to mirror the organization of the openings (and the oppositions). The briefs shall not exceed half of the pages used in the opposition briefs to which they respond (not to exceed **30 PAGES** in

1 any event). There shall be no reply declarations except for very good
2 cause, the Court being of the view that it is unfair for a movant to
3 deprive the other side of its chance to respond to evidentiary material.
4 If a brief quotes from any deposition or other exhibit, then the brief
5 should quote the entire passage, not just the helpful part. Please do the
6 same for quotations from case law.

7 **10.** A hearing on all motions is set for **DECEMBER 20, 2017, AT 8:00 A.M.**

8 **11.** If necessary, a **BENCH TRIAL** will be held on **FEBRUARY 5, 2018, AT**
9 **7:30 A.M.**, with a **FINAL PRETRIAL CONFERENCE** to be held on
10 **JANUARY 24, 2018, AT 2:00 P.M.**

11 For now, all filings should be made in any civil action to which they pertain *and*, for the
12 sake of coordination, in the low-numbered action (No. C 17-05211 WHA). Counsel shall confer
13 and recommend any better way of organizing the filing system for these cases, including, for
14 example, the possibility of filing everything in the low-numbered action and thereby deeming it
15 to be filed in all actions. Counsel may also stipulate to tweaks in the wording of this order (but
16 not to its substance or timeline). Any such fully-stipulated modifications must be submitted by
17 **SEPTEMBER 29, AT NOON**, failing which this order shall control.

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19 **IT IS SO ORDERED.**

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21 Dated: September 22, 2017.

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23 _____
24 WILLIAM ALSUP
25 UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	
MARTÍN JONATHAN BATALLA VIDAL, et al.,	CASE MANAGEMENT
Plaintiffs,	AND SCHEDULING ORDER
-against-	
ELAINE C. DUKE, et al.,	16-CV-4756 (NGG) (JO)
Defendants.	
-----X	
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STATE OF NEW YORK, et al.,	17-CV-5228 (NGG) (JO)
Plaintiffs,	
-against-	
DONALD TRUMP, et al.,	
Defendants.	
-----X	

James Orenstein, Magistrate Judge:

At a conference before the court on September 26, 2017, the court set a briefing schedule for dispositive motions, and, over the defendants' objection, I ordered discovery to proceed as set forth below:

I. DEADLINES AND COURT APPEARANCES

- | | |
|---|--------------------------------------|
| Joint proposal for schedule of bi-weekly status conferences to address outstanding discovery disputes due by: | September 29, 2017 |
| Deadline for all Rule 26(a)(1) disclosures: | October 4, 2017 |
| Deadline for defendants' production of administrative record and privilege log: | October 6, 2017 |
| Objections to discovery requests due by: | 1 week after service of requests |
| Responses to discovery requests due by: | 2 weeks after service of requests |
| Deposition errata due by: | 1 week after deposition |
| Joint status report due by: | 1 week before each status conference |
| All expert disclosures due by: | November 15, 2017 |
| All discovery to be completed by: | December 15, 2017 |

II. DISCOVERY

a. No stays of discovery absent an explicit court order. Discovery is not automatically stayed by the pendency of a dispositive motion, settlement discussions between the parties, referral to mediation, or an agreement between the parties to suspend discovery. Any application for a stay of discovery must show good cause why such relief should be granted.

b. Written discovery. Unless otherwise agreed to by the parties or so ordered by the court, responses to any request for written discovery pursuant to Rules 33, 34, and 36 of the Federal Rules of Civil Procedure are due no later than 14 days after service of the request. All such requests and responses must conform to Local Civil Rules 26.3 (uniform definitions in discovery requests), 26.5 (cooperation among counsel in discovery), 26.6 (attorney review of form discovery requests), and 26.7 (discovery requests to be read reasonably).

c. Privilege. The privilege log to be produced by October 6, 2017, shall include a description of every document considered within any component of the executive branch as part of the process of determining the policy and actions at issue in these actions that are not being produced and as to which the defendants would assert a claim of privilege, regardless of whether the defendants deem such that record to be part of the official administrative record. Failure to describe a pertinent document in the privilege log due on October 6, 2017, will waive any later assertion of privilege absent a showing of good cause. *See* Loc. Civ. R. 26.2, 26.3.

