From: Kirschner, Adam (CIV) </O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN= b6

Sent: Tuesday, June 6, 2017 3:52 PM

To: Tyler, John (CIV) < b6

Cc: Halainen, Daniel J. (CIV) < b6

Subject: RE: Scheduling Order: Texas v. United States

---

b6,b5

b6,b5

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Tuesday, June 06, 2017 3:24 PM
To: Halainen, Daniel J. (CIV) b6

Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) <b6 Tyler, John (CIV)
b6
Subject: RE: Scheduling Order: Texas v. United States

Daniel:

In anticipation of our call tomorrow, please find attached a proposed scheduling order. Thanks.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [mailto: b6
Sent: Friday, June 02, 2017 1:22 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) <b6 Tyler, John (CIV)
b6
Subject: RE: Scheduling Order: Texas v. United States

Adam,

Thank you for reaching out. Are you available to confer on Wednesday afternoon at 3:00 pm Eastern / 2:00 pm Central ? Please let me know if that time doesn't work. Have a nice weekend.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 01, 2017 4:19 PM
To: Saltman, Julie (CIV) <b6>; Halainen, Daniel J. (CIV) <b6>; Tyler, John (CIV) <b6>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Scheduling Order: Texas v. United States

All:

As you know, Judge Hanen issued an order in March requiring the parties to confer and propose a scheduling order by June 15. We were hoping to schedule a conference call for early next week to discuss. Please let us know your availability and I will circulate a call-in number. Thank you and have a good rest of your day.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

b5,b6

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 2:05 PM
To: Saltman, Julie (CIV) <b6 Tyler, John (CIV) <b6 Halainen, Daniel J. (CIV) [b6 ; [redacted]; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Counsel,

In light of the Court's September 8, 2017 order regarding Plaintiffs' notice of voluntary dismissal (ECF No. 471), we propose to file a Stipulation of Voluntary Dismissal in the above-referenced matter. Attached, in Word and PDF form, is a draft of that proposed stipulation for your consideration.

Please let us know if the proposed stipulation is acceptable to Defendants and Intervenors. Assuming the parties are in agreement regarding the stipulation, we ask that you physically sign your respective signature block (with any necessary changes to the block) and send us a scanned version of the hand-signed page. As reflected in the attached proposal, we intend to file the stipulation with the imaged signature pages for Defendants and Intervenors.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Bitter, Adam <Adam.Bitter@oag.texas.gov>
Sent: Tuesday, September 12, 2017 12:39 PM
To: Saltman, Julie (CIV) <b6>; Nina Perales [redacted] Tyler, John (CIV) <b6> Halainen, Daniel J. (CIV) <b6>; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: RE: Texas v. United States: Proposed Stipulation of Voluntary Dismissal
Attach: 20170912_TX v. US - Pls.' Stip of Vol Dismissal (Final for Filing).pdf

---

Julie: Thank you for your response.

All: Attached is a copy of the stipulation that we will be filing shortly. Note that the attached document is identical to what we circulated yesterday, except that we have inserted today's date and the signed signature pages for Defendants and Intervenors.

Thank you again, and best regards,

Adam

From: Saltman, Julie (CIV) b6
Sent: Tuesday, September 12, 2017 11:26 AM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales [redacted]; Tyler, John (CIV) b6; Halainen, Daniel J. (CIV) <b6> Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: RE: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Adam,

Thanks for your patience. We agree to the stipulation you circulated. Attached is a signed signature page for defendants.

Thank you,

Julie

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 5:53 PM
To: Nina Perales [redacted]>; Saltman, Julie (CIV) <b6>; Tyler, John (CIV) b6; Halainen, Daniel J. (CIV) <b6>; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: RE: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Nina: Thank you for sending your signed signature block. We have received it and will insert your signed page into the filing.

John, Julie, Daniel: Please let us know if you have any objections or changes to the proposed stipulation. Otherwise, please physically sign the signature block for Defendants and send it back to me for inclusion in the filing. Thank you in advance.

Regards,

Adam

From: Nina Perales [redacted]
Sent: Monday, September 11, 2017 4:44 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Saltman, Julie (CIV) [redacted] Tyler, John (CIV) [redacted]; Halainen, Daniel J. (CIV) [redacted]; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: RE: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Adam,

Please find my signed page below, thank you.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 1:05 PM
To: Saltman, Julie (CIV); Tyler, John (CIV); Halainen, Daniel J. (CIV); Nina Perales; Markoff, Gabriel
Cc: Colmenero, Angela; Biggs, Adam
Subject: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Counsel,

In light of the Court's September 8, 2017 order regarding Plaintiffs' notice of voluntary dismissal (ECF No. 471), we propose to file a Stipulation of Voluntary Dismissal in the above-referenced matter. Attached, in Word and PDF form, is a draft of that proposed stipulation for your consideration.

Please let us know if the proposed stipulation is acceptable to Defendants and Intervenors. Assuming the parties are in agreement regarding the stipulation, we ask that you physically sign your respective signature block (with any necessary changes to the block) and send us a scanned version of the hand-signed page. As reflected in the attached proposal, we intend to file the stipulation with the imaged signature pages for Defendants and Intervenors.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: b6

Sent: Monday, September 11, 2017 5:58 PM

To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales [redacted]
Tyler, John (CIV) <b6>; Halainen, Daniel J. (CIV)
<b6>; Markoff, Gabriel <gmarkoff@omm.com>

Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam
<Adam.Biggs@oag.texas.gov>

Subject: Re: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

---

Thanks Adam. We're still reviewing everything but we'll get back to you about this soon.

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "Bitter, Adam" <Adam.Bitter@oag.texas.gov>
Date: 9/11/17 5:53 PM (GMT-05:00)
To: Nina Perales <[redacted]>, "Saltman, Julie (CIV)" <b6>, "Tyler,
John (CIV)" <b6>, "Halainen, Daniel J. (CIV)" <b6>
"Markoff, Gabriel" <gmarkoff@omm.com>
Cc: "Colmenero, Angela" <Angela.Colmenero@oag.texas.gov>, "Biggs, Adam"
<Adam.Biggs@oag.texas.gov>
Subject: RE: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

From: Nina Perales <[redacted]>
Sent: Monday, September 11, 2017 5:44 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Saltman, Julie (CIV) [b6]; Tyler, John (CIV) <[b6]>; Halainen, Daniel J. (CIV) [b6]; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: RE: Texas v. United States: Proposed Stipulation of Voluntary Dismissal
Attach: scanner@maldef.org_20170911_164023.pdf

Adam,

Please find my signed page below, thank you.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
Ph (210) 224-5476 ext. 206
FAX (210 224-5382

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 1:05 PM
To: Saltman, Julie (CIV); Tyler, John (CIV); Halainen, Daniel J. (CIV); Nina Perales; Markoff, Gabriel
Cc: Colmenero, Angela; Biggs, Adam
Subject: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Counsel,

In light of the Court's September 8, 2017 order regarding Plaintiffs' notice of voluntary dismissal (ECF No. 471), we propose to file a Stipulation of Voluntary Dismissal in the above-referenced matter. Attached, in Word and PDF form, is a draft of that proposed stipulation for your consideration.

Please let us know if the proposed stipulation is acceptable to Defendants and Intervenors. Assuming the parties are in agreement regarding the stipulation, we ask that you physically sign your respective signature block (with any necessary changes to the block) and send us a scanned version of the hand-signed page. As reflected in the attached proposal, we intend to file the stipulation with the imaged signature pages for Defendants and Intervenors.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas

P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Saltman, Julie (CIV) </O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN=[redacted]
Sent: Tuesday, September 12, 2017 12:26 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales <[redacted]>; Tyler, John (CIV) <[redacted]>; Halainen, Daniel J. (CIV) <[redacted]>; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: RE: Texas v. United States: Proposed Stipulation of Voluntary Dismissal
Attach: defs signature_stipulation of dismissal.pdf

Adam,

Thanks for your patience. We agree to the stipulation you circulated. Attached is a signed signature page for defendants.

Thank you,

Julie

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 5:53 PM
To: Nina Perales <[redacted]>; Saltman, Julie (CIV) <[redacted]>; Tyler, John (CIV) <[redacted]>; Halainen, Daniel J. (CIV) <[redacted]>; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: RE: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Nina: Thank you for sending your signed signature block. We have received it and will insert your signed page into the filing.

John, Julie, Daniel: Please let us know if you have any objections or changes to the proposed stipulation. Otherwise, please physically sign the signature block for Defendants and send it back to me for inclusion in the filing. Thank you in advance.

Regards,

Adam

From: Nina Perales [mailto[redacted]
Sent: Monday, September 11, 2017 4:44 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Saltman, Julie (CIV) <[redacted]>; Tyler, John (CIV) <[redacted]>; Halainen, Daniel J. (CIV) <[redacted]>; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: RE: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Adam,

Please find my signed page below, thank you.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 1:05 PM
To: Saltman, Julie (CIV); Tyler, John (CIV); Halainen, Daniel J. (CIV); Nina Perales; Markoff, Gabriel
Cc: Colmenero, Angela; Biggs, Adam
Subject: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Counsel,

In light of the Court's September 8, 2017 order regarding Plaintiffs' notice of voluntary dismissal (ECF No. 471), we propose to file a Stipulation of Voluntary Dismissal in the above-referenced matter. Attached, in Word and PDF form, is a draft of that proposed stipulation for your consideration.

Please let us know if the proposed stipulation is acceptable to Defendants and Intervenors. Assuming the parties are in agreement regarding the stipulation, we ask that you physically sign your respective signature block (with any necessary changes to the block) and send us a scanned version of the hand-signed page. As reflected in the attached proposal, we intend to file the stipulation with the imaged signature pages for Defendants and Intervenors.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

b5,b6

From: ecf_txnd@txnd.uscourts.gov [mailto:ecf_txnd@txnd.uscourts.gov]
Sent: Thursday, March 02, 2017 12:44 PM
To: Courtmail@txnd.uscourts.gov
Subject: Activity in Case 7:15-cv-00151-O State of Texas v. United States of America Order on Motion to Extend Time

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

If you need to know whether you must send the presiding judge a paper copy of a document that you have docketed in this case, click here: Judges' Copy Requirements. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms and Instructions found at www.txnd.uscourts.gov. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge.

U.S. District Court

Northern District of Texas

Notice of Electronic Filing

The following transaction was entered on 3/2/2017 at 11:44 AM CST and filed on 3/2/2017
Case Name: State of Texas v. United States of America
Case Number: 7:15-cv-00151-O
Filer:
Document Number: 58

Docket Text:
ORDER: Defendants' Consent Motion for Extension of Time and to Modify Scheduling Order (ECF No. [57]) is GRANTED. Accordingly, it is ORDERED that the deadline for Defendants to submit Defendants' Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment is extended to May 5, 2017. The deadline for Plaintiffs to submit Plaintiffs' Reply in Support of Summary Judgment and Response to Defendants' Motion for Summary Judgment is extended to May 26, 2017. The deadline for Defendants to submit Defendants' Reply in Support of Summary Judgment is extended to June 12, 2017. The Expert Objection Deadline is extended to June 12, 2017. (Ordered by Judge Reed C. O'Connor on 3/2/2017) (baa)

7:15-cv-00151-O Notice has been electronically mailed to:

Thomas A Albright thomas.albright@texasattorneygeneral.gov, Andrew.Leonie@texasattorneygeneral.gov, Andrew.Stephens@texasattorneygeneral.gov, Bryan.Clark@ag.ks.gov, Cherie.Reed@oag.texas.gov, CodyB@ag.state.la.us, Gaynell.Williams@oag.texas.gov, Heather.McVeigh@atg.in.gov, Jeff.Chanay@ag.ks.gov, Michael.Toth@texasattorneygeneral.gov, PhillipsT@ag.state.la.us, Tom.Fisher@atg.in.gov, WiltonP@ag.state.la.us, austin.nimocks@texasattorneygeneral.gov, bergln@doj.state.wi.us, brantley.starr@texasattorneygeneral.gov, dave.bydalek@nebraska.gov, laura.stowe@texasattorneygeneral.gov, lenningtondp@doj.state.wi.us, tseytlinm@doj.state.wi.us

Andrew D Leonie andrew.leonie@texasattorneygeneral.gov, grace.moody@texasattorneygeneral.gov

Austin R Nimocks austin.nimocks@oag.texas.gov, andrew.leonie@oag.texas.gov, brantley.starr@oag.texas.gov, david.hacker@oag.texas.gov, grace.moody@oag.texas.gov, joel.stonedale@oag.texas.gov, michael.toth@oag.texas.gov

Rohit Dwarka Nath-DOJ b6

Julie Straus Harris-DOJ b6

Deepthy Kishore b6

Michael Christopher Toth michael.toth@oag.texas.gov

7:15-cv-00151-O The CM/ECF system has NOT delivered notice electronically to the names listed below. The clerk's office will serve notice of court Orders and Judgments by mail as required by the federal rules. An attorney/pro se litigant is cautioned to carefully follow the federal rules (see FedRCivP 5) with regard to service of any document the attorney/pro se litigant has filed with the court. The clerk's office will not serve paper documents on behalf of an attorney/pro se litigant.

