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

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

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05211-WHA

NOTICE OF UNOPPOSED
ADMINISTRATIVE MOTION AND
MOTION FOR ADDITIONAL PAGES FOR
JOINT LETTER RE DISCOVERY DISPUTE

Judge: Honorable Sallie Kim

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

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05235-WHA

CITY OF SAN JOSE, a municipal corporation,

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05329-WHA

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

Plaintiffs,

v.

UNITED STATES OF AMERICA, DONALD J. TRUMP, in his official capacity as President of the United States, U.S. DEPARTMENT OF HOMELAND SECURITY, and ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security,

Defendants.

CASE NO. 17-CV-05380-WHA

COUNTY OF SANTA CLARA and
SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 521,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, JEFFERSON
BEAUREGARD SESSIONS, in his official
capacity as Attorney General of the United
States; ELAINE DUKE, in her official
capacity as Acting Secretary of the Department
of Homeland Security; and U.S.
DEPARTMENT OF HOMELAND
SECURITY,

Defendants.

CASE NO. 17-CV-05813-WHA

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**NOTICE OF UNOPPOSED ADMINISTRATIVE MOTION
AND ADMINISTRATIVE MOTION
FOR ADDITIONAL PAGES FOR JOINT LETTER RE DISCOVERY DISPUTE**

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that plaintiffs from *Regents of the Univ. of Cal., et al. v. U.S. Dep’t of Homeland Sec., et al.*, No. 3:17-cv-05211-WHA; *State of Cal., et al. v. U.S. Dep’t of Homeland Sec., et al.*, No. 3:17-cv-05235-WHA; *City of San Jose v. Donald J. Trump, et al.*, No. 3:17-cv-05329-WHA; *Garcia, et al. v. United States of America, et al.*, No. 3:17-cv-05380-WHA; and *County of Santa Clara, et al., v. Trump, et al.*, No. 3:17-cv-05813-WHA (collectively, “Plaintiffs”) hereby make an administrative motion pursuant to Local Rule 7-11 to be allowed three additional pages in their joint letter relating to privileges asserted in depositions in this matter.

Plaintiffs make this motion because the issues raised in the letter are complex and require more discussion than the eight double-spaced pages specified in the Court’s standing order allows for. The letter addresses three distinct privileges, each with its own complexities, and five depositions. The parties have made diligent efforts to address all of these issues within the eight-page limit but have been unable to.

Defendants have stipulated to this motion.

Dated: October 23, 2017

Respectfully submitted,

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Attorney General of California

/s/ James F. Zahradka II
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Deputy Attorney General
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Service Employees International Union Local 521

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

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

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05211-WHA

**STIPULATION AND [PROPOSED] ORDER
RE NOTICE OF UNOPPOSED
ADMINISTRATIVE MOTION AND
MOTION FOR ADDITIONAL PAGES FOR
JOINT LETTER RE DISCOVERY DISPUTE**

Judge: Honorable Sallie Kim

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

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05235-WHA

CITY OF SAN JOSE, a municipal corporation,

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05329-WHA

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

Plaintiffs,

v.

UNITED STATES OF AMERICA, DONALD J. TRUMP, in his official capacity as President of the United States, U.S. DEPARTMENT OF HOMELAND SECURITY, and ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security,

Defendants.

CASE NO. 17-CV-05380-WHA

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COUNTY OF SANTA CLARA and
SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 521,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, JEFFERSON
BEAUREGARD SESSIONS, in his official
capacity as Attorney General of the United
States; ELAINE DUKE, in her official
capacity as Acting Secretary of the Department
of Homeland Security; and U.S.
DEPARTMENT OF HOMELAND
SECURITY,

Defendants.

CASE NO. 17-CV-05813-WHA

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On October 23, 2017, Plaintiffs filed an Administrative Motion for Additional Pages for Letter re Discovery Dispute. Defendants hereby stipulate to that motion.

IT IS SO STIPULATED.

Dated: October 23, 2017

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Deputy Attorney General
Attorneys for State of California

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Assistant Director, Federal Programs Branch

/s/ Brad P. Rosenberg
BRAD P. ROSENBERG
Senior Trial Counsel
Attorneys for Defendants and Non-Party
United States of America

Filer's Attestation:

Pursuant to Local Rule 5-1(h)(3), I attest under penalty of perjury that concurrence in the filing of the document has been obtained from each of the other Signatories.

Dated: October 23, 2017

Respectfully submitted,

/s/ James F. Zahradka II
James F. Zahradka II

1 Having considered the papers and pleadings on file, the Court GRANTS the Unopposed
2 Administrative Motion for Additional Pages for Joint Letter re Discovery Dispute. The parties'
3 joint letter shall not exceed 11 double-spaced pages, excluding the cover page and signature
4 pages.

5 **PURSUANT TO STIPULATION, IT IS SO ORDERED.**

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7 Dated: _____

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10 THE HONORABLE SALLIE KIM
11 UNITED STATES MAGISTRATE JUDGE
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28 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05211-WHA

**JOINT LETTER BRIEF REGARDING
DEPOSITION OF ACTING SECRETARY
OF HOMELAND SECURITY DUKE**

Judge: Honorable Sallie Kim

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

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05235-WHA

CITY OF SAN JOSE, a municipal corporation,

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05329-WHA

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

Plaintiffs,

v.

UNITED STATES OF AMERICA, DONALD J. TRUMP, in his official capacity as President of the United States, U.S. DEPARTMENT OF HOMELAND SECURITY, and ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security,

Defendants.

CASE NO. 17-CV-05380-WHA

COUNTY OF SANTA CLARA and
SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 521,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, JEFFERSON
BEAUREGARD SESSIONS, in his official
capacity as Attorney General of the United
States; ELAINE DUKE, in her official
capacity as Acting Secretary of the Department
of Homeland Security; and U.S.
DEPARTMENT OF HOMELAND
SECURITY,

Defendants.

CASE NO. 17-CV-05813-WHA

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1 The undersigned hereby attest that counsel for Defendants and counsel for Plaintiffs met and
2 conferred telephonically on October 17-20, 2017 and finalized the procedures for drafting the joint
3 letter on October 20, 2017. The parties have complied with Section 9 of the Northern District's
4 Guidelines for Professional Conduct regarding discovery before filing this joint letter brief.

5
6 Dated: October 23, 2017

Respectfully submitted,

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22 *Service Employees International Union Local 521*

October 23, 2017

The Honorable Sallie Kim
United States District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

Re: Application of the Attorney-Client, Deliberative Process and Executive Privileges to
Deposition Testimony in *State of California v. Department of Homeland Security*
Case No. 17-cv-5235-WHA (N.D. Cal.) and related cases

Dear Judge Kim:

The parties jointly submit this letter brief concerning Defendants' assertion of the attorney-client and deliberative process privileges during five depositions.¹ These issues are likely to recur in depositions scheduled over the next two weeks.

I. Plaintiffs' Argument

Defendants have taken the position that the attorney-client privilege and deliberative process privilege categorically preclude any inquiry into the substance of the agency's decision to rescind DACA.² This position is inconsistent with Ninth Circuit precedent as well as Judge Alsup's AR Order³, holding that (1) Defendants have waived attorney-client privilege by asserting the legality of DACA and/or litigation risk as the ground for agency action and (2) the factors articulated in *F.T.C. v. Warner Commun. Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984), require disclosure of further materials notwithstanding any application of the deliberative process privilege. Plaintiffs ask this Court to (1) overrule the privilege objections that Defendants interposed during the witnesses' depositions; (2)

¹ Relevant portions of the deposition transcripts are attached as Exhibits A-D; assertions of the attorney-client privilege and deliberative process privilege are highlighted. Further background regarding this case is found in the joint letter relating to the "apex doctrine," which the parties submitted to the Court earlier today.

² *See, e.g.*, Nealon Tr. 182:6-12 (counsel explaining Defendants' position that privilege covered all "substantive statements" made at agency meetings regarding DACA other than the witness's description, "at a high level of generality," of the topics discussed at those meetings).

³ Defendants argue that the fact that they have filed for mandamus with the Ninth Circuit means that a ruling by this Court would be "premature." However, this case is on an expedited timeline and these issues cannot wait for resolution, especially given the fact that depositions are taking place almost daily. Further, the Ninth Circuit has not ruled on Defendants' request for an administrative stay.

permit Plaintiffs to conduct additional depositions of these witnesses, if necessary;⁴ (3) order the witnesses to produce documents referenced in their testimony as discussed below; and (4) limit Defendants' assertion of the attorney-client and deliberative process privileges in subsequent depositions consistent with the AR Order and this Court's resolution of the instant issue.

A. The Court Should Overrule Defendants' Attorney-Client Privilege Assertions.

The attorney-client privilege is strictly construed. *Weil v. Inv./Indicators, Research & Mgt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). The party asserting the privilege bears the burden of proving both that it applies and that it has not been waived. *Id.* at 25. As Judge Alsup recognized, the privilege "may not be used both as a sword and a shield," and "[w]here a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived." *Chevron Corp. v. Pennziol Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992); *see* AR Order at 9 (ECF 79).

Granting in part Plaintiffs' motion to supplement the administrative record, Judge Alsup found that Defendants waived attorney-client privilege by placing the legality of DACA at issue in the decision to rescind. AR Order at 9. The same analysis holds for deposition testimony regarding Defendants' assessment of the legality of DACA or evaluation of the litigation risk associated with retaining DACA. Plaintiffs therefore ask the Court to overrule Defendants' objections based on attorney-client privilege to such testimony during the Nealon, McCament, Miller, and Neufeld depositions⁵ and to prevent Defendants from asserting it in later depositions as to such testimony.⁶

⁴ Defendants urge the Court not to re-open depositions, but "explore potential alternatives to deposition testimony." While Plaintiffs stand ready to maximize the efficiency of discovery, this Court should not reward Defendants for making inappropriate privilege objections by allowing deponents to avoid providing live testimony.

⁵ Nealon Tr. 52:25-53:10, 54:1-9, 54:14-20, 54:22-55:1, 79:9-15, 84:24-85:5, 86:1-6, 87:16-21, 87:23-88:4, 123:7-11, 145:12-19; McCament Tr. 81:16-82:2, 84:1-6, 129:10-17, 130:2-10; Miller Tr. 96:1-5, 96:17-24, 97:3-9; Neufeld Tr. 79:3-7, 87:15-20, 91:5-20, 127:8-17, 150:5-15.

⁶ Defendants' assertion that Judge Alsup applied a "limiting principle" on his ruling relating to attorney-client privilege that affects the analysis here falls flat. The "legality of DACA" and "litigation risk" regarding which Plaintiffs assert a right to obtain testimony are directly tied to the question of whether DACA "was an unlawful exercise of executive power." The latter is the basis on which Texas and other states threatened to expand their lawsuit, AR 238-240 (ECF 64-1), a threat which ostensibly was Defendants' rationale for their decision.

B. The Court Should Overrule Defendants’ Deliberative Process Objections.

The deliberative process privilege was developed to “protect the quality of agency decisions” by “promot[ing] frank and independent discussion among those responsible for making governmental decisions” and “protect[ing] against premature disclosure of proposed agency policies or decisions.” *Warner*, 742 F.2d at 1161. It is a qualified privilege only, applicable to “predecisional” documents containing “opinions, recommendations, or advice about agency policies.” *Id.* The privilege may be overcome where the litigant’s need for the materials and the public’s need “for accurate fact-finding override the government’s interest in non-disclosure.” *Id.* The *Warner* court articulated four factors to consider: “1) the relevance of the evidence; 2) the availability of other evidence; 3) the government’s role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” *Id.*

Applying the *Warner* factors favors disclosure in this matter. First, Defendants have made agency materials and deliberation regarding the legality and litigation risk of DACA directly relevant to this litigation by basing their decision to terminate DACA based on those two factors, AR 255 (ECF 64-1)—a rationale which Judge Alsup characterized as “the exact opposite of the decision by the very same agency in February where they decided to carve out the DACA program from any revocation.” Hearing Tr. 26:1-3 (ECF 78-1); see *Elec. Frontier Found. v. U.S. Dept. of J.*, 739 F.3d 1, 11 (D.C. Cir. 2014) (privilege does not apply “when predecisional recommendations . . . are expressly adopted in [a] final, nonexempt memorandum”).⁷

⁷ Although discovery is the exception to the rule in APA cases, the Ninth Circuit has recognized that discovery may be appropriate where there is limited time for judicial review of an agency action, when deposition or other materials outside of the record are necessary to determine whether the agency has considered all relevant factors or explained the basis for its action, when there is evidence the agency relied on materials outside of the administrative record, or when plaintiffs made a showing of bad faith. *Natl. Audubon Soc. v. U.S. Forest Serv.*, 46 F.3d 1437, 1447 & n.9 (9th Cir. 1993). All of these factors are present here.

