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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

CASA DE MARYLAND, et al., Civil No. RWT-17-2942

Plaintiffs,

v. Greenbelt, Maryland

U.S. DEPARTMENT OF HOMELAND SECURITY, et al., December 15, 2017

Defendants. 9:30 a.m.

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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography,
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P R O C E E D I N G S

THE CLERK: The matter now pending before the Court is Civil Case Number RWT-17-2942. Casa de Maryland, et al. versus U.S. Department of Homeland Security, et al. The matter comes before this Court for a motions hearing. Counsel, please identify yourselves for the record.

MS. BOWER: Good morning, Your Honor. Elizabeth Bower, willkie Farr and Gallagher on behalf of the plaintiffs.

THE COURT: Good morning.

MS. CASSIDY: Good morning, Your Honor. Nicole Cassidy, willkie Farr and Gallagher for the plaintiffs.

MR. FREEDMAN: Good morning, Your Honor. John Freedman from Arnold and Porter Kaye Scholer for the plaintiffs.

MR. CORKERY: Good morning, Your Honor. Dennis Corkery for the Washington Lawyers Committee for Civil Rights and Urban Affairs.

THE COURT: Good morning.

MR. SHUMATE: Good morning, Your Honor. Brett Shumate from the Department of Justice on behalf of the defendants.

THE COURT: Good morning.

MS. DAVIS: Good morning. Kathryn Davis from the Department of Justice.

1 MS. WESTMORELAND: Good morning. Rachael
2 Westmoreland from the Department of Justice.

3 THE COURT: Good morning. We've got some back
4 benchers.

5 MR. TYLER: John Tyler, Department of Justice on
6 behalf of the defendants, Your Honor.

7 MR. ROSENBERG: Brad Rosenberg of the Department
8 of Justice also on behalf of the defendants.

9 MR. PEZZI: Steven Pezzi on behalf of the
10 Department of Justice for defendants.

11 THE COURT: Good morning. All right. I see
12 we're well represented from the Justice Department.

13 All right. We are here on the defense motion.
14 I'll be glad to hear from you. Are you going to argue,
15 Mr. Shumate?

16 MR. SHUMATE: Yes, Your Honor.

17 THE COURT: Thank you.

18 MR. SHUMATE: May it please the Court. The
19 Court should dismiss this challenge to DHS' rescission of
20 the deferred action policy known as DACA for three
21 reasons. First, the Court lacks jurisdiction because the
22 rescission of DACA is an unreviewable exercise of
23 prosecutorial discretion to deny deferred action to
24 persons who are removable; second, DHS reasonably
25 explained its decision to rescind DACA in an orderly

1 fashion rather than risk an immediate nationwide
2 injunction by the same Texas district court that had
3 enjoined expanded DAPA in an opinion that had been
4 affirmed by the Fifth Circuit and the Supreme Court; and,
5 third, that plaintiffs have not alleged a clear case that
6 the rescission of DACA was motivated by animus nor have
7 they alleged any due process right to the continuation of
8 DACA.

9 If I could first speak to the question of the
10 Court's jurisdiction, Your Honor? The Court should
11 dismiss the case because Congress has --

12 THE COURT: Were you comfortable that the Texas
13 court had jurisdiction?

14 MR. SHUMATE: Well, that involved a very
15 different situation, Your Honor. That was a case and the
16 Texas court said this is a case where the government is
17 affirmatively taking some action. It would be very
18 different if it were government inaction to deny deferred
19 action or voluntary departure and they distinguished that
20 case from the Perales case which involved denial of work
21 authorization and voluntary departure. And the court said
22 in that situation there is no law to apply. When the
23 government is taking some action -- in that case it was
24 granting DACA -- there is a danger that the government may
25 be abdicating its statutory responsibilities. But it's a

1 very different case in a situation like this where the
2 government is not taking action. It's denying deferred
3 action. In a case like this one, there is simply no law
4 to apply.

5 And Section 701(a)(2) of the APA strips the
6 court of jurisdiction in a case involving a denial of
7 deferred action because it is an exercise of prosecutorial
8 discretion that is committed by law to the executive
9 branch.

10 In addition, there is a second statute that
11 strips the court of jurisdiction. That is Section 1252(g)
12 of the INA. That statute strips the court of jurisdiction
13 to review the rescission of DACA because Congress intended
14 to prevent courts from reviewing denials of deferred
15 action.

16 The plaintiffs try to circumvent these
17 jurisdictional bars in a number of ways and I'm happy to
18 respond to each of those. Each of those arguments are
19 meritless. And the first point I'd like to make is that
20 the rescission of DACA does not become reviewable simply
21 because the Acting Secretary gave a reviewable reason in
22 her decision. The Supreme Court explained in a case
23 called BLE that the exercise of prosecutorial discretion
24 does not become reviewable simply because the agency gives
25 a reviewable reason.

1 So it's important not to confuse the agency
2 action here with the reason given for that action. The
3 agency action that is being challenged here is a denial of
4 deferred action. That is inherently an exercise of
5 prosecutorial discretion.

6 THE COURT: well, is a denial a deferred action
7 or is it simply rescinding the program of prosecutorial
8 discretion that was put in place previously?

9 MR. SHUMATE: The rescission of DACA is a
10 decision by DHS not to grant deferred action. So DACA
11 established a policy whereby the government would grant
12 deferred action status on a class-wide basis --

13 THE COURT: Allegedly on the basis of
14 prosecutorial discretion.

15 MR. SHUMATE: That's correct.

16 THE COURT: Right.

17 MR. SHUMATE: And the rescission of that
18 decision is also --

19 THE COURT: Also an exercise of prosecutorial
20 discretion.

21 MR. SHUMATE: Right.

22 THE COURT: Right. Okay.

23 MR. SHUMATE: Exactly right. And what makes it
24 an exercise of prosecutorial discretion is that denial of
25 deferred action, there is simply nothing in the INA that

1 the plaintiffs can point to that would give the court a
2 meaningful standard to evaluate whether the denial of
3 deferred action was reasonable or not.

4 The Supreme Court in the AADC case explained
5 that. Denials of deferred action, that is a discretionary
6 determination by the government.

7 In the Mada-Luna case from the Ninth Circuit,
8 that court also explained denial of deferred action status
9 is not something that is reviewable because there is not a
10 standard in the INA. That decision to deny deferred
11 action does not, therefore, become reviewable simply
12 because the Acting Secretary said we have concerns about
13 the legality of DACA.

14 Imagine if in this case the Acting Secretary had
15 just said I'm rescinding the 2012 DACA memorandum full
16 stop. There would be no explanation about the legality --
17 of her concerns about the legality of the policy or the
18 Attorney General's views about the legality. There would
19 be nothing in the record that the court would even
20 potentially be able to review. The reviewability and
21 justiciability question shouldn't be any different merely
22 because she gave a reviewable reason and that is she had
23 concerns about the legality of the policy.

24 The second reason the plaintiffs have pointed to
25 is that this was a class-wide decision rather than an

1 individualized denial of deferred action. But that is a
2 distinction without a difference.

3 The Heckler case, which is a 1985 Supreme Court
4 decision involved a decision to deny enforcement on a
5 class-wide basis, not to go after manufacturers of drugs
6 using the capital punishment.

7 The bottom line question is whether there is law
8 to apply to evaluate the denial of deferred action and
9 they have not pointed to anything. It doesn't matter
10 whether that decision is taken on a class-wide basis or on
11 an individualized basis. The point of our Section 701
12 argument is that there is simply no law to apply in the
13 INA to evaluate whether the denial of deferred action
14 status is something that the Court can review.

15 I'd also like to address Section 1252(g) and the
16 plaintiffs' argument really does miss the forest for the
17 trees. The statute applies here to the rescission of DACA
18 because this was a decision to deny deferred action to
19 individuals who are otherwise removable. And the Supreme
20 Court spoke to this in the AADC case and they said the
21 entire point of the statute is to insulate decisions to
22 deny deferred action and other discretionary
23 determinations from judicial review. There is an inherent
24 danger when courts exercise review over decisions to take
25 prosecutorial discretion.

1 And so there are two circuits that have already
2 weighed in on this question. The Seventh Circuit in a
3 case called Botezatu said "review of refusal to grant
4 deferred action is excluded from the jurisdiction of the
5 district court." And the Third Circuit in a case called
6 Vasquez, which we cited in our brief says courts do not
7 have "jurisdiction to review a denial of DACA relief
8 because that decision involves the exercise of
9 prosecutorial discretion not to grant deferred action."

10 At the end of the day, what the plaintiffs are
11 asking the Court to do is gut the entire purpose of that
12 statute by reviewing a denial of deferred action and the
13 Court should not do that.

14 One of the other points that the plaintiffs have
15 made is that their constitutional claims are not covered
16 by either of these jurisdictional bars and that even if
17 the Court were to dismiss their statutory claims, their
18 other claims would survive. But that is not true, Your
19 Honor. Section 1252(g) expressly applies to any cause or
20 claim. So therefore, it insulates denial of deferred
21 action from any challenges.