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1004035775 [Date=3/2/2017] [FileNumber=9838365-0]
[ec553bbdea300d3f9287b6c27b651280cea38509c8151cbab75d1a2ec4d68c572b55
6fa8c12162591903978957b6b08910217b9d3cb6c778dfc54451e943f247]]

b5,b6

From: ecf_txnd@txnd.uscourts.gov [mailto:ecf_txnd@txnd.uscourts.gov]
Sent: Thursday, March 02, 2017 12:44 PM
To: Courtmail@txnd.uscourts.gov
Subject: Activity in Case 7:15-cv-00151-O State of Texas v. United States of America Order on Motion to Extend Time

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

If you need to know whether you must send the presiding judge a paper copy of a document that you have docketed in this case, click here: Judges' Copy Requirements. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms and Instructions found at www.txnd.uscourts.gov. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge.

U.S. District Court

Northern District of Texas

Notice of Electronic Filing

The following transaction was entered on 3/2/2017 at 11:44 AM CST and filed on 3/2/2017
Case Name: State of Texas v. United States of America
Case Number: 7:15-cv-00151-O
Filer:

Document Number: 58

Docket Text:
ORDER: Defendants' Consent Motion for Extension of Time and to Modify Scheduling Order (ECF No. [57]) is GRANTED. Accordingly, it is ORDERED that the deadline for Defendants to submit Defendants' Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment is extended to May 5, 2017. The deadline for Plaintiffs to submit Plaintiffs' Reply in Support of Summary Judgment and Response to Defendants' Motion for Summary Judgment is extended to May 26, 2017. The deadline for Defendants to submit Defendants' Reply in Support of Summary Judgment is extended to June 12, 2017. The Expert Objection Deadline is extended to June 12, 2017. (Ordered by Judge Reed C. O'Connor on 3/2/2017) (baa)

7:15-cv-00151-O Notice has been electronically mailed to:

Thomas A Albright thomas.albright@texasattorneygeneral.gov, Andrew.Leonie@texasattorneygeneral.gov, Andrew.Stephens@texasattorneygeneral.gov, Bryan.Clark@ag.ks.gov, Cherie.Reed@oag.texas.gov, CodyB@ag.state.la.us, Gaynell.Williams@oag.texas.gov, Heather.McVeigh@atg.in.gov, Jeff.Chanay@ag.ks.gov, Michael.Toth@texasattorneygeneral.gov, PhillipsT@ag.state.la.us, Tom.Fisher@atg.in.gov, WiltonP@ag.state.la.us, austin.nimocks@texasattorneygeneral.gov, bergln@doj.state.wi.us, brantley.starr@texasattorneygeneral.gov, dave.bydalek@nebraska.gov, laura.stowe@texasattorneygeneral.gov, lenningtondp@doj.state.wi.us, tseytlinm@doj.state.wi.us

Andrew D Leonie andrew.leonie@texasattorneygeneral.gov, grace.moody@texasattorneygeneral.gov

Austin R Nimocks austin.nimocks@oag.texas.gov, andrew.leonie@oag.texas.gov, brantley.starr@oag.texas.gov, david.hacker@oag.texas.gov, grace.moody@oag.texas.gov, joel.stonedale@oag.texas.gov, michael.toth@oag.texas.gov

Rohit Dwarka Nath-DOJ b6

Julie Straus Harris-DOJ b6

Deepthy Kishore b6

Michael Christopher Toth michael.toth@oag.texas.gov

7:15-cv-00151-O The CM/ECF system has NOT delivered notice electronically to the names listed below. The clerk's office will serve notice of court Orders and Judgments by mail as required by the federal rules. An attorney/pro se litigant is cautioned to carefully follow the federal rules (see FedRCivP 5) with regard to service of any document the attorney/pro se litigant has filed with the court. The clerk's office will not serve paper documents on behalf of an attorney/pro se litigant.

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1004035775 [Date=3/2/2017] [FileNumber=9838365-0]
[ec553bbdea300d3f9287b6c27b651280cea38509c8151cbab75d1a2ec4d68c572b55
6fa8c12162591903978957b6b08910217b9d3cb6c778dfc54451e943f247]]

b5,b6

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Tuesday, June 06, 2017 3:24 PM
To: Halainen, Daniel J. (CIV) <b6
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) <b6; Tyler, John (CIV) <b6
Subject: RE: Scheduling Order: Texas v. United States

Daniel:

In anticipation of our call tomorrow, please find attached a proposed scheduling order. Thanks.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [b6
Sent: Friday, June 02, 2017 1:22 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) <b6; Tyler, John (CIV) <b6
Subject: RE: Scheduling Order: Texas v. United States

Adam,

Thank you for reaching out. Are you available to confer on Wednesday afternoon at 3:00 pm Eastern / 2:00 pm Central ? Please let me know if that time doesn't work. Have a nice weekend.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 01, 2017 4:19 PM
To: Saltman, Julie (CIV) <b6>; Halainen, Daniel J. (CIV) <b6>; Tyler, John (CIV) <b6>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Scheduling Order: Texas v. United States

All:

As you know, Judge Hanen issued an order in March requiring the parties to confer and propose a scheduling order by June 15. We were hoping to schedule a conference call for early next week to discuss. Please let us know your availability and I will circulate a call-in number. Thank you and have a good rest of your day.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

b5,b6

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Tuesday, June 06, 2017 3:24 PM
To: Halainen, Daniel J. (CIV) [b6]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) [b6] Tyler, John (CIV) [b6]
Subject: RE: Scheduling Order: Texas v. United States

Daniel:

In anticipation of our call tomorrow, please find attached a proposed scheduling order. Thanks.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [b6]
Sent: Friday, June 02, 2017 1:22 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) [b6] Tyler, John (CIV) [b6]
Subject: RE: Scheduling Order: Texas v. United States

Adam,

Thank you for reaching out. Are you available to confer on Wednesday afternoon at 3:00 pm Eastern / 2:00 pm

Central ? Please let me know if that time doesn't work. Have a nice weekend.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 01, 2017 4:19 PM
To: Saltman, Julie (CIV) <b6>; Halainen, Daniel J. (CIV) <b6>; Tyler, John (CIV) [b6]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Scheduling Order: Texas v. United States

All:

As you know, Judge Hanen issued an order in March requiring the parties to confer and propose a scheduling order by June 15. We were hoping to schedule a conference call for early next week to discuss. Please let us know your availability and I will circulate a call-in number. Thank you and have a good rest of your day.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

b5,b6

From: Nina Perales [redacted]
Sent: Thursday, June 15, 2017 7:32 PM
To: Halainen, Daniel J. (CIV) [b6]
Cc: Tyler, John (CIV) < [b6] Saltman, Julie (CIV) < [b6]
Subject: RE: Texas v. United States - scheduling order

I would like to see a copy of the exhibit before giving our position on the request for an additional stay.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [b6]
Sent: Thursday, June 15, 2017 6:29 PM
To: Nina Perales
Cc: Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Nina,

Thanks – I will remove that language. Does MALDEF have a position that we can include in the motion?

We are still waiting for a copy of Exhibit A to include with the motion.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Nina Perales [mailto[redacted]
Sent: Thursday, June 15, 2017 7:24 PM
To: Halainen, Daniel J. (CIV) <[b6]
Cc: Tyler, John (CIV) <[b6] Saltman, Julie (CIV) <[b6]
Subject: RE: Texas v. United States - scheduling order

Please also provide Exhibit A to the motion.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Nina Perales
Sent: Thursday, June 15, 2017 6:21 PM
To: 'Halainen, Daniel J. (CIV)'
Cc: Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Daniel,

Please remove the language that says: Counsel for Intervenors was not available to state its position on this motion.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [[b6]
Sent: Thursday, June 15, 2017 5:51 PM

To: Biggs, Adam; Nina Perales
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Attached please find a draft motion to stay the merits proceedings for two weeks in light of new guidance signed by the Secretary of Homeland Security today.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 15, 2017 6:29 PM
To: Halainen, Daniel J. (CIV) <b6 Nina Perales (b) (6)
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <b6 Saltman, Julie (CIV)
b6
Subject: RE: Texas v. United States - scheduling order

Fine with us.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [b6
Sent: Thursday, June 15, 2017 5:11 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales (b) (6)
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy

<Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [b6] Saltman, Julie (CIV) [b6]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Are you available for a call at 6:30 pm Eastern/5:30 pm Central? Please call [b6] and enter the PIN [redacted].

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[b6]

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 5:37 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' <[redacted]
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [b6] Saltman, Julie (CIV) [b6]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Thanks again for your patience. We will make every effort to get back to you within the half hour.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[b6]

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 11:55 AM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' [redacted]>
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [b6] Saltman, Julie (CIV) [b6]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Following up on our call yesterday, we have nothing definitive to report at this time. I apologize for the delay, and thank you for your patience. We will get back to you this afternoon.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch

20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Halainen, Daniel J. (CIV)
Sent: Wednesday, June 14, 2017 12:22 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; Nina Perales <[redacted]>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <b6> Saltman, Julie (CIV)
b6
Subject: RE: Texas v. United States - scheduling order

All,

For today's *Texas v. United States* call at 3:00 pm Eastern/2:00 pm Central, please call the conference line at b6
b6

Thanks,

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Monday, June 12, 2017 1:59 PM
To: Nina Perales <[redacted]> Halainen, Daniel J. (CIV) <b6>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <b6>; Saltman, Julie (CIV)
b6
Subject: RE: Texas v. United States - scheduling order

Daniel:

That is fine.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Nina Perales [mailto: [redacted]
Sent: Monday, June 12, 2017 12:57 PM
To: Halainen, Daniel J. (CIV) <[redacted] b6 Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted] b6 Saltman, Julie (CIV)
b6
Subject: RE: Texas v. United States - scheduling order

That's ok with me.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [redacted] b6
Sent: Monday, June 12, 2017 12:27 PM
To: Biggs, Adam
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV); Nina Perales
Subject: Texas v. United States - scheduling order

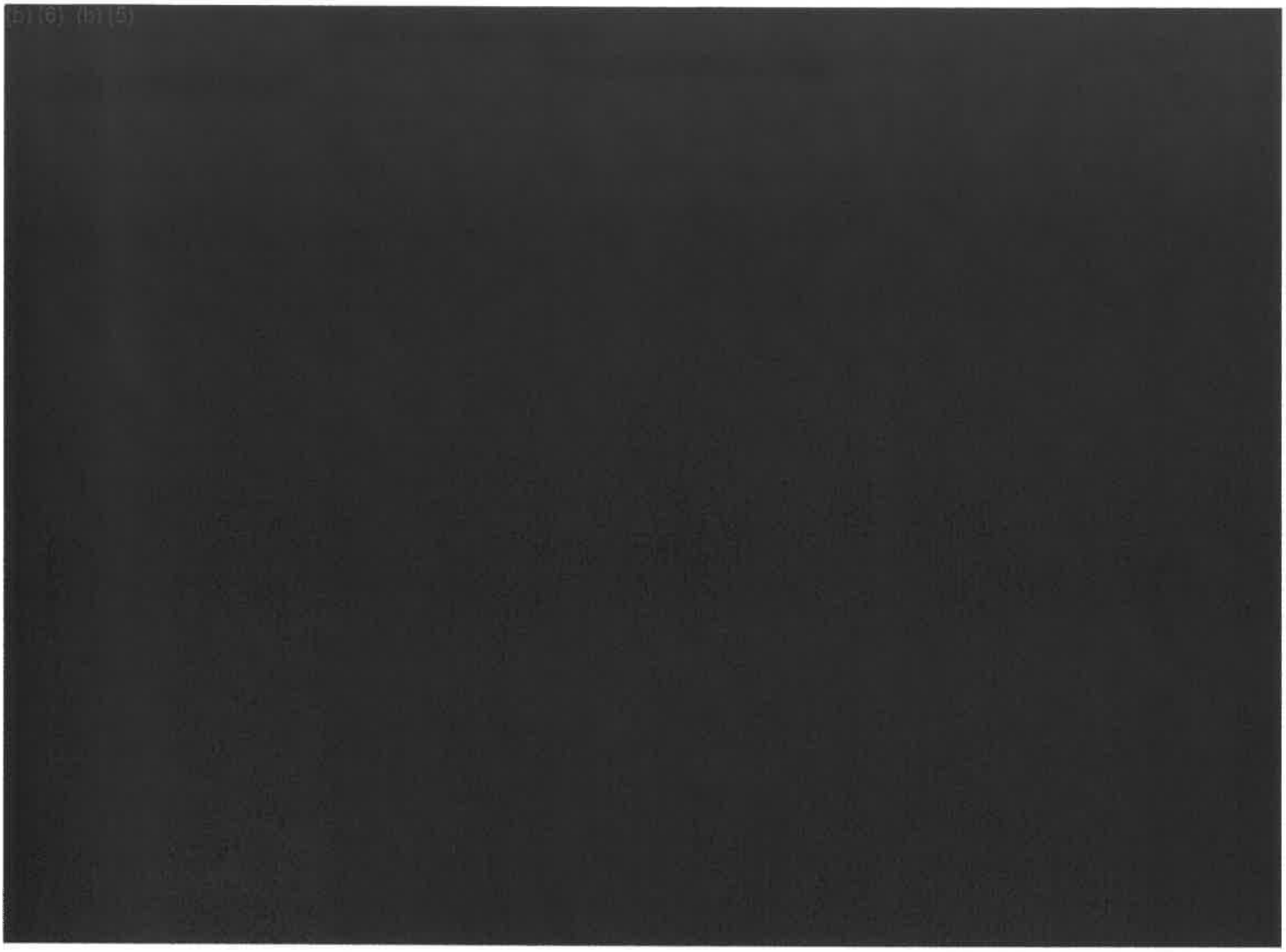
Adam,

We have nothing further to report today on the proposed scheduling order due to the court by Thursday, June 15. Can we reschedule today's call for Wednesday, June 14, at 3:00 pm Eastern/2:00 pm Central? If we have a response for you before then, I'll let you know. I'm copying Nina Perales of MALDEF, so that we can coordinate among the parties.

