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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY and KIRSTJEN M. NIELSEN, in her official capacity as the Secretary of Homeland Security,

Defendants.

No. 3:17-cv-05211-WHA

DEFENDANTS' RESPONSE TO THIS COURT'S ORDER REGARDING THE ADMINISTRATIVE RECORD AND DISCOVERY

Judge: Honorable William Alsup

STATE OF CALIFORNIA, STATE OF MAINE, STATE OF MARYLAND, and STATE OF MINNESOTA, Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, KIRSTJEN M. NIELSEN, in her official capacity as Secretary of Homeland Security, and the UNITED STATES OF AMERICA, Defendants.	No. 3:17-cv-05235-WHA
CITY OF SAN JOSE, a municipal corporation, Plaintiff, v. DONALD J. TRUMP, President of the United States, in his official capacity, KIRSTJEN M. NIELSEN, in her official capacity as Secretary of Homeland Security, and the UNITED STATES OF AMERICA, Defendants.	No. 3:17-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	No. 3:17-cv-05380-WHA

as President of the United States, U.S. DEPARTMENT OF HOMELAND SECURITY, and KIRSTJEN M. NIELSEN, in her official capacity as Secretary of Homeland Security,

Defendants.

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

Plaintiffs,

v.

DONALD J. TRUMP, President of the United States, in his official capacity; JEFFERSON BEAUREGARD SESSIONS, Attorney General of the United States, in his official capacity; KIRSTJEN M. NIELSEN, Secretary of Homeland Security, in her official capacity; and the U.S. DEPARTMENT OF HOMELAND SECURITY,

Defendants.

No. 3:17-cv-05813-WHA

DEFENDANTS' RESPONSE TO THIS COURT'S ORDER REGARDING THE ADMINISTRATIVE RECORD AND DISCOVERY

On January 12, 2018, this Court issued an Order requesting that the parties submit their views regarding the scope of the administrative record, the resolution of privilege claims regarding any documents that purportedly are part of any such record, and whether discovery should resume. *See* Follow-Up Request re Completion of the Administrative Record and Discovery, and Vacating Certain Dates, ECF No. 240.[1] As for the administrative record, as the Government has previously argued, no modification to the record that the Government initially submitted is necessary or appropriate, but to the extent the Court disagrees the Government identifies below four alternatives to narrow this Court's prior Order regarding the record's scope. The Government also proposes a procedure below to fully brief, at the appropriate time, any privilege issues relating to the administrative record.

As a threshold matter, however, the Government requests that the Court stay proceedings in this case, including any supplementation of the administrative record, briefing of privilege issues, discovery, motions practice regarding amended complaints, and the filing of answers,[2] pending resolution of both the Government's appeal to the Ninth Circuit and a separate petition for a writ of certiorari before judgment filed with the Supreme Court. As explained below, the Government is already in full compliance with the Court's preliminary injunction and does not intend to seek a stay of that injunction pending appellate review. That appellate review will provide guidance on the scope and nature of future district court proceedings, to the extent future proceedings would even be necessary or appropriate. Accordingly, staying these proceedings now would be efficient and would not prejudice Plaintiffs in any way.

1. Stay of Proceedings

This Court has now entered a preliminary injunction in his matter, thus largely preserving the status quo ante. *See* ECF No. 234. U.S. Citizenship and Immigration Service immediately took steps to comply with that injunction and, on January 13, 2018, updated its website with

[1] All references to docket entries refer to the docket in *Regents of the University of California v. U.S. Dep't of Homeland Sec.*, No. 3:17-cv-05211-WHA.

[2] To the extent the Court does not grant the Government's request to stay all proceedings, the parties are separately negotiating an extension of time for the Government to file its responsive pleadings.

instructions regarding the submission of renewal Deferred Action for Childhood Arrival ("DACA") requests pursuant to the Court's Order. *See* https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction. Shortly thereafter, on January 16, 2018, the Government appealed this Court's preliminary injunction to the United States Court of Appeals for the Ninth Circuit. *See* Notice of Appeal, ECF No. 241. That same day, and pursuant to this Court's Section 1292(b) certification, the Government filed a petition in the Ninth Circuit for permission to appeal this Court's decisions on the Government's motion to dismiss. And on January 18, 2018, the Government filed a petition for a writ of certiorari before judgment with the United States Supreme Court. The Government has therefore both complied with the Court's preliminary injunction and promptly moved to seek appellate relief.