22 And to be sure, the Supreme Court has indicated
23 there may be some cases that fall within Section 701 that
24 may allow constitutional claims to be brought. But those
25 are not cases involving prosecutorial discretion and

1 certainly not in the immigration context. In that
2 specific --

3 THE COURT: well, if they're alleging here that
4 prosecutorial discretion is being exercised in an
5 unconstitutional manner, doesn't that get review before
6 this court?

7 MR. SHUMATE: well, what the Supreme Court said
8 in AADC is that there may be a rare case involving
9 outrageous discrimination where the presumption against
10 reviewing exercises of prosecutorial discretion may be
11 overcome. We respectfully submit that is not even close
12 to that case here.

13 But what the court said is that in a case
14 involving an equal protection challenge and in AADC, it
15 was a selective prosecution claim. These are claims by
16 individuals who are unlawfully in the country and it's
17 just the courts do not allow those individuals to bring
18 these types of claims lightly. And so, therefore, there
19 is a very high hurdle to bring those claims. So in our
20 view, Your Honor, the jurisdictional bar is applied
21 equally to all of their claims.

22 If I can next turn to -- even if the Court were
23 to decide that these claims were reviewable, Your Honor,
24 we think the Secretary's decision easily survives the APA
25 standard of review for a couple of reasons. First is that

1 she rationally explained her decision to rescind the 2012
2 DACA memorandum. I think it's important to first
3 recognize there is no statutory challenge to the Acting
4 Secretary's decision. There is no dispute that the action
5 she took here is consistent with the INA. Is not in any
6 way in conflict with the statute or foreclosed by the
7 statute.

8 The only question is whether she gave a rational
9 explanation for her decision under the deferential APA
10 standard of view and here she plainly did. She explained
11 that DACA would likely be enjoined by the same Texas
12 district court that had enjoined expanded DACA on a
13 nationwide basis. That decision was affirmed by the Fifth
14 Circuit and it was affirmed by the Supreme Court.

15 And so her calculus was I can either rescind
16 DACA in an orderly fashion, allow for a wind-down or I can
17 take the risk that the Texas plaintiffs who had already
18 threatened to bring a lawsuit against DACA would do so in
19 the same Texas district court that had enjoined expanded
20 DACA, in which case there very likely would have been an
21 immediate injunction ending the program and allowing --
22 and throwing the entire DACA policy into chaos. She chose
23 the least disruptive option. She chose to wind down DACA
24 in an orderly fashion. She did not strip any DACA
25 recipient of their DACA status immediately. She allowed

1 for there to be a process whereby the policy would be
2 wound down over the course of six months. She allowed
3 renewals to take place. There is nothing irrational about
4 that in any way.

5 She also relied on the Attorney General's view
6 that DACA is unlawful. That conclusion follows naturally
7 from the Fifth Circuit's decision that expanded DACA was
8 unlawful, conflicted with the statute, conflicted with
9 other principles in the INA that -- and the Supreme Court
10 had affirmed that decision.

11 Here, the Attorney General concluded that DACA
12 has the same legal and constitutional defects as expanded
13 DACA and that's quite clear. DACA like expanded DACA had
14 been created by DHS as an exercise of discretion without
15 proper statutory authority. The Fifth Circuit has said
16 quite clearly that Congress had spoken to this question
17 and had not allowed DHS to create this type of deferred
18 action policy.

19 Another thing that troubled the Attorney General
20 is that DACA had no established end date. It allowed
21 class-wide relief of -- for class-wide grants of deferred
22 action status. I think it's essential here to remember
23 the APA standard of review. This is not a situation where
24 the Court should substitute its judgment for the Acting
25 Secretary's. Under the deferential APA standard of

1 review, the only question is whether her decision is
2 rational and we submit that it respectfully is.

3 Now the second reason they have alleged that the
4 Acting Secretary's decision conflicts with the APA is that
5 rescission of DACA did not go through the APA's notice and
6 comment rule-making requirements.

7 I just have two points to make on that, Your
8 Honor. The first is that the creation of DACA did not go
9 through notice and comment rule-making. And the Fourth
10 Circuit has spoken to a situation just like this. Where
11 an agency adopts a policy and it does not do so through
12 notice and comment rule-making, the agency does not have
13 to go through those strict procedures to rescind a policy
14 that did not go through notice and comment rule-making.
15 That's the Carroll case, 48 F.3rd 1331 at Footnote 9. I
16 can just read from the opinion. "If the interim rule were
17 a substantive rule, it would have been invalid from the
18 date of its issuance for failure to comply with the notice
19 requirements under 5 USC 553."

20 So even if the rescission of DACA were a
21 substantive legislative rule that should have gone through
22 notice and comment rule-making, DACA was also a
23 legislative rule and did not go through notice and comment
24 rule-making procedures and therefore, would have been
25 invalid from the start.

1 Now the second reason why notice and comment
2 rule-making procedures are not required is that this is a
3 statement of policy exempt from the notice and comment
4 rule-making requirements in the APA because this explains
5 to the public how DHS intends to exercise its discretion
6 in the future with respect to deferred action.

7 Now there's a test that the Fourth Circuit uses
8 to evaluate whether something is a legislative rule or a
9 statement of policy and we satisfy both of those. Number
10 one, the memo that rescinds the DACA policy establishes no
11 binding legal norms. It does not in any way strip anyone
12 of their DACA status immediately. It imposes no binding
13 legal norms on DACA recipients and it doesn't affect any
14 rights of DACA recipients because the 2012 DACA memorandum
15 was quite clear that it created no rights in any -- no
16 substantive right in any of the recipients of DACA.

17 Moreover, DHS remains free to exercise its
18 discretion to grant deferred action status in the future.
19 The memo describes how DHS will adjudicate requests for
20 deferred action in the future on an individualized
21 case-by-case basis. It quite clearly says that DHS will
22 continue to exercise its discretionary authority over
23 deferred action and it also says that the memo places "no
24 limitations on the agency's otherwise lawful enforcement
25 prerogatives." So it's quite clear that this is a

1 statement of policy. It did not have to go through notice
2 and comment rule-making procedures.

3 And the third APA issue I'd like to address,
4 Your Honor, goes to the information-sharing claims. One
5 of the allegations is that the government has decided to
6 change the policy on a sharing of information that DACA
7 recipients have submitted to ICE and CBP for enforcement
8 purposes. But those claims fail for one simple reason.
9 There has been no change in the policy on
10 information-sharing. So therefore, there's no final
11 agency action and the plaintiffs have no standing.

12 The rescission policy that is being challenged
13 here says nothing about the sharing of information for
14 enforcement purposes. There's nothing more that the
15 plaintiffs have raised other than a speculative fear that
16 this might happen in the future. But DHS has been quite
17 clear and they said on the FAQ section --

18 THE COURT: Are you prepared to say that from
19 representing the defendants that there is no intention of
20 changing the information-sharing assurances that were
21 given in connection with DACA?

22 MR. SHUMATE: No. I'm not making that
23 representation, Your Honor. Even from the beginning, DHS
24 has been quite clear that this policy on
25 information-sharing can change. But the question for the

1 Court is has it changed. Have they alleged final agency
2 action that the Court would thus have jurisdiction to
3 review it and they have not. And DHS said quite clearly
4 "this information-sharing policy has not changed in any
5 way since it was first announced including as a result of
6 the September 5, 2017 memo starting a wind-down of the
7 DACA policy." So there has been no change. DHS has been
8 clear from the start that there has been no change.

9 But they also I think take liberties with what
10 that policy is. There has never been a promise or
11 assurance that that information would never be changed.
12 FAQ 19 quite clearly says that the information is
13 generally protected and will not be shared for enforcement
14 purposes, but there may be circumstances where it will be
15 to adjudicate a DACA application or for law enforcement
16 purposes if the individual meets the status of the test
17 for notice to appear. But also quite clearly, DHS has
18 said from the start that the information policy -- sharing
19 policy can change, but it has not. So that really should
20 be the end of the debate about information-sharing.

21 If there are no other questions about the APA
22 claims, I'd like to say a few things about the
23 constitutional claims that are --

24 THE COURT: Okay. You may proceed.

25 MR. SHUMATE: The equal protection claims are

1 the ones that are primarily being brought by the
2 plaintiffs, those should be dismissed, Your Honor, because
3 the plaintiffs have come nowhere close to meeting the high
4 standard for alleging an equal protection challenge to the
5 exercise of prosecutorial discretion.