Thanks very much.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6



From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Tuesday, June 06, 2017 3:24 PM
To: Halainen, Daniel J. (CIV) <[redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted]
Subject: RE: Scheduling Order: Texas v. United States

Daniel:

In anticipation of our call tomorrow, please find attached a proposed scheduling order. Thanks.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711

t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [mailto[redacted]
Sent: Friday, June 02, 2017 1:22 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) [redacted]>; Tyler, John (CIV) <[redacted]
Subject: RE: Scheduling Order: Texas v. United States

Adam,

Thank you for reaching out. Are you available to confer on Wednesday afternoon at 3:00 pm Eastern / 2:00 pm Central ? Please let me know if that time doesn't work. Have a nice weekend.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 01, 2017 4:19 PM
To: Saltman, Julie (CIV) [redacted]>; Halainen, Daniel J. (CIV) <[redacted]>; Tyler, John (CIV) [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Scheduling Order: Texas v. United States

All:

As you know, Judge Hanen issued an order in March requiring the parties to confer and propose a scheduling order by June 15. We were hoping to schedule a conference call for early next week to discuss. Please let us know your availability and I will circulate a call-in number. Thank you and have a good rest of your day.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Tuesday, June 06, 2017 3:24 PM
To: Halainen, Daniel J. (CIV) [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted]
Subject: RE: Scheduling Order: Texas v. United States

Daniel:

In anticipation of our call tomorrow, please find attached a proposed scheduling order. Thanks.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [mailto:[redacted]
Sent: Friday, June 02, 2017 1:22 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted]

Subject: RE: Scheduling Order: Texas v. United States

Adam,

Thank you for reaching out. Are you available to confer on Wednesday afternoon at 3:00 pm Eastern / 2:00 pm Central ? Please let me know if that time doesn't work. Have a nice weekend.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 01, 2017 4:19 PM
To: Saltman, Julie (CIV) [redacted] Halainen, Daniel J. (CIV) [redacted]; Tyler, John (CIV) [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Scheduling Order: Texas v. United States

All:

As you know, Judge Hanen issued an order in March requiring the parties to confer and propose a scheduling order by June 15. We were hoping to schedule a conference call for early next week to discuss. Please let us know your availability and I will circulate a call-in number. Thank you and have a good rest of your day.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Markoff, Gabriel [mailto:gmarkoff@omm.com]
Sent: Friday, July 28, 2017 11:46 AM
To: angela.colmenero@texasattorneygeneral.gov; peggy.hamil@oag.texas.gov; emily.ardolino@oag.texas.gov; adam.bitter@texasattorneygeneral.gov; adam.biggs@oag.texas.gov; Saltman, Julie (CIV) b6
Tyler, John (CIV) b6 b6
Cc: Nina Perales [redacted]
Subject: Texas v. United States - Conference on Motion

Dear Counsel:

I am writing on behalf of Nina Perales, counsel for the Jane Doe intervenors. We intend to file a motion today to dismiss Plaintiffs' complaint in the *Texas v. United States* litigation pending before Judge Hanen as moot without leave to amend in light of the Secretary's June 15 decision to rescind the November 2014 DAPA Memorandum.

Please let us know your positions on this motion.

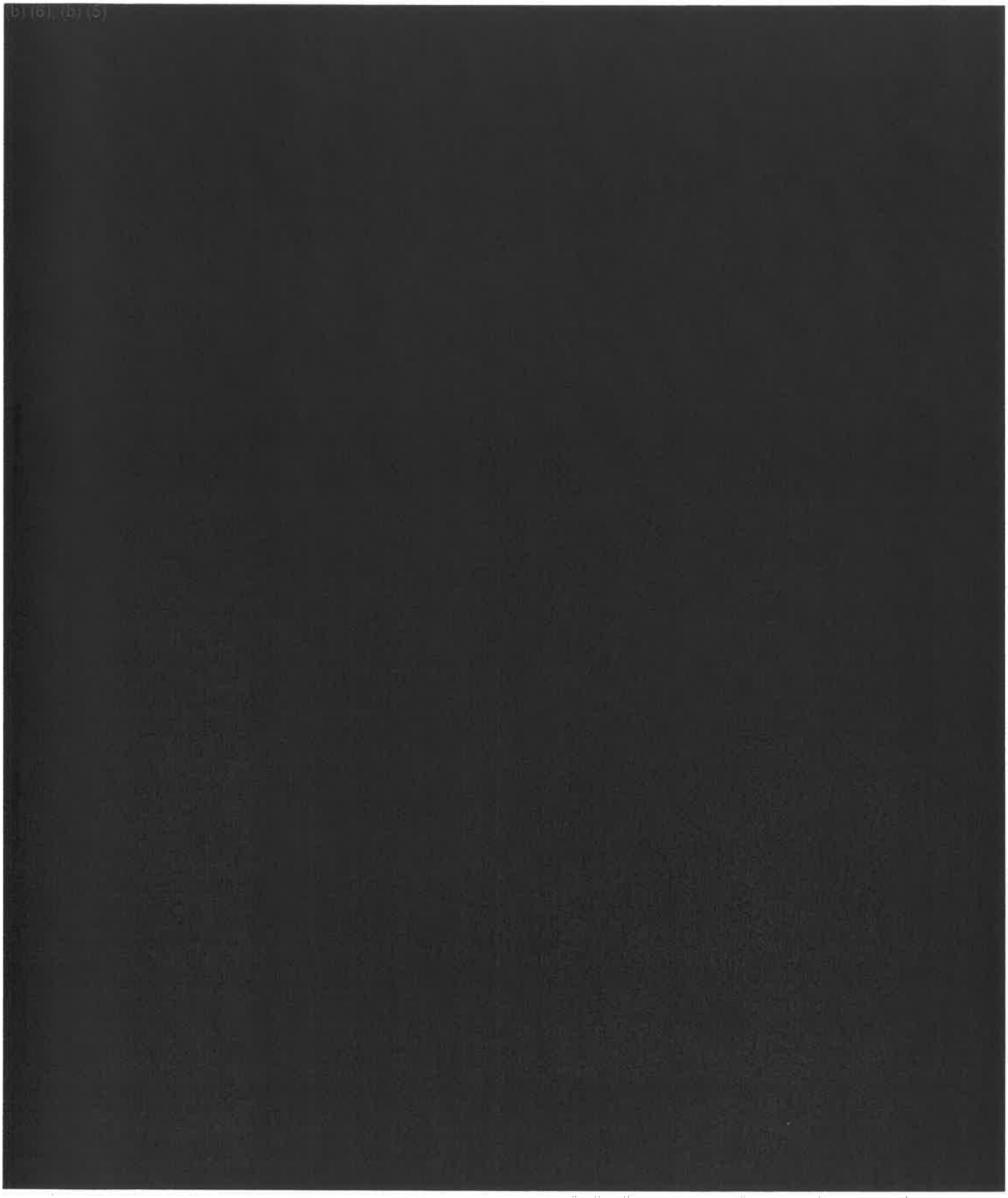
Thank you,
Gabriel

O'Melveny

Gabriel Markoff
gmarkoff@omm.com
O: +1-415-984-8890

O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111

This message and any attached documents contain information from the law firm of O'Melveny & Myers LLP that may be confidential and/or privileged. If you are not the intended recipient, you may not read, copy, distribute, or use this information. If you have received this transmission in error, please notify the sender immediately by reply e-mail and then delete this message.



From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]

Sent: Thursday, August 31, 2017 10:07 AM
To: Saltman, Julie (CIV) <[redacted]; Tyler, John (CIV) <[redacted] Halainen, Daniel J. (CIV) [redacted]>; nperales@maldef.org; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Texas v. United States: Conference on motion for leave to amend complaint

Counsel,

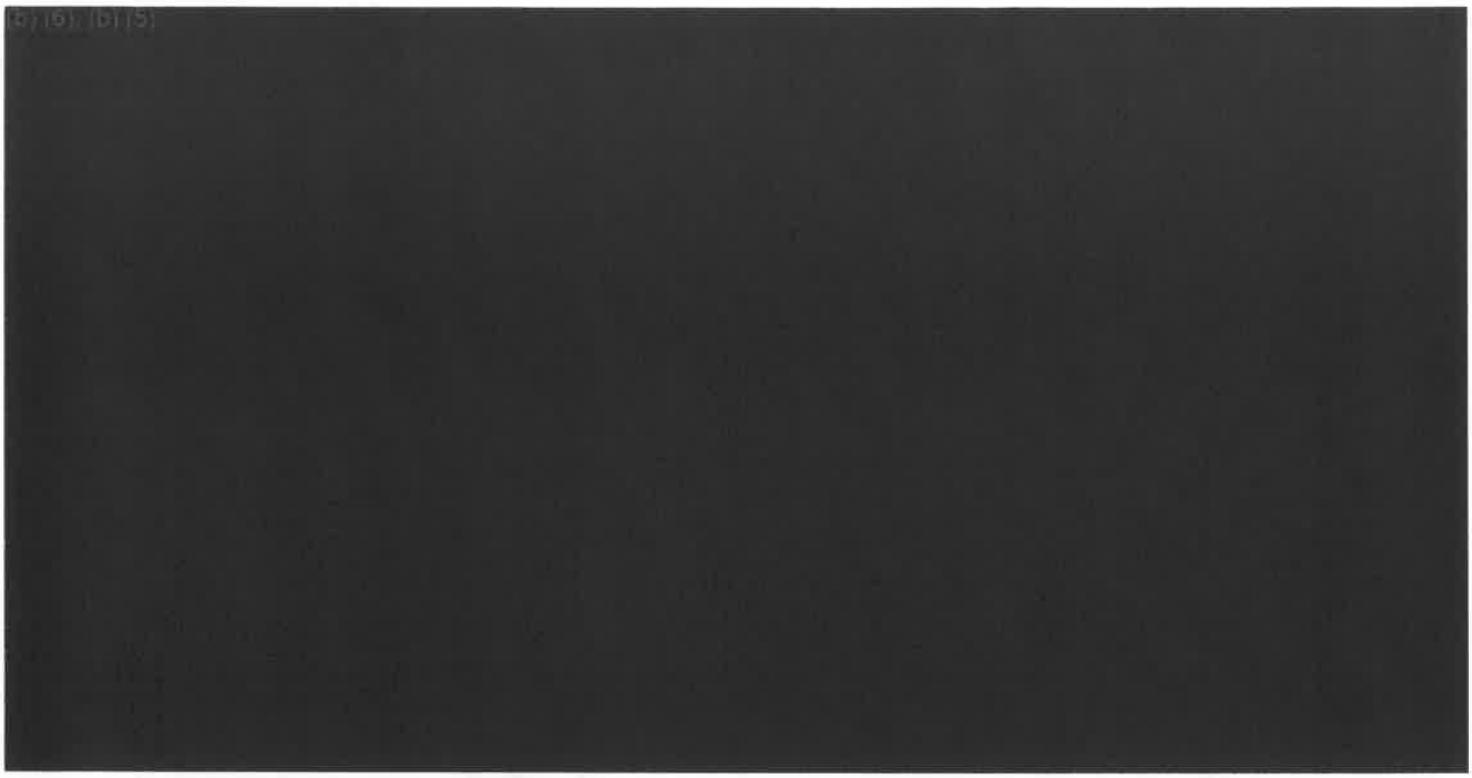
On Tuesday, September 5, 2017, the Plaintiffs intend to file a motion for leave to amend their complaint in the above-referenced matter, consistent with the information contained in Plaintiffs' Motion to Stay filed on July 7, 2017 (ECF No. 447).