This Court should now stay all district court proceedings pending the resolution of these appeals, which will provide critical guidance on further proceedings in these cases. The Supreme Court has already noted that the Government's threshold arguments should be resolved before considering whether any record supplementation is necessary or appropriate. *In re United States*, 138 S. Ct. 443, 445 (2017). While this Court has rejected many of the Government's arguments, it has also recognized that the issues the Government raised in its motion to dismiss (for both lack of jurisdiction and failure to state a claim) involve "controlling questions of law as to which there is substantial ground for difference of opinion" such that "their resolution by the court of appeals will materially advance the litigation." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211 WHA, 2018 WL 339144, at *29 (N.D. Cal. Jan. 9, 2018) ("PI Order"); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211 WHA, 2018 WL 401177, at *8 (N.D. Cal. Jan. 12, 2018) (same).

The court of appeals and, potentially, the Supreme Court, should have an opportunity to provide guidance on these critical legal issues before further litigation proceeds in the district court. Appellate resolution of the Government's threshold justiciability issues may obviate the need for an administrative record at all. Similarly, appellate resolution of this Court's Order on the Government's Rule 12(b)(6) motion may eliminate the need for discovery regarding

Plaintiffs' constitutional claims, to the extent any such discovery is even appropriate. And Plaintiffs should not be required to move for leave to amend their complaints, and the Government should not be required to respond to those complaints, absent guidance from the appellate courts as to what claims, if any, are even viable. Accordingly, a stay of proceedings—which is within the inherent powers of this Court—would be both efficient and appropriate. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

Plaintiffs will not be prejudiced by a stay. The Court has entered a preliminary injunction, and the Government is already fully complying with the Court's Order. Moreover, the Government does not intend to seek a stay of the preliminary injunction pending resolution of these appellate proceedings. For these reasons, the Court should stay proceedings.

2. Scope of the Administrative Record

a. To the extent the Court wishes to re-evaluate the scope of the administrative record now, it should limit the record to that which was already defined and submitted by the Government: Non-privileged documents considered by the then-Acting Secretary of Homeland Security in deciding to rescind DACA.[3]

In its opinion, the Supreme Court recognized that the Government has "serious arguments" that this Court's order to supplement the administrative record is "overly broad," and suggested that, after the Government's threshold arguments were resolved, the district court could "consider whether narrower amendments to the record are *necessary and appropriate*." *In re United States*, 138 S. Ct. at 445 (emphasis added). In issuing that guidance, the Supreme Court implicitly rejected this Court's broader definition of an administrative record as set forth in its October 17, 2017 Order. *See* ECF No. 79. Accordingly, in re-evaluating the administrative record the Court should first determine whether any amendments to the record are even *necessary* at all.

[3] For the reasons set forth in Defendants' Opposition to Plaintiffs' Motion to Compel Completion of the Administrative Record, ECF No. 71, that is the appropriate record here.

And even if the Court finds that any such amendments are necessary, it must determine what amendments to the record would be *appropriate*.

No amendment of the administrative record is necessary. As a threshold matter, one of the two grounds for granting Plaintiffs' request for provisional relief was this Court's finding that the rescission was based on an allegedly flawed legal premise that the Department of Homeland Security ("DHS") lacked authority to implement DACA. *See* PI Order at *17-22. The Court's determination in this regard, however, was principally a legal one. And even if the Court were to conclude that the administrative record is somehow relevant to the Court's legal analysis, and also conclude that the record is somehow incomplete in this regard, the appropriate step would be to vacate the agency's action and remand for further investigation or explanation. *See Fl. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Camp v. Pitts*, 411 U.S. 1389, 142 (1973) (per curiam).

Nor is any record supplementation necessary regarding the Court's conclusion that Plaintiffs are likely to prevail in showing that litigation risk did not justify DACA's rescission. *See* PI Order at *23-26. Notwithstanding this Court's statement that litigation risk was a post-hoc argument advanced by government counsel, the administrative record is replete with documents reflecting an evaluation of litigation risk, including the OLC memo, court opinions from the *Texas* litigation, the letter from the Texas Attorney General threatening to amend the states' complaint in order to challenge DACA, the letter from the Attorney General identifying the threat of imminent litigation, and the rescission memo itself. To the extent the Court ultimately concludes that these materials are insufficient to support DACA's rescission due to litigation risk (as it has concluded for purposes of the preliminary injunction), it should simply remand to allow DHS "to cure the flaws in its process via a fresh agency action." PI Order at *26.

b. If the Court nonetheless concludes that a modification of the administrative record is necessary and appropriate, any modification should be significantly narrower than the Court's prior order in at least four respects.