6 The standard is quite high. The Supreme Court
7 has been quite clear on this in *Armstrong* and *AADC* is that
8 to overcome the presumption of regularity that attaches to
9 an exercise of prosecutorial discretion, the plaintiff has
10 to allege a clear case that the government's action was
11 motivated by discriminatory animus. And in the *AADC* case,
12 the Supreme Court spoke clearly to the exercise of
13 prosecutorial discretion in the immigration context and
14 they said there has to be a rare case indeed involving
15 outrageous discrimination to overcome that presumption
16 because there are dangers inherent with courts
17 second-guessing the exercise of prosecutorial discretion.

18 And the plaintiffs failed to meet that standard
19 here for a couple of reasons. They really only point to
20 two things. One is the alleged disparate impact on
21 Mexicans and Latin Americans from the rescission of DACA.
22 But the fact that the policy may affect those individuals
23 is an accident of geography, not an example of
24 discriminatory animus. And I think the case law is pretty
25 clear that just because something may impact a group of

1 individuals does not suggest that action was taken with
2 some sort of ill motivation toward those individuals.

3 They also point to a number of statements, but
4 they cannot attach any of those statements to the actual
5 decision maker here who was Elaine Duke, the Acting
6 Secretary of DHS. There is no suggestion that she
7 harbored any animus when she took this decision to -- made
8 this decision to rescind the 2012 DACA memorandum.

9 The other set of claims are due process claims,
10 Your Honor, but those should also be dismissed because
11 there is no due process right to the continuation of DACA.
12 The 2012 memo was clear and I'll quote "this memorandum
13 confers no right immigration status or pathway to
14 citizenship. Only the Congress acting through its
15 legislative authority can confer those rights." If there
16 is no right, there is no due process claim because they
17 have not sufficiently alleged a property or liberty
18 interest in their deferred action status.

19 The other reason is that this is entirely
20 discretionary. The decision by the government to grant
21 deferred action status is something that is inherent in
22 the government's discretion. Likewise the denial of that
23 deferred action status is not something that confers any
24 rights. It is not something that is conferred by statute
25 or regulation. This is something that is inherent to the

1 agency's prosecutorial discretion.

2 The last thing I'd like to address, Your Honor,
3 is the request for Rule 56(d) discovery. I can just make
4 a few brief points on that. This is really nothing more
5 than a fishing expedition and I think if you take a look
6 at some of the discovery requests, it will be quite clear.
7 One thing they are asking for is "any and all documents
8 and communications within the entire executive branch
9 related to the presence in the United States of Mexicans,
10 Central Americans or Latinos." That is nothing more than
11 a fishing expedition.

12 I think it's important to remember what the
13 standard is for Rule 56(d). It is the fact that they have
14 to show that they cannot oppose the motion for summary
15 judgment because they do not have facts that are essential
16 to opposing the motion. They do not lack any of those
17 facts, Your Honor. This is a record review case involving
18 the Acting Secretary's decision to rescind the 2012 DACA
19 memorandum. Her reasons are quite clear on the face of
20 that document. There is no reason or need for the Court
21 to engage in discovery to evaluate the legal questions
22 that are now before the Court.

23 It would also be improper for them to use Rule
24 56(d) to overcome the high bar on discovery of equal
25 protection claims, Your Honor. As I mentioned Armstrong

1 involved an equal protection challenge to the exercise of
2 prosecutorial discretion. And the court said to get
3 discovery on that claim, a plaintiff has to overcome a
4 very high bar and to demonstrate -- make a threshold
5 showing that there has been a clear case of
6 discrimination. They have not met that bar here.
7 Therefore, discovery would be inappropriate, Your Honor.
8 Those are the only points I'd like to make, Your Honor.
9 I'm happy to answer any other questions.

10 THE COURT: All right. Let me hear from the
11 plaintiffs.

12 MR. SHUMATE: Thank you.

13 MS. BOWER: Good morning, Your Honor. Elizabeth
14 Bower, as I said earlier, on behalf of the plaintiffs.

15 We need to take a step back. What we did not
16 hear from the government's presentation is anything that
17 was alleged in the complaint. As we state specifically in
18 our complaint and as apparent from the caption and the
19 facts in the complaint, I represent 16 individuals and
20 nine organizations who filed this lawsuit to challenge not
21 a denial of deferred action, but to challenge the
22 government's decision that was announced on September 5th
23 to rescind a program, the DACA program and all of its
24 protections after a chorus of derogatory and threatening
25 public statements by senior government officials directed

1 at Mexican and Latino immigrants.

2 The organizational plaintiffs provide services,
3 support and advocate on behalf of immigrants including
4 DACA recipients and as the complaint makes clear, they
5 have collectively assisted tens of thousands of
6 individuals to apply for DACA and have several thousand
7 DACA members. The individuals are young men and women and
8 some teenagers of Mexican and Latino descent brought here
9 to this country as children and raised here. They have
10 built their lives in this country. This is their home.

11 THE COURT: Well, I understand what the program
12 is all about and why it was put together and those are
13 very, you know, meritorious reasons for trying to protect
14 people of this nature. If I understand some of the
15 contentions that the plaintiffs are making is that the
16 President through the use of his statements via Twitter
17 and other things, which make life very interesting for
18 judges and lawyers, has expressed some views about
19 immigration and people coming here from Mexico and that
20 some of them may be rapists and murderers and so forth.
21 He also said some of them are very nice people. So he's
22 not made all Mexicans into this category.

23 But if I understand with respect to the question
24 of DACA, the specific program, the Secretary in this case
25 has decided to rescind it because of announced questions

1 as to its legality based upon the Fifth Circuit opinion
2 and the affirmance by an equally divided Supreme Court and
3 that the program needs to be wound down, not abruptly
4 stopped. And if I recall correctly, the President said
5 something to the effect he wanted Congress to do something
6 within that six months to regularize it from a legal
7 standpoint by enacting it as a congressional act. Isn't
8 that the background that I have to examine this case on?

9 MS. BOWER: Well, that is part of the
10 background, Your Honor. But the reliance element, which
11 is why the implementation of the program and the
12 individuals who were eligible for and applied for and in
13 good faith relied on the government in coming forward and
14 applying and taking advantage of the benefits provided by
15 the program is important to the decision-making process
16 that Secretary Duke applied and others within the
17 administration including individuals within the White
18 House and the Department of Justice. That the reliance by
19 these individuals is a critical component and a salient
20 problem of the agency's decision to rescind DACA that is
21 completely absent from this record that the government has
22 put forth to support the rescission decision.

23 And on the congressional point, we would love
24 for Congress to act on this issue, but --

25 THE COURT: There's still time.

1 MS. BOWER: -- we're not here.

2 THE COURT: They are still negotiating.

3 Congress is in session.

4 MS. BOWER: Congress is in session.

5 THE COURT: Hope springs eternal.

6 MS. BOWER: It does. It certainly does. But
7 until that time --

8 THE COURT: I would like nothing better than to
9 have this case become moot.

10 (Laughter.)

11 MS. BOWER: But today, it's not.

12 THE COURT: My understanding is that that is
13 being talked about on Capitol Hill. Now whether they do
14 anything before the wind-down of this program or not, we
15 don't know.

16 MS. BOWER: That is correct, Your Honor.

17 THE COURT: Okay.

18 MS. BOWER: And given the significant impact
19 that this rescission memo has and will continue to have on
20 both recipients of DACA and those who are eligible for and
21 now are no longer under the rescission memo able to apply
22 for DACA, it's important to move forward with --

23 THE COURT: Well, how did they get all these
24 rights that you're describing when the initial memorandum
25 that established the program in the first place said that

1 there's no rights being established by virtue of the
2 deferred action in their exercise of discretion? It was
3 spelled out loudly and clearly in the original decision,
4 wasn't it?

5 MS. BOWER: The savings clause, if you will,
6 Your Honor, does not negate the substantial benefits that
7 were conferred through the operation of the program. DACA
8 was pushed out. There was a concerted outreach effort by
9 the government to go and encourage individuals to apply
10 and when they pitched the program, they pitched it as a
11 package of benefits. It provided the tool kit not only to
12 stay in this country, but it provided the tool kit for a
13 livelihood. Recipients were told that they would have the
14 ability to work, that they would have the ability --

15 THE COURT: Is it your position that that
16 language in the original decision to establish DACA was
17 simply providing legal cover for the government's
18 intention to set up some real permanent benefits for
19 people and that they were really trying to cover their
20 tracks by saying you're not getting any permanent rights
21 by this program?

22 MS. BOWER: I wouldn't call it legal cover, Your
23 Honor, and I don't know what their intention was obviously
24 for providing that. But I will say that a general savings
25 clause cannot trump the specific rights that were

1 conferred through the program.

2 And the 150-page standard operating procedures
3 that the government ruled out in connection with DACA
4 spelled out specific steps that would need to occur in
5 order for an individual to be terminated from the benefits
6 and the program, the DACA program itself. So the
7 government also acted in a way and reflected as the Perry
8 case supports a mutual understanding between the
9 government and the DACA recipients that it was conferring
10 benefits and that they had legal protection to live in
11 this country.