Please let me know whether you are opposed or unopposed to Plaintiffs' motion for leave.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov



From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Thursday, August 31, 2017 10:07 AM
To: Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted]; Halainen, Daniel J. (CIV) [redacted]; [redacted] Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Texas v. United States: Conference on motion for leave to amend complaint

Counsel,

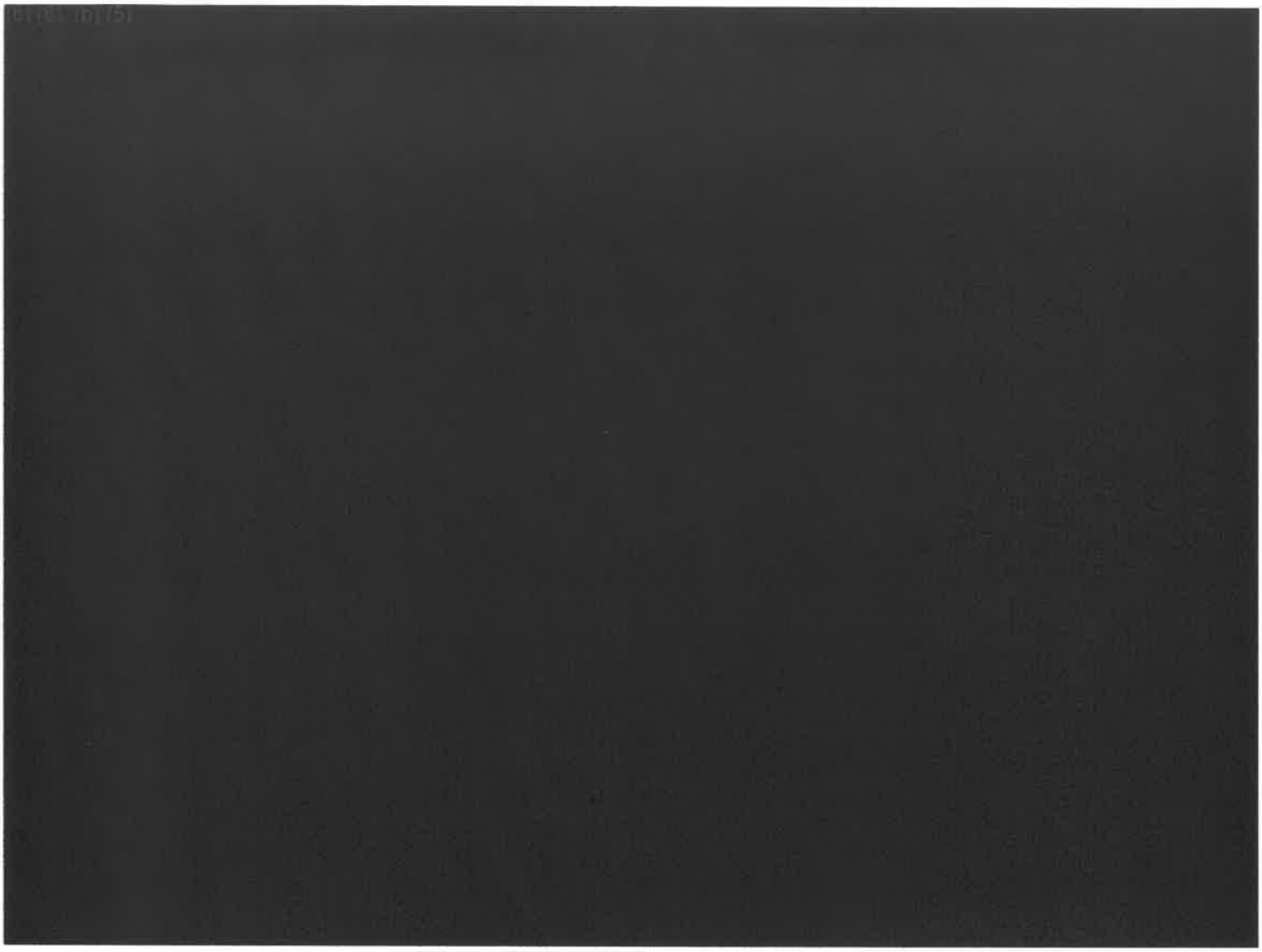
On Tuesday, September 5, 2017, the Plaintiffs intend to file a motion for leave to amend their complaint in the above-referenced matter, consistent with the information contained in Plaintiffs' Motion to Stay filed on July 7, 2017 (ECF No. 447).

Please let me know whether you are opposed or unopposed to Plaintiffs' motion for leave.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov



From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 2:05 PM
To: Saltman, Julie (CIV) <[redacted]; Tyler, John (CIV) <[redacted]>; Halainen, Daniel J. (CIV) [redacted]>; [redacted]; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Counsel,

In light of the Court's September 8, 2017 order regarding Plaintiffs' notice of voluntary dismissal (ECF No. 471), we propose to file a Stipulation of Voluntary Dismissal in the above-referenced matter. Attached, in Word and PDF form, is a draft of that proposed stipulation for your consideration.

Please let us know if the proposed stipulation is acceptable to Defendants and Intervenors. Assuming the parties are in agreement regarding the stipulation, we ask that you physically sign your respective signature block (with any necessary changes to the block) and send us a scanned version of the hand-signed page. As reflected in the attached proposal, we intend to file the stipulation with the imaged signature pages for Defendants and Intervenors.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

b5,b6

From: ecf_txnd@txnd.uscourts.gov [mailto:ecf_txnd@txnd.uscourts.gov]
Sent: Thursday, July 13, 2017 4:50 PM
To: Courtmail@txnd.uscourts.gov
Subject: Activity in Case 7:15-cv-00151-O State of Texas v. United States of America Reply

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

If you need to know whether you must send the presiding judge a paper copy of a document that you have docketed in this case, click here: Judges' Copy Requirements. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms and Instructions found at www.txnd.uscourts.gov. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge.

U.S. District Court

Northern District of Texas

Notice of Electronic Filing

The following transaction was entered by Straus Harris-DOJ, Julie on 7/13/2017 at 3:50 PM CDT and filed on 7/13/2017
Case Name: State of Texas v. United States of America
Case Number: 7:15-cv-00151-O

Filer: Sylvia Burwell
John Koskinen
United States Department of Health & Human Services
United States Internal Revenue Service
United States of America

Document Number: 67

Docket Text:
REPLY filed by Sylvia Burwell, John Koskinen, United States Department of Health & Human Services, United States Internal Revenue Service, United States of America re: [62] MOTION for Summary Judgment *and Response in Opposition to Plaintiffs' Motion for Summary Judgment* (Straus Harris-DOJ, Julie)

7:15-cv-00151-O Notice has been electronically mailed to:

Andrew D Leonie andrew.leonie@texasattorneygeneral.gov, grace.moody@texasattorneygeneral.gov

Austin Nimocks austin.nimocks@oag.texas.gov, andrew.leonie@oag.texas.gov, brantley.starr@oag.texas.gov, david.hacker@oag.texas.gov, grace.moody@oag.texas.gov, joel.stonedale@oag.texas.gov, michael.toth@oag.texas.gov

Deepthy Kishore b6

Julie Straus Harris-DOJ b6

Michael Christopher Toth michael.toth@oag.texas.gov

Michelle Bennett - DOJ b6

Rohit Dwarka Nath-DOJ b6

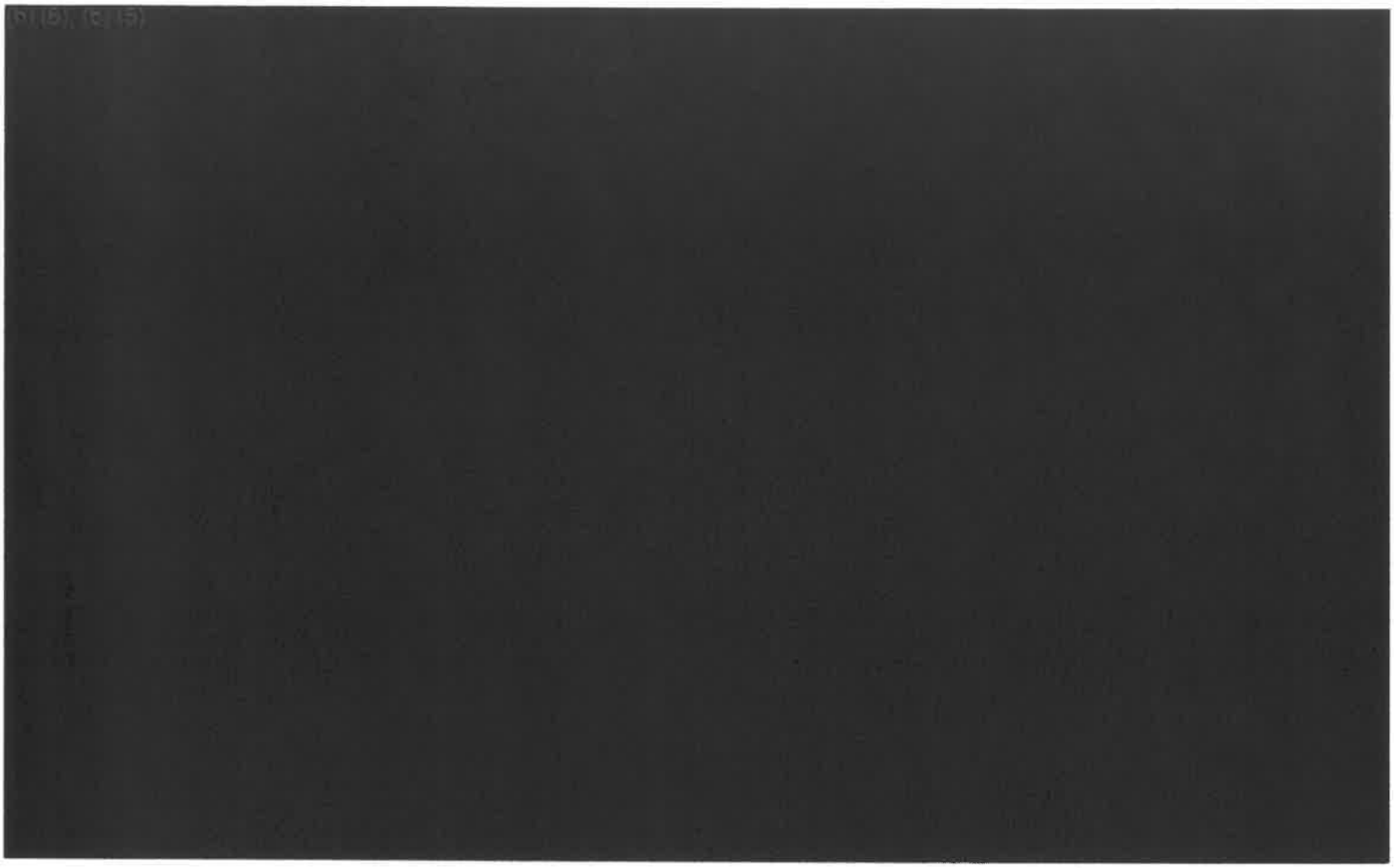
Thomas A Albright thomas.albright@texasattorneygeneral.gov, Andrew.Leonie@texasattorneygeneral.gov, Andrew.Stephens@texasattorneygeneral.gov, austin.nimocks@texasattorneygeneral.gov, bergln@doj.state.wi.us, brantley.starr@texasattorneygeneral.gov, Bryan.Clark@ag.ks.gov, CodyB@ag.state.la.us, dave.bydalek@nebraska.gov, Gaynell.Williams@oag.texas.gov, Heather.McVeigh@atg.in.gov, Jeff.Chanay@ag.ks.gov, laura.stowe@texasattorneygeneral.gov, lenningtondp@doj.state.wi.us, Michael.Toth@texasattorneygeneral.gov, PhillipsT@ag.state.la.us, Tamera.Martinez@oag.texas.gov, Tom.Fisher@atg.in.gov, tseytlinm@doj.state.wi.us, WiltonP@ag.state.la.us

7:15-cv-00151-O The CM/ECF system has NOT delivered notice electronically to the names listed below. The clerk's office will serve notice of court Orders and Judgments by mail as required by the federal rules. An attorney/pro se litigant is cautioned to carefully follow the federal rules (see FedRCivP 5) with regard to service of any document the attorney/pro se litigant has filed with the court. The clerk's office will not serve paper documents on behalf of an attorney/pro se litigant.

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1004035775 [Date=7/13/2017] [FileNumber=10106124-

0] [24c85155b25b00850128753a59b8fc4dca4d431dc3d00097eaac116c4b3fabd513
798b231b84495757e124263c9889221e285fdf8dd11f27aee5c3df141dbf24]]



From: Markoff, Gabriel [mailto:gmarkoff@omm.com]
Sent: Friday, July 28, 2017 11:46 AM
To: angela.colmenero@texasattorneygeneral.gov; peggy.hamil@oag.texas.gov; emily.ardolino@oag.texas.gov; adam.bitter@texasattorneygeneral.gov; adam.biggs@oag.texas.gov; Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted]
Cc: Nina Perales [redacted]
Subject: Texas v. United States - Conference on Motion

Dear Counsel:

I am writing on behalf of Nina Perales, counsel for the Jane Doe intervenors. We intend to file a motion today to dismiss Plaintiffs' complaint in the *Texas v. United States* litigation pending before Judge Hanen as moot without leave to amend in light of the Secretary's June 15 decision to rescind the November 2014 DAPA Memorandum.