d. Depositions. Pursuant to Local Civil Rule 26.5, counsel should cooperate, consistent with their clients' legitimate interests, in scheduling and conducting depositions.

i. If counsel cannot agree on a schedule for a given deposition, the deponent must appear at the date, time, and place set forth in a notice properly served pursuant to Fed. R. Civ. P. 30 unless excused by the party that served the notice or by the court.

ii. Counsel are obligated to attempt in good faith to resolve any dispute that arises during a deposition before seeking judicial intervention.

e. Expert discovery. Unless specific deadlines for expert discovery are set forth above, the deadline for completing all discovery includes the production of all expert reports, including any rebuttal reports. The parties must ensure that they have completed underlying fact discovery, and that they have produced initial expert reports, in sufficient time for any rebuttal reports to have been served by the deadline. Unless otherwise ordered, or unless the parties agree to proceed otherwise, expert depositions may take place at any time before trial.

f. Discovery disputes. Parties are obligated to attempt in good faith to resolve discovery disputes before seeking judicial intervention. Any unresolved dispute must be brought to my attention in sufficient time for the dispute to be resolved and discovery to be completed according to the deadlines set forth above. Motions to resolve discovery disputes shall be litigated in accordance with my Individual Practice Rules and Local Civil Rules 37.3 and 6.4. Failure to submit a timely opposition in compliance with applicable rules may result in the motion being granted as unopposed.

g. Timeliness of requests. To be timely, a request for written discovery, deposition notice, or subpoena must be served in sufficient time for the responding party to comply with the request in full before the relevant discovery deadline. In the event that any such discovery demand is untimely, I may decide not to enforce it.

III. REQUIREMENTS FOR STATUS CONFERENCES

a. No later than seven days before each status conference, the parties are directed to file a joint report on the status of the case, the nature of any pending disputes (including the parties' respective arguments on such disputes), and whether discovery is proceeding on schedule. If there are no pending disputes requiring court intervention, I will entertain a joint application to adjourn or cancel the conference. If the parties agree to discuss settlement at the status conference, the parties should also submit *ex parte* statements of their respective settlement positions.

b. All conferences will be in person unless otherwise ordered. Any request to conduct a conference by telephone must be made at least 48 hours before the scheduled start of the conference.

c. All conferences will start on time. Any attorney who does not arrive on time may be directed to obtain a transcript of the proceeding and provide it to the represented party to avoid prejudice to that party arising from proceedings conducted in its absence.

d. Counsel for each party must be fully familiar with the case and prepared to discuss the status of discovery, the party's current settlement position, and any unresolved issue in the case. A party's counsel of record may send substitute counsel only if the latter is fully prepared to discuss all of the matters described above.

e. If a conference cannot proceed due to counsel's failure to appear on time or unpreparedness to discuss the case, I will reschedule the conference and consider an order requiring the attorney responsible for the delay to reimburse the other participants' costs, including reasonable attorneys' fees.

f. Only a party's counsel of record, or an attorney personally authorized to appear by the party (and not simply by the party's counsel of record) may appear on behalf of a party. If a law firm has appeared as counsel of record for a party, any attorney actually employed by that law firm may appear. An attorney acting "of counsel" for a party's counsel of record may not appear without the represented party's explicit authorization, as such an attorney has no authority to make binding representation on behalf of any party. *See* N.Y. Rules of Prof'l Conduct 1.2(c), 22 N.Y.C. R.R. § 1200 (requiring client to give "informed consent" before an attorney may make a limited appearance on the client's behalf).

