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

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

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05211-WHA

**PLAINTIFFS' MEMORANDUM  
IN RESPONSE TO  
FOLLOW-UP REQUEST RE  
COMPLETION OF  
ADMINISTRATIVE  
RECORD AND DISCOVERY**

Judge: Honorable William Alsup

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

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05235-WHA

CITY OF SAN JOSE, a municipal corporation,

Plaintiff,

v.

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

Defendants.

CASE NO. 17-CV-05329-WHA

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

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05380-WHA

County of Santa Clara and Service Employees International Union Local 521,

Plaintiffs,

v.

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

Defendants.

CASE NO. 17-CV-05813-WHA

1 Plaintiffs submit the following memorandum in response to the Court’s Follow-Up Request Re  
2 Completion of the Administrative Record and Discovery, and Vacating Certain Dates (Dkt. No. 240).  
3 Plaintiffs submit that it would be prudent for the Court to narrow certain aspects of its October 17, 2017  
4 Order Re Motion to Complete the Administrative Record, and to stay discovery until the parties have the  
5 opportunity to pursue complete appellate review of the Court’s Orders dated January 9 and 12, 2018.

6 **A. The Administrative Record**

7 Defendants have proposed that their obligation to complete the administrative record be stayed  
8 pending the resolution of the government’s pending appeal of this Court’s rulings on the preliminary  
9 injunction and the motion to dismiss. Plaintiffs are prepared to agree with this proposal so long as the  
10 preliminary injunction remains in place and the government does not seek a stay of the injunction.

11 With respect to the scope of the record, plaintiffs and defendants have discussed the contents of  
12 the administrative record to see if agreement could be reached and further appellate proceedings on the  
13 issue avoided. To see if an agreement or narrowing of issues is possible, plaintiffs request that the Court  
14 defer any further order regarding the administrative record for an additional seven days to permit the  
15 parties to further discuss the issues.

16 Finally, in the interest of avoiding further delays and interlocutory appellate proceedings,  
17 plaintiffs are willing to agree to certain limitations on the scope of the record previously ordered,  
18 including the following.

19 **1. The Court could prudently limit the search for DACA-related materials to**  
20 **DHS and DOJ rather than “anywhere in the government.”**

21 By order dated October 17, 2017, the Court ordered defendants to include in the record all  
22 DACA-related materials considered by persons “anywhere in the government” who provided then-  
23 Acting Secretary Elaine Duke with written or verbal advice or input on the actual or potential rescission  
24 of DACA. *See* Order Re Motion to Complete Administrative Record, Oct. 17, 2017 (Dkt. No. 79)  
25 (“Order”) at 12–13. Plaintiffs suggest that the Court consider narrowing this requirement to apply only  
26 to materials located within or reviewed by personnel of the Department of Homeland Security (“DHS”) and  
27 the Department of Justice (“DOJ”) rather than “anywhere in the government.” *See In re United*  
28 *States*, 138 S. Ct. 443, 444 (2017) (noting that, in claiming that the Court’s order was overly broad, the

1 government emphasized the requirement that it produce DACA-related materials from anywhere in the  
2 government).

3 **2. The Court could prudently exempt from the administrative record White**  
4 **House documents that never left the White House.**

5 The Court ordered defendants to include in the record documents from White House personnel to  
6 the extent such personnel gave verbal or written input to then-Acting Secretary Duke. Order at 13. The  
7 Court should consider narrowing this requirement to only those documents from White House personnel  
8 that were actually provided to DHS or DOJ. Defendants have argued that the inclusion of documents  
9 that did not leave the White House complex and did not reach the relevant administrative agencies raises  
10 separation of powers concerns. Plaintiffs' proposal would obviate the need for White House personnel  
11 themselves to search for and produce any materials and exclude those documents that were internal to  
12 the White House, while still allowing the Court to review plaintiffs' claims in light of an administrative  
13 record that contains materials considered directly or indirectly by the agency.

14 **3. The Court could prudently limit its finding of "at-issue" waiver to materials**  
15 **that led to Attorney General Sessions' letter.**

16 The Court found that defendants waived attorney-client privilege by placing at issue attorney-  
17 client communications regarding "whether or not DACA was an unlawful exercise of executive power  
18 and therefore should be rescinded." Order at 10. Because the act that created the "at-issue" waiver was  
19 Attorney General Jeff Sessions' September 4, 2017 letter advising then-Acting Secretary Duke that  
20 DACA should be rescinded, the Court could reasonably limit the finding of waiver to materials that  
21 relate to the preparation of that September 4, 2017 letter. *See Duncan v. U.S. Dist. Court for Cent. Dist.*  
22 *of California*, 78 F.3d 592 (9th Cir. 1996) (noting that privilege is waived where a party puts  
23 privileged information at issue and that the "overarching concern is whether application of  
24 the privilege would be manifestly unfair to the opposing party" (citation and internal quotation marks  
25 omitted)).

26 **B. The Government's Privilege Assertions**

27 Plaintiffs agree with the Court's proposal for a fair and orderly process for defendants to raise  
28 any privilege claims with respect to specific documents or categories of documents. *See* Dkt. No. 240 at

1 1-2. Plaintiffs believe that all parties should have the opportunity to brief and, if appropriate, present  
2 oral argument on any such claims before the Court rules on them. Plaintiffs do not oppose the Court's  
3 Order directing defendants to submit for *in camera* review those documents they wish to withhold as  
4 privileged. However, plaintiffs request the opportunity to contest defendants' privilege assertions,  
5 which—as the Court has already found—have been overbroad. *See* Order at 13. Therefore, plaintiffs  
6 should be afforded the benefit of a robust privilege log, access to the declarations used to support  
7 defendants' assertions of privilege, and an opportunity to contest those privilege assertions. To enable  
8 plaintiffs to meaningfully assess the government's privilege claims, the Court should also require the  
9 government to supply redacted versions of the documents at issue. If the Court rules that particular  
10 documents for which defendants have asserted a privilege claim should be disclosed, and defendants  
11 intend to seek appellate review of those rulings, plaintiffs would be amenable to an arrangement under  
12 which the disputed documents would be maintained under seal to provide an opportunity for appellate  
13 review.

14 **C. Discovery Should Be Stayed Pending Resolution of the Present Interlocutory**  
15 **Appeals.**

16 In order to ensure the timely and efficient adjudication of their claims, plaintiffs are prepared to  
17 agree, so long as the preliminary injunction is in effect and the government is not seeking a stay of the  
18 injunction, to pause discovery until the parties have the opportunity to pursue complete appellate review  
19 of the Court's Orders dated January 9 and 12. The pending appeals may greatly affect the scope of  
20 required discovery.  
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1 Dated: January 19, 2018

Respectfully submitted,

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**ATTESTATION**

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

Dated: January 19, 2018

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