Please let us know your positions on this motion.

Thank you,
Gabriel

O'Melveny
Gabriel Markoff
gmarkoff@omm.com
O: +1-415-984-8890

O'Melveny & Myers LLP

Two Embarcadero Center, 28th Floor
San Francisco, CA 94111

This message and any attached documents contain information from the law firm of O'Melveny & Myers LLP that may be confidential and/or privileged. If you are not the intended recipient, you may not read, copy, distribute, or use this information. If you have received this transmission in error, please notify the sender immediately by reply e-mail and then delete this message.

b5,b6

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Friday, June 02, 2017 4:03 PM
To: Halainen, Daniel J. (CIV) [b6]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) [b6]; Tyler, John (CIV) [b6]
Subject: RE: Scheduling Order: Texas v. United States

Daniel:

That works for Wednesday. Have a good weekend as well.

Conference call details:

Dial-In: [redacted]

Passcode:

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711

t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [b6]
Sent: Friday, June 02, 2017 1:22 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) <[b6]>; Tyler, John (CIV) [b6]
Subject: RE: Scheduling Order: Texas v. United States

Adam,

Thank you for reaching out. Are you available to confer on Wednesday afternoon at 3:00 pm Eastern / 2:00 pm Central ? Please let me know if that time doesn't work. Have a nice weekend.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[b6]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 01, 2017 4:19 PM
To: Saltman, Julie (CIV) <[b6]>; Halainen, Daniel J. (CIV) <[b6]>; Tyler, John (CIV) <[b6]>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Scheduling Order: Texas v. United States

All:

As you know, Judge Hanen issued an order in March requiring the parties to confer and propose a scheduling order by June 15. We were hoping to schedule a conference call for early next week to discuss. Please let us know your availability and I will circulate a call-in number. Thank you and have a good rest of your day.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

[redacted]

From: Nina Perales [mailto[redacted]
Sent: Thursday, June 15, 2017 7:32 PM
To: Halainen, Daniel J. (CIV) [redacted]>
Cc: Tyler, John (CIV) <[redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

I would like to see a copy of the exhibit before giving our position on the request for an additional stay.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [mail[redacted]
Sent: Thursday, June 15, 2017 6:29 PM
To: Nina Perales
Cc: Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Nina,

Thanks – I will remove that language. Does MALDEF have a position that we can include in the motion?

We are still waiting for a copy of Exhibit A to include with the motion.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Nina Perales [mailto:[redacted]
Sent: Thursday, June 15, 2017 7:24 PM
To: Halainen, Daniel J. (CIV) <[redacted]
Cc: Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) <[redacted]
Subject: RE: Texas v. United States - scheduling order

Please also provide Exhibit A to the motion.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Nina Perales
Sent: Thursday, June 15, 2017 6:21 PM
To: 'Halainen, Daniel J. (CIV)'
Cc: Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Daniel,

Please remove the language that says: Counsel for Intervenors was not available to state its position on this motion.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [mailto:[redacted]
Sent: Thursday, June 15, 2017 5:51 PM
To: Biggs, Adam; Nina Perales
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Attached please find a draft motion to stay the merits proceedings for two weeks in light of new guidance signed by the Secretary of Homeland Security today.

Daniel Halainen

Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 15, 2017 6:29 PM
To: Halainen, Daniel J. (CIV) <[redacted] Nina Perales [redacted]>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]; Saltman, Julie (CIV) [redacted]V>
Subject: RE: Texas v. United States - scheduling order

Fine with us.

Best.

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [mailto:[redacted]
Sent: Thursday, June 15, 2017 5:11 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted] Saltman, Julie (CIV) [redacted]>
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Are you available for a call at 6:30 pm Eastern/5:30 pm Central? Please call [redacted] and enter the PIN [redacted]

Daniel Halainen
Trial Attorney, U.S. Department of Justice

Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
(b) (6)

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 5:37 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' (b) (6)
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) (b) (6) >; Saltman, Julie (CIV) (b) (6)
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Thanks again for your patience. We will make every effort to get back to you within the half hour.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
(b) (6)

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 11:55 AM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' (b) (6)
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <(b) (6) ; Saltman, Julie (CIV) (b) (6)
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Following up on our call yesterday, we have nothing definitive to report at this time. I apologize for the delay, and thank you for your patience. We will get back to you this afternoon.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
(b) (6)

From: Halainen, Daniel J. (CIV)
Sent: Wednesday, June 14, 2017 12:22 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; Nina Perales <(b) (6)
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) (b) (6) ; Saltman, Julie (CIV)

[redacted]
Subject: RE: Texas v. United States - scheduling order

All,

For today's *Texas v. United States* call at 3:00 pm Eastern/2:00 pm Central, please call the conference line at [redacted] and enter the PIN [redacted].

Thanks,

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Monday, June 12, 2017 1:59 PM
To: Nina Perales <nperales@MALDEF.org>; Halainen, Daniel J. (CIV) <[redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Daniel:

That is fine.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Nina Perales [mailto[redacted]
Sent: Monday, June 12, 2017 12:57 PM

To: Halainen, Daniel J. (CIV) <[redacted]>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]>; Saltman, Julie (CIV) [redacted]>
Subject: RE: Texas v. United States - scheduling order

That's ok with me.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [mailto[redacted]
Sent: Monday, June 12, 2017 12:27 PM
To: Biggs, Adam
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV); Nina Perales
Subject: Texas v. United States - scheduling order

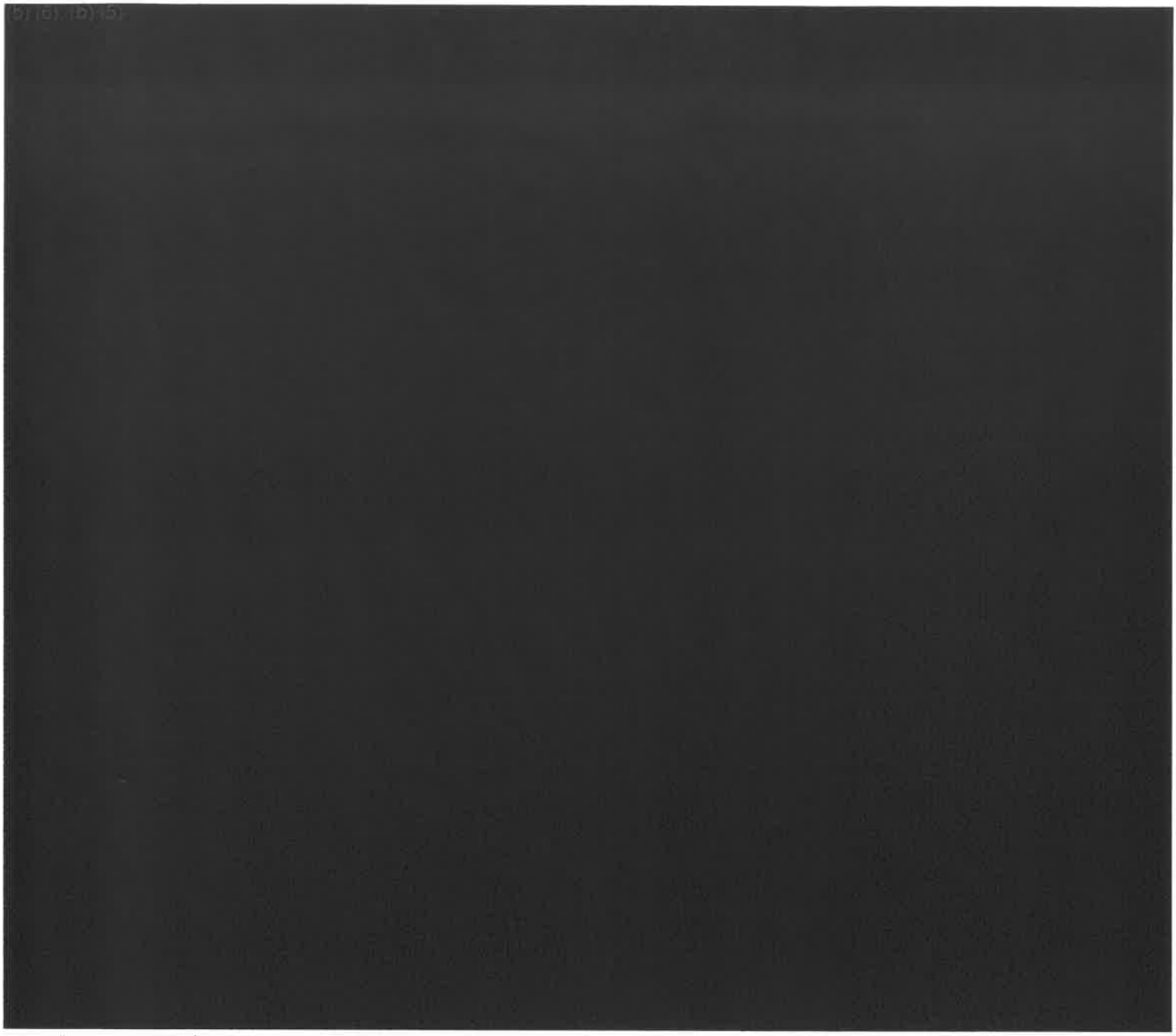
Adam,

We have nothing further to report today on the proposed scheduling order due to the court by Thursday, June 15. Can we reschedule today's call for Wednesday, June 14, at 3:00 pm Eastern/2:00 pm Central? If we have a response for you before then, I'll let you know. I'm copying Nina Perales of MALDEF, so that we can coordinate among the parties.

Thanks very much.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]



From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Thursday, August 31, 2017 10:07 AM
To: Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted] Halainen, Daniel J. (CIV) [redacted] Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Texas v. United States: Conference on motion for leave to amend complaint

Counsel,

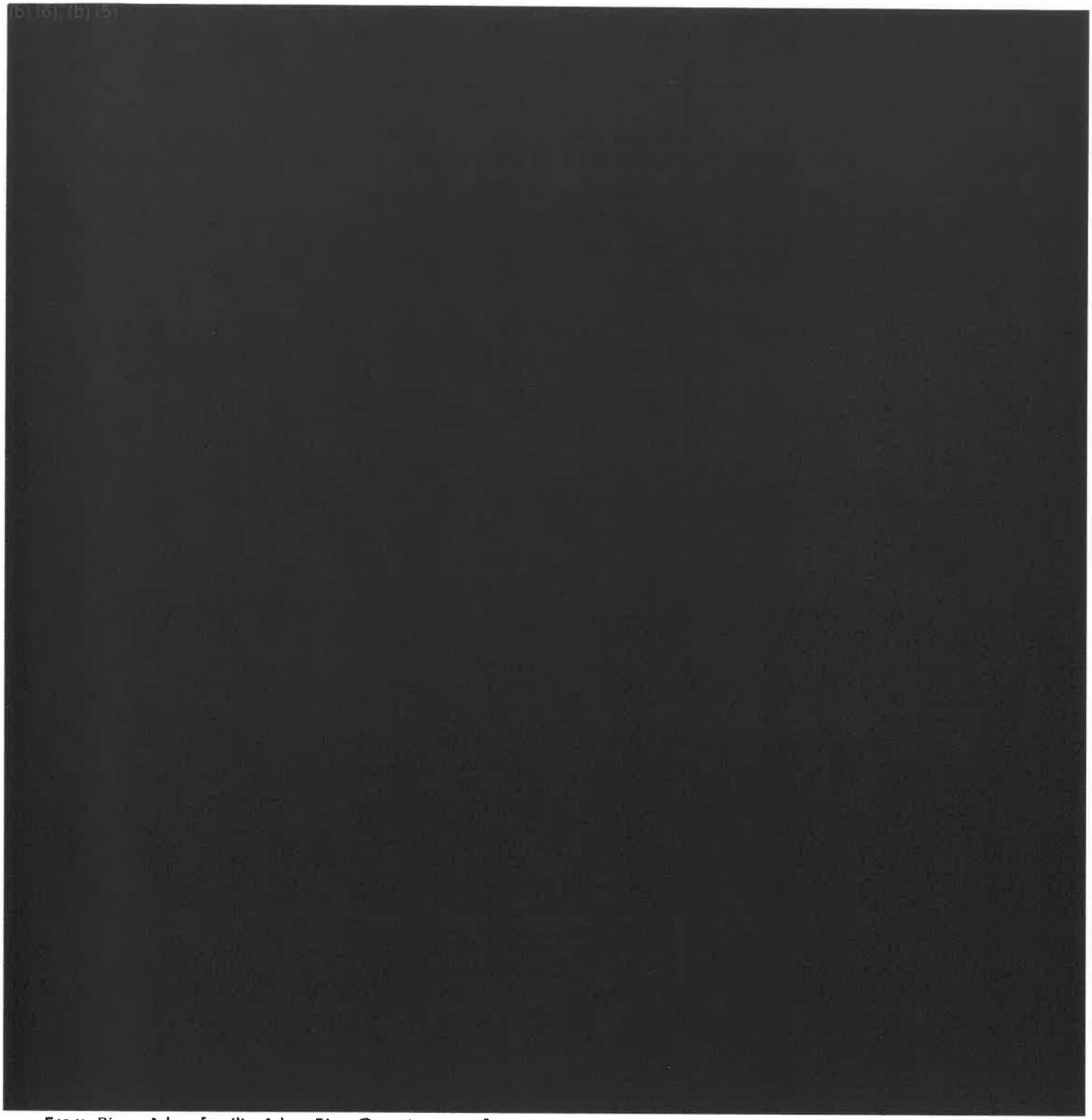
On Tuesday, September 5, 2017, the Plaintiffs intend to file a motion for leave to amend their complaint in the above-referenced matter, consistent with the information contained in Plaintiffs' Motion to Stay filed on July 7, 2017 (ECF No. 447).