IV. POST-DISCOVERY MATTERS

a. Dispositive Motions Deadline. The deadline for commencing dispositive motions is the date by which the first action must be taken to commence such a motion pursuant to the individual practices of the district judge to whom this case is assigned. As specified in the individual

practice rules of the assigned district judge (available at www.nyed.uscourts.gov), that action will be either (a) submitting a letter requesting a pre-motion conference, (b) requesting an oral argument date from the district judge, (c) initiating the exchange of statements pursuant to Local Civil Rule 56.1, or (d) filing the notice of motion together with supporting papers.

b. Joint Pretrial Order Deadline. The deadline for submitting a joint pretrial order is the date by which the parties must file a single document that reflects input from all parties and that fully complies with the individual practice requirements of the district judge to whom the case is assigned (not my individual practice requirements, unless the parties have unanimously agreed to refer the case to a magistrate judge for all purposes including the entry of judgment pursuant to 28 U.S.C. § 636(c)). If one party has completed its portion of the proposed pretrial order but cannot obtain input from an adversary, it must so advise me before the deadline.

c. Generally, no extension due to the pendency of summary judgment motions.

i. In cases that are assigned to a district judge whose individual practice rules require the submission of a joint pretrial order no later than 60 days after the close of discovery (as do most judges in this district, *see* www.nyed.uscourts.gov), I will not extend this deadline based on the anticipation or pendency of a summary judgment motion absent an order from the assigned district judge.

ii. The fact that a party intends to seek summary judgment will not be considered good cause to postpone a discussion of settlement at the pretrial conference or the submission of *ex parte* statements of the parties' respective settlement positions in advance.

V. EXTENSIONS OF DEADLINES.

a. The deadlines in this order will be enforced, and in light of the history and circumstances of these actions will be modified only upon a timely showing of the most compelling and unforeseeable of extraordinary circumstances. Failure to comply with a deadline may result in the imposition of appropriate sanctions pursuant to Rules 16 and 37 of the Federal Rules of Civil Procedure, including a recommendation of dispositive relief.

b. While the parties are encouraged to cooperate with each other in conducting discovery, they must not agree among themselves to any extensions or suspensions of discovery that will render them unable to meet any deadline set forth above; any such agreement requires court approval. Similarly, an agreement among the parties to discuss settlement will not excuse failure to comply with any deadline set forth above. Parties wishing to suspend discovery or adjourn a deadline to promote settlement discussions must seek permission from the court.

c. A request for an extension of any deadline submitted less than 14 days before that deadline will be considered untimely and will not be granted, absent extraordinary circumstances.

d. A request for modification of any deadline in this scheduling order must be in writing, and submitted in accordance with Rule II.A of my individual practice rules.

**UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND**

ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770
301-344-0052

MEMORANDUM

TO: Counsel of Record

FROM: Judge Roger W. Titus

RE: *Casa De Maryland, et al., v. United States Dept. of Homeland Security, et al.*
Civil No. RWT-17-2942

DATE: October 20, 2017

* * * * *

Per Plaintiffs' Request for Conference [ECF No. 8], an in-person status conference in the above case is hereby **SCHEDULED** for **November 1, 2017 at 2:00 p.m.**

Despite the informal nature of this ruling, it shall constitute an Order of the Court, and the Clerk is directed to docket it accordingly.

/s/
Roger W. Titus
United States District Judge

Douglas J. McNamara

From: Douglas J. McNamara
Sent: Friday, October 13, 2017 6:55 PM
To: 'Brad.Rosenberg@usdoj.gov'
Cc: Joseph M. Sellers; 'Louard, Janette (jlouard@naacpnet.org)'; Julia Horwitz; Berry, Bradford (bberry@naacpnet.org)
Subject: RE: NAACP v. Trump et al
Attachments: daca - proposed CMO 20171013.docx

Brad, we didn't hear from you today. We would like to move this matter along, and have prepared the draft case management order. We are hopeful that the government can provide its position on each matter. We would like to file a motion for a status conference with the Court early next week, and suggest the attached schedule. Please let us know your thoughts. Thank you for your cooperation.

Douglas J. McNamara
Of Counsel
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From: Douglas J. McNamara
Sent: Thursday, October 12, 2017 5:58 PM
To: 'Brad.Rosenberg@usdoj.gov'
Cc: Joseph M. Sellers; Louard, Janette (jlouard@naacpnet.org)
Subject: NAACP v. Trump et al

Hi, Brad. Are you around tomorrow afternoon for a quick call to discuss case management in the NAACP DACA action? Please let us know. Thanks.