Defendants’ argument that the legal analysis underlying the DACA rescission decision—other than the Attorney General’s letter which is part of the AR—has not been incorporated into the final decisional document is unavailing. Judge Alsup expressly—and correctly—found that Defendants could not assert privilege to “conceal all . . . legal analysis

The basis of Defendants’ decision is also directly at issue in Plaintiffs’ equal protection and due process claims, including claims that the agency’s proffered justification serves as a fig-leaf for the scapegoating of immigrants; that the agency was motivated by improper discriminatory intent and animus toward Mexican and Latino immigrants; and that the agency intends to renege on its promises to DACA applicants not to use the sensitive information they provided in their applications for immigration enforcement purposes. Tellingly, Defendants utterly fail to discuss these claims in their discussion of the first *Warner* factor.⁸

Second, these materials and communications are the **only** source of information about the agency’s intent and potential animus—a fact heavily favoring disclosure, particularly given the civil rights implications here.⁹ Third, the government’s deliberations on rescission are central to this case “and its intent in crafting the policy is a primary issue.” *Az. Dream Act Coalition v. Brewer*, 2014 WL 171923, at *3 (D. Ariz. Jan. 15, 2014). Fourth, the public need “for accurate fact-finding override[s] the government’s interest in non-disclosure” in this matter. *Warner*, 742 F.2d at 1161. As the D.C. Circuit explains, when the agency adopts predecisional recommendations into a final, nonexempt memorandum “there is no longer any need to protect the consultative process.” *Afshar v. Dept. of State*, 702 F.2d 1125, 1142 (D.C. Cir. 1983).¹⁰

[other than the Attorney General’s letter] available to the Acting Secretary and Attorney General.” Accordingly, Judge Alsup overruled Defendants’ objections as to a number of documents on **both** attorney-client and deliberative process grounds, rejecting this argument. *Compare* AR Order at 13 with Privilege Log (ECF 71-2).

⁸ Defendants attempt to incorporate large swaths of their mandamus petition by reference, an improper attempt to circumvent this Court’s page limit on joint letters and direction that “relevant legal authority” should be contained in the letter itself. The Court should not consider these arguments; if it decides to consider them, Plaintiffs should be allowed to supplement this letter with a corresponding number of pages.

⁹ As the D.C. Circuit explains, “if either the Constitution or a statute makes the nature of governmental officials’ deliberations the issue, the privilege is a nonsequitur.” *In re Subpoena Duces Tecum*, 145 F.3d 1422, 1424 (D.C. Cir.), *modified*, 156 F.3d 1279 (D.C. Cir. 1998); *see also* *L.H. v. Schwarzenegger*, 2007 WL 2009807, at *8 (E.D. Cal. July 6, 2007) (“when the issues involved are alleged violations of federally-protected civil rights, courts have consistently found that [the] need [for deliberative materials] is heightened and the privilege is outweighed”).

¹⁰ Defendants point to a few scraps of ostensibly “substantive” testimony Plaintiffs have managed to obtain despite Defendants’ blanket objections as undermining Plaintiffs on this score. But the fact that these weak, marginally relevant statements are the best Defendants can point to actually supports Plaintiffs’ arguments, showing how Defendants’ objections prevented meaningful testimony as to the substance of the relevant deliberations.

Applying the *Warner* factors on *in camera* review of the government's submission of materials withheld from the administrative record based on the deliberative process privilege, Judge Alsup ordered numerous items to be disclosed. AR Order at 13. Plaintiffs ask this Court to do the same with respect to information sought through deposition, including information pertaining to Defendants' legal analysis;¹¹ whether Defendants failed to consider relevant factors in their deliberations about rescinding DACA;¹² whether Defendants intend to misuse DACA grantees' personal information for immigration enforcement purposes;¹³ and whether Defendants may have relied on other, unstated rationales to rescind the DACA program.¹⁴ The need for accurate judicial fact-finding on a decision that will affect the lives and well-being of more than 800,000 individuals and their families and communities clearly outweighs whatever residual interest the government may have in protecting the "frank" communications that have already been the subject of an Office of Legal Counsel memorandum and briefing in prior litigation.¹⁵

Finally, any applicable privilege is limited to "predecisional" documents containing "opinions, recommendations, or advice," *Warner*, 742 F.2d at 1161, that cannot be readily segregated from non-privileged materials. *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir 2008); see *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866, 869 (D.C. Cir. 1980) (privilege generally does not apply to directives from senior officials to subordinates). Accordingly, the Court should overrule Defendants' blanket objections to the extent they seek to assert privilege as to (1) facts, (2) matters that were no longer predecisional, or (3) segregable non-privileged matter.¹⁶

¹¹ E.g., Nealon Tr. 52:25-53:11, 54:1-55:1 (counsel's input on rescission); McCament Tr. 248:17-249:3.

¹² E.g., Nealon Tr. 51:11-19, 176:21-177:1; Neufeld Tr. at 48:17-21, 91:5-20, 127:8-17 (questions re. implementation).

¹³ E.g., Nealon Tr. 141:2-10, 142:4-24; McCament Tr. 37:4-15; Miller 59:10-17.

¹⁴ E.g., Nealon Tr. 150:23-151:3, 153:21-154:2, 156:1-17, 163:19-25, 164:12-18 (other considerations); Neufeld Tr. 150:5-15 (reference to DACA recipients as "criminals").

¹⁵ See AR at 21 n.8 (ECF 64-1); see also, e.g., Brief of United States as Amicus Curiae at 22-28, *Arizona Dream Act Coalition v. Brewer*, No. 15-15307 (9th Cir. Aug. 28, 2015), ECF No. 62.

¹⁶ (1) E.g., Nealon Tr. 74:22-75:1 (factual report of numbers of unaccompanied minors); Miller Tr. 120:23-121:8, 124:8-17, 124:24-125:5 (number of ICE enforcement actions against DACA beneficiaries). (2) E.g., Nealon Tr. 69:14-16 (describing the decision to rescind DACA one "made by the Acting Secretary" and explaining that it was important that

C. Defendants Improperly Interposed Privilege Objections Relating to the President-Elect's Transition Activities.

In the deposition of Gene Hamilton, Defendants repeatedly asserted executive privilege and deliberative process privilege to block testimony about President Trump's transition team's pre-inauguration activities.¹⁷ However, courts have rejected the application of privileges in this time frame.¹⁸ In a very recent case relating to President Trump's transition team, a magistrate judge overruled the executive privilege asserted by Kansas Secretary of State Kris Kobach regarding communications during his meetings with the President-elect and his transition team. *Fish v. Kobach*, 2017 WL 1373882, at *6, *8 (D. Kan. Apr. 17, 2017). The District Court judge agreed on review, reasoning that even where the privilege was extended to former presidents, the privilege covered only a president's communications while in office. *Fish v. Kobach*, 2017 WL 1929010, at *5 (D. Kan. May 10, 2017). Simply put, the President-elect is not the President, and the communications and decisions by the President-elect are therefore not protected by privileges accorded to communications and decisions by an incumbent President.

II. Defendant's Argument

Plaintiffs would have this Court overrule all of Defendants' attorney-client and deliberative process privilege objections during depositions, regardless of the question asked or the information sought. That categorical approach is inconsistent with this Court's own approach to deposition objections generally, would be unworkable as applied to specific questions and objections, and ignores critical aspects of Judge Alsup's AR Order that evaluated the assertion of the deliberative

he, as the acting head of the office of policy, "be aware of [that decision]"); Miller Tr. 220:20-25, 225:23-226:8, 226:19-227:1 (materials in a press packet and prepared response to expected questions); Neufeld Tr. 87:15-20, 122:16-124:10, 131:3-12 (post-decisional communication). (3) E.g., Nealon Tr. 180:3-182:12 (explaining Defendants' position that privilege covers all "substantive statements" re. DACA, including all "**information** that's delivered in predecisional [meetings]" [emphasis added]).

¹⁷ Hamilton Rough Tr. 60:20-61:11; 62:7-14; 197:7-12.

¹⁸ Note that despite Defendants' implications to the contrary, Plaintiffs do not concede that the "elements of executive privilege apply to the communications at issue." Plaintiffs reserve the right to contest this assertion if they deem it necessary to do so.

process privilege on a case-by-case basis.

1. Attorney-Client Privilege.

Defendants, of course, acknowledge that Judge Alsup's Order regarding the administrative record notes that Defendants have waived the attorney-client privilege for "materials that bore on whether or not DACA was an unlawful exercise of executive power and therefore should be rescinded." AR Order at 10. Defendants, however, have filed a Mandamus Petition with the Ninth Circuit that, among other things, addresses whether Defendants have waived the attorney-client privilege. *See* Mandamus Pet. at 23, ECF No. 86-1 at 26.¹⁹ And within hours of the filing of that Mandamus Petition, the Ninth Circuit issued an order noting that Defendants' petition "raises issues that warrant an answer" and setting a schedule pursuant to which briefing will be complete by 9:00 a.m. PST on Wednesday, October 25, 2017. *In re United States of America, et al.*, 9th Cir. No. 17-72917, Dkt. No. 2. Accordingly, it would be premature for this Court to address the application of the attorney-client privilege to deposition testimony in light of any potential guidance that the Ninth Circuit may provide in the coming days.²⁰

Even if this Court were to address the issue, Judge Alsup's Order only applies to "materials" concerning whether or not DACA was an unlawful exercise of executive power in the context of whether the policy should be rescinded. *See* AR Order at 10. Plaintiffs seek to stretch that decision to broader categories of "Defendants' assessment of the legality of DACA" generally, regardless of the context of the assessment, "or evaluation of litigation risk associated with retaining DACA,"

¹⁹ All references to the docket are to Case No. 3:17-cv-05211-WHA.

²⁰ Defendants believe that this Court erred because review of the APA claims in this case is limited to whether the Acting Secretary's decision to rescind DACA was irrational, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), which in turn is based on whether the "contemporaneous explanation of the agency decision" is "sustainable on the administrative record made," *Camp*, 411 U.S. at 143. Unlike the case cited by Plaintiffs in this letter, this is therefore not a circumstance in which "a litigant waives the attorney-client privilege by putting the lawyer's performance at issue during the course of litigation." *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003) (en banc). While Plaintiffs cite *National Council of La Raza v. Department of Justice* for the proposition that attorney-client privilege can be waived by an administrative agency, the case is inapplicable here, as "mere reliance" on legal conclusions "does not necessarily involve reliance" on otherwise privileged legal analysis. 411 F.3d 350, 358.

regardless of whether that analysis turned on the question of the policy being an “unlawful exercise of executive power”—a specific limiting principle that Judge Alsup applied. AR Order at 10.

Because context—including the specific question being asked in a deposition—matters a great deal, *see infra*, Defendants respectfully believe that this Court can best address assertions of privilege in the context of specific deposition questions that may arise in future depositions.

2. Deliberative Process Privilege.

Just as with Plaintiffs’ arguments regarding the attorney-client privilege, it would be premature for this Court to provide relief regarding plaintiffs’ deliberative process privilege claims because Defendants have raised the Court’s treatment of that privilege in their Ninth Circuit mandamus petition as well. *See* Mandamus Pet. at 19-26, ECF No. 86-1 at 22-29.

Alternatively, Plaintiffs fail to meet the four-part *Warner* test for overcoming Defendants’ assertion of deliberative process privilege. First, the information they seek—internal agency deliberations—is entirely irrelevant to their APA claim. *See* Mandamus Pet. at 19-24, ECF No. 86-1 at 22-27; *see generally In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279 (D.C. Cir. 1998) (where “a party challenges agency action as arbitrary and capricious thereasonableness of the agency’s action is judged in accordance with its *stated* reasons”) (emphasis added). Nor is it relevant to Plaintiffs’ constitutional claims. *See generally id.* at 24-26, ECF No. 86-1 at 27-29. Plaintiffs attempt to side-step this problem by arguing that deliberations regarding the legality of DACA are somehow incorporated into the rescission memorandum in a manner that makes pre-decisional deliberations part and parcel of the final decision itself. But Plaintiffs describe the reference to legality and litigation risk in the memorandum as “cursory,” *supra*; *see* AR 255 (ECF 64-1), which falls short of the incorporation standard in the primary case that Plaintiffs cite. *See, e.g., Elec. Frontier Found. v. U.S. Dept. of J.*, 739 F.3d 1, 11 (D.C. Cir. 2014) (privilege does not apply “when predecisional recommendations . . . are *expressly adopted* in [a] final, nonexempt memorandum”) (emphasis added);

see also Common Cause v. IRS, 646 F.2d 656, 660 (D.C. Cir. 1981) (“[C]asual allusion in a post-decisional document to subject matter discussed in some pre-decisional, intra-agency memoranda is not the express adoption or incorporation by reference which . . . would remove the protection of [privilege]”). And in any event, to the extent the rescission memorandum “expressly adopt[s]” the Attorney General’s letter to Acting Secretary Duke, that letter is already part of the administrative record. *See* AR 251 (ECF 64-1).

Nor can Plaintiffs meet the second *Warner* factor: Whether other evidence is available. Plaintiffs claim that the privileged testimony is “the only source of information about the agency’s intent and potential animus.” *Supra*. But that assertion ignores the non-deliberative information that Plaintiffs have already received through deposition testimony; it certainly does not justify the blanket relief Plaintiffs seek here. That is because the type of information elicited from a witness, including whether it is privileged, “depend[s] on how questions are phrased.” *Protective Nat. Ins. Co. of Omaha v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 280 (D. Neb. 1989). For example, Plaintiffs cite a portion of the McCament deposition where they ask, “what do you remember about the internal discussions at USCIS” regarding the use of DACA information for immigration enforcement purposes. *See* McCament Dep. Tr. 36:2-37:14. The witness was (appropriately) instructed not to answer unless he could do so “without revealing deliberative information.” While the witness did not answer that *particular* question, he did provide extensive, non-deliberative testimony regarding the topic when questions crafted to elicit non-deliberative information were asked. *See id.* at 37:15-38:11 (testimony that, “if the program was being built and the assurance that was being provided, within parameters set out in our FAQs, that we would intend to keep that”).²¹

²¹ Any sort of blanket relief would also be inconsistent with Judge Alsup’s approach regarding Defendants’ assertion of deliberative process privilege. While Defendants disagree with the Court’s rulings regarding privilege and believe that the Court did not adequately address privileges as applied to particular documents, the Court did nonetheless individually review and rule on the application of privileges on a document-by-document basis. *See* AR Order.