Please let me know whether you are opposed or unopposed to Plaintiffs' motion for leave.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov



From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Wednesday, July 05, 2017 1:23 PM
To: Saltman, Julie (CIV) [redacted]; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales [redacted]
Cc: Tyler, John (CIV) [redacted]; Halainen, Daniel J. (CIV) [redacted]; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

All:

In light of the Friday deadline, we would like to schedule a conference call for later today or tomorrow to discuss how the Defendants intend to proceed. What time works best for everyone?

Please let me know and I will circulate the call in information.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Saltman, Julie (CIV) [redacted]
Sent: Thursday, June 29, 2017 3:39 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales [redacted]
Cc: Tyler, John (CIV) [redacted]>; Halainen, Daniel J. (CIV) <Daniel.J.Halainen@usdoj.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

All,

In light of Judge Hanen's order extending our deadline to July 7, we wanted to confirm for you that we don't think it's necessary to file the joint motion we discussed on the call today.

Thanks,

Julie

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Wednesday, June 28, 2017 6:50 PM
To: Nina Perales <[redacted]; Saltman, Julie (CIV) <[redacted]>
Cc: Tyler, John (CIV) <[redacted]>; Halainen, Daniel J. (CIV) <[redacted]; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

Julie,

We can talk at 2:00 pm CST tomorrow. Could you please send around the call-in details?

Thanks,

Adam

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Nina Perales [mailto:[redacted]
Sent: Wednesday, June 28, 2017 5:06 PM
To: Saltman, Julie (CIV) <[redacted]>
Cc: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Tyler, John (CIV) [redacted]>; Halainen, Daniel J. (CIV) [redacted]>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Re: Texas v United States - call Thursday

Yes

Sent from my iPhone

On Jun 28, 2017, at 4:07 PM, Saltman, Julie (CIV) <[redacted] wrote:

> Adam and Nina,
>
> I've spoken to you both about a call tomorrow regarding the *Texas* case. I understand you're both unavailable in the morning. Would everyone be available for a call at 2 pm CST/3 pm EST to discuss our status report in this case?
>
> Thanks,
>
> Julie
>
> Julie Saltman
> Trial Attorney
> United States Department of Justice
> Civil Division, Federal Programs Branch
> 20 Massachusetts Ave. NW
> Washington, DC 20530
> [redacted]

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Thursday, August 31, 2017 10:07 AM
To: Saltman, Julie (CIV) <(b) (6)>; Tyler, John (CIV) <(b) (6)>; Halainen, Daniel J. (CIV) <(b) (6)> (b) (6) Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Texas v. United States: Conference on motion for leave to amend complaint

Counsel,

On Tuesday, September 5, 2017, the Plaintiffs intend to file a motion for leave to amend their complaint in the above-referenced matter, consistent with the information contained in Plaintiffs' Motion to Stay filed on July 7, 2017 (ECF No. 447).

Please let me know whether you are opposed or unopposed to Plaintiffs' motion for leave.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

[redacted]

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Thursday, August 31, 2017 10:07 AM
To: Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted]; Halainen, Daniel J. (CIV) [redacted]; [redacted] Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Texas v. United States: Conference on motion for leave to amend complaint

Counsel,

On Tuesday, September 5, 2017, the Plaintiffs intend to file a motion for leave to amend their complaint in the above-referenced matter, consistent with the information contained in Plaintiffs' Motion to Stay filed on July 7, 2017 (ECF No. 447).

Please let me know whether you are opposed or unopposed to Plaintiffs' motion for leave.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

b5,b6

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 2:05 PM
To: Saltman, Julie (CIV) <b6>; Tyler, John (CIV) <b6>; Halainen, Daniel J. (CIV) <b6>; [redacted] Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Counsel,

In light of the Court's September 8, 2017 order regarding Plaintiffs' notice of voluntary dismissal (ECF No. 471), we propose to file a Stipulation of Voluntary Dismissal in the above-referenced matter. Attached, in Word and PDF form, is a draft of that proposed stipulation for your consideration.

Please let us know if the proposed stipulation is acceptable to Defendants and Intervenors. Assuming the parties are in agreement regarding the stipulation, we ask that you physically sign your respective signature block (with any necessary changes to the block) and send us a scanned version of the hand-signed page. As reflected in the attached proposal, we intend to file the stipulation with the imaged signature pages for Defendants and Intervenors.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Ardolino, Emily [Emily.Ardolino@oag.texas.gov]
Sent: Wednesday, July 05, 2017 5:13:58 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States - call Thursday

Your message

To:
Subject: Texas v United States - call Thursday
Sent: Wednesday, July 05, 2017 5:14:37 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Wednesday, July 05, 2017 5:13:58 PM (UTC-05:00) Eastern Time (US & Canada).

From: Ardolino, Emily [Emily.Ardolino@oag.texas.gov]
Sent: Wednesday, July 05, 2017 4:48:36 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States - call Thursday

Your message

To:
Subject: Texas v United States - call Thursday
Sent: Wednesday, July 05, 2017 4:49:07 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Wednesday, July 05, 2017 4:48:36 PM (UTC-05:00) Eastern Time (US & Canada).

From: Ardolino, Emily [Emily.Ardolino@oag.texas.gov]
Sent: Friday, July 07, 2017 11:56:26 AM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States - call Thursday

Your message

To:
Subject: Texas v United States - call Thursday
Sent: Friday, July 07, 2017 11:57:29 AM (UTC-05:00) Eastern Time (US & Canada)

was read on Friday, July 07, 2017 11:56:26 AM (UTC-05:00) Eastern Time (US & Canada).

From: Ardolino, Emily [Emily.Ardolino@oag.texas.gov]
Sent: Friday, July 07, 2017 3:26:40 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States - call Thursday

Your message

To:
Subject: Texas v United States - call Thursday
Sent: Friday, July 07, 2017 3:27:08 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Friday, July 07, 2017 3:26:40 PM (UTC-05:00) Eastern Time (US & Canada).

From: Ardolino, Emily [Emily.Ardolino@oag.texas.gov]
Sent: Friday, July 28, 2017 3:43:40 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v. United States - Conference on Motion

Your message

To:
Subject: Texas v. United States - Conference on Motion
Sent: Friday, July 28, 2017 3:44:01 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Friday, July 28, 2017 3:43:40 PM (UTC-05:00) Eastern Time (US & Canada).

From: Biggs, Adam <Adam.Biggs@oag.texas.gov>
Sent: Thursday, June 15, 2017 7:27 PM
To: Halainen, Daniel J. (CIV) <b6 Nina Perales <nperales@MALDEF.org>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <b6 Saltman, Julie (CIV)
b6
Subject: RE: Texas v. United States - scheduling order

Daniel:

Please change the draft to an unopposed motion—not a joint motion. Let us know when you have fixed the language.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [mailto: b6
Sent: Thursday, June 15, 2017 5:51 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) b6 altman, Julie (CIV)
b6 >
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Attached please find a draft motion to stay the merits proceedings for two weeks in light of new guidance signed by the Secretary of Homeland Security today.

Daniel Halainen

Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6 [1]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 15, 2017 6:29 PM
To: Halainen, Daniel J. (CIV) <b6>; Nina Perales [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <b6>; Saltman, Julie (CIV) <b6>
Subject: RE: Texas v. United States - scheduling order

Fine with us.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) <b6>
Sent: Thursday, June 15, 2017 5:11 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales <[redacted]>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <b6>; Saltman, Julie (CIV) <b6>
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Are you available for a call at 6:30 pm Eastern/5:30 pm Central? Please call b6 and enter the PIN b6

Daniel Halainen
Trial Attorney, U.S. Department of Justice

Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 5:37 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' [redacted]
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [b6]; Saltman, Julie (CIV) [b6]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Thanks again for your patience. We will make every effort to get back to you within the half hour.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 11:55 AM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' [redacted]
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [b6]; Saltman, Julie (CIV) [b6]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Following up on our call yesterday, we have nothing definitive to report at this time. I apologize for the delay, and thank you for your patience. We will get back to you this afternoon.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Halainen, Daniel J. (CIV)
Sent: Wednesday, June 14, 2017 12:22 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; Nina Perales [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [b6]; Saltman, Julie (CIV)

b6
Subject: RE: Texas v. United States - scheduling order

All,

For today's *Texas v. United States* call at 3:00 pm Eastern/2:00 pm Central, please call the conference line at (b6
b6 and enter the PIN b6

Thanks,

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Monday, June 12, 2017 1:59 PM
To: Nina Perales [redacted]; Halainen, Daniel J. (CIV) <b6
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) < b6 >; Saltman, Julie (CIV)
b6
Subject: RE: Texas v. United States - scheduling order

Daniel:

That is fine.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Nina Perales [mailto: [redacted]
Sent: Monday, June 12, 2017 12:57 PM

To: Halainen, Daniel J. (CIV) [b6] Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[b6] Saltman, Julie (CIV)
[b6]
Subject: RE: Texas v. United States - scheduling order

That's ok with me.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [b6]
Sent: Monday, June 12, 2017 12:[redacted]
To: Biggs, Adam
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV); Nina Perales
Subject: Texas v. United States - scheduling order

Adam,

We have nothing further to report today on the proposed scheduling order due to the court by Thursday, June 15. Can we reschedule today's call for Wednesday, June 14, at 3:00 pm Eastern/2:00 pm Central? If we have a response for you before then, I'll let you know. I'm copying Nina Perales of MALDEF, so that we can coordinate among the parties.

Thanks very much.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[b6]

From: Biggs, Adam [Adam.Biggs@oag.texas.gov]
Sent: Friday, June 23, 2017 3:06:18 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States

Your message

To:
Subject: Texas v United States
Sent: Friday, June 23, 2017 3:06:49 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Friday, June 23, 2017 3:06:18 PM (UTC-05:00) Eastern Time (US & Canada).

From: Biggs, Adam [Adam.Biggs@oag.texas.gov]
Sent: Friday, June 23, 2017 5:31:26 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States

Your message

To:
Subject: Texas v United States
Sent: Friday, June 23, 2017 5:32:14 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Friday, June 23, 2017 5:31:26 PM (UTC-05:00) Eastern Time (US & Canada).

From: Biggs, Adam [Adam.Biggs@oag.texas.gov]
Sent: Wednesday, June 28, 2017 3:41:25 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States

Your message

To:
Subject: Texas v United States
Sent: Wednesday, June 28, 2017 3:41:34 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Wednesday, June 28, 2017 3:41:25 PM (UTC-05:00) Eastern Time (US & Canada).

From: Biggs, Adam [Adam.Biggs@oag.texas.gov]
Sent: Wednesday, June 28, 2017 5:51:33 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States - call Thursday

Your message

To:
Subject: Texas v United States - call Thursday
Sent: Wednesday, June 28, 2017 5:51:50 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Wednesday, June 28, 2017 5:51:33 PM (UTC-05:00) Eastern Time (US & Canada).

From: Biggs, Adam [Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 29, 2017 11:01:01 AM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States - call Thursday

Your message

To:
Subject: Texas v United States - call Thursday
Sent: Thursday, June 29, 2017 11:02:02 AM (UTC-05:00) Eastern Time (US & Canada)

was read on Thursday, June 29, 2017 11:01:01 AM (UTC-05:00) Eastern Time (US & Canada).

From: Biggs, Adam [Adam.Biggs@oag.texas.gov]
Sent: Wednesday, July 05, 2017 5:12:49 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States - call Thursday

Your message

To:
Subject: Texas v United States - call Thursday
Sent: Wednesday, July 05, 2017 5:13:26 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Wednesday, July 05, 2017 5:12:49 PM (UTC-05:00) Eastern Time (US & Canada).