Douglas J. McNamara
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Douglas J. McNamara

From: Beckenhauer, Eric (CIV) <Eric.Beckenhauer@usdoj.gov>
Sent: Tuesday, October 17, 2017 1:17 PM
To: Douglas J. McNamara; Rosenberg, Brad (CIV); Tyler, John (CIV)
Cc: Joseph M. Sellers; 'Louard, Janette (jlouard@naacpnet.org)'; Julia Horwitz; Berry, Bradford (bberry@naacpnet.org)
Subject: RE: NAACP v. Trump et al

Hi Douglas—

Thanks very much for your message, and nice to (virtually) meet you.

We've now had a chance to confer internally, and we plan to move to dismiss, as I believe Brad previously mentioned was our inclination. Thus, we don't believe that filing a Rule 26(f) report would be appropriate, and in any event don't agree that any discussions we've had were for that purpose. As you may be aware, the local rules provide that Rules 16(b) and 26(f) don't apply before an answer has been filed—or at all in record-review cases like this one. LCvR 16.3(b).

Our motion to dismiss will raise threshold justiciability arguments that would be fully dispositive of the case, making discovery particularly inappropriate here. And although discovery is proceeding in the E.D.N.Y. and N.D. Cal. cases, that is happening over our continued objection, and we would likewise object here.

I'd be more than happy to chat about this by phone, if that would be helpful.

Thanks again,
Eric

Eric B. Beckenhauer
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
(202) 514-3338
(202) 616-8470 (fax)
eric.beckenhauer@usdoj.gov

From: Douglas J. McNamara [mailto:DMcNamara@cohenmilstein.com]
Sent: Tuesday, October 17, 2017 12:35 PM
To: Rosenberg, Brad (CIV) <BRosenbe@civ.usdoj.gov>; Beckenhauer, Eric (CIV) <EBeckenh@civ.usdoj.gov>; Tyler, John (CIV) <JTyl@CIV.USDOJ.GOV>
Cc: Joseph M. Sellers <JSellers@cohenmilstein.com>; 'Louard, Janette (jlouard@naacpnet.org)' <jlouard@naacpnet.org>; Julia Horwitz <jhorwitz@cohenmilstein.com>; Berry, Bradford (bberry@naacpnet.org) <bberry@naacpnet.org>
Subject: RE: NAACP v. Trump et al

Brad and Eric: any comments on the proposed CMO? We would like to file something tomorrow with the Court. Thanks.

Douglas J. McNamara
Of Counsel

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From: Rosenberg, Brad (CIV) [<mailto:Brad.Rosenberg@usdoj.gov>]
Sent: Friday, October 13, 2017 7:43 PM
To: Douglas J. McNamara; Beckenhauer, Eric (CIV); Tyler, John (CIV)
Cc: Joseph M. Sellers; 'Louard, Janette (jlouard@naacpnet.org)'; Julia Horwitz; Berry, Bradford (bberry@naacpnet.org)
Subject: RE: NAACP v. Trump et al

Hi Douglas:

I'm sorry that I was not able to talk to you today. I am looping-in two of my colleagues, Eric Beckenhauer and John Tyler, who hopefully can get back to you early next week.

Thanks, and have a nice weekend.

-Brad

From: Douglas J. McNamara [<mailto:DMcNamara@cohenmilstein.com>]
Sent: Friday, October 13, 2017 6:55 PM
To: Rosenberg, Brad (CIV) <BRosenbe@civ.usdoj.gov>
Cc: Joseph M. Sellers <JSellers@cohenmilstein.com>; 'Louard, Janette (jlouard@naacpnet.org)'
<jlouard@naacpnet.org>; Julia Horwitz <jhorwitz@cohenmilstein.com>; Berry, Bradford (bberry@naacpnet.org)
<bberry@naacpnet.org>
Subject: RE: NAACP v. Trump et al

Brad, we didn't hear from you today. We would like to move this matter along, and have prepared the draft case management order. We are hopeful that the government can provide its position on each matter. We would like to file a motion for a status conference with the Court early next week, and suggest the attached schedule. Please let us know your thoughts. Thank you for your cooperation.

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Hi, Brad. Are you around tomorrow afternoon for a quick call to discuss case management in the NAACP DACA action? Please let us know. Thanks.