There can also be no doubt that disclosure of the information plaintiffs seek would have a chilling effect on internal governmental deliberations, which the deliberative process privilege protects. *See, e.g., Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (deliberative process privilege “serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism”). That is especially true where, as here, Plaintiffs seek testimony that reaches into the core of the decisionmaking process.

Finally, Plaintiffs ask this Court to overrule Defendants’ objections to the extent they seek to assert privilege as to factual matters, matters that were no longer predecisional, or segregable non-privileged information. But much of the information that Plaintiffs are seeking in this case relates purely to internal agency discussions of type that are not easily segregable; as noted above, Plaintiffs have asked questions that seek information regarding the deliberations themselves. By contrast, to the extent Plaintiffs have sought factual information in depositions, Defendants have provided it when the information can be segregated. It is not the case that Defendants have invoked some sort of ironclad objection to “all substantive statements,” as Plaintiffs put it. *Supra* n.13. To the contrary, in the portion of the transcript Plaintiffs cite for this proposition, a witness provided substantive testimony that “the Acting Secretary was interested in how many people are affected” by the rescission. Nealon Tr. 74:16-23. Similarly, in Deputy Director McCament’s deposition, Defendants did not object to testimony about what research tasks USCIS performed following a White House meeting, *see* McCament Tr. 101:8-21, but only objected when Plaintiffs asked if this specific information was gathered to inform the decision-making process leading to the rescission of DACA. *Id.* That information, which “would expose ‘the decision-making process’ itself to public scrutiny by revealing the agency’s evaluation” of the facts, is subject to privilege. *See Nat’l Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114, 1118 (9th Cir. 1988).

3. Executive Privilege

Executive privilege exists so that the President and his advisors are “free to explore alternatives in the process of shaping policies and making decisions” while carrying out his Article II duties. *U.S. v. Nixon*, 418 U.S. 683, 708 (1974). Plaintiffs do not contest that the elements of executive privilege apply to the communications at issue. Rather, they contest whether such privilege should apply during the transition period between election and inauguration. However, in order for the President to effectively begin governing on inauguration day, he must be afforded executive privilege as President-elect while forming the very policies that will be implemented at the beginning of his presidency. Plaintiffs’ reliance on one unpublished opinion, *Fish v. Kobach*, to categorically deny executive privilege to all of the President-elect’s activities is unpersuasive. 2017 WL 1929010, (D. Kan. May 10, 2017). Unlike Mr. Kobach, Gene Hamilton was a member of the President-elect’s transition team, and his communications concerning the advice to be given to the President-elect in exercising his Article II duties goes to the heart of executive privilege.

If this Court orders any relief, it should provide guidelines for the invocation of privileges but allow Defendants to assert specific objections and instructions not to answer, which Plaintiffs can then take up on a case-by-case basis. To the extent Plaintiffs are seeking the production of documents, Defendants believe that the parties have not yet conferred regarding that issue and, in any event, as of the date of this letter Defendants’ obligation to produce documents in response to document requests has not yet begun. Finally, Defendants do not believe that it would be appropriate to re-open depositions that have already taken place; instead, if the Court overrules Defendants’ objections, the parties should be directed to meet-and-confer to explore potential alternatives to deposition testimony that would provide Plaintiffs with equivalent substantive relief.

Sincerely yours,

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Attorney General

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EXHIBIT A

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE REGENTS OF THE UNIVERSITY OF) Case No.
CALIFORNIA and JANET NAPOLITANO,) 17-CV-05211-WHA
in her official capacity as)
President of the University of)
California,)

Plaintiffs,)

v.)

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

Defendants.)
-----)

- - -
Friday, October 13, 2017
- - -

Videotaped deposition of JAMES D. NEALON,
taken at the offices of Covington & Burling,
850 Tenth Street NW, One City Center,
Washington, D.C., beginning at 7:32 a.m., before
Nancy J. Martin, a Registered Merit Reporter,
Certified Shorthand Reporter.

1 one of many voices helping the secretary weigh the
2 potential decisions and potential consequences of such
3 decisions.

4 Q. Did you provide recommendations to the acting
5 secretary relating to the rescission of DACA?

6 A. I don't recall offering a specific
7 recommendation.

8 Q. Did you provide research relating to the
9 rescission of DACA to Acting Secretary Duke?

10 A. I don't recall providing research.

11 Q. Can you please describe what kind of voice
12 you had in helping the secretary weigh the potential
13 decisions and potential consequences of rescission of
14 DACA?

15 MR. GARDNER: At this point I am going to
16 object. I think we are implicating a little bit of
17 process privilege right now.

18 So I will instruct the witness not to answer
19 that particular question.

20 BY MS. CHUANG:

21 Q. You stated that you were one of many voices
22 helping the secretary weigh the potential decision and
23 potential consequences of such decisions. Do you know
24 who the other voices were?

25 A. I know who some of the voices were, yes.

1 Q. Who were they?

2 A. So she was certainly listening to legal
3 counsel. She was certainly listening to U.S.
4 citizenship and immigration services, USCIS, who owned
5 the program within the Department of Homeland
6 Security. They're the ones who administer that
7 program. I'm sure she was listening to her front
8 office staff, her chief of staff, and her counselors.
9 And she may have listened to others as well.

10 Q. Are those entities that you just described
11 all within the Department of Homeland Security?

12 A. They are.

13 Q. Do you know if any other departments in the
14 federal government provided a voice in assisting the
15 Secretary weigh the potential decisions and
16 consequences of rescission of DACA?

17 A. So I don't know specifically.

18 Q. You had mentioned that legal counsel was one
19 of those voices.

20 A. Yes.

21 Q. Who specifically?

22 A. So the general counsel of the department is
23 Joseph Maher. And another attorney who was involved
24 was Dimple Shah. And there may have been others.

25 Q. What was Joseph Maher's voice in -- do you

1 know what Joseph Maher and Acting Secretary Duke
2 discussed in relation to the rescission of DACA?

3 MR. GARDNER: Objection.

4 You can answer that question "yes" or "no,"
5 but the content of that would be subject to privilege,
6 but in terms of attorney-client and deliberative
7 process privilege.

8 In other words, you can answer that question
9 with a "yes" or "no," but the content of that would be
10 privileged, and I would instruct you not to answer.

11 Could you repeat the question?

12 BY MS. CHUANG:

13 Q. Do you know what Joseph Maher and Acting
14 Secretary Duke discussed in relation to the rescission
15 of DACA?

16 A. I know some of the things they discussed,
17 yes.

18 MS. CHUANG: I would like to also state for
19 the record that I understand that some of these issues
20 pertaining to the privileges that you are asserting
21 are being disputed currently, and that there is a
22 motion that will be heard on Monday that may address
23 some of these issues.

24 MR. GARDNER: We have the same understanding.

25 BY MS. CHUANG:

1 Q. Do you know what was discussed between Dimple
2 Shah and Acting Secretary Duke relating to the
3 rescission of DACA?

4 MR. GARDNER: Same objection.

5 You can answer that with a "yes" or "no."
6 The contents of that conversation would be subject to
7 the attorney-client privilege, the deliberative
8 process privilege. I would instruct you not to answer
9 as to the content of those conversations.

10 THE WITNESS: Okay.

11 Yes, I know some of the discussion that went
12 back and forth.

13 BY MS. CHUANG:

14 Q. And what is the substance of that
15 conversation between Dimple Shah and Acting Secretary
16 Duke relating to the rescission of DACA?

17 MR. GARDNER: Objection. Calls for
18 attorney-client privilege and deliberative process
19 privilege.

20 I instruct the witness not to answer.

21 BY MS. CHUANG:

22 Q. What were the substance of the conversation
23 between Joseph Maher and Acting Secretary Duke related
24 to the decision, rescission of DACA?

25 MR. GARDNER: Same objection. Same

1 instruction.

2 BY MS. CHUANG:

3 Q. You had also mentioned that another voice
4 involved in this decision-making process was USCIS; is
5 that correct?

6 A. Yes.

7 Q. Who specifically at USCIS?

8 A. So the acting director at that time was James
9 McCament.

10 Q. Is he still currently the acting director?

11 A. He is not.

12 Q. Who is the acting director?

13 A. So now there's a confirmed director whose
14 name is Francis Cissna.

15 Q. Besides acting director McCament at that
16 time, anybody else from USCIS?

17 A. There may have been, but I don't recall
18 specifically.

19 Q. Do you know the substance of the conversation
20 between James McCament and Acting Secretary Duke
21 relating to the decision of DACA?

22 MR. GARDNER: I do want to lodge an objection
23 here.

24 You can answer that question with a "yes" or
25 "no." The substance of those conversations would be

1 subject to deliberative process privilege.

2 And I would instruct you not to answer as to
3 the content.

4 THE WITNESS: Okay.

5 Yes, I was familiar with some of the
6 discussion that they had.

7 BY MS. CHUANG:

8 Q. What are the discussions that they had?

9 MR. GARDNER: Object on the basis of
10 deliberative process, privilege.

11 I instruct the witness not to answer.

12 BY MS. CHUANG:

13 Q. You also mentioned that there was front
14 office staff, such as the chief of staff, that was
15 involved in the decision-making process relating to
16 the rescission of DACA; is that correct?

17 A. Yes. Whether or not they were actually
18 involved in the decision making itself, but they were
19 certainly involved in conversations.

20 Q. Who specifically?

21 A. So the chief of staff was Chad Wolf. Deputy
22 chief of staff is Elizabeth Neumann. And then there
23 were other counselors who were advisors within the
24 Secretary's front office who would have been involved
25 as well.

1 THE WITNESS: Okay. I've read the document.

2 BY MS. CHUANG:

3 Q. You are listed as a recipient of this memo;
4 is that correct?

5 A. Correct.

6 Q. I'm going refer to this as "the Duke memo"
7 for the purposes of this deposition. Okay?

8 A. Okay.

9 Q. Why did you receive a copy of the Duke memo?

10 A. Because I'm the acting head of the office of
11 policy.

12 Q. And why as acting head of the office of
13 policy would you receive a memo like this?

14 A. Because this was an important policy decision
15 made by the Acting Secretary. It was important that I
16 be aware of it.

17 Q. And you were a part of this important policy
18 decision?

19 A. So I played a role in -- as I've stated
20 previously, in trying to ensure that the Acting
21 Secretary understood DACA and the decisions and
22 consequences of rescinding or not.

23 Q. And how did you do that if you didn't do any
24 research or independent inquiries into DACA? What was
25 the basis for your helping Acting Secretary

1 there. I believe Gene Hamilton was there, and USCIS
2 was certainly represented. I don't remember
3 specifically if it was Mr. McCament or not.

4 Q. Was Chad Wolf there?

5 A. I believe he was there. Although I don't
6 recollect specifically whether or not he was.

7 Q. Was Joseph Maher there?

8 A. So again, representatives of the general
9 counsel were there. I do remember Dimple Shah being
10 there. I don't recall if Mr. Maher was there or not.

11 Q. Was there anyone else besides those persons
12 you listed there?

13 A. There may have been, but I don't recall.

14 Q. How long did this meeting last?

15 A. My guess is it probably lasted about an hour.

16 Q. Were any documents reviewed during this
17 meeting?

18 A. I don't recall specifically, but there may
19 have been documents which gave numbers. I know the
20 Acting Secretary was interested in how many people are
21 affected and so forth.

22 Q. What specific numbers do those documents
23 give?

24 MR. GARDNER: Objection. To the extent it
25 calls for information subject to deliberative process

1 process privilege.

2 I instruct the witness not to answer.

3 BY MS. CHUANG:

4 Q. You had also mentioned that generally, it was
5 to help provide information to Acting Secretary Duke
6 regarding the impending decision relating to DACA; is
7 that correct?

8 A. Correct.

9 Q. What other information was provided to Acting
10 Secretary Duke during this meeting?

11 MR. GARDNER: Objection. Calls for
12 information subject to deliberative process privilege.
13 It also calls for information subject to the
14 attorney-client privilege.

15 I instruct the witness not to answer.

16 BY MS. CHUANG:

17 Q. Did you direct anyone on your staff to help
18 you out -- to help you get up to speed on DACA?

19 A. I'm sure I asked people questions about DACA,
20 especially about the historic nature.

21 Q. Who did you ask?

22 A. I don't recall at this time, but we have a
23 staff of 150 people in the policy shop.

24 Q. Do you recall if you asked all 150 people in
25 the policy staff?

1 around August 21?

2 A. It would appear to be, yes.

3 Q. Did Thomas Homan attend the meeting that you
4 had described previously in August?

5 A. So now that I see his name in print, I recall
6 that he was at the meeting, yes.

7 Q. This also mentions that's Chad Wolf and
8 Dimple Shah attended the meeting in addition to
9 yourself; is that correct?

10 A. That is what it says, yes.

11 Q. So if you'd turn to the second page of the
12 article, the fourth paragraph down states, "In the
13 wake of the legal activity, the DHS officials gathered
14 to 'review the status of DACA and determine next
15 steps' for the program." Is that what it states?