From: Biggs, Adam [Adam.Biggs@oag.texas.gov]
Sent: Wednesday, July 05, 2017 4:22:45 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States - call Thursday

Your message

To:
Subject: Texas v United States - call Thursday
Sent: Wednesday, July 05, 2017 4:23:07 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Wednesday, July 05, 2017 4:22:45 PM (UTC-05:00) Eastern Time (US & Canada).

From: Bitter, Adam <Adam.Bitter@oag.texas.gov>
Sent: Friday, June 23, 2017 4:24 PM
To: Saltman, Julie (CIV) [b6]
Cc: Tyler, John (CIV) [b6]; Halainen, Daniel J. (CIV) [b6]; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States

Julie,

We are not available on Monday. Would 1:30 CST on Wednesday, June 28 work for you all?

Best regards,

Adam

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Saltman, Julie (CIV) [b6]
Sent: Friday, June 23, 2017 1:48 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Cc: Tyler, John (CIV) [b6]; Halainen, Daniel J. (CIV) [b6]
Subject: Texas v United States

Adam, et al,

Are you available for phone call on Monday, June 23, at 3 pm EST/2 pm CST to discuss next steps in *Texas*? If that time doesn't work, please let us know when would be a convenient time to discuss this case.

Thanks,

Julie

Julie Saltman
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[b6]

From: Bitter, Adam <Adam.Bitter@oag.texas.gov>
Sent: Tuesday, June 27, 2017 6:28 PM
To: Saltman, Julie (CIV) [b6]
Cc: Tyler, John (CIV) [b6]; Halainen, Daniel J. (CIV) [b6]; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States

Julie,

We need to reschedule our conference call to Thursday. Are you all available to talk at 3:00 CST on Thursday instead?

Thanks,

Adam

From: Saltman, Julie (CIV) [mailto:[b6]
Sent: Monday, June 26, 2017 10:09 AM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) [b6]; Halainen, Daniel J. (CIV) [b6] Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States

Thanks, Adam.

The call-in number is:

[b6]

We look forward to speaking with you Wednesday at 230 CST/330 EST.

Best,

Juliw

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Friday, June 23, 2017 7:51 PM
To: Saltman, Julie (CIV) [b6]
Cc: Tyler, John (CIV) [b6]; Halainen, Daniel J. (CIV) [b6]; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States

Julie,

2:30 CST on Wednesday works for us. Please circulate a dial-in number if you'd like us to use your conference line; otherwise, we are happy to set up a line on our end.

Best regards,

Adam

From: Saltman, Julie (CIV) b6
Sent: Friday, June 23, 2017 4:08 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) <b6; Halainen, Daniel J. (CIV) <b6 Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States

Hi Adam,

We are available a little later in the day on Wednesday. Would 2:30 CST/3:30 EST work for you?

Best,

Julie

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Friday, June 23, 2017 4:24 PM
To: Saltman, Julie (CIV) b6
Cc: Tyler, John (CIV) b6; Halainen, Daniel J. (CIV) <b6; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States

Julie,

We are not available on Monday. Would 1:30 CST on Wednesday, June 28 work for you all?

Best regards,

Adam

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Saltman, Julie (CIV) b6
Sent: Friday, June 23, 2017 1:48 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Cc: Tyler, John (CIV) <b6>; Halainen, Daniel J. (CIV) <b6
Subject: Texas v United States

Adam, et al,

Are you available for phone call on Monday, June 23, at 3 pm EST/2 pm CST to discuss next steps in *Texas*? If that time doesn't work, please let us know when would be a convenient time to discuss this case.

Thanks,

Julie

Julie Saltman
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Bitter, Adam <Adam.Bitter@oag.texas.gov>
Sent: Thursday, June 29, 2017 5:13 PM
To: Saltman, Julie (CIV) <b6>; Nina Perales (b) (6) >
Cc: Tyler, John (CIV) <b6>; Halainen, Daniel J. (CIV) <b6>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

Julie,

Plaintiffs agree that no joint motion is necessary today.

Sincerely,

Adam Bitter

From: Saltman, Julie (CIV) [mailto:b6]
Sent: Thursday, June 29, 2017 3:39 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales (b) (6) >
Cc: Tyler, John (CIV) <b6> Halainen, Daniel J. (CIV) <b6> Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

All,

In light of Judge Hanen's order extending our deadline to July 7, we wanted to confirm for you that we don't think it's necessary to file the joint motion we discussed on the call today.

Thanks,

Julie

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Wednesday, June 28, 2017 6:50 PM
To: Nina Perales <(b) (6) Saltman, Julie (CIV) <b6>
Cc: Tyler, John (CIV) <b6>; Halainen, Daniel J. (CIV) <b6> Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

Julie,

We can talk at 2:00 pm CST tomorrow. Could you please send around the call-in details?

Thanks,

Adam

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Nina Perales [mailto:[redacted]]
Sent: Wednesday, June 28, 2017 5:06 PM
To: Saltman, Julie (CIV) <b6
Cc: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Tyler, John (CIV) <b6>; Halainen, Daniel J. (CIV) b6; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Re: Texas v United States - call Thursday

Yes

Sent from my iPhone

On Jun 28, 2017, at 4:07 PM, Saltman, Julie (CIV) <b6> wrote:

> Adam and Nina,
>
> I've spoken to you both about a call tomorrow regarding the *Texas* case. I understand you're both unavailable in the morning. Would everyone be available for a call at 2 pm CST/3 pm EST to discuss our status report in this case?
>
> Thanks,
>
> Julie
>
> Julie Saltman
> Trial Attorney
> United States Department of Justice
> Civil Division, Federal Programs Branch
> 20 Massachusetts Ave. NW
> Washington, DC 20530
> b6

From: Bitter, Adam <Adam.Bitter@oag.texas.gov>
Sent: Friday, July 28, 2017 12:40 PM
To: Markoff, Gabriel <gmarkoff@omm.com>
Cc: Nina Perales [redacted]; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Saltman, Julie (CIV) <b6>; Tyler, John (CIV) <b6>; b6
Subject: RE: Texas v. United States - Conference on Motion

Gabriel,

Thanks for your message. Plaintiffs oppose your motion to dismiss.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Markoff, Gabriel [mailto:gmarkoff@omm.com]
Sent: Friday, July 28, 2017 10:46 AM
To: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; b6 Tyler, John (CIV) <b6>; b6
Cc: Nina Perales [redacted]
Subject: Texas v. United States - Conference on Motion

Dear Counsel:

I am writing on behalf of Nina Perales, counsel for the Jane Doe intervenors. We intend to file a motion today to dismiss Plaintiffs' complaint in the *Texas v. United States* litigation pending before Judge Hanen as moot without leave to amend in light of the Secretary's June 15 decision to rescind the November 2014 DAPA Memorandum.

Please let us know your positions on this motion.

Thank you,
Gabriel

O'Melveny

Gabriel Markoff
gmarkoff@omm.com
O: +1-415-984-8890

O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111

This message and any attached documents contain information from the law firm of O'Melveny & Myers LLP that may be confidential and/or privileged. If you are not the intended recipient, you may not read, copy, distribute, or use this information. If you have received this transmission in error, please notify the sender immediately by reply e-mail and then delete this message.

From: Bitter, Adam <Adam.Bitter@oag.texas.gov>
Sent: Thursday, August 31, 2017 10:07 AM
To: Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted]; Halainen, Daniel J. (CIV) [redacted]; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Texas v. United States: Conference on motion for leave to amend complaint

---

Counsel,

On Tuesday, September 5, 2017, the Plaintiffs intend to file a motion for leave to amend their complaint in the above-referenced matter, consistent with the information contained in Plaintiffs' Motion to Stay filed on July 7, 2017 (ECF No. 447).

Please let me know whether you are opposed or unopposed to Plaintiffs' motion for leave.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Bitter, Adam <Adam.Bitter@oag.texas.gov>
Sent: Monday, September 4, 2017 11:50 AM
To: Halainen, Daniel J. (CIV) <b6> Saltman, Julie (CIV) <b6> Tyler, John (CIV) <[redacted]> [redacted] Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v. United States: Conference on motion for leave to amend complaint

---

All,

Plaintiffs anticipate that their motion for leave to file an amended complaint will exceed the Court's 20-page limit by no more than 5 pages. Please advise if you oppose a request to exceed the page limits on our motion for leave to file an amended complaint.

Sincerely,

Adam Bitter

From: Halainen, Daniel J. (CIV) [mailto:b6
Sent: Thursday, August 31, 2017 2:08 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Saltman, Julie (CIV) <b6 Tyler, John (CIV) <b6 [redacted] Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v. United States: Conference on motion for leave to amend complaint

Adam,

Defendants will not be able to formulate a position until we have reviewed your filed motion, and we will respond to the motion once it is filed.

Please let me know if you have any questions.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Thursday, August 31, 2017 10:07 AM
To: Saltman, Julie (CIV) <b6 Tyler, John (CIV) <b6 >; Halainen, Daniel J. (CIV) <b6 >; [redacted] Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy

<Peggy.Hamil@oag.texas.gov>
Subject: Texas v. United States: Conference on motion for leave to amend complaint

Counsel,

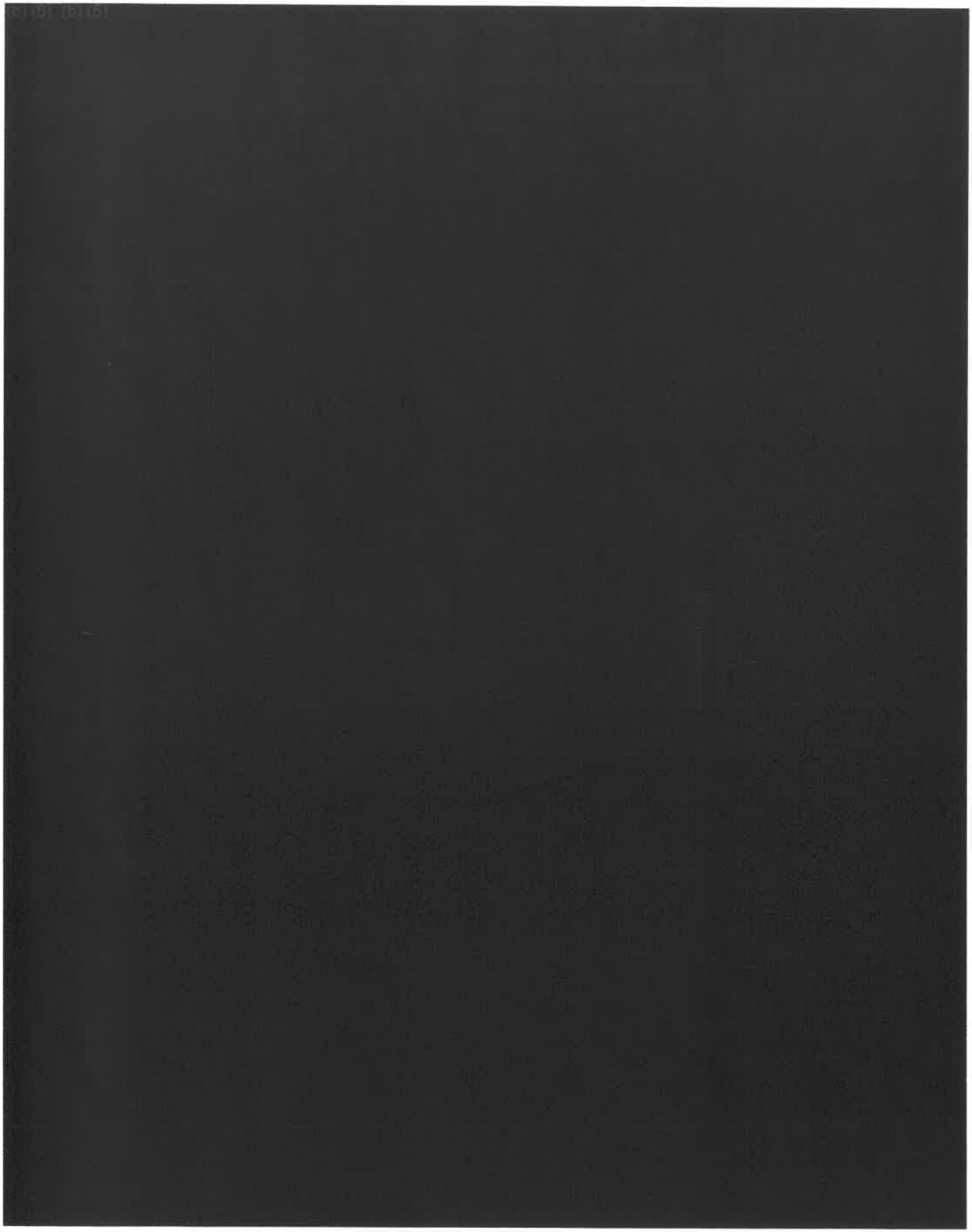
On Tuesday, September 5, 2017, the Plaintiffs intend to file a motion for leave to amend their complaint in the above-referenced matter, consistent with the information contained in Plaintiffs' Motion to Stay filed on July 7, 2017 (ECF No. 447).