12 THE COURT: Let me ask you this. The original
13 program was expressed in terms of prosecutorial discretion
14 and that we're going to exercise the discretion not to
15 prosecute people who are here illegally provided you do
16 the following things. That's essentially what it's
17 saying.

18 Prosecutors' offices throughout the country have
19 to make decisions like that. A state legislature can pass
20 laws and say we want to prohibit the possession of various
21 types of drugs and the maximum punishment is X, Y and Z
22 and you, prosecutors, you faithfully execute the laws and
23 prosecute these people. There's not a prosecutor's office
24 around this country that I'm aware of that doesn't have
25 some kind of a deferred or diversionary program for

1 low-grade drug offenses. And they will tell people come
2 to us with your low grade -- you've been charged by the
3 police with possession of some particularly small quantity
4 of drugs. We got better -- more important fish to fry in
5 this prosecutor's office, the murderers and the robbers
6 and rapists and we're not going to -- and we don't want to
7 use our resources on these cases. But if you want to have
8 deferred prosecution or non-prosecution or nolle prosequi
9 or anything of that nature, we want to make certain you're
10 addressing your drug problem. So we have established a
11 drug court or a drug problem, treatment programs. So
12 you've been caught and we could prosecute you, but we
13 won't. But you must go into this treatment program.

14 Now do the people -- a prosecutor's office could
15 say I'm the new guy in town, I'm going to prosecute all of
16 these cases, we're no longer going to have the deferral
17 programs, we're no longer going to have the option of drug
18 treatment. Do they have a right to come in and say,
19 uh-huh, no, I'm entitled to a drug treatment program? How
20 is that any different than this?

21 MS. BOWER: It's different than this because the
22 program itself said come out of the shadows and we will
23 provide you with the tools you need to live here. Right?
24 It wasn't saying provided you do X, Y and Z. Now there
25 were exceptions. If there were subsequent criminal

1 activities, if there was fraud or misrepresentations, they
2 could be terminated from the program and that was set
3 forth specifically in the standard operating procedures.

4 But the act of prosecutorial discretion at the
5 time that they were approved, it wasn't just we're going
6 to look the other way, we know you're violating the law,
7 we are going to look the other way. It is we want you to
8 come forward, we want you to be successful here and they
9 have been. These DACA recipients took advantage of these
10 programs and are valuable contributors to the economy and
11 our communities. They have literally built their lives
12 around the status and the promises made by the government.

13 Now if there were violations, as I said, if
14 there was subsequent criminal activity, if they didn't
15 abide, then there are procedures in place in the DACA
16 program itself to terminate those individuals and they
17 were told that they would be provided notice of
18 termination and they would have an opportunity to respond.
19 And that did not occur here, Your Honor.

20 So I'm going to go back to the points that the
21 government made with respect to justiciability. I think
22 it's quite clear from the case law, Your Honor, that the
23 presumption is in favor of judicial review of
24 administrative action even in the immigration context and
25 there are plenty of cases, Texas v. U.S. is one of those

1 cases where the court has made clear that there is a
2 strong presumption of judicial review of agency action.
3 The government relies on two what the Supreme Court in
4 Overton Park has called very narrow exceptions to judicial
5 review and they, frankly, do not apply here.

6 The first is that the matter is committed to
7 agency discretion as a matter of law. And their as you
8 heard from the government this morning, their basis for
9 that conclusion is solely that this rescission memo is an
10 exercise of prosecutorial discretion. But it is not. The
11 exercise occurred as Your Honor pointed out when the
12 program was initiated and the individuals who applied for
13 and were granted deferred action received that deferred
14 action status. What the rescission memo does is eliminate
15 the opportunity for prosecutorial discretion with respect
16 to these individuals as it relates to the current --

17 THE COURT: Isn't it simply an exercise of
18 discretion just like the original program was?

19 MS. BOWER: It is not because it's eliminating
20 the entirety -- it's stripping them of their legal
21 protection provided by the original program. And as
22 Cheney and the subsequent cases make clear, there's a
23 distinction between when the government chooses to act and
24 when it chooses not to act. And the exercise of
25 discretion in connection with the deferred action decision

1 at the outset is a decision not to act.

2 THE COURT: Well, one could argue and looking at
3 the Fifth Circuit decision, you could argue forcefully
4 that calling this an exercise of prosecutorial discretion
5 is disguising what it really is and that is basically
6 trying to change the law, which is the function of
7 Congress to do, not for an agency and especially in light
8 of the legislative history of efforts made in Congress to
9 do what DACA did that failed and they are saying wait a
10 minute, whether you call this an exercise of discretion or
11 not, in good faith as a legal matter, it is on very shaky
12 ground because of the Fifth Circuit decision. We don't
13 like to be on shaky ground. And, therefore, and calling
14 it an exercise of prosecutorial discretion when in fact at
15 least the argument goes this is trying to do at the agency
16 level what Congress refused to do and you can't do that
17 and this is a shaky ground. We want to get this program
18 on proper ground, but we can't continue to do something
19 that the Attorney General's office has advised is
20 unconstitutional or illegal. Therefore, we're going to
21 wind down the program, but give Congress plenty of time to
22 fix it. Isn't that a reasonable argument?

23 MS. BOWER: Well, it may be a reasonable
24 argument, Your Honor, but a reasonable argument is not
25 sufficient. Under the APA, the agency has to provide a

1 reasoned analysis and the court in reviewing --

2 THE COURT: Well, where was the reasoned
3 analysis provided for DACA in the first place? It just
4 came out of the blue, didn't it?

5 MS. BOWER: Well, the DACA program itself
6 obviously was not an issue in either Texas and certainly,
7 it's not an issue with respect --

8 THE COURT: Understood. But the basic theory of
9 both programs is very similar. The basic legal
10 justification for both of them.

11 MS. BOWER: You're saying for both programs,
12 DACA and DAPA?

13 THE COURT: Yes.

14 MS. BOWER: Well, a significance difference,
15 which is not at all reflected in the administrative record
16 is that the administration at the time that it implemented
17 DACA took into consideration that the individuals who were
18 eligible to receive DACA did not have the requisite mens
19 rea to violate the immigration laws in the first place
20 because these are individuals who came -- who were brought
21 here as children. And there is a significant difference
22 when you are considering the legality and other factors
23 under the agency's decision making process and none of
24 that was considered according to the administrative record
25 that the government has submitted to this court.

1 with respect to whether the agency has the
2 discretion to enter the rescission memo in the first
3 place, the agency is capable of undertaking a reasoned
4 analysis and rendering decisions as to how it sees fit to
5 exercise its authority, issues that fall under its domain.
6 But there are processes and procedures in place for how
7 that needs to occur.

8 And with respect to the decision in the first
9 instance, it needs to be supported by the evidence. And
10 the government submitted on November 15th, the same day as
11 it submitted its motion for summary judgment an
12 administrative record in this court that is woefully
13 incomplete. And the government acknowledges under the
14 Fourth Circuit precedent that it's incomplete because it
15 is only including documents actually considered by then
16 Acting Secretary Duke and that is not the law in this
17 circuit. The administrative record needs to include all
18 information that was in front of the decision -- in front
19 of the agency when it rendered its decision and the
20 government simply has not done that. And, you know,
21 without that record, it is difficult to undertake the
22 analysis that Your Honor is being asked to do here on the
23 government's motion in connecting the dots between the
24 rationality or reasonableness of the agency's decision and
25 the information it had in front of it at the time that it

1 rendered that decision. The record is completely devoid
2 of that evidence.

3 with respect to the 1252(g) as a potential
4 jurisdictional bar, the AADC case is clear, Your Honor,
5 that 1252(g) applies in three discreet situations, all in
6 involving the actual proceedings. The decision to
7 commence, the decision to continue and the decision to
8 terminate a proceeding, a deportation proceeding or
9 removal proceeding and that's simply not the case here.

10 This was as I said earlier an affirmative act by
11 the government to eliminate a program that conferred
12 benefits and legal protection on 800,000 people. This is
13 not an individualized assessment as Cheney and even AADC
14 considered because those were individual decisions of
15 prosecutorial discretion or agency enforcement discretion
16 with respect to the specific individuals and the specific
17 violations of the law and that is not what this is. This
18 is a broad policy affecting an entire class of immigrants.

19 Turning then to the APA claims, both the whether
20 the claim is arbitrary and capricious as well as the rule
21 making, our notice and comment rule-making claim. The
22 case law under Greater Boston and even FCC versus Fox
23 Television make clear that the agency has to explain not
24 just her rationale for the decision, but a reasoned
25 analysis for a change in policy after taking a hard look

1 at all of the salient problems. And as I said earlier,
2 reliance is a significant salient problem.

3 THE COURT: well, didn't the Acting Secretary in
4 this case explain that there was great concern about the
5 legal validity of the program and that it should be wound
6 down in favor of congressional action? Isn't that what it
7 amounts to?