16 A. That is what it states.

17 Q. What did the review of the status of DACA
18 entail?

19 MR. GARDNER: Objection. Calls for
20 disclosure of information subject to deliberative
21 process privilege.

22 Instruct the witness not to answer.

23 BY MS. CHUANG:

24 Q. What was the discussion of the next steps?

25 MR. GARDNER: Objection. Calls for

1 information subject to the deliberative process
2 privilege.

3 I instruct the witness not to answer.

4 BY MS. CHUANG:

5 Q. Did the attendees of this meeting determine
6 next steps in this meeting?

7 MR. GARDNER: Objection. Calls for
8 information subject to the deliberative process
9 privilege.

10 You can answer that question with a "yes" or
11 "no." Otherwise, I instruct you not to answer.

12 THE WITNESS: Could you repeat the question?

13 BY MS. CHUANG:

14 Q. Did the attendees of this meeting determine
15 next steps in this meeting?

16 A. If by "next steps" you mean a final decision
17 on DACA, that's not my recollection, no.

18 Q. What is your understanding of what the next
19 steps were?

20 MR. GARDNER: Objection. Calls for
21 information subject to deliberative process privilege.

22 I instruct the witness not to answer.

23 BY MS. CHUANG:

24 Q. What did you specifically discuss in this
25 meeting?

1 MR. GARDNER: Objection. Calls for
2 information subject to deliberative process privilege.

3 I instruct the witness not to answer.

4 It also calls for disclosure of
5 attorney-client protected information.

6 And I so instruct.

7 BY MS. CHUANG:

8 Q. What did Acting Secretary Duke discuss in
9 this meeting?

10 MR. GARDNER: Objection. Calls for
11 information subject to deliberative process privilege.

12 I instruct the witness not to answer.

13 BY MS. CHUANG:

14 Q. What did Thomas Homan discuss in this
15 meeting?

16 MR. GARDNER: Objection. Calls for
17 information subject to the deliberative process
18 privilege.

19 I instruct the witness not to answer.

20 BY MS. CHUANG:

21 Q. What did Chad Wolf discuss in this meeting?

22 MR. GARDNER: Objection. Calls for
23 information subject to deliberative process privilege.

24 I instruct the witness not to answer.

25 BY MS. CHUANG:

1 Q. What did Dimple Shah discuss in this meeting?

2 MR. GARDNER: Objection. Calls for
3 disclosure of information subject to deliberative
4 process privilege, as well as the attorney-client
5 privilege.

6 I instruct the witness not to answer.

7 BY MS. CHUANG:

8 Q. Now that you have reviewed this article, does
9 it refresh your recollection as to the specific
10 attendees at the meeting?

11 A. It did. So I hadn't recalled that Tom Homan
12 was there, and now I do.

13 Q. Beside the individuals that are noted in this
14 article, did any other persons attend this meeting?

15 A. So I believe I've already answered that
16 question, haven't I?

17 Q. No.

18 A. Okay. So again, the Acting Secretary was
19 there. I was there. Dimple Shah was there. Now I
20 recall that Tom Homan was there. There were
21 representatives of USCIS there, and there were -- I'm
22 almost certain -- I am certain Mr. Hamilton was there.

23 Q. Mr. Hamilton isn't noted in this article,
24 though; correct?

25 A. I don't see his name in the article.

1 Q. And representatives from USCIS are not noted
2 in this article; is that correct?

3 A. That appears to be correct.

4 Q. So is it your understanding that other
5 persons besides those individuals noted in this
6 article attended the meeting?

7 A. Yes.

8 Q. And those were Gene Hamilton and
9 representatives from USCIS?

10 A. Yes.

11 Q. And who was the representative from USCIS?

12 A. So again, I don't recall specifically. James
13 McCament was the acting director at the time. So it
14 may have been him, or he may have been represented by
15 someone else. I just don't recall.

16 Q. What did Gene Hamilton discuss in this
17 meeting?

18 MR. GARDNER: Objection. Calls for
19 information subject to the deliberative process
20 privilege, as well as attorney-client privilege.

21 I instruct the witness not to answer.

22 BY MS. CHUANG:

23 Q. What did the representatives from USCIS
24 discuss at this meeting?

25 MR. GARDNER: Objection. Calls for

1 information subject to nondisclosure by the
2 deliberative process privilege as well as
3 attorney-client privilege.

4 I instruct the witness not to answer.

5 BY MS. CHUANG:

6 Q. Were any other individuals outside of DHS in
7 attendance at this meeting?

8 A. I'm sorry. People from outside of DHS?

9 Q. Yes.

10 A. I don't believe so, no.

11 Q. Besides this August 21 meeting, did you have
12 any other meetings involving DACA?

13 A. So there may have been. I don't recall
14 specific meetings related to DACA, but there may have
15 been.

16 Q. Let's start with July. Do you recall any
17 specific meetings in July relating to DACA?

18 A. I don't.

19 Q. In August, besides this August 21 meeting, do
20 you recall any specific meetings relating to DACA?

21 A. I don't.

22 Q. In September, do you recall any specific
23 meetings relating to DACA?

24 A. I don't.

25 Q. Did you have any communications with any

1 that you referenced?

2 A. I don't recall any other specific
3 conversations, that's correct.

4 Q. What was the substance of the multiple
5 conversations relying the underlying decisions
6 relating to the letter?

7 MR. GARDNER: Objection. Calls for
8 disclosure of information subject to the deliberative
9 process privilege, as well as the attorney-client
10 privilege.

11 I instruct the witness not to answer.

12 BY MS. CHUANG:

13 Q. Besides the office of general counsel who
14 else was involved in these conversations relying the
15 underlying decisions referenced in this letter?

16 A. So again, I'm referring to a single meeting.
17 A single meeting that we've already discussed. So
18 we've already discussed who was present at that
19 meeting.

20 Q. You also mentioned that there were other
21 conversations.

22 A. No. I said there may have been other
23 conversations. I don't have a specific recall of it.

24 Q. What is your basis for believing that there
25 may have been other conversations?

1 A. No.

2 Q. Have you had any discussions with any DHS
3 employees relating to the use of DACA information for
4 immigration enforcement purposes?

5 A. So I believe --

6 MR. GARDNER: I'm going to object and
7 instruct the witness not to answer. The witness could
8 answer that question with a "yes" or "no," but beyond
9 that, that would be subject to deliberative process
10 privilege.

11 THE WITNESS: Sorry. Repeat the question.

12 BY MS. CHUANG:

13 Q. Have you had any discussions with any DHS
14 employees relating to the use of DACA information for
15 immigration enforcement purposes?

16 A. Yes.

17 Q. When did those discussions take place?

18 A. Probably in August.

19 Q. How many conversations were there?

20 A. I recall one.

21 Q. Was this in person or via telephone?

22 A. In person.

23 Q. Was it separate from the August 21 meeting
24 that we have discussed previously?

25 A. No.

1 Q. So this discussion was part of the August 21
2 meeting?

3 A. If I understand correctly, yes.

4 Q. What was discussed specifically with respect
5 to the use of DACA information for immigration
6 enforcement purposes?

7 MR. GARDNER: Objection. That implicates the
8 deliberative process privilege.

9 I instruct the witness not to answer.

10 BY MS. CHUANG:

11 Q. Who specifically discussed the use of DACA
12 information for immigration enforcement purposes?

13 A. It was part of the general discussion to
14 inform the Acting --

15 MR. GARDNER: Objection. She's asking for
16 the identity of names, which we are not asserting
17 privilege over. To the extent that you want to get
18 into substance, we do assert that that is subject to
19 the deliberative process privilege.

20 And we instruct you not to answer.

21 MS. CHUANG: No speaking objections, please.

22 MR. GARDNER: Counsel, I'm trying to help the
23 witness respond to your questions in a way that does
24 not implicate privilege.

25 MS. CHUANG: If he misunderstand my question,

1 acting secretary about the implications of a possible
2 end of DACA.

3 Q. Did you specifically discuss the use of DACA
4 information for immigration enforcement purposes at
5 the August 21 meeting?

6 A. No, I don't recall discussing that.

7 Q. Did Thomas Homan discuss the use of
8 information for immigration enforcement purposes at
9 the August 21 meeting?

10 A. I don't recall specifically who discussed it,
11 but I do recall that there was a discussion.

12 Q. What was the specific discussion relating to
13 DACA information being used for immigration
14 enforcement purposes?

15 MR. GARDNER: Objection.

16 Instruct the witness not to answer.

17 Calls for the disclosure of information
18 subject to the deliberative process privilege and the
19 attorney-client privilege.

20 BY MS. CHUANG:

21 Q. Were there any other conversations or
22 meetings outside of this particular meeting in which
23 the use of DACA information was discussed?

24 A. Not that I'm aware of.

25 Q. So you personally didn't participate in any

1 would it be fair to say you weigh the costs and
2 benefits of policy options?

3 A. Generally speaking, yes.

4 Q. And the more the benefits of an option
5 outweigh the costs, the better a policy it is?

6 A. Oftentimes, yes.

7 Q. Are there any times when a policy option is
8 worse even though its benefits outweigh its costs more
9 than any other option?

10 A. Well, there may be. I don't know. Political
11 science discussion.

12 Q. In your career in government, have you ever
13 encountered such a situation?

14 A. Generally speaking, you try to do the right
15 thing.

16 Q. I appreciate that. My question was about
17 whether you'd ever encountered a situation when in
18 weighing different policy options the best option was
19 one where its costs exceeded its benefits more than
20 any other option?

21 A. Maybe. I don't recall a specific incident
22 like that. I'm sure you're going to take me there.

23 Q. So in considering the rescission of DACA, one
24 policy option was to rescind DACA; is that correct?

25 MR. GARDNER: Objection. Calls for

1 disclosure of information subject to deliberative
2 process privilege.

3 Instruct the witness not to answer.

4 BY MR. BERENGAUT:

5 Q. Prior to the rescission of DACA, DACA was a
6 policy of the DHS. Is that fair to say?

7 A. Yes.

8 Q. Did that policy have policy benefits and
9 costs?

10 MR. GARDNER: Objection. Calls for
11 speculation. Lack of foundation.

12 THE WITNESS: Repeat the question, please.

13 BY MR. BERENGAUT:

14 Q. Did DACA as a policy have costs and benefits?

15 A. Those are matters of opinion.

16 Q. Let me ask my question again. Did DACA as a
17 policy have costs and benefits?

18 MR. GARDNER: Same objections.

19 THE WITNESS: I'm sure it did.

20 BY MS. CHUANG:

21 Q. Do you have an understanding of what some of
22 the benefits of DACA as a policy are?

23 A. So there were clear benefits of DACA to the
24 beneficiaries of DACA.

25 Q. Right. You already testified about the

1 MR. GARDNER: Objection. Lack of foundation.

2 THE WITNESS: No, not at the moment.

3 BY MR. BERENGAUT:

4 Q. Do you have an understanding of any policy
5 costs of the DACA program?

6 A. Yes.

7 Q. What is that understanding?

8 A. Again, you have a large body of people who
9 are in legal limbo, and that's not a good policy.

10 Q. Do you have an understanding of any other
11 policy costs of the DACA program?

12 A. No. I'd be happy to answer questions, but I
13 don't, off the top of my head, know.

14 Q. Now, this policy cost that you described of
15 individuals being in legal limbo, have you seen any
16 documents relating to that policy cost?

17 A. No.

18 Q. Have you had any communications with anyone
19 else at DHS relating to that policy cost?

20 A. No.

21 Q. To your knowledge, was that policy cost
22 considered in connection with the decision to rescind
23 DACA?

24 MR. GARDNER: Objection. Calls for
25 disclosure of information subject to deliberative

1 process privilege.

2 I instruct the witness not to answer.

3 MR. BERENGAUT: Sorry. I was receiving a
4 note to adjust the microphone on my tie.

5 MR. GARDNER: Everyone's a critic.

6 MR. BERENGAUT: Is that better?

7 THE VIDEOGRAPHER: Yes. Thank you.

8 MR. BERENGAUT: Thank you.

9 Q. Let me ask you about some other policy
10 benefits of DACA. Are you aware that DACA recipients
11 serve in this country's armed forces?

12 A. Yes.

13 Q. Would you say their service is a policy
14 benefit of DACA?

15 A. We certainly thank them for their service,
16 and anyone who serves in our military deserves our
17 gratitude.

18 BY MR. BERENGAUT:

19 Q. Can you think of any other -- now that we've
20 had a couple of other examples, any other policy
21 benefits of DACA?

22 A. Not off the top of my head.

23 Q. Do you have an understanding of what
24 "litigation risk" is?

25 A. Some understanding.

1 Q. To your knowledge, were these other
2 administration goals in the immigration context
3 considered in connection with the decision to rescind
4 DACA?

5 MR. GARDNER: Objection. Calls for
6 disclosure of information subject to deliberative
7 process privilege.

8 Instruct the witness not to answer.

9 BY MR. BERENGAUT:

10 Q. To your knowledge, was the administration
11 goal of constructing a wall on the border between the
12 United States and Mexico considered in connection with
13 the decision to rescind DACA?