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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.)

NO. C 17-05329 WHA

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.)

DULCE GARCIA, MIRIAM GONZALEZ)
AVILA, SAUL JIMENEZ SUAREZ,)
VIRIDIANA CHABOLLA MENDOZA,)
NORMA RAMIREZ and JIRAYUT)
LATTHIVONGSKORN,)

Plaintiffs,)

VS.)

NO. C 17-05380 WHA

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.)
_____)

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

APPEARANCES :

For the Plaintiffs in case C 17-05211 WHA:
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COVINGTON & BURLING LLP
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BY: MARK H. LYNCH, ATTORNEY AT LAW
ALEXANDER A. BERENGAUT, ATTORNEY AT LAW

For the Plaintiffs in case C 17-05235 WHA:
 OFFICE OF THE ATTORNEY GENERAL
 State of California
 1515 Clay Street - Suite 2000
 Oakland, California 94612
BY: JAMES ZAHRADKA, DEPUTY ATTORNEY GENERAL

For the Plaintiff in case C 17-05329 WHA:
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 840 Malcolm Road
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BY: NANCY L. FINEMAN, ATTORNEY AT LAW

For the Plaintiffs in case C 17-05380 WHA:
 GIBSON, DUNN & CRUTCHER LLP
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 San Francisco, California 94105
BY: ETHAN DETTMER, ATTORNEY AT LAW

For the Plaintiffs in case C 17-05380 WHA:
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BY: MARK ROSENBAUM, ATTORNEY AT LAW

For the Defendants:
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 Civil Division
 United States Attorney's Office
 450 Golden Gate Avenue - 9th Floor
 San Francisco, California 94102
BY: SARA WINSLOW, ASSISTANT U.S. ATTORNEY

1 **APPEARANCES:** (CONTINUED)

2 For the Defendants:

3 U.S. DEPARTMENT OF JUSTICE
4 CIVIL DIVISION
5 Federal Programs Branch
6 950 Pennsylvania Avenue, N.W.
7 Washington, D.C. 20530

8 **BY: BRETT A. SHUMATE**
9 **DEPUTY ASSISTANT ATTORNEY GENERAL**

10 U.S. DEPARTMENT OF JUSTICE
11 CIVIL DIVISION
12 Federal Programs Branch
13 20 Massachusetts Avenue, N.W.
14 Washington, D.C. 20001

15 **BY: BRAD P. ROSENBERG, SENIOR TRIAL COUNSEL**

16
17
18
19
20
21
22
23
24
25

1 Thursday - September 21, 2017

10:28 a.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Calling Civil Case Number 17-5211,
5 17-5235, and 17-5329, Regents of the University of California
6 versus U.S. Department of Homeland Security, State of
7 California versus U.S. Department of Homeland Security, and the
8 City of San Jose versus Donald Trump.

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

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

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

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

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

18 **MR. DETTMER:** Thank you.

19 **THE COURT:** Appearances, please.

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

23 **THE COURT:** Okay. Welcome to you.

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

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

3 **THE COURT:** Great. Welcome to you.

4 **MR. ZAHRADKA:** Thank you.

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

7 **THE COURT:** All right. Welcome again.

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

11 **THE COURT:** Thank you. Welcome.

12 **MR. LYNCH:** Thank you.

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

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

18 **THE COURT:** Again, welcome.

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

22 **THE COURT:** Okay. Thank you.

23 And over here?

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

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

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

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

13 **MR. SHUMATE:** Yes, Your Honor.

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

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

21 Now, are you-all on the same case?

22 **MR. ZAHRADKA:** No.

23 **THE COURT:** Okay.

24 **MR. ZAHRADKA:** One at a time?

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

1 the Regents?

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

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

7 Okay. The Regents get to go first.

8 **MR. DAVIDSON:** Thank you, Your Honor.

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

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

18 **MR. DAVIDSON:** So that issue is the following:

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

1 The Government has --

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

5 **MR. DAVIDSON:** Correct.

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

8 **MR. DAVIDSON:** Two years.

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

11 **MR. DAVIDSON:** Correct.