8 MS. BOWER: She stated three reasons. She
9 relied on the Attorney General's conclusion that DACA --

10 THE COURT: which was in turn based upon the
11 Fifth Circuit decision. Right?

12 MS. BOWER: Correct. But there is no analysis
13 in the administrative record of that litigation risk
14 assessment, Your Honor. There is simply not --

15 THE COURT: If you're concerned that what you
16 are doing is illegal and you decide you want to eliminate
17 something that you believe is illegal based upon a
18 published decision of an appellate court. What's the
19 matter with that?

20 MS. BOWER: Because there -- several things.
21 First is that the record itself contains 14 documents, all
22 of which are publicly available documents. None of which
23 include an assessment, independent assessment by the
24 executive branch of the validity of that one case and it
25 flies in the face of precedent from the agency that the

1 decision --

2 THE COURT: I mean are you saying that it's
3 arbitrary for her to believe in the validity of an
4 appellate court's decision?

5 MS. BOWER: It's not that it's arbitrary for her
6 to believe in the validity. It is arbitrary for her not
7 to have considered the alternates. There was no analysis.

8 Former Secretary Kelly in February and June of
9 this year twelve months after the conclusion in the Texas
10 v. U.S. litigation reached the conclusion that the program
11 could continue. That is an inherent acceptance that it is
12 not an illegal program and that is well after the Texas
13 versus U.S. litigation was completed.

14 And there is no evidence in the administrative
15 record that the agency considered that Secretary Kelly's
16 decisions or the reasoning or the basis in which he
17 reached those decisions at the time. They simply accepted
18 the threat from the Texas Attorney General that he and
19 perhaps some of the plaintiffs in the Texas litigation
20 would amend their complaint and that it would be
21 successful. But that is putting the cart before the
22 horse. You have to analyze that.

23 And the government's practice in the DACA
24 litigation undermines their view that the Texas litigation
25 could mean an eminent injunction of the entirety of the

1 DACA program.

2 The government didn't accept the Northern
3 District of California's conclusion that the
4 administrative record was incomplete. They challenged it
5 in the Eastern District of New York and now they're
6 challenging it to the Supreme Court and then they
7 submitted the same record here.

8 THE COURT: Well, the Supreme Court put a kibosh
9 on that last week, didn't it?

10 MS. BOWER: They stayed while they considered
11 the merits of the claim. That is correct.

12 THE COURT: Well, they stayed an order directing
13 them to expand the record. Correct?

14 MS. BOWER: They did. Just last week.

15 THE COURT: I know.

16 MS. BOWER: They stayed it. Yes. While they
17 consider. My point is they didn't accept any of those
18 decisions as gospel. They considered -- they continued to
19 press what they believed was the correct conclusion and
20 that is completely absent from the administrative record
21 with respect to their conclusion on the rescission memo.
22 They merely accepted that conclusion and moved forward.

23 There's no analysis of either their own internal
24 decision making and how their position has changed and
25 that is arbitrary and capricious. You have to -- when you

1 are undertaking a change of policy, you have to address
2 the fact that you have changed the policy and you need to
3 explain why it is that your decision has changed. And
4 there is no evidence that that consideration occurred
5 here.

6 THE COURT: Well, was any of that done in
7 connection with the original adoption of DACA?

8 MS. BOWER: I don't have the original
9 administrative record with respect to the decision of DACA
10 in front of me, Your Honor.

11 But the fact that DACA may or may not have --
12 may or may not have gone through a notice and rule-making
13 process does not mean that the rescission memo did not
14 have to abide by the APA both arbitrary and capricious
15 analysis and the notice and comment rule-making analysis.

16 The action that the Court considers, the action
17 that the Court looks at is the action at issue here, which
18 is the rescission memo. And contrary to the government's
19 representation, no court has held that the character of
20 the original action carries through on every subsequent
21 action. To the contrary, the Court must consider the
22 specific action at issue whether that's an initial
23 implementation of a rule or a policy, whether that's an
24 amendment or a modification or if it's a rescission. You
25 have to look at the parameters of the decision in front of

1 the Court at the time.

2 And the rescission memo when doing so is a
3 substantive rule making that did require notice and
4 comment and did require independently the reasoned
5 analysis.

6 And it's important to note, too, Your Honor,
7 that there has not been a suit challenging DACA. The
8 Texas litigation did not challenge the original -- DACA as
9 originally implemented. And so by not considering the
10 fact that no challenge directly to DACA had occurred, that
11 also renders a decision arbitrary and capricious.

12 With respect to the rescission memo itself, as
13 we state in the papers, it is in fact a substantive rule
14 making and the fact that it does apply to a broad swath of
15 individuals is relevant to the Court's consideration
16 because it binds DHS with respect to how to handle
17 deferred action status with respect to this class of
18 individuals going forward.

19 The rescission memo itself dictates the outcome
20 of Dreamers DACA status at the administrative record, page
21 255. It specifically requires DHS to reject any deferred
22 action applications under DACA coming in on or after
23 September 5th.

24 And with respect to current DACA recipients, the
25 government said earlier it didn't strip any of them of

1 their DACA status, but in fact it did. The DACA program
2 as implemented allowed for renewals and according to the
3 rescission memo, any renewal must be rejected if not
4 submitted before October 5th. Renewals for -- and then to
5 the extent it considers renewals at all, it's only for a
6 small window of time between September 5th and --
7 September 5, 2017 and those that expire March 5, 2018.

8 So there is no consideration given to renewals
9 although it was included in their understanding of the
10 DACA program at the outset for individuals whose DACA
11 status had expired prior to September 5th or expires like
12 our named plaintiff, J.M.O., after March 5th. One day
13 after. His expires on March 6th.

14 And the fact that the government provides no
15 analysis or discussion or reference to the selection of
16 these arbitrary deadlines also supports our claim that the
17 decision was arbitrary and capricious.

18 It also, Your Honor, requires the DHS to reject
19 all pending or new advanced parole applications for DACA
20 recipients. That is a clear, present effect that is one
21 of the factors the Court has to consider when deciding
22 whether a agency action is a substantive rule or a
23 discretion -- a broad statement of policy. And here,
24 there is no discretion and it has present effects which
25 means it is a substantive rule and needs to go through

1 notice and rule making.

2 The C and I court also made clear that the
3 language of the agency action is also indicative of
4 whether the action is a substantive rule making or a
5 general statement of policy and noted that where the
6 agency uses the word "will" versus "may" is a strong
7 indicator, if not dispositive. And every bullet point in
8 the rescission memo starts with the word "will" stripping
9 DHS of any discretion to render any decisions other than
10 what is specifically set forth in the rescission memo.
11 And the only discretion with respect to deferred action
12 that the rescission memo retains for DHS is to terminate
13 or deny deferred action status.

14 with respect to our equal protection claims,
15 Your Honor, the government is mistaken that Armstrong
16 creates a heightened burden on a Rule 12(b)(6) motion to
17 plead equal protection claim in this context.

18 THE COURT: well, at the heart of an equal
19 protection claim is a classification. What is the
20 classification that elimination of DACA establishes and
21 how -- what is your attack on the classification make?

22 MS. BOWER: As we allege in the complaint, Your
23 Honor, the government has retained other deferred action
24 programs that are not predominantly utilized by
25 individuals of Mexican or Latino descent. As stated in

1 the complaint and the government has conceded, more than
2 90% of recipients of DACA status are in fact Mexican or
3 Latino immigrants. Other deferred action programs are
4 going forward and the government has not explained why
5 it's treating differently similarly-situated individuals.

6 So the requirement in Armstrong to allege that
7 similarly-situated individuals are being treated
8 differently is satisfied in our complaint, Your Honor, and
9 the impact as well -- as well as the animus, excuse me.
10 The animus is sufficiently alleged as well.

11 The government has taken the position in the
12 papers and here today that Acting Secretary Duke was the
13 only decision maker. And that is simply just contrary to
14 the evidence that they put forward in the past and as
15 we've alleged in the complaint.

16 Moreover, Acting Secretary Duke works for the
17 President and Attorney General Sessions. So to say that
18 comments made by her bosses can't be imputed to or
19 potentially affect the decision making of that agency is
20 just -- is simply incredible.

21 And the government and testimony provided in the
22 Northern District of California case has made clear that
23 multiple individuals, including senior government
24 officials who have made the derogatory statements that are
25 alleged in the complaint were individuals who participated

1 in the decision-making process. President Trump and
2 Attorney General Sessions themselves issued press releases
3 announcing the rescission of DACA in which they took
4 credit for the rescission. So our complaint clearly
5 satisfies the pleading requirements of discriminatory
6 animus and discriminatory --

7 THE COURT: Didn't those same statements say
8 that they would urge Congress to regularize it by enacting
9 it?

10 MS. BOWER: President Trump issued a tweet later
11 saying he would urge Congress to act, but that doesn't
12 remove all of the other direct and derogatory statements
13 regarding Mexicans and Latino immigrants that were made.