14 MR. GARDNER: Objection. Calls for
15 disclosure of information subject to deliberative
16 process privilege.

17 I instruct the witness not to answer.

18 BY MR. BERENGAUT:

19 Q. If we could go back to the administrative
20 record exhibit, which I believe is Exhibit 1. It's
21 the document you have right in front of you. And if
22 we could go back to what --

23 MR. GARDNER: Exhibit 3?

24 MR. BERENGAUT: I'm sorry. Was the
25 administrative record Exhibit 3? Yeah. Exhibit 3.

1 specific meetings.

2 Q. We've talked about policy goals, and I'd like
3 to ask a question about political goals. Do you know
4 what a "political goal" is?

5 A. Why don't you explain to me what you mean by
6 "political goal."

7 Q. An example of a political goal would be to
8 win an election. Is that an example that is
9 consistent with your understanding of that term?

10 A. Yes.

11 Q. Do you have an understanding of what a
12 political goal is?

13 A. I believe I do.

14 Q. What is that understanding?

15 A. That would be -- sorry. We've been here a
16 long time. Something like what you described.
17 Something that you would achieve politically, such as
18 winning an election.

19 Q. To your knowledge, during the discussions
20 related to the rescission of DACA in which you
21 participated, did anyone discuss any political goals?

22 MR. GARDNER: Objection. Calls for
23 disclosure of information subject to deliberative
24 process privilege.

25 I instruct the witness not to answer.

1 BY MR. BERENGAUT:

2 Q. Have you seen any documents relating to the
3 rescission of DACA that referenced political goals?

4 A. No. I don't recall any such document.

5 Q. Are you aware -- this goes back to what I was
6 asking about the administration's policy objectives in
7 the immigration context. As part of those policy
8 objectives, the administration has an agenda for
9 legislation with, like, Congress to enact; is that
10 correct?

11 A. Yes.

12 Q. To your knowledge, did the administration's
13 legislative agenda before Congress come up in any
14 discussions relating to the rescission of DACA?

15 MR. GARDNER: Objection. Calls for
16 disclosure of information subject to deliberative
17 process privilege.

18 Instruct the witness not to answer.

19 BY MR. BERENGAUT:

20 Q. Have you seen any document relating to the
21 rescission of DACA that discusses the administration's
22 legislative agenda?

23 A. No.

24 Q. Earlier in your deposition you talked about
25 the voices within DHS that fed into the

1 MR. GARDNER: You can answer the "yes" or
2 "no" to the question, and then when we get to the
3 substance, we'll take it question by question.

4 THE WITNESS: So sorry. Can you repeat the
5 question?

6 BY MS. MORRISSON:

7 Q. Have you asked anyone what will happen to
8 DACA recipients if DACA is terminated and there is no
9 legislative action?

10 A. I'm not sure I asked anyone, but there was a
11 discussion of that.

12 Q. And when was that discussion?

13 A. Very same meeting.

14 Q. Do you recall who asked that question?

15 A. I don't.

16 Q. Do you recall if an answer was provided to
17 that question?

18 A. I don't recall there being a definitive,
19 specific answer. I recall there being a discussion of
20 what could happen.

21 Q. Okay. And was one of the possibilities that
22 DACA recipients could be removed from the
23 United States?

24 MR. GARDNER: Object. Instruct the witness
25 not to answer as calling for disclosure of information

1 subject to deliberative process privilege.

2 BY MS. MORRISSON:

3 Q. Earlier, you testified about a conversation
4 you had with John Kramer from the western hemisphere
5 bureau of the Department of State. Do you recall that
6 testimony?

7 A. I do.

8 Q. You said that in the context of that
9 conversation, you discussed that Mexico would be
10 especially impacted if DACA were terminated?

11 A. Yes.

12 Q. And you testified that if DACA were
13 terminated and a large number of Mexicans were removed
14 from the United States that would have a large impact
15 on Mexico's economy on foreign relations.

16 A. I believe I said it could. There was a
17 discussion of whether there would be an impact, what
18 that impact might be.

19 Q. Was one of the considerations if a large
20 number of Mexicans were removed from the
21 United States?

22 A. I'm sorry?

23 Q. I believe you said in terms of the
24 potentially large impact on Mexico's economy, one of
25 the factors would be if a large number of Mexicans

1 the different privileges that were being asserted
2 today by your counsel.

3 You've asserted a number of privileges,
4 including the deliberative process privilege. I
5 wanted to just understand the scope and the extent of
6 that privilege and what you're asserting.

7 MR. GARDNER: Sure. We've actually asserted
8 two privileges today. The first is the
9 attorney-client privilege, and that relates to the
10 fact that as the Ambassador testified, members from
11 the office of general counsel were in that meeting in
12 a confidential setting, providing legal advice that
13 was received by other members of the Department of
14 Homeland Security.

15 With respect to deliberative process
16 privilege, we've tried to be very, I think narrow in
17 its assertion, allowing you to get the identities of
18 individuals who participated in meetings, the high
19 level topics addressed at those meetings, but the
20 substantive deliberations are classic deliberative
21 predecisional information that is subject to the
22 federal deliberative process privilege.

23 MS. CHUANG: Are you invoking the
24 deliberative process privilege as to any substantive
25 statement that was made during those meetings that we

1 discussed today irrespective of whether the
2 communication was advice or factual statements?

3 MR. GARDNER: We are objecting to information
4 that is deliberative and predecisional.

5 MS. CHUANG: I'm sorry. I don't think that
6 you answered my question.

7 MR. GARDNER: I feel like I did. I'm sorry.
8 I'm not trying to be obstreperous. I mean deliberate
9 process privilege covers information that's delivered
10 in predecisional. When I made those objections, it
11 was to cover precisely that information. We can have
12 a disagreement about that, although I don't know that
13 doing that in front of the witness is going to be
14 productive, but that is the scope of our privilege
15 assertion.

16 MS. CHUANG: So I just want to understand
17 that you're invoking the deliberative process
18 privilege to cover all communications that occurred
19 during those meetings --

20 MR. GARDNER: No --

21 MS. CHUANG: -- the substance of all
22 communication that occurred during those meetings.

23 MR. GARDNER: The substance of those
24 conversations that are deliberative and predecisional
25 are subject to the deliberative process privilege, and

1 therefore, the privilege has been invoked and the
2 witness has been instructed not to answer.

3 MS. CHUANG: Were there any substantive
4 statements that fall outside of that scope of the
5 deliberative process?

6 MR. GARDNER: Well, I mean the witness has
7 testified at a high level of generality the topics
8 that were addressed at the meeting. We did not lodge
9 objections to that. But the specific conversations
10 that contain deliberative predecisional information we
11 did object to, and we did instruct the witness not to
12 answer.

13 MS. CHUANG: Okay. Thank you.

14 MR. GARDNER: You're welcome.

15 MS. CHUANG: Let's take a two-minute break.

16 THE VIDEOGRAPHER: Off the record at 11:49.

17 (A recess was taken from 11:49 a.m.
18 to 11:51 a.m.)

19 THE VIDEOGRAPHER: We're back on the record
20 at 11:51.

21

22 EXAMINATION

23 BY MS. CHANG:

24 Q. Good morning, Mr. Nealon. My name is Cecilia
25 Chang, and work for the National Immigration Law

EXHIBIT B

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE REGENTS OF THE UNIVERSITY OF) Case No.
CALIFORNIA and JANET NAPOLITANO,) 17-CV-05211-WHA
in her official capacity as)
President of the University of)
California,)

Plaintiffs,)

v.)

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

Defendants.)

-----)
AND RELATED CASES.)
-----)

- - -
Tuesday, October 17, 2017
- - -

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

1 I'm comfortable I'm pretty correct.

2 Q. I appreciate that, and I do know, obviously,
3 this was a while ago. So based on the conversations
4 about DACA that you were part of at that time, do you
5 remember hearing a concern that undocumented people
6 would be hesitant to sign up for DACA because they
7 were giving sensitive information to the government?
8 Do you remember that concern generally from that time
9 period?

10 A. Generally, I do. And that it was also coming
11 from outside, meaning, if I may --

12 Q. Please.

13 A. That as I recall -- and again, over five
14 years, public statements, internal working group
15 statements, questions tend to blur a bit, but I
16 believe there were even questions from the Hill,
17 Capitol Hill and the public, what would happen to that
18 information once provided.

19 Q. So you remember that issue being something
20 that was discussed in these working groups, sort of
21 how to address that concern?

22 MR. GARDNER: Objection. Mischaracterizes
23 the witness' testimony.

24 THE WITNESS: Could you restate the question?

25 BY MR. DETTMER:

1 Q. Sure. So we just talked about this concern
2 that was in the air at the time; right?

3 A. Uh-huh.

4 Q. I gather that you don't have specific
5 recollection of specific comments that were made.

6 My question is -- maybe I'm rephrasing it all
7 together -- what do you remember about the internal
8 discussions at USCIS about that topic?

9 MR. GARDNER: Objection to the extent it
10 calls for disclosure of information subject to
11 deliberative process privilege.

12 If you can answer that question without
13 revealing deliberative information, you can answer.
14 Otherwise, I'd instruct you not to answer.

15 THE WITNESS: I don't believe I can.

16 BY MR. DETTMER:

17 Q. Do you remember being concerned about that
18 issue?

19 A. My personal --

20 Q. Yes.

21 A. -- concern?

22 No, I do not.

23 Q. And why not?

24 A. So from my perspective as head of legislative
25 affairs, but also working in the immigration sphere,

1 at least from 2006 on, I saw that if -- my belief was
2 that if we were asking for information and setting
3 parameters on how it would be used, as in all the many
4 benefit types and requests in this case, that we would
5 keep our word, that DHS would keep our word, USCIS
6 would keep our word.

7 I understand the concern and -- but my belief
8 was if the program was being built and the assurance
9 that was being provided, within parameters which was
10 set out in our FAQs, that we would intend to keep
11 that.

12 Q. So -- and we'll look at the FAQs.

13 A. Sure.

14 Q. Without pretending to quote from them, the
15 basic word that was given was that that information
16 would not be used for enforcement purposes, with some
17 caveats?

18 A. With some caveats, and actually, yes, the
19 immigration specifically, if I recall -- I don't have
20 them in front of me. But that FAQ by which we
21 governed the program, rather uniquely among other
22 elements that we administer, did say that the
23 information provided for DACA request purposes would
24 not be provided for immigration enforcement purposes
25 but could be provided for other reasons. National

1 A. I would say somewhere in between.

2 Q. Okay. And who were the people who spoke the
3 most? The ones that you just identified?

4 A. I would say almost all of those spoke, not
5 necessarily equally but quite a bit.

6 Q. And who talked the most? Obviously, General
7 Kelly was leading the meeting. Who else?

8 A. General Kelly. Acting Secretary Duke, the
9 attorney general. As I recall, Don McGhan, Stephen
10 Miller. Marc Short, to your point, less so --

11 Q. Okay.

12 A. -- strategy. And Director Mulvaney.

13 Q. Less so?

14 A. As I recall, probably less so than those
15 others.

16 MR. DETTMER: Okay. In the interest of time,
17 I mean I gather from our exchange that you're going to
18 assert the privilege objections to all my questions
19 about what did each one of these people say.

20 MR. GARDNER: And just to be absolutely clear
21 with you, that's right. I'm really trying to give you
22 as much latitude as reasonably possible. We would
23 assert both the attorney-client privilege,
24 deliberative process privilege, and potentially the
25 Presidential communications privilege over the subject

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

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

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

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

11 MR. GARDNER: Of course. Of course.

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

14 MR. GARDNER: I appreciate that.

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

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

1 MR. DETTMER: Let us go through that process.

2 Q. So what was the -- actually, let me ask you a
3 question I think you can answer within the scope of
4 what your lawyer is telling you.

5 Was a decision actually reached at this
6 meeting?

7 MR. GARDNER: You can answer that with a
8 "yes" or a "no" without going into detail.

9 THE WITNESS: Not an ultimate decision. So I
10 guess no to that.

11 BY MR. DETTMER:

12 Q. Okay. A tentative decision?

13 A. In part, yes.

14 Q. Okay.

15 MR. GARDNER: It's bigger than a bread box.
16 It's two words.

17 THE WITNESS: Right. It's hard.

18 MR. GARDNER: We're in this together, my
19 friend.

20 THE WITNESS: All three of us, actually.

21 BY MR. DETTMER:

22 Q. Okay. Well, then in order to preserve the
23 fight for judicial resolution, what was the decision
24 that was -- or the partial decision that was
25 eventually reached at this meeting?

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

6 I instruct the witness not to answer.

7 BY MR. DETTMER:

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

10 A. Yes.

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

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

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

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

25 I understand you've had communications with

1 BY MR. DETTMER:

2 Q. All right. It won't surprise you to hear I
3 have a few follow-up questions from our earlier
4 discussion. So one question, I think you mentioned
5 that you had some communications with your staff
6 following that August 24 meeting. Obviously not
7 getting into the substance of them for now. One of
8 the things that you, I think, mentioned was that they
9 were working on various tasks related to DACA at the
10 time; is that right?

11 A. Yes.

12 Q. What were they doing with respect to DACA at
13 that time? So I guess we're talking about, you know,
14 the week following August 24? What was your staff
15 doing with respect to DACA at that time?

16 A. So with respect to the DACA program at large
17 or the rescission --

18 Q. Let's start with that. How about -- well,
19 actually, why don't we start with the rescission.
20 What tasks did they have?

21 MR. GARDNER: So I had understood you to be
22 asking about the DACA program more generally, which I
23 have no objection to. If the question is about issues
24 relating to DACA rescission, I would object on the
25 bases of deliberative process privilege.