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

14 **MR. DAVIDSON:** Two years.

15 **THE COURT:** Two years. All right.

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

19 **MR. DAVIDSON:** The announcement rescinding DACA said
20 the renewal applications would no longer be processed after
21 October 5th. So it's possible that someone could receive a
22 letter yesterday saying, "As in the ordinary course, you have
23 120 days to renew," but they don't have 120 days to renew
24 according to the policy. They've got 15 days to renew.

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

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

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

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

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

12 **MR. SHUMATE:** Sorry.

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

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

17 **THE COURT:** All right, but slowly.

18 **MR. SHUMATE:** (reading)

19 "DHS will adjudicate on an individual case-by-case
20 basis properly filed pending DACA renewal requests and
21 associated applications for employment authorization
22 documents from current beneficiaries that have been
23 accepted by the Department as of the date of this
24 memorandum and from current beneficiaries whose benefits
25 will expire between the date of this memorandum and

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

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

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

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

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

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

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

19 Is that correct?

20 **MR. SHUMATE:** That's correct.

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

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

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

3 **THE COURT:** All right. Please.

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

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

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

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

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

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

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

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

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

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

20 Okay. You have a seat.

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

23 Okay. What else is on your agenda?

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

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

3 The -- in order to --

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

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

15 **THE COURT:** Nobody wants to interfere with the what?

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

21 **THE COURT:** Of course.

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

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

1 by Congress; right?

2 **MR. DAVIDSON:** Yes, he says that.

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

7 **MR. DAVIDSON:** Indeed.

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

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

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

22 **MR. DAVIDSON:** Yes.

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

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

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

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

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

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

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

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

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

7 I just want to reiterate --

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

10 **MR. SHUMATE:** Your Honor, we are --

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

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

14 **THE COURT:** How about if I order it?

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

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

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

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

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

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

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

12 If I could throw out a suggested briefing schedule.

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

14 **MR. SHUMATE:** Okay.

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

16 **MR. SHUMATE:** Okay.

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

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

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

24 **THE COURT:** Sure.

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

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

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

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

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

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

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

25 **THE COURT:** But they got terminated?

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

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

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

13 **MR. DAVIDSON:** Yes.

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

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

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

1 record, they both cross-move for summary judgment.

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

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

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

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

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

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

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

1 **MR. SHUMATE:** Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 **THE COURT:** Give me your schedule.

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

1 **THE COURT:** That's a Wednesday; right?

2 **MR. DAVIDSON:** That is a Wednesday.

3 **THE COURT:** Okay, Wednesday.

4 All right. And their response when?

5 **MR. DAVIDSON:** December 6th.

6 **THE COURT:** That's too far out.

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

9 **THE COURT:** Then what?

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

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

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

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

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

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

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

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

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

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

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

20 **THE COURT:** Is that true?

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

1 to make sure that's clear on the record.

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

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

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

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

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

17 **THE COURT:** All right. Does that satisfy you?

18 **MR. DAVIDSON:** It does, Your Honor.

19 **THE COURT:** All right. Thank you.

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

21 **MR. SHUMATE:** Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

1 cross-summary judgment motions --

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

6 **MR. ZAHRADKA:** That seems appropriate.

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

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

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

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

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

21 **THE COURT:** Of course.

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

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

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

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

17 **THE COURT:** Okay. Thank you.

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

20 **THE COURT:** All right. Who's next?

21 **MS. FINEMAN:** Good morning, Your Honor.

22 Nancy Fineman.

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

1 numbers.

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

3 **MS. FINEMAN:** We are, Your Honor.

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

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

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

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

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

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

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

12 So making sure --

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

18 **MS. FINEMAN:** And that's --

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

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

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

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

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

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

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

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

1 you lose.

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

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

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

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

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

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

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

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

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

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

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

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

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

24 **THE COURT:** And you would reject their suggestions.

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

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

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

8 **MR. SHUMATE:** Thank you, Your Honor.

9 **THE COURT:** All right. Who's next?

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

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

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

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

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

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

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

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

20 And if there are fact issues and our case --

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

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

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

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

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

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

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

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

23 **MR. DETTMER:** Yes, Your Honor.