First, this Court should exclude the White House from the scope of any order requiring supplementation of the administrative record. Any order requiring the White House to retrieve, review, process, and assert privilege over executive records would be akin to a discovery order and would therefore raise enormous separation of powers concerns. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 385 (2004) (making clear that discovery directed to the White House raises "special considerations" regarding "the Executive Branch's interests in maintaining the autonomy of its office" and "[t]he high respect that is owed to the office of the Chief Executive." (citation omitted)). Indeed, the Supreme Court in *Cheney* specifically rejected the contention that the White House could sufficiently protect itself against intrusive discovery through individual privilege assertions, holding that the White House should not unnecessarily be placed in the position of having to assert executive privilege. *Id.* at 390. As the Supreme Court explained, "[o]nce executive privilege is asserted, coequal branches of the Government are set on a collision course" and "[t]he Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives." *Id.* at 389. This Court's prior Order regarding the administrative record raises the exact same concerns as discovery: It requires the White House to identify custodians, retrieve and process documents, and assert privileges. Any record supplementation order should not impose these burdens on the White House. And for many of the same reasons, White House documents that are in the possession of DHS or other agencies should similarly be excluded from the scope of the administrative record. For these reasons, White House documents should explicitly be excluded from the scope of any future orders regarding the administrative record.

Second, DHS should not be ordered to supplement the record with additional documents unrelated to the litigation risk of maintaining the DACA policy and the Acting Secretary's concerns regarding its legality. Those are the reasons being offered by the Acting Secretary to justify her decision, and therefore those are the only possible documents relevant to the Court's review. *See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

Third, and for the reasons previously set forth by the Government, all deliberative materials should be categorically excluded from any supplementation of the administrative record. *See* ECF No. 71 at 20-22. That is because "the reasonableness of the agency's action is judged in accordance with its *stated* reasons." *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998) (emphasis added). It simply is "not the function of the court to probe the mental processes" of the then-Acting Secretary. *Morgan v. United States*, 304 U.S. 1, 18 (1938). Indeed, the analysis the Court has already conducted did not require any delving into the agency's "mental processes," but instead involved reviewing whether the stated reasons for the rescission were supported by the record the agency submitted. Accordingly, deliberative documents should be excluded from the scope of the administrative record, and no privilege logs should be required for any such documents.

Fourth, this Court should not require the retrieval and processing of documents from custodians who merely provided "verbal input regarding the actual or potential rescission of DACA" to the Acting Secretary. ECF No. 79 at 13. The Government is not aware of any authority requiring an administrative record to include documents considered by individuals who merely provided verbal input—however briefly—regarding the agency action reflected in that record. Moreover, this requirement has proven to be enormously burdensome and disproportionate to the needs of this case: Approximately half of DHS's relevant custodians, and one of the two Department of Justice relevant custodians, are on the Government's custodian list for the administrative record merely because they may have provided verbal input, and most if not all of those individuals are on that list because they happened to attend (and potentially spoke at) at a single meeting during which the potential rescission of DACA was discussed.

3. Privilege Issues[4]

To the extent the Court orders the production of any privileged documents (regardless of the basis for the privilege), Defendants request the opportunity—after the conclusion of the appeals—to formally invoke privilege regarding any privileged documents being withheld. To formally invoke the privilege regarding the documents previously identified on the privilege log, *see* ECF No. 71-2, as well as any privileged documents that might be identified in the future regarding an augmented administrative record, the Government proposes the following procedure that balances the Government's need for confidentiality with the Court's request to make the "vetting process fair to both sides," ECF No. 240 at 2:

- In conjunction with the filing of a privilege log, the privileged documents shall be submitted to the Court for *in camera* review;
- Within 60 days of the submission of the privilege log and the *in-camera* documents, the government shall publicly file a brief presenting its argument as to why Plaintiffs' need for the documents does not overcome the Government's assertion of privilege; and
- In conjunction with the public filing of the brief, the Government shall submit, *ex parte* and under seal, declarations formally invoking and asserting privilege.

Because the preparation of declarations will require coordination between multiple executive branch entities, the Government requests that it be provided with 60 days from the date that the Court lifts any stay of proceedings in order to provide its submission regarding the documents previously identified in its privilege log, with any subsequent submissions taking place 60 days after subsequent documents are identified on a privilege log.[5]

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[4] The Government respectfully believes that the Court's decision regarding waiver of the attorney-client privilege is in error. *See* ECF No. 79 at 9-10. To the extent the Court concludes that privileged documents are a proper part of the administrative record, the Government should be provided with an opportunity to assert all applicable privileges, including the attorney-client privilege.

[5] If the Court does not stay proceedings, the Government requests 60 days from the date of an order setting a schedule to submit its declarations and brief regarding the documents previously identified on its privilege log.

Dated: January 19, 2018

Respectfully submitted,

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