1 If you can answer that question without
2 getting into deliberative process making, please
3 answer the question.

4 THE WITNESS: With respect to the rescission?

5 MR. GARDNER: As I understood his question.

6 BY MR. DETTMER:

7 Q. Yeah.

8 A. So outside the decision for rescission --

9 Q. Yeah.

10 A. -- but continuing to gather review data on
11 DACA requesters, recipients, program parameters as
12 being currently operated.

13 Q. So without giving me sort of -- and again,
14 I'm asking the questions in this way --

15 A. Sure.

16 Q. -- just to try to get what we can, you know,
17 in the absence of a ruling thus far.

18 Without giving sort of the substance, were
19 they gathering data to inform the decision-making
20 process on DACA rescission?

21 A. Yes.

22 MR. DETTMER: Okay. Were they -- so
23 okay. Let's put that to the side because I would like
24 to ask all sorts of substantive questions about that.
25 You're going to give an instruction, and you're going

1 position to have some role in the decision making?

2 A. Not necessarily, but I can explain.

3 Q. Please do.

4 A. So the ombudsman has by the definition the
5 title of ombudsman, oversees partners with our agency,
6 and so therefore, has opinions on our operations and
7 involves themselves appropriately with the work or
8 operations on decisions sometimes may, usually does
9 not from a guidance perspective.

10 Q. Okay. Well, just to go through the
11 formalities, what was discussed at that August 21
12 meeting?

13 MR. GARDNER: Objection. Calls for
14 disclosure of information subject to deliberative
15 process privilege as well as the attorney-client
16 privilege.

17 I instruct the witness not to answer.

18 THE WITNESS: And I follow my counsel's lead.

19 MR. DETTMER: If I didn't say that I'm going
20 to observe the formalities, you think I could have
21 slipped that through?

22 MR. GARDNER: I think so. I'm still in a
23 lunch coma right now.

24 THE WITNESS: Looking at these different
25 options to keep it going.

1 BY MR. DETTMER:

2 Q. Was there any follow-up to that August 21
3 meeting that you were part of?

4 A. Yes.

5 Q. Can you describe that.

6 MR. GARDNER: Objection. Calls for
7 disclosure of information and subject to the
8 deliberative process privilege and potentially the
9 attorney-client privilege.

10 I instruct the witness not to answer.

11 BY MR. DETTMER:

12 Q. So --

13 A. I agree. I concur, yes.

14 Q. So let me just back off of that just a little
15 bit --

16 A. Sure.

17 Q. -- and ask you without divulging the
18 substance of the follow-up conversations, how many
19 were there, who were they with, when did they happen?

20 MR. GARDNER: Objection. Compound. Can we
21 do it question by question? I'm not trying to --

22 MR. DETTMER: No. Sure.

23 Q. I'm trying to do it in a way that --

24 A. Understood.

25 Q. How many follow-up conversations do you

1 A. So I recall, I think Gene and I discussed and
2 we prepared information, you know, pulling data and
3 information. So it was prior to the August 21
4 meeting. I just don't really recall kind of the
5 cadence of that.

6 Q. And by "Gene," are you referring to
7 Mr. Hamilton?

8 A. Uh-huh.

9 Q. And were these communications via E-mail?

10 A. So yes with respect to the data questions.
11 That's what I recall.

12 Q. Do you recall if these E-mails were of the
13 type that you turned over to counsel, your counsel?

14 A. As referenced to Ethan, I asked of EIT and my
15 counsel team to review all my E-mails and pull up what
16 was responsive.

17 Q. Sure. How did you understand that the basis
18 for rescinding DACA would be the illegality of the
19 program as articulated by Secretary Duke's rescission
20 memo?

21 MR. GARDNER: Objecting to the extent --
22 well, a couple of objections. 1, mischaracterizes the
23 witness' prior testimony.

24 But 2, objection to the extent that that
25 question is implicating the deliberative process

1 privilege, and to the extent you're asking him for
2 deliberations, I'll instruct the witness not to
3 answer.

4 THE WITNESS: I'll follow counsel's advice.
5 BY MR. LEE:

6 Q. You agree with me that as articulated by
7 Secretary Duke in the rescission memo, that the basis
8 for rescinding the DACA program is because it is an
9 unlawful program?

10 MR. GARDNER: Objection. Mischaracterizes
11 the document.

12 THE WITNESS: As described -- the Secretary
13 described her reasons in the memo.

14 BY MR. LEE:

15 Q. And when did you first come to understand
16 that those reasons, as she articulated in her memo
17 would be the reasons for rescinding DACA?

18 A. I mean I'm pausing because I'm not quite
19 sure. The -- there are several factors sort of
20 leading to what I think I understand your question to
21 be.

22 Q. I can clarify, and I apologize.

23 A. My apologies, probably with the time.

24 Q. Not at all. For present purposes I'm
25 referring only to the reasons that were articulated by

EXHIBIT C

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE REGENTS OF THE UNIVERSITY OF) Case No.
CALIFORNIA and JANET NAPOLITANO,) 17-CV-05211-WHA
in her official capacity as)
President of the University of)
California,)

Plaintiffs,)

v.)

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

Defendants.)

-----)
AND RELATED CASES.)
-----)

Wednesday, October 18, 2017

Videotaped deposition of PHILIP T. MILLER,
taken at the offices of Gibson, Dunn & Crutcher,
1050 Connecticut Avenue NW, Washington, D.C.,
beginning at 9:06 a.m., before Nancy J. Martin, a
Registered Merit Reporter, Certified Shorthand
Reporter.

1 Q. That's very helpful. Thank you.

2 I want to go back also to our prior
3 discussion about your contacts with the White House in
4 your current position. Under the prior
5 administration, my understanding is that your
6 interactions with the White House included
7 interactions with domestic policy counsel, the NSC,
8 OMB and leg affairs?

9 A. Correct.

10 Q. Can you explain to me, with respect to the
11 DPP (sic), how those interactions arose?

12 MS. DAVIS: I'm going to object on the
13 grounds of privilege, the deliberative process
14 privilege with respect to any of the content of
15 meetings with White House officials.

16 I instruct you not to answer with respect to
17 content.

18 THE WITNESS: I mean they wanted somebody
19 from ICE to be involved in the conversations, and
20 since I was running operations, I was the person that
21 was sent to those meetings, and we seemed to work well
22 together. So I kept getting invited.

23 BY MR. LEE:

24 Q. So just speaking specifically about the
25 DPP --

1 BY MR. LEE:

2 Q. If you can just say that last name once more,
3 slowly for me.

4 A. Loiacono.

5 Q. Loiacono?

6 A. Yes.

7 Q. And was this conversation with Mr. Loiacono
8 in a professional context or in sort of in a --
9 through a personal relationship?

10 A. Professional.

11 Q. What was the occasion by which you -- how did
12 you have occasion to speak with Mr. Loiacono?

13 A. He's my attorney, my primary, principal
14 attorney that I go to when I have questions. We meet
15 periodically to discuss either areas of concern that I
16 have, or he kind of updates me on issues that he's
17 working on with the Office of General Counsel.

18 Q. So was this -- how often do you speak with
19 him?

20 A. Almost daily.

21 Q. So was it in the course of one of these daily
22 conversations that you learned from him of the
23 possibility that DACA would be rescinded or amended?

24 A. Yeah. We talked about, you know, if it was
25 to be amended or --

1 MS. DAVIS: At this point I'm going to object
2 on the basis of the attorney-client privilege and
3 instruct the witness not to answer about the content
4 of his conversations with Mr. Loiacono with respect to
5 this subject.

6 BY MR. LEE:

7 Q. When, in spring 2017, did this conversation
8 occur?

9 A. I don't recall the specific date.

10 Q. How do you know that it was the spring?

11 A. Because ever since the executive orders came
12 out, we've been reviewing all of ICE policies and
13 procedures to make sure that they're aligned with the
14 executive orders.

15 Q. Was this conversation in person?

16 A. Yes.

17 Q. Were there any subsequent conversations with
18 Mr. Loiacono in which the general subject matter was
19 either the amendment or rescission of DACA?

20 MS. DAVIS: Again, I'm going to object on the
21 basis of the attorney-client privilege with respect to
22 the substance of his conversations with Mr. Loiacono.

23 I'm going to instruct the witness not to
24 answer.

25 MR. LEE: May he answer "yes" or "no"?

1 MS. DAVIS: Can you repeat the question?

2 MR. LEE: Of course.

3 Q. Were there any subsequent conversations with
4 Mr. Loiacono in which the general subject matter was
5 either the amendment or the rescission of DACA?

6 MS. DAVIS: I think you're asking about the
7 subject of those conversations, and the fact that he
8 spoke with them about those subjects would be a
9 privileged fact under the attorney-client privilege.

10 MR. LEE: Counsel, this is a question about
11 subject matter, not as to the content of what was
12 discussed regarding the potential amendment or
13 rescission of DACA, and I think this is clearly
14 contemplated by Judge Alsup's recent order with
15 respect to allowable lines of questioning in this
16 case.

17 And I mean, and for the record, in
18 yesterday's deposition your colleague, Mr. Gardner --
19 and you're welcome to confer with him -- has permitted
20 the witness to answer these questions at least at a
21 minimum with a "yes" or "no" answer.

22 So I'm going ask you that question once more,
23 and if you'd like to go off the record to confer with
24 Mr. Gardner or anybody else or review Judge Alsup's
25 order from yesterday, we can do that. But I will ask

1 that question once more and ask for a "yes" or "no"
2 answer, and you can let me know what you decide.

3 MS. DAVIS: Can you just hold on one second?

4 MR. LEE: Of course.

5 (Ms. Davis and Mr. Arnold conferred
6 sotto voce.)

7 (Pause in proceedings.)

8 MS. DAVIS: Can we go off the record so my
9 colleague and I can consult.

10 MR. LEE: Absolutely.

11 THE VIDEOGRAPHER: We're going off the
12 record. The time on the video is 11:40 a.m.

13 (A recess was taken from 11:40 a.m.
14 to 11:43 a.m.)

15 THE VIDEOGRAPHER: We're back on the record.
16 The time on the video is 11:54 a.m.

17 BY MR. LEE:

18 Q. Mr. Miller, you understand you are still
19 under oath?

20 A. Yes, I do.

21 Q. So let me go back to the question that was
22 pending. You discussed a spring 2017 meeting with
23 Mr. Loiacono in which he referenced the possible
24 amendment of rescission of DACA; correct?

25 MS. DAVIS: Objection to the characterization

1 purpose of that request?

2 A. I believe it was just to update something
3 that we had reported previously, and that was the
4 first ask of the new administration on something we
5 had generated for the previous administration.

6 Q. When you say, "first ask," what do you mean
7 by that?

8 A. The first time the new administration had
9 asked us to produce metrics on subsequent -- persons
10 who we took an enforcement action against subsequent
11 to being granted DACA.

12 Q. Was this the first ask of metrics from you
13 whatsoever from the Trump administration?

14 A. Well, I mean it wasn't asked directly to me.
15 There's been other -- you know, other reporting
16 requirements that we have on a regular, reoccurring
17 basis.

18 Q. But with respect to the metrics you were
19 involved in compiling since the beginning of this new
20 administration, was this request the first one that
21 you received?

22 A. No.

23 Q. What were some other metrics that you were
24 asked to provide for the new administration?

25 MS. DAVIS: Counsel, I'm going to object to

1 questions with respect to work product that has been
2 requested under the deliberative process privilege. I
3 should have made this objection before with respect to
4 the other work product. However, I'm going to
5 instruct the witness to not answer with respect to
6 work product that was asked of him predecisional to
7 any decisions that were made in consideration of that
8 information.

9 MR. LEE: The existence of the work product
10 or the content of the work product?

11 MS. DAVIS: Well, we've talked about the
12 content of the work product, which I think reveals
13 what was asked for and what was considered, or at
14 least what was asked for, and I think that does expose
15 an element of the deliberative process predecisional
16 to policies or decisions that were used -- or that
17 were made at a higher level. So I'm going to object
18 with respect to more questions about the content of
19 any work product that Mr. Miller created.

20 MR. LEE: As it relates to DACA.

21 MS. DAVIS: As it relates to DACA or to any
22 other decision that was made by the department in
23 which this was a request in order to -- you know,
24 through the deliberative process to consider
25 information in forming such a decision.

1 MR. LEE: Well, with respect, Counsel, your
2 definition of the deliberative process privilege,
3 there was no limiting principle. I mean that
4 essentially exempts -- or your instructions are then
5 to ask Mr. Miller to essentially not opine on any work
6 product he's ever done with the federal government.

7 Work product is probably work that eventually
8 laid to some form of action or decision eventually
9 with the government. So I cannot think that an
10 appropriate objection would be that even with respect
11 to work product that does not relate to DACA that the
12 deliberative process privilege applies.

13 MS. DAVIS: Okay. Perhaps we can lay a
14 foundation, then, with respect to the request, the
15 existence of work product and, I guess, a particular
16 decision or consideration that that request was
17 related to.

18 MR. LEE: That's fair. And I will do that.
19 Thank you.

20 Q. Mr. Miller, you indicated that you have
21 compiled metrics to the Trump administration prior to
22 the specific request relating to the aggregate numbers
23 of DACA beneficiaries that ICE has taken enforcement
24 action against; is that correct?