14 Our complaint also alleges, Your Honor, due
15 process violations. As I stated earlier and as set forth
16 in our papers --

17 THE COURT: Let me go back to your equal
18 protection thing.

19 MS. BOWER: Yes.

20 THE COURT: Tell me again your best case for why
21 there's an equal protection denial and how the
22 classification works and how this fails under any one of
23 the three standards for denial of equal protection.

24 MS. BOWER: I'm sorry. How the DACA rescission
25 fails under a denial?

1 THE COURT: Yes. Tell me how it violates equal
2 protection.

3 MS. BOWER: It violates equal protection because
4 we've alleged that it was motivated by discriminatory
5 animus as reflected in the 18 statements set forth in the
6 complaint --

7 THE COURT: The classification you are saying is
8 is that they selected one program out of a lot of other
9 programs and that the other programs are not
10 discriminatory and this one is?

11 MS. BOWER: Well, that's one of the grounds in
12 which we were attempting to seek discovery, Your Honor,
13 that the government is trying to foreclose. But we allege
14 in the complaint that there are other deferred action
15 programs that are not predominantly utilized by
16 individuals of Mexican and Latino descent --

17 THE COURT: Well, wait a minute. This is a
18 facially neutral program. Applies to anybody coming from
19 Canada, Germany, South America, North America, anywhere.
20 It's not limited to those coming across the Mexican
21 border, is it?

22 MS. BOWER: The program itself is not, Your
23 Honor. But in implementation and in effect, it does
24 include a near majority.

25 THE COURT: Isn't that just an accident of

1 geography?

2 MS. BOWER: It may be that the program is an
3 accident of geography. But that doesn't mean that we
4 haven't sufficiently pled a claim. You have to look
5 beyond -- that's why you have to look into the allegations
6 of animus and implementation when considering an equal
7 protection claim. If you could just look at a facially
8 neutral action and leave it at that in the face of
9 specific and repeated derogatory comments, it would
10 undermine the entire review and would render --

11 THE COURT: Well, as I said, our President and
12 his use of Twitter has made life very interesting for all
13 of us. But if you look at all of the statements
14 attributed to him directly or through Twitter, you've got
15 a group of statements, including when he announced he was
16 going to run that they are murderers and rapists and
17 there's some very good people, too. He put that in for
18 good measure. He said some people are bad hombres and
19 there are in this world bad hombres. I mean not everybody
20 is a bad hombre. And I assume when he says bad hombres,
21 he is referring to those who are criminals.

22 But I'm not sure that his inopportune comments
23 necessarily call into question a program, the legal
24 sufficiency of which has been called into question by his
25 Attorney General and by an appellate court and translates

1 that into an improper animus towards Mexican-Americans and
2 other people of Latin American origin. Help me out with
3 that.

4 MS. BOWER: Well, other statements as we've
5 alleged in the complaint, Your Honor, reflect that
6 Attorney General Sessions has also made comments about
7 getting all of them out. That wasn't tied to --

8 THE COURT: Well, that's people who are here
9 illegally. Isn't that what he's saying?

10 MS. BOWER: But that would cover the individuals
11 with DACA status, Your Honor. But it also goes to -- he
12 was referring to not only individuals who are here
13 illegally. But he's referring specifically to those of
14 Mexican and Latino descent, who are here illegally.

15 And so against that backdrop, we have
16 sufficiently alleged that animus was at play or may have
17 been at play in rendering the -- in reaching the
18 conclusion to rescind DACA. We have alleged that
19 similarly-situated individuals are being treated
20 differently and that is all we need to allege in
21 connection with a 12(b)(6) challenge to the equal
22 protection claim.

23 with respect to the due process claim, I also
24 heard the government challenge the due process claims on
25 the basis that there are no rights and they are relying on

1 the savings clause that we discussed earlier that it
2 cannot --

3 THE COURT: well, am I to disregard that? Are
4 you telling me that I should take that -- just ignore that
5 it's there?

6 MS. BOWER: That's not what precludes the
7 creation of rights, Your Honor. That provision has to be
8 read as a whole in terms of what the --

9 THE COURT: well, I mean the memo pretty clear
10 says this memorandum confers no substantive right,
11 immigration status or pathway to citizenship. Only the
12 Congress acting to its legislative authority can confer
13 these rights. Remains for the executive branch, however,
14 to set forth policy for the exercise of discretion within
15 the framework of the existing law. I have done so here.
16 You want me to disregard that?

17 MS. BOWER: You don't need to disregard it, Your
18 Honor. But you need to take it into context.

19 THE COURT: what you're saying is even though
20 she said that in her memorandum, she turned right around
21 and gave substantive rights to these people. Not
22 withstanding what she is saying here. The Lord giveth,
23 the Lord taketh away. She can't take these things away
24 because she gave them. Right?

25 MS. BOWER: They developed a mutual

1 understanding between the government and DACA applicants
2 that conferred the protected interests. That was the
3 government's repeated outreach and representations that
4 they had legal protection provided they followed the
5 procedures set forth in the DACA program. That they had
6 legal protection from deportation and could live and could
7 create a livelihood here in this country and that program
8 was subject to renewal again provided they met the
9 requirements.

10 And that mutual understanding between the
11 government and the individuals created protected property
12 interests and liberty interests. And there's no dispute
13 that the actual interests are protected interests. The
14 only dispute is whether they could have been created in
15 the first instance and here they were.

16 Under Perry, there was a mutual understanding
17 between the government and the recipients that they were
18 protected from deportation and that they had the right to
19 work, to travel, to attend school and they had eligibility
20 for certain benefits as well. That they could live safely
21 and comfortably in the United States without fear of
22 deportation and that is sufficient to create a protected
23 interest under the due process clause.

24 And we've alleged that the decision to rescind
25 those protections does rise to the level of shocking the

1 conscience. We've alleged that it was based on
2 discriminatory animus. And if that is established to be
3 true through the course of discovery and further
4 proceedings in this case, then that does shock the
5 conscience because it's an abuse of executive power.

6 It also shocks the conscience that the
7 government made repeated promises and assurances to these
8 individuals both with respect to the benefits, but also
9 specifically with respect to the use of the personal
10 information that was provided to the government in
11 connection with their applications. And it shocks the
12 conscience, that the government would induce these
13 individuals to turn over all of the information that the
14 government would need to deport these individuals and to
15 then say we're taking it back. It's a constitutional bait
16 and switch and that's protected under the substantive due
17 process clause.

18 THE COURT: Well, what information do you have
19 that the government is getting ready to break its promise
20 as to the use that they would put the information to that
21 they were given by these people?

22 MS. BOWER: The statements --

23 THE COURT: I mean the government is saying that
24 they haven't done anything.

25 MS. BOWER: Well, the government's updated FAQs

1 say that they won't proactively share. They've given no
2 information of what access ICE or CBP now have to the
3 information that was previously guaranteed would not be
4 shared with ICE and CBP provided certain circumstances
5 were not present and there's no allegation that any of
6 those exceptions apply to any of the individual plaintiffs
7 in this case. So with respect to our plaintiffs, the
8 promise not to share that information or use that
9 information for deportation purposes was unequivocal.

10 The complaint also alleges six instances in
11 which individuals with DACA status were deported. We're
12 entitled to discovery to determine whether and to the
13 extent of which that information is being shared or access
14 is being granted contrary to the promises made to the
15 recipients when they applied for DACA.

16 And in April of this year, Your Honor, the
17 government rolled out I believe it was an executive order.
18 There was a privacy memo that said that it would not
19 continue to maintain privacy over information collected by
20 the government with respect to --

21 THE COURT: Is that prospectively or
22 retroactively or both?

23 MS. BOWER: Both. It's my understanding that
24 the memo says it's no longer providing -- it will not
25 apply the privacy act to immigrants, undocumented

1 immigrants, people here illegally and that is contrary to
2 the position that the government has taken for decades
3 with respect to this type of personal information.

4 And you asked the government point blank this
5 morning whether they were prepared to make a
6 representation that they do not intend to use information
7 contrary to the assurances provided to the DACA applicants
8 and he was not able to say that. They reserve the right
9 to change it and that is a constitutional --

10 THE COURT: They haven't done anything yet as
11 far as with what they're telling me.

12 MS. BOWER: We don't know, Your Honor. As we
13 said in the complaint, there are six individuals who have
14 been subjected to deportation attempts. Discovery may
15 tell us how it is or why it is that those individuals were
16 picked up. The relief that the plaintiffs are seeking in
17 this case without the protection, all of DACA recipients
18 remain at risk and live in constant fear of deportation
19 activities because of the information that they've
20 provided to this government based on its promises that it
21 would not use it against them. Thank you, Your Honor.

22 THE COURT: Thank you. All right. Mr. Shumate?

23 MR. SHUMATE: Your Honor, I think the plaintiffs
24 have a fundamental misunderstanding of DACA. It is not a
25 government benefits program. It did not make promises and

1 assurances. You've already read the last paragraph of
2 Secretary Napolitano's memo and I'll read it again. "This
3 memorandum confers no substantive right, immigration
4 status or pathway to citizenship."