24 **THE COURT:** So they're registered now?

25 **MR. DETTMER:** Correct.

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

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

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

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

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

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

25 **MR. DETTMER:** Correct, Your Honor.

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

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

11 I think --

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

14 **MR. SHUMATE:** Right, Your Honor.

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

17 **MR. DETTMER:** December 8th.

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

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

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

3 **MR. SHUMATE:** I think that makes sense.

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

6 **MR. SHUMATE:** I think that makes sense.

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

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

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

20 **THE COURT:** Okay. Hang on a minute.

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

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

25 **THE COURT:** All right. Read it out loud.

1 **MR. SHUMATE:** (reading)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 **THE COURT:** All right. Go ahead.

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

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

22 **MR. ZAHRADKA:** Of course.

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

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

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

4 **THE COURT:** All right.

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

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

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

12 **THE COURT:** All right.

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

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

19 **MR. ZAHRADKA:** That's correct.

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

22 **MR. ZAHRADKA:** That's correct.

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

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

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

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

11 **THE COURT:** Well, you said there --

12 **MR. ZAHRADKA:** A line of cases. Sorry.

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

16 **MR. ZAHRADKA:** Yes, sir.

17 **THE COURT:** All right. Yeah.

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

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

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

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

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

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

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

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

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

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

3 **MR. DAVIDSON:** Like a Supreme Court opinion.

4 **THE COURT:** What?

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

7 **THE COURT:** Is that the way they do it?

8 **MR. DAVIDSON:** Yeah.

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

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

16 Please try to honor the page limits. I will be generous
17 on giving you more, but please try your best. But each of
18 those have it. So you get 25 pages on the constitutional one,
19 25 pages on the statutory one.

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

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

1 reply.

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

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

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

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

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

16 Just to make sure that I understand, because we have four
17 sets of plaintiffs and each set of plaintiffs except for the
18 City of San Jose has multiple plaintiffs, that however the
19 Court sets up its briefing with the number of pages, that we
20 have a like number of pages to respond. So if there are a
21 total number of 50 pages allowed for the plaintiffs, then the
22 Government would receive 50 pages in response, or would it be
23 100?

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

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

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

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

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

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

19 Do you understand what I'm saying?

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

22 **THE COURT:** Okay. Good.

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

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

9 Go ahead.

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

12 **THE COURT:** Sure.

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

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

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

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

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

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

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

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

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

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

5 **MR. ROSENBERG:** All right.

6 **THE COURT:** Okay.

7 **MR. ROSENBERG:** Thank you.

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

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

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

25 Nevertheless, on your side, please coordinate your

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

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

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

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

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

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

1 do that promptly?

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

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

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

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

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

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

1 as for the submission of the administrative record.

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

4 **MR. DAVIDSON:** Very well, Your Honor.

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

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

9 **MR. DAVIDSON:** Understood. Very well.

10 **THE COURT:** You're looking quizzical.

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

14 **THE COURT:** Okay. Good.

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

17 **MR. ROSENBAUM:** Your Honor, one other matter.

18 **THE COURT:** Sure.

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

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

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

5 **MR. ROSENBAUM:** That's perfect.

6 **THE COURT:** All right.

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

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

13 One issue that has come up --

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

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

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

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

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

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

8 **MS. FINEMAN:** Not us.

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

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

11 **MR. DETTMER:** Yes.

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

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

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

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

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

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

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

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

18 Okay?

19 **MR. DAVIDSON:** Very well.

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

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

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

10 Is that something you would be interested in doing?

11 **MR. DETTMER:** Yes, Your Honor.

12 **MS. FINEMAN:** Yes.

13 **MR. ZAHRADKA:** Yeah.

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

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

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

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

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

3 **MR. DETTMER:** Your Honor, Ethan Dettmer.

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

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

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

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

25 **MR. DETTMER:** We'd welcome the opportunity,

1 Your Honor.

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

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

5 **THE COURT:** Okay. Good.

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

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

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

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

14 **MR. DETTMER:** Okay.

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

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

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

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

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

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

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

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

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

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

22 **THE COURT:** What?

23 **MR. ROSENBAUM:** That's correct.

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