25 A. Yes.

1 Q. Were these metrics, these other metrics
2 related to DACA?

3 A. No.

4 Q. What was the nature those requests? What
5 metrics were you asked to provide is probably a better
6 question?

7 A. Well, enforcement action, a comparator pre
8 and post PEP, and metrics about UAC and family unit
9 encounters on the southwest border pre and post the
10 executive orders.

11 Q. When you say, "the executive orders," you're
12 referring to the February executive orders by
13 President Trump?

14 A. In January. The ones related to our line of
15 business were issued in January.

16 Q. That's correct, and thanks for the
17 clarification.

18 So to just make sure I understand and make
19 clear, one of the metrics was metrics involving
20 unaccompanied minors and family unit encounters on the
21 southwest border pre and post the January 2017
22 executive orders?

23 A. Correct.

24 Q. Thank you.

25 Any other metrics not related to DACA?

1 A. No.

2 Q. With respect to the metrics you developed --
3 with respect to the metrics you developed for
4 enforcement actions against DACA beneficiaries, do you
5 know if the information you provided was used
6 publicly?

7 A. I do not know.

8 Q. Do you recall in any shape or fashion the
9 number of individuals, DACA beneficiaries that ICE
10 took enforcement action against according to the
11 metrics you compiled?

12 MS. DAVIS: And I'm going to object to that
13 with respect to the deliberative process privilege to
14 the extent that you're asking for the content of that
15 metrics system itself. If he can -- he can answer yes
16 or no, but I'm going to object to the revelation of
17 the content of that information.

18 MR. LEE: Okay. So you're objecting to him
19 disclosing the number.

20 MS. DAVIS: Correct. I believe you asked if
21 he was aware, yes or no.

22 THE WITNESS: Could you restate, please.

23 BY MR. LEE:

24 Q. Well, I assume you are aware that you've
25 reached a number as a result of that compilation.

1 A. Yes.

2 MR. LEE: And I think where I was going to
3 was for the number itself. Which you're objecting?

4 MS. DAVIS: Yes. Under the deliberative
5 process privilege.

6 BY MR. LEE:

7 Q. And you intend to follow that instruction?

8 A. Yes.

9 Q. The metrics that you compiled, I believe you
10 referenced earlier, required a request for a USCIS
11 data set; is that correct?

12 A. Yes.

13 Q. And this USCIS data set included the alien
14 numbers?

15 A. Yes.

16 Q. Names?

17 A. I believe so, yes.

18 Q. Addresses?

19 A. That, I don't know.

20 Q. Any other information?

21 A. I'm not sure. I didn't review the status
22 myself.

23 Q. But the alien number, the "A" numbers and the
24 names you recall were part of this data set?

25 A. Yes. CIS keeps most of their data tied to

1 Q. And what did he say?

2 A. Essentially that, that he had been dealing
3 with Congressional separately, and that Corey was
4 going to do that. He wanted me to do the press and
5 have Corey do the Congressional.

6 Q. Going back to the E-mail chain that you
7 referenced about the Congressional event, who else was
8 on that chain?

9 A. Ray Covachi, who is the assistant director
10 for Congressional relations. I know he was on it.
11 Maybe some of the people that work in his office. I
12 don't recall specifically. Since I was going to do
13 the press, I kind of dropped off the conversation
14 about the Congressional stuff.

15 Q. Did you have any discussions with Ms. Johnson
16 prior to the press event about what you would tell the
17 press?

18 A. That morning we went through the press packet
19 in preparation for the call.

20 Q. What items were in the press packet?

21 A. There was a schedule --

22 MS. DAVIS: I'm going to object. I think we
23 need to lay some foundation with respect to the press
24 packet to determine if it's deliberative process
25 privileged.

1 MS. SAXE: I'm happy to lay a foundation. I
2 don't see how it would be subject to the deliberative
3 process privilege considering that a decision was
4 already made and that privilege only applies to
5 predecisional deliberations.

6 MS. DAVIS: Sure. The decision I have an
7 issue with is the communication to the public, not the
8 decision for DACA rescission. So with respect to that
9 decision, talking points or other recommendations may
10 be deliberative process privileged.

11 MS. SAXE: I'm going to go back to my
12 question, which was what items were in the press
13 packet. I'm not sure I see how a catalog of the items
14 that were in the press packet could be subject to a
15 deliberative process privilege.

16 MS. DAVIS: Okay. If your question is what
17 materials, as in like the title or identification of
18 the materials, then I think that's fine. I wouldn't
19 object to that. I think my objection would be to the
20 content of those materials, to the extent that the
21 deliberative process privilege applies.

22 MS. SAXE: Okay. Well, why don't we start
23 there.

24 Q. Mr. Miller, do you recall the specific items
25 that were included in the press packet, the documents?

1 It was either 9:30 or 10:00. I don't remember
2 specifically.

3 Q. How long did the call last?

4 A. It was about an hour.

5 Q. Going back to the other documents that were
6 in the press packet, you said there were FAQs?

7 A. Yes, ma'am.

8 Q. Were those the same FAQs that have since been
9 posted on the website?

10 A. I'd have to compare the two. Like I said, I
11 didn't review the press packet beforehand, and the
12 first time I've read the CIS FAQs is when your
13 colleague gave them to me today.

14 Q. And you weren't involved in drafting those
15 FAQs?

16 A. No, ma'am.

17 Q. You said there were also suggested responses
18 to possible questions from the press included in the
19 press packet?

20 A. Yes.

21 Q. Were you involved in drafting those?

22 A. No.

23 Q. Do you recall what the expected questions
24 from the press were that were described in those RTQs?

25 MS. DAVIS: Objection with respect to

1 privilege, deliberative process privilege. As I
2 explained, the suggested RTQs seem to be
3 recommendations with respect to public statements,
4 and, you know, as being predecisional to any
5 statements, I think that they are properly privileged,
6 and I'm going to instruct him not to answer unless you
7 have questions with respect to public statements that
8 he actually made that day.

9 MS. SAXE: I disagree with your assessment
10 that the deliberative process privilege applies. By
11 your definition, that privilege would encompass
12 essentially every action or communication or piece of
13 work product that the government prepares, and I don't
14 think that that is within the scope of that privilege.

15 I also don't think that because these
16 suggested responses were responses to questions that
17 would be coming from the press and published to the
18 public, the privilege could apply.

19 Are you instructing your client not to
20 answer?

21 MS. DAVIS: I would instruct him not to
22 answer with any other information than what was
23 publicly said on that call that day.

24 BY MS. SAXE:

25 Q. Are you choosing not to answer?

1 A. Yes.

2 Q. Do you recall specific questions that you
3 received from the press that day?

4 A. Yes.

5 Q. What specific questions do you recall?

6 A. I recall being asked what is the process for
7 the issuance of a notice to appear. We went through
8 that process. I was asked about are there any plans
9 to take enforcement action against people whose
10 benefits expire during the course of the maturation,
11 that two-year period, which there are no plans. And
12 we were asked if that would change after March 6, and
13 I told them that we have no plans for anything after
14 March 6. I believe those were the focus of the
15 questions of me, or at least the questions that were
16 referred to ICE.

17 Q. What was the process for the issuance of a
18 notice to appear that you walked through with the
19 press?

20 A. I told them that generally, our encounters
21 are in a custodial environment. The officer will
22 interview the suspected illegal alien, or person who's
23 violated their status. If they determine alien
24 removability, which is our two prong test for probable
25 cause, then they'll continue with a complete

EXHIBIT D

DONALD NEUFELD

10/18/2017

MARTIN JONATHAN BATALLA VIDAL v ELAINE C. DUKE

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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 MARTIN JONATHAN BATALLA)
 VIDAL, et al.,)
)
 Plaintiffs,)
) Case No.
 v) 1:16-CV-04756 (NGG) (JO)
)
 ELAINE C. DUKE, Acting)
 Secretary Department of)
 Homeland Security)
 JEFFERSON BEAUREGARD)
 SESSION III, Attorney)
 General of the United)
 States, and DONALD J TRUMP,)
 President of the UNITED)
 STATES,)
)
 Defendants.)
)
 -----x

Deposition of DONALD NEUFELD

Washington, DC

Wednesday, October 18, 2017

9:16 a.m.

Job No.: 37566

Pages: 1 - 211

Reported by: Donna Marie Lewis, RPR, CSR (HI)

1 to make, to issue reminder notices made within the
2 60 days?

3 A I believe so, yes.

4 Q Were you involved in the making of those
5 policies?

6 A I was involved in discussions about how
7 we could issue notices. I was not in the decision
8 making process for that policy. I was not part of
9 the group that decided that.

10 Q Were you consulted at all in that
11 decision to make --

12 A Yes.

13 Q -- policy? What was the nature of that
14 consultation?

15 A To offer how we might implement that
16 policy if it were adopted.

17 Q What was your recommendation to how
18 SCOPS might implement that policy?

19 MR. TYLER: Object on the grounds of
20 privilege. It is deliberative process
21 information. Direct the witness not to answer.

22

1 Q Who else was part of that meeting?

2 A James McCament, Tracy Renaud. Gene
3 Hamilton I believe participated by phone. There
4 was another individual -- individual on the phone
5 that I don't recall his name or even where he
6 worked. I believe there may have been one or two
7 others. I couldn't recall specifically who they
8 were.

9 Q What was the subject of that meeting?

10 Do you remember?

11 A The wind down of DACA.

12 Q Was there an agenda for that meeting?

13 A No.

14 Q Were there any written materials
15 generated for that meeting?

16 A Not that I recall.

17 Q Do you know if someone took notes or
18 minutes of that meetings?

19 A I don't believe so.

20 Q Were written minutes shared afterwards?

21 A No.

22 Q Do you know what was discussed at that

1 meeting?

2 A Yes.

3 Q What was the content of the discussion?

4 MR. TYLER: I'll object on the grounds
5 of deliberative process privilege, attorney/client
6 privilege, attorney work product privilege.
7 Directing the witness not to answer.

8 MR CHEN: Just for the record I want to
9 briefly note our objection to the invocation of
10 the deliberative process instruction in this
11 deposition. First, we don't think it's
12 appropriate to invoke that privilege generally in
13 this case because plaintiffs are challenging the
14 agency's decision making process and even if the
15 privilege does apply in this case we don't think
16 the government has met it's burden of making a
17 sufficient showing of the elements in that
18 specific instance. And I want to also note that
19 plaintiff's position is that the defendants have
20 waived attorney/client privilege over any
21 materials that bear on the legality of the DACA
22 program. Defendants stated that one of DHS's

1 A It would not have been SCOPS.

2 Q **Would it have been an outside vendor?**

3 A I'm not sure of the arrangement of how
4 the system gets programmed. It would have been
5 the responsibility of our Office of Information
6 Technology to make that happen and how they do
7 that I do not know.

8 Q **Do you know if they would have**
9 **contracted out to an outside vendor?**

10 A I know that they do contract out to
11 outside vendors. I don't know how they -- whether
12 they contracted out -- you know, what they
13 contract out to different vendors or what they do
14 in-house.

15 Q **I want to turn now to your office's**
16 **implementation of the DACA termination. Are you**
17 **familiar with Acting Secretary Duke's September 5,**
18 **2017 memo terminating the DACA program?**

19 A Yes.

20 Q **When did you first learn that the DACA**
21 **program would be terminated?**

22 A Well, I knew that it was a campaign

1 promise of the president.

2 Q When did you learn of the final decision
3 to terminate the DACA program?

4 A The final decision, when it was issued
5 on September 5.

6 Q You did not -- you didn't learn about --
7 you didn't learn that the DACA program would be
8 terminated prior to that date?

9 MR. TYLER: Objection. Vague.

10 THE WITNESS: I learned that they --
11 there was the meeting that I referenced before
12 where there were discussions about the wind down
13 of the DACA program.

14 BY MR CHEN:

15 Q At that meeting were you aware that the
16 DACA program would be terminated?

17 MR. TYLER: Objection. I will direct
18 the witness not to answer on grounds of privilege,
19 deliberative process privilege, attorney/client
20 privilege, attorney work product privilege.

21 MR CHEN: I just want to note for the
22 record that plaintiffs again object to the

1 MR. TYLER: Objection. Argumentative,
2 mischaracterizes testimony, vague, and you are
3 asking for a personal opinion.

4 BY MR CHEN:

5 Q Were you ever consulted about the
6 implementation of the DACA termination?

7 A Yes.

8 Q When were you consulted?

9 A Prior to September 5 and then at times
10 after September 5.

11 Q Let's start with consultations prior to
12 September 5. When did those consultations occur?

13 A The first meeting that I recall is the
14 one that I referenced earlier that was shortly
15 before September 5, probably the week before.

16 Q And you said that this was an in-person
17 meeting. Is that correct?

18 A Many of us were gathered in person
19 around the table and there were as I recall two
20 participants by phone.

21 Q Did you bring any documents to this
22 meeting?

1 A No --

2 MR. TYLER: -- Objection. Asked and
3 answered.

4 BY MR CHEN:

5 **Q What was the nature of the consultation?**

6 MR. TYLER: Objection. Direct the
7 witness not to answer on grounds of the
8 deliberative process privilege, the
9 attorney/client privilege, the attorney work
10 product.