5 Another piece of information I'd like to read to
6 the Court is from DHS' FAQs. This is -- it's Document
7 12-14, page 8 on this court's docket. Question 27. "Can
8 my deferred action under the DACA process be terminated
9 before it expires? Answer: Yes. DACA is an exercise of
10 prosecutorial discretion and deferred action may be
11 terminated at any time with or without a notice of intent
12 to terminate at DHS' discretion." That has been DACA from
13 the beginning. It has not been a government benefits
14 program. To be sure, there may be a collateral
15 consequences from the grant of deferred action status,
16 which is work authorization, advanced parole. That sort
17 of thing. But DACA itself was not a government benefits
18 program.

19 I think the Court used a good analogy. Here's
20 another one. Imagine if the Attorney General had said the
21 prior administration had not done a sufficient job of
22 prosecuting drug crimes and we're going to institute a new
23 enforcement policy to charge more drug crimes because this
24 is a real problem. No court would subject that to
25 judicial review. That is an enforcement policy. It is

1 not a substantive rule. It is an exercise of discretion.
2 If the Attorney General were then to rescind that
3 memorandum and say we don't think that's a good policy,
4 we're going to go in a different direction, that would not
5 be reviewable either.

6 That is what we have here. We have the DACA
7 memorandum from 2012 was an exercise of discretion. This
8 is how we intend to enforce the law. We are going to
9 grant deferred action status. This administration
10 rescinded that. That is an exercise of discretion.

11 If I could speak to the justiciability
12 questions -- issues just for a few moments? We don't
13 dispute that there is an ordinary presumption of judicial
14 review under the APA of agency action. But there is an
15 equally strong presumption that the exercises of
16 prosecutorial discretion are not subject to judicial
17 review. That is from the Heckler case and from the AADC
18 case.

19 They dispute that this was an exercise of
20 prosecutorial discretion. But that argument is foreclosed
21 by AADC, which quite clearly describes denials of deferred
22 action status as a discretionary determination. And there
23 are two circuit courts that have addressed this question.
24 Mada-Luna, the Ninth Circuit and the Fifth Circuit in
25 Texas, which has subscribed that the denial of voluntary

1 departure and work authorization is not something that's
2 reviewable because there's no statutory standard by which
3 to judge that.

4 There was an argument that the plaintiffs made
5 that DACA was not at issue in the Texas litigation, but
6 that is not entirely accurate. The Texas litigation
7 involved a challenge to the 2014 memorandum. That
8 memorandum expanded DACA and directed DHS to create an
9 additional deferred action policy, which became to be
10 known as DAPA. In the Fifth Circuit opinion, they
11 described it as DAPA. But they said in a footnote, this
12 analysis applies to expanded DACA and DAPA itself. And so
13 the analysis that the Fifth Circuit went through of
14 expanded DACA and DAPA applies four square with this case
15 and that's why the Attorney General explained that DACA
16 itself, the original DACA, has the same problems both
17 constitutionally and legally as expanded DACA.

18 I think it's interesting, Your Honor, that they
19 point to the APA standard of review for all of their APA
20 claims. So our argument under Section 701 and Heckler is
21 that there is no law to apply for the Court to judge and
22 evaluate the reasonableness or the rationality of the
23 Secretary's decision to rescind the memorandum and deny
24 deferred action.

25 So they point to the APA as a standard to apply.

1 The Court can just ordinarily apply arbitrary and
2 capricious review. Well, if that's right, then Section
3 701 of the APA has no meaning at all because Section 701
4 says all claims brought pursuant to this chapter. You
5 know, if the agency's decision is committed to the
6 agency's discretion, it's not reviewable. So they can't
7 then bootstrap their way around Section 701 with claims
8 brought pursuant to Section 706, which is the arbitrary
9 and capricious standard.

10 We have not conceded that the record is
11 incomplete. I'm glad Your Honor brought up the Supreme
12 Court stay. The Supreme Court, as Your Honor noted last
13 week, granted a stay. But implicit in the stay is that
14 five justices are likely to reverse the order from the
15 District Court in California to supplement the record.

16 Now the Court's inquiry here is merely to decide
17 whether the agency's decision is rational based on the
18 record she has provided. If the Court is not satisfied
19 with that decision and again, we think it is eminently
20 reasonable what she did here. But if the Court does not
21 believe that the administrative record supports her
22 decision, the remedy is not to supplement the record or
23 grant discovery to find out what was really going on. The
24 remedy is to set aside the rescission memo and remand the
25 decision to the Acting Secretary.

1 with respect to 1252(g), Your Honor, their
2 argument was that AADC doesn't apply because this
3 particular case does not fit within the three articulated
4 provisions of that statute. But this is an action by the
5 Secretary to commence proceedings. It's not very
6 different than if the agency had issued a notice to
7 appear, which is an ingredient to the commencement of
8 enforcement proceedings. So is this. This is a denial of
9 deferred action and that is plainly what the Supreme Court
10 intended to insulate from judicial review.

11 On the APA claims, Your Honor, the argument is
12 that there was just simply no analysis from the Acting
13 Secretary. But again, she gave reasons for her decisions
14 that is entirely rational. And to the extent the
15 plaintiffs say she didn't consider this factor or that
16 factor or this alternative or that alternative, well, they
17 point to nothing in the INA that would give a standard for
18 the Court to evaluate whether this was unreasonable or not
19 because the INA itself does not provide any standard by
20 which to evaluate the reasonableness of her actions. So
21 that's why we do not believe that this is something that
22 the Court should review.

23 On the equal protection claims, Your Honor, you
24 are right. There is no classification here. The memo --

25 THE COURT: well, I think the response they gave

1 me was, well, this deferred action program that you're
2 junking is a violation of equal protection because there's
3 a lot of other deferred action programs that they're not
4 junking and that when we look at those classifications, we
5 discover that this one is aimed primarily at Hispanics.
6 What's your answer to that?

7 MR. SHUMATE: Well, the answer to that, Your
8 Honor, is that this is neutral on its face. It says
9 nothing about the national origin of those individuals
10 that the government is trying to target in any way. Even
11 if you look at the Armstrong case, Your Honor, that was a
12 case involved where a hundred percent of the individuals
13 affected by the government's action there were
14 African-American. The court was not troubled by that. It
15 said just because there is a disparate impact on a certain
16 group of individuals doesn't make it an equal protection
17 violation.

18 Really, their primary argument is animus and
19 there is nothing that they can point to from the decision
20 maker in this case, the Acting Secretary of Homeland
21 Security, who does not work for the Attorney General. She
22 is the head of a separate department within the
23 government. There's nothing to suggest that she in any
24 way acted --

25 THE COURT: But she's relying upon the advice of

1 the Attorney General, isn't she?

2 MR. SHUMATE: To be sure. To be sure. She
3 relied on the Attorney General's view that DACA is
4 unlawful. And in the face of that letter, in the face of
5 the letter from the Texas plaintiffs that they intended to
6 challenge DACA in light of the Fifth Circuit's decision
7 affirmed by the Supreme Court, it was entirely rational
8 for her to decide we need to wind this policy down in an
9 orderly fashion rather than allow the Texas District Court
10 to end it immediately.

11 On the information-sharing claims, Your Honor,
12 again there has been no change. But DHS has always been
13 clear that information can be shared under certain
14 circumstances and those policies can change in the future.
15 To the extent that policy does change, the plaintiffs can
16 come back and they can bring an APA challenge at that
17 time. But as of right now, there's no final agency action
18 that would give them standing or this Court jurisdiction
19 to challenge the information-sharing policy.

20 If there are no other questions, Your Honor,
21 thank you.

22 THE COURT: All right. Any desire to -- I don't
23 ordinarily permit this, but this is a very important case.
24 If you have something additional you want to say, you can
25 say it.

1 MS. BOWER: Well, if you're giving me the
2 opportunity, I can't turn it down.

3 THE COURT: I can't hear you.

4 MS. BOWER: I said if you're giving me the
5 opportunity, I can't turn it down.

6 THE COURT: I'll give you an opportunity. Like
7 the Vy Metallic case, there must be an end to individual
8 argument in such matters for the government to go on -- I
9 know that case from way back. It's an oldie, but goodie.
10 But I'm always happy -- this is a very important case to
11 both sides and very important issues. I want to make sure
12 that you don't go home and say I forgot to tell Judge
13 Titus X. So this is your chance to tell me X.

14 MS. BOWER: Thank you, Your Honor. So picking
15 up with the analogy theme. I mean a better analogy than
16 that offered by the government is the analogy of parole.
17 So the government decides it's going to get rid of parole
18 and --

19 THE COURT: We did that a long time ago in 1984.

20 MS. BOWER: Right. Well, the solution was not
21 to send everyone back to jail and there was individualized
22 process in evaluating parolees' status. Again that is
23 completely absent from this case.

24 With respect to the 1252(g) under AADC, Your
25 Honor, Justice Scalia writing for the court expressly

1 states that 1252(g) does not cover every step in the
2 process or every stage leading up to and through
3 deportation. And I heard the government say that this was
4 commencing an action. However, you're rescinding deferred
5 action status is not commencing an action. So this does
6 not fit under the three discreet steps in the deferred
7 deportation process that AADC says is precluded under
8 1252(g).

9 And both Cheney and the Robbins v. Reagan cases
10 cited in our papers make clear, they distinguish the
11 situation where commitments are given and the impact of
12 those commitments and as Robbins v. Reagan expressly
13 states when there is a rescission of a prior commitment as
14 we have in this case, that the courts -- that it is an
15 action and the Court should review it to ensure that there
16 is some fidelity to the agency's decision to go back on a
17 decision they had made that they felt was a proper
18 exercise of its discretion at the time. And that's the
19 same case here, Your Honor.

20 With respect to the information-sharing, you
21 know, the -- you just have to look at Exhibit 21 of the
22 Freedman declaration, which is a Power Point presentation
23 on -- a DHS Power Point presentation and there's nothing
24 in that slide that refers to the fact that the policy
25 could be changed or rescinded and it makes clear to DACA

1 applicants that the government will continue to keep --
2 will not disclose and will continue to keep secret the
3 personal information provided.

4 It specifically says under Protecting Your
5 Information, we will not share any information about you
6 with ICE or U.S. Customs and Border Protection for the
7 purpose of immigration enforcement proceedings unless you
8 meet the criterion for and then it lists two criterion.
9 There is nothing underneath that that says this policy can
10 be changed or rescinded at any point in time. So to say
11 that the government has always told people that it could
12 be rescinded is just simply not true and is contrary to
13 the allegations in the complaint.

14 And I'd just remind you that this was on a
15 12(b)(6) motion. Obviously, the government has made clear
16 that its request for summary judgment was focused on the
17 APA claim.

18 With respect to whether DACA was at issue in the
19 Texas litigation, the rescission memo itself states that
20 DACA was not at issue in the Texas v. U.S. litigation. It
21 specifically says although the original DACA policy was
22 not challenged in the lawsuit, referring to the Texas
23 litigation. So when the government said that DACA was at
24 issue in the Texas case, the DACA program --

25 THE COURT: Well, I think they're referring to

1 the legal analysis. Obviously, DACA was not specifically
2 before the court for a decision.

3 MS. BOWER: Correct.

4 THE COURT: But they referred to it in the
5 decision, didn't they?

6 MS. BOWER: They referred to it in the factual
7 discussions and they referred to it to the extent that it
8 relates to that part of DACA expansion that was at issue
9 in the Texas litigation. But that was not an analysis of
10 the original DACA program. And as we said earlier, there
11 are differences, not the least of which is the procedural
12 posture. The Texas litigation, that program had not yet
13 even been implemented. Here, DACA has been in place and
14 people have relied upon it for over five years and that
15 reliance is completely absent from this record.

16 THE COURT: Let me ask you this. You want me to
17 consider a lot of statements made by our talkative
18 President. Aren't there some concerns that the Supreme
19 Court has expressed about evaluating things in light of
20 statements like that like in Hamdan versus Rumsfeld?

21 MS. BOWER: Well, courts have taken into
22 consideration -- the travel ban cases courts have taken
23 into consideration all of the public statements and I
24 think the --

25 THE COURT: Well, there's been criticism of

1 that. I mean some courts have said that shouldn't happen
2 or some judges have said it shouldn't happen. You
3 shouldn't be referring to campaign statements made by a
4 candidate.

5 MS. BOWER: We don't just have campaign
6 statements, Your Honor. We have statements made when the
7 President was in office. We have post-election statements
8 we've alleged in the complaint and we have
9 post-inauguration statements alleged in the complaint from
10 senior government officials. So you don't have to rely on
11 campaign statements.

12 And with respect to the equal protection claim,
13 the classification is DACA recipients. And the Armstrong
14 case didn't address animus at all. The problem with the
15 Armstrong case was it was just focused on discriminatory
16 effect. And there is no evidence that there were
17 allegations in that complaint of discriminatory animus as
18 we have here. Thank you, Your Honor.

19 THE COURT: Okay. Anything further, Mr.
20 Shumate? I'll give you another shot.

21 MR. SHUMATE: Very briefly, Your Honor. I also
22 can't help myself. With respect to --

23 THE COURT: I don't want you to go home thinking
24 you forgot to tell me something. So take your time.

25 MR. SHUMATE: The AADC case, there was a --

1 THE COURT: Say again. What?

2 MR. SHUMATE: Sorry. The Reno versus AADC case.

3 THE COURT: Okay. Okay.

4 MR. SHUMATE: To be sure, the statute does not
5 apply to everything that may be at issue in a deportation
6 proceeding, but the Supreme Court said what it was meant
7 to protect. "To give some measure of protection to no
8 deferred action decisions in similar discretionary
9 determinations." That is the rescission of DACA, a
10 decision to not grant deferred action. So we fall within
11 the purpose and the letter and the precedent involving
12 Section 1252(g).

13 There's also been a couple of references in the
14 complaint to a Privacy Impact Statement and that would
15 have created some kind of a reliance interest and things
16 like that. The privacy interest itself or -- sorry. The
17 Privacy Impact Statement says "USCIS may share information
18 with other agencies to assist in making a determination on
19 a deferred action request. USCIS also shares information
20 with other agencies for law enforcement purposes." That
21 policy has not changed.

22 They also point to some form instructions, Form
23 I-82-ID. As we explained in page 21 of our brief, the
24 instructions quite clearly say that the
25 information-sharing policy may change. It says "that

1 policy may be modified, superseded or rescinded at any
2 time without notice.

3 And, finally, with respect to the President's
4 statements, Your Honor, he was not the decision maker
5 here. The one individual with the legal authority to
6 rescind the 2012 memo was Acting Secretary Duke. There is
7 nothing tying her to any animus toward the plaintiffs.
8 And it would be improper for the Court to impute any
9 motive from anybody else within the government to her.

10 With respect to the President's statements as I
11 think you have recognized, Your Honor, there is nothing
12 there that is related to DACA or DACA recipients at all.
13 He has indicated that the government is working towards
14 seeking some type of legislative solution. That does not
15 reflect animus whatsoever.

16 THE COURT: Okay. All right. Thank you very
17 much.

18 Now I'm praying for Congress to moot this case
19 and if while I'm considering what to do in this case,
20 Congress does take some action, I will notify the parties
21 that I've been advised that action has been taken and ask
22 the parties to tell me whether that moots the case. The
23 plaintiffs may take the position that what Congress did
24 does not fix the problem or does fix the problem. So I
25 will need to potentially have supplemental briefing on

1 whether it's moot or not if -- I'm praying -- Congress
2 decides to take action to re-establish this program
3 without the deficiencies that the President believes or
4 the Secretary believes are applicable to the existing
5 program that she's decided to wind down.

6 So I can't predict what's going to happen. But
7 hopefully, they will steal the thunder from this case and
8 re-establish it because the vast majority of the American
9 public believes we ought to make protections for this type
10 of person that came here through no fault of their own at
11 age 2 and so forth and so on. So it's a motherhood and
12 apple pie type program. Then to be in favor of a program
13 like this, the question here is whether terminating a
14 program, the legal sufficiency of which has been called
15 into question, is appropriate and that's the question that
16 I'll have to sort out.

17 So I will be in touch with you if Congress does
18 act in the holiday season. Hopefully, they will. But if
19 they don't, I have it under advisement and I'll get a
20 decision to you as promptly as I can.

21 Now if I understand in terms of the time
22 sensitivity here, March is when the program would come
23 wind down. And so if Congress does not act in the
24 intervening period, then it would be essential to have a
25 decision by then. Am I correct on my timing?

1 MS. BOWER: That is correct, Your Honor.

2 THE COURT: Okay. All right. Well, I will do
3 the best I can to get you a decision as promptly as
4 possible and consistent with the timetable that we're all
5 facing in this case. So thank you very much. I enjoyed
6 your arguments very much.

7 MS. BOWER: Thank you, Your Honor.

8 MR. SHUMATE: Thank you, Your Honor.

9 (Proceedings concluded.)

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CERTIFICATE OF REPORTER

I, Lisa K. Bankins, an Official Court Reporter for the United States District Court for the District of Maryland, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the motions hearing in the case of the Casa De Maryland, et al. versus U.S. Department of Homeland Security, et al., Civil Action Number RWT-17-2942, in said court on the 15th day of December, 2017.

I further certify that the foregoing 66 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 17th day of December, 2017.

Lisa K. Bankins

Lisa K. Bankins
Official Court Reporter

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