11 BY MR CHEN:

12 **Q Did you suggest extending the September**
13 **5 deadline?**

14 MR. TYLER: Same objection. Directing
15 the witness not to answer.

16 BY MR CHEN:

17 **Q Did you suggest sending notices to**
18 **individuals to renew?**

19 MR. TYLER: Same objection. Directing
20 the witness not to answer.

21 BY MR CHEN:

22 **Q Did SCOPS make any preparations to**

1 discuss in a meaningful way what that -- how that
2 should impact my operations.

3 Q Did you discuss it in any other
4 capacity?

5 A No. What I would say is there was
6 speculation in conversations I had with colleagues
7 about whether that would back prompt something
8 from the department or the president.

9 Q Did you have other conversations?

10 A No.

11 Q Are you aware of Attorney General
12 Session's letter recommending to Secretary Duke --
13 Acting Secretary Duke, recommending that DACA be
14 terminated?

15 A Yes.

16 Q Did you ever have discussions about that
17 letter with other individuals in DHS?

18 MR. TYLER: I'll object to the extent
19 that the question calls for a revelation of the
20 consultive discussions, discussions with counsel
21 in regard to that subject matter.

22

1 BY MR CHEN:

2 Q So were you -- did you have discussions
3 with attorney general -- about the -- about the
4 letter with other individuals in DHS?

5 MR. TYLER: I will try to be clear with
6 my objection. To the extent that calls for an
7 answer about what might have occurred at the
8 meetings that Mr. Neufeld has testified about. If
9 it calls for a response that would inform you of
10 the subject matter of that meeting, what was
11 discussed, what factors were discussed I'm
12 directing the witness not to answer that question.

13 BY MR CHEN:

14 Q To be clear, I'm asking specifically
15 whether you have or have not discussed that, the
16 letter with individuals within DHS?

17 MR. TYLER: Same objection applies.

18 MR. WISHNIE: So that the record is
19 clear between objection and instruction, you are
20 instructing him not to answer the yes or no
21 question?

22 MR. TYLER: I'm asking to the extent

1 that counsel is seeking or his question seeks
2 information about what was discussed at this
3 consultative meeting that Mr. Neufeld has
4 testified in which counsel were present and which
5 the termination of DACA was discussed, if that
6 touches upon that meeting, that discussion then
7 I'm directing him not to answer the question. If
8 you are asking did he have water cooler
9 conversations with colleagues at SCOPS about the
10 AG's letter he can respond to that question.

11 BY MR CHEN:

12 Q Did you ever discuss the termination of
13 DACA with Acting Secretary Duke?

14 A No.

15 Q Did you ever discuss the termination of
16 DACA with acting director of USCIS James McCament?

17 A Yes.

18 Q When did you have these discussions?

19 A Again, the ending of DACA has been a
20 topic of conversation since DACA was instituted
21 and James McCament has been involved in a
22 leadership position of some sort for about that

1 MR. TYLER: Objection. Vague.

2 Argumentative.

3 THE WITNESS: I will -- it needs to be
4 clear that I didn't know about a decision, a final
5 decision until the final decision was issued on
6 September 5.

7 BY MR CHEN:

8 Q So when you referenced -- when you
9 characterized discussion about the wind down of
10 the DACA program what did you mean by wind down?

11 MR. TYLER: I'm going to direct the
12 witness not to answer. He's obviously referring
13 to the consultative process to which we've
14 objected before. So I'm going to direct the
15 witness not to answer on the same privileges;
16 attorney/client, deliberative process privilege,
17 attorney work product privilege.

18 BY MR CHEN:

19 Q So besides the one meeting that you
20 referred to a week before September 5 as well as
21 the phone conversations were there any other
22 meetings in which you and Mr. McCament were

1 discussed the consideration of termination of DACA
2 with people outside of DHS. Who are those
3 individuals?

4 MR. TYLER: Objection. I believe you
5 mischaracterized testimony.

6 THE WITNESS: I have had conversations
7 since the beginning of DACA about the DACA program
8 and its likely end at some point with neighbors,
9 relatives, many people.

10 BY MR CHEN:

11 Q Did you discuss the term -- the
12 considerations to terminate DACA with individuals
13 within the government besides those that you just
14 previously mentioned?

15 A Again, I have numerous colleagues and
16 the possibility of the termination of DACA was
17 widely discussed, but not in a planning sense.
18 More in terms of its news, it would affect our
19 operations and just a topic of conversation like
20 that. Not for planning purposes or deliberating
21 how to do it.

22 Q Were the reasons for the DACA

1 **termination communicated to you?**

2 A In the memo.

3 **Q Were they communicated to you in any**
4 **other way?**

5 MR. TYLER: I will again object to the
6 extent that you are trying to delve into
7 consultative conversations that the witness has
8 already testified to in which amongst other
9 participants counsel were present. I going to
10 direct that he not answer that question on grounds
11 of privilege. Same privileges that I have been
12 citing to.

13 BY MR CHEN:

14 **Q Just to be clear, Mr. Neufeld, I'm**
15 **simply asking whether the reasons were**
16 **communicated to you or not, besides those in the**
17 **memo, not the contents of those reasons.**

18 MR. TYLER: I'll object on vagueness. I
19 don't know what time we are now talking about.

20 BY MR CHEN:

21 **Q My question applies to any time whether**
22 **the reasons for the DACA termination?**

1 Q And you mentioned previously that you
2 have been in meetings and conversations with Gene
3 Hamilton about the DACA program. Is that correct?

4 A Yes.

5 Q And so, has he ever referred to DACA
6 recipients as criminals?

7 MR. TYLER: I'll object again to the
8 extent he has identified Mr. Hamilton as having
9 taken part in this meeting that the substance of
10 which we are objecting to on three privileges. So
11 to the extent you are asking him to go back to
12 that meeting and report what was said by whom I'm
13 going to object on grounds of deliberative process
14 privilege, attorney/client privilege, and attorney
15 work product privilege.

16 MR. WISHNIE: And you are also going to
17 instruct the witness? Is that right? I want to
18 make a clear record here for the court.

19 MR. TYLER: -- Yes.

20 BY MR CHEN:

21 Q Outside of that meeting, same question,
22 have you heard Mr. Hamilton refer to DACA

1 recipients as criminals?

2 A No --

3 MR. TYLER: -- Objection. Lack of
4 foundation. You can answer.

5 THE WITNESS: No.

6 BY MR CHEN:

7 Q Has Mr. Hamilton ever suggested that
8 DACA recipients do not deserve to be in this
9 country according to your -- to your knowledge?

10 MR. TYLER: Objection. Lack of
11 foundation.

12 THE WITNESS: No.

13 BY MR CHEN:

14 Q To your knowledge has Mr. Hamilton ever
15 used a racial slur to refer to DACA recipients?

16 A No.

17 Q And to your knowledge has he ever
18 referred to DACA recipients as a population by
19 race?

20 A No.

21 Q And to your knowledge has Mr. Hamilton
22 ever mentioned reasons to terminate DACA besides

1 the legality of the DACA program?

2 MR. TYLER: Object. I will direct the
3 witness not to answer if this question elicits
4 conversations that took place in this meeting.

5 BY MR CHEN:

6 Q To your knowledge outside of the
7 meeting?

8 A No.

9 MR. WISHNIE: Let's just have a moment.
10 We are just about done. We can stay on the record
11 for a moment.

12 BY MR CHEN:

13 Q I want to return just really quickly to
14 the late filed applications after October 5. So
15 you mentioned that there were six applications
16 filed late from Puerto Rico. Is that correct?

17 A That's correct.

18 Q You also mentioned that you had approved
19 all six or accepted is the term that you used?

20 A Directed that they be accepted.

21 Q You directed that they be accepted. And
22 did you use any criteria -- what criteria did you

EXHIBIT E

1 UNEDITED ROUGH DRAFT - GENE HAMILTON

09:15:20 2 P-R-O-C-E-E-D-I-N-G-S

09:15:20 3 THE VIDEOGRAPHER: Good morning. We

09:15:23 4 are going on the record at 9:00 a.m. on Friday --

09:15:26 5 excuse me, 9:13 a.m. on Friday, October 20, 2017.

09:15:32 6 This is media unit one of the video recorded

09:15:35 7 deposition of Gene Hamilton taken by counsel for

09:15:40 8 the plaintiff in the matter of Martin Jonathan

09:15:44 9 Batalla Vidal, et al., v. Elaine C. Duke, Acting

09:15:49 10 Secretary of the Department of Homeland Security;

09:15:50 11 Jefferson Beauregard Sessions III, Attorney

09:15:58 12 General of the United States; and Donald J.

09:16:01 13 Trump, President of the United States.

09:16:04 14 This is filed in the United States

09:16:06 15 District Court for the Eastern District of

09:16:09 16 New York. This deposition is being held at the

09:16:12 17 offices of the Conference of Mayors located at

09:16:17 18 1620 I Street, Northwest, Washington, D C 20006.

09:16:22 19 My name is Dan Raki from the firm of

09:16:25 20 Veritext Legal Solutions and I am the

09:16:28 21 videographer. The court reporter this morning is

09:16:31 22 Donna Lewis from the firm Olender Court

1 UNEDITED ROUGH DRAFT - GENE HAMILTON

10:24:40 2 BY MS. TUMLIN:

10:24:41 3 Q Okay. And I believe I was asking you
10:24:43 4 some questions about your role in president elect
10:24:47 5 Trump's transition team. When we broke I was
10:24:47 6 asking you about your work with Stephen Miller on
10:24:47 7 the transition team. To try to help us get over
10:24:55 8 some of the disagreement on objections I'm going
10:24:59 9 to restate that question and limit the temporal
10:25:03 10 scope.

10:25:03 11 So can you describe your work with
10:25:05 12 Stephen Miller on the transition team prior to
10:25:11 13 the election of President Trump?

10:25:18 14 A I don't know that we had a whole lot of
10:25:23 15 direct interaction on the transition team itself.
10:25:28 16 He was busy with the campaign. We were focused
10:25:32 17 on transition team related matters. We had some
10:25:38 18 interactions but I don't recall anything
10:25:40 19 specifically.

10:25:42 20 Q Okay. And looking now only at the
10:25:47 21 period after the election day and prior to the
10:25:50 22 inauguration of President Trump can you describe

1 UNEDITED ROUGH DRAFT - GENE HAMILTON

10:25:52 2 your interaction with Stephen Miller while on the
10:25:57 3 transition team?

10:25:57 4 MR. GARDNER: You can you answer that
10:25:58 5 question to the extent you can do so without
10:26:00 6 identifying pre-decisional deliberative
10:26:05 7 information. To the extent your answer would
10:26:07 8 include that we would instruct you not to answer
10:26:08 9 on the basis deliberative process privilege and
10:26:09 10 potentially presidential communications
10:26:12 11 privilege.

10:26:14 12 A We generally discussed the formulation
10:26:16 13 of policy.

10:26:18 14 Q Did you discuss the formulation of
10:26:20 15 immigration policy?

10:26:25 16 MR. GARDNER: That is a question you
10:26:25 17 can answer.

10:26:26 18 THE WITNESS: Yes.

10:26:26 19 BY MS. TUMLIN:

10:26:27 20 Q Did you discuss the formulation of
10:26:29 21 policy with respect to the DACA program?

10:26:34 22 A Yes.

1 UNEDITED ROUGH DRAFT - GENE HAMILTON

10:26:34 2 Q Did you discuss whether or not you felt
10:26:37 3 the DACA program should be terminated?

10:26:39 4 MR. GARDNER: I will object and now we
10:26:41 5 are talking post November 7?

10:26:44 6 BY MS. TUMLIN:

10:26:44 7 Q We're talking after November 7 and
10:26:47 8 prior to January 20 did you discuss whether you
10:26:49 9 felt the DACA program should be terminated with
10:26:52 10 Stephen Miller?

10:26:54 11 MR. GARDNER: At this point we object
10:26:54 12 on the basis deliberative process privilege and
10:26:56 13 presidential communication privilege. I instruct
10:26:58 14 the witness not to answer.

10:26:59 15 MS. TUMLIN: Okay. Plaintiffs take the
10:27:01 16 position that because the president had not yet
10:27:01 17 taken the oath of office that the presidential
10:27:06 18 privilege does not apply. We preserve our right
10:27:09 19 to take up that objection and the deliberative
10:27:13 20 process privilege as well.

10:27:21 21 BY MS. TUMLIN:

10:27:22 22 Q So again, I will try to be clear about

1 UNEDITED ROUGH DRAFT - GENE HAMILTON

01:44:42 2 Q To your knowledge did the day one book
01:44:44 3 include draft legislation that would effect DACA
01:44:47 4 recipientss?

01:44:49 5 A I don't recall anything that specific
01:44:52 6 it is possible but I really don't remember.

01:45:10 7 Q What were the key immigration proposal
01:45:15 8 in the day one book that you remember?

01:45:17 9 MR. GARDNER: Objection calls for
01:45:19 10 disclosure subject to deliberative process
01:45:23 11 privilege as well as presidential privilege I
01:45:29 12 instruct him not to answer.

01:45:33 13 BY MS. TUMLIN:

01:45:33 14 Q Have you discussed DACA with any
01:45:37 15 organization or individual outside of the federal
01:45:39 16 government?

01:45:43 17 A Is a pretty broad question. If you can
01:45:46 18 give me just a time frame.

01:45:48 19 Q Sure. Since inauguration day for
01:45:53 20 President Trump have you discuss DACA with any
01:45:55 21 organization outside of the federal government?

01:46:01 22 A I mean I can't say no. I probably it