Please let me know whether you are opposed or unopposed to Plaintiffs' motion for leave.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov



From: Nina Perales [mailto:[redacted]

Sent: Thursday, June 15, 2017 7:32 PM
To: Halainen, Daniel J. (CIV) <[redacted]
Cc: Tyler, John (CIV) [redacted]>; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

I would like to see a copy of the exhibit before giving our position on the request for an additional stay.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [redacted]
Sent: Thursday, June 15, 2017 6:29 PM
To: Nina Perales
Cc: Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Nina,

Thanks – I will remove that language. Does MALDEF have a position that we can include in the motion?

We are still waiting for a copy of Exhibit A to include with the motion.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Nina Perales [mailto[redacted]
Sent: Thursday, June 15, 2017 7:24 PM
To: Halainen, Daniel J. (CIV) <[redacted]>
Cc: Tyler, John (CIV) <[redacted]Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Please also provide Exhibit A to the motion.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Nina Perales
Sent: Thursday, June 15, 2017 6:21 PM
To: 'Halainen, Daniel J. (CIV)'
Cc: Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Daniel,

Please remove the language that says: Counsel for Intervenors was not available to state its position on this motion.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [mailto[redacted]
Sent: Thursday, June 15, 2017 5:51 PM
To: Biggs, Adam; Nina Perales
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Attached please find a draft motion to stay the merits proceedings for two weeks in light of new guidance signed by the Secretary of Homeland Security today.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 15, 2017 6:29 PM
To: Halainen, Daniel J. (CIV) [redacted]; Nina Perales [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted] Saltman, Julie (CIV) [redacted]>
Subject: RE: Texas v. United States - scheduling order

Fine with us.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [mailto:[redacted]
Sent: Thursday, June 15, 2017 5:11 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales <[redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) <[redacted]>
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Are you available for a call at 6:30 pm Eastern/5:30 pm Central? Please call [redacted] and enter the PIN [redacted]

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 5:37 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' [redacted]
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Thanks again for your patience. We will make every effort to get back to you within the half hour.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 11:55 AM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' [redacted]
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Following up on our call yesterday, we have nothing definitive to report at this time. I apologize for the delay, and thank you for your patience. We will get back to you this afternoon.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Halainen, Daniel J. (CIV)
Sent: Wednesday, June 14, 2017 12:22 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; Nina Perales [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

All,

For today's *Texas v. United States* call at 3:00 pm Eastern/2:00 pm Central, please call the conference line at [redacted] and enter the [redacted]

Thanks,

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Monday, June 12, 2017 1:59 PM
To: Nina Perales <[redacted]>; Halainen, Daniel J. (CIV) [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Daniel:

That is fine.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Nina Perales [mailto:[redacted]
Sent: Monday, June 12, 2017 12:57 PM
To: Halainen, Daniel J. (CIV) <[redacted]>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) [redacted]>
Subject: RE: Texas v. United States - scheduling order

That's ok with me.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [mailto[redacted]
Sent: Monday, June 12, 2017 12:27 PM
To: Biggs, Adam
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV); Nina Perales
Subject: Texas v. United States - scheduling order

Adam,

We have nothing further to report today on the proposed scheduling order due to the court by Thursday, June 15. Can we reschedule today's call for Wednesday, June 14, at 3:00 pm Eastern/2:00 pm Central? If we have a response for you before then, I'll let you know. I'm copying Nina Perales of MALDEF, so that we can coordinate among the parties.

Thanks very much.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

b5,b6

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Friday, July 07, 2017 12:29 PM
To: Saltman, Julie (CIV) [b6]; Nina Perales [redacted]; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) [b6] Halainen, Daniel J. (CIV) [b6]; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday
Importance: High

Julie:

Please find attached a draft incorporating all of your proposed changes and making a few other tweaks. Let me know if we are good to file.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station

Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Saltman, Julie (CIV) [b6
Sent: Friday, July 07, 2017 10:15 AM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales <(b) (6); Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) <b6; Halainen, Daniel J. (CIV) <b6; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

Adam,

Thanks for the opportunity to review your motion. The attached reflects our suggested edits for your consideration. Let us know if you'd like to discuss this further.

Thanks,

Julie

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Wednesday, July 05, 2017 6:48 PM
To: Saltman, Julie (CIV) <b6; Nina Perales <(b) (6); Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) <b6; Halainen, Daniel J. (CIV) <b6; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

All:

Please find attached a draft for your consideration. Currently, it assumes no opposition. Please let me know if that is not the case.

Here is the call-in information:

Dial-In: b6

Passcode:

Thanks and have a good night everyone.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Saltman, Julie (CIV) [r b6
Sent: Wednesday, July 05, 2017 4:12 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales <[redacted]>; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) < b6 ; Halainen, Daniel J. (CIV) < b6 Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

Thanks, Adam. That would be fine. Could you please provide a call line number? We would also appreciate it if you could share a draft of any stay motion you'd like our position on before the call to facilitate our discussion tomorrow afternoon.

Thanks,

Julie

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Wednesday, July 05, 2017 4:55 PM
To: Nina Perales [redacted]g>; Saltman, Julie (CIV) < b6 ; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) < b6 Halainen, Daniel J. (CIV) < b6 olmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

That works for us. Would you like to use our conference call line?

Best,

Adam Arthur Biggs

Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Nina Perales [mailto:[redacted]
Sent: Wednesday, July 05, 2017 3:27 PM
To: Saltman, Julie (CIV) [b6]; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) <[b6]; Halainen, Daniel J. (CIV) <[b6]; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

I am available.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
Ph [redacted]
FAX (210 224-5382

From: Saltman, Julie (CIV) [mailto:[b6]
Sent: Wednesday, July 05, 2017 3:22 PM
To: Biggs, Adam; Bitter, Adam; Nina Perales
Cc: Tyler, John (CIV); Halainen, Daniel J. (CIV); Colmenero, Angela; Hamil, Peggy; Ardolino, Emily
Subject: RE: Texas v United States - call Thursday

We are available at 4:30 pm EST/3:30 pm CST for a call tomorrow. Would that time work for everyone else?

Thanks,

Julie

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Wednesday, July 05, 2017 1:23 PM
To: Saltman, Julie (CIV) <[b6]>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales

[redacted]
Cc: Tyler, John (CIV) [b6] Halainen, Daniel J. (CIV) <b6>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

All:

In light of the Friday deadline, we would like to schedule a conference call for later today or tomorrow to discuss how the Defendants intend to proceed. What time works best for everyone?

Please let me know and I will circulate the call in information.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Saltman, Julie (CIV) [mailto:b6]
Sent: Thursday, June 29, 2017 3:39 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales [redacted]
Cc: Tyler, John (CIV) <b6>; Halainen, Daniel J. (CIV) <b6>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

All,

In light of Judge Hanen's order extending our deadline to July 7, we wanted to confirm for you that we don't think it's necessary to file the joint motion we discussed on the call today.

Thanks,

Julie

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]

Sent: Wednesday, June 28, 2017 6:50 PM
To: Nina Perales <[redacted] Saltman, Julie (CIV) <b6
Cc: Tyler, John (CIV) <b6; Halainen, Daniel J. (CIV) b6; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

Julie,

We can talk at 2:00 pm CST tomorrow. Could you please send around the call-in details?

Thanks,

Adam

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Nina Perales [mailto[redacted]
Sent: Wednesday, June 28, 2017 5:06 PM
To: Saltman, Julie (CIV) <b6
Cc: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Tyler, John (CIV) <b6 Halainen, Daniel J. (CIV) b6 Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Re: Texas v United States - call Thursday

Yes

Sent from my iPhone

On Jun 28, 2017, at 4:07 PM, Saltman, Julie (CIV) <b6 wrote:

> Adam and Nina,
>
> I've spoken to you both about a call tomorrow regarding the *Texas* case. I understand you're both unavailable in the morning. Would everyone be available for a call at 2 pm CST/3 pm EST to discuss our status report in this case?
>
> Thanks,
>
> Julie
>
> Julie Saltman

Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Halainen, Daniel J. (CIV) [redacted]
Sent: Monday, June 5, 2017 12:18 PM
To: Browne, Rene <[redacted]; Cox, Reid [redacted]>; Franke, Evan R [redacted]>
Cc: Saltman, Julie (CIV) [redacted]
Subject: FW: Scheduling Order: Texas v. United States

[redacted]

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Friday, June 02, 2017 4:03 PM
To: Halainen, Daniel J. (CIV) [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted]
Subject: RE: Scheduling Order: Texas v. United States

Daniel:

That works for Wednesday. Have a good weekend as well.

Conference call details:

Dial-In: [redacted]ee

Passcode:

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas

P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [redacted]
Sent: Friday, June 02, 2017 1:22 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) [redacted] Tyler, John (CIV) [redacted]
Subject: RE: Scheduling Order: Texas v. United States

Adam,

Thank you for reaching out. Are you available to confer on Wednesday afternoon at 3:00 pm Eastern / 2:00 pm Central ? Please let me know if that time doesn't work. Have a nice weekend.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 01, 2017 4:19 PM
To: Saltman, Julie (CIV) <[redacted]>; Halainen, Daniel J. (CIV) <[redacted]>; Tyler, John (CIV) [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Scheduling Order: Texas v. United States

All:

As you know, Judge Hanen issued an order in March requiring the parties to confer and propose a scheduling order by June 15. We were hoping to schedule a conference call for early next week to discuss. Please let us know your availability and I will circulate a call-in number. Thank you and have a good rest of your day.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) <b6>
Sent: Monday, June 12, 2017 1:27 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <b6>; Saltman, Julie (CIV) <b6> (b)(6)
Subject: Texas v. United States - scheduling order

Adam,

We have nothing further to report today on the proposed scheduling order due to the court by Thursday, June 15. Can we reschedule today's call for Wednesday, June 14, at 3:00 pm Eastern/2:00 pm Central? If we have a response for you before then, I'll let you know. I'm copying Nina Perales of MALDEF, so that we can coordinate among the parties.

Thanks very much.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Halainen, Daniel J. (CIV) <[redacted]>
Sent: Thursday, June 15, 2017 9:14 PM
To: Nina Perales [redacted]>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]>; Saltman, Julie (CIV) [redacted]>
Subject: RE: Texas v. United States - scheduling order
Attach: US v. Texas - Motion to Stay 20170615 (for circulation) v3.pdf; Exhibit A.pdf

---

Thanks, Nina. The attached is revised to reflect that the motion is unopposed by both Plaintiffs and Intervenors. We'll file at 9:30 pm Eastern/8:30 pm Central unless I hear otherwise.

Thanks,

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Nina Perales [mailto[redacted]
Sent: Thursday, June 15, 2017 8:59 PM
To: Halainen, Daniel J. (CIV) <[redacted] Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]>; Saltman, Julie (CIV) [redacted]>
Subject: RE: Texas v. United States - scheduling order

Intervenors do not oppose

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [mailto[redacted]
Sent: Thursday, June 15, 2017 7:53 PM
To: Biggs, Adam; Nina Perales
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Thanks, Adam.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 15, 2017 8:51 PM
To: Halainen, Daniel J. (CIV) [redacted]; Nina Perales [redacted]g>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

We are good with this draft. Please file tonight.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [mailto:[redacted]
Sent: Thursday, June 15, 2017 7:07 PM
To: Nina Perales <[redacted]>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Attached is a revised draft styled as Defendants' motion, noting that Plaintiffs do not oppose. Nina, we'll add your position once we have it. Attached is also the memorandum, which will be Exhibit A.

Thanks,

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Nina Perales [mailto:[redacted]
Sent: Thursday, June 15, 2017 7:29 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Halainen, Daniel J. (CIV) <[redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]>
Subject: RE: Texas v. United States - scheduling order

I have also asked for Mr. Halainen to send Exhibit A and remove language saying the intervenors were unavailable to conference on the motion.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 15, 2017 6:27 PM
To: Halainen, Daniel J. (CIV); Nina Perales
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Daniel:

Please change the draft to an unopposed motion—not a joint motion. Let us know when you have fixed the language.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [mailto[redacted]
Sent: Thursday, June 15, 2017 5:51 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales <[redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) <[redacted]>
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Attached please find a draft motion to stay the merits proceedings for two weeks in light of new guidance signed by the Secretary of Homeland Security today.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 15, 2017 6:29 PM
To: Halainen, Daniel J. (CIV) [redacted]; Nina Perales <[redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) <[redacted]>
Subject: RE: Texas v. United States - scheduling order

Fine with us.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [redacted]
Sent: Thursday, June 15, 2017 5:11 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales <[redacted]>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Are you available for a call at 6:30 pm Eastern/5:30 pm Central? Please call [redacted] and enter the PIN [redacted]

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 5:37 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' <[redacted]>
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Thanks again for your patience. We will make every effort to get back to you within the half hour.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 11:55 AM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' [redacted]

Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Following up on our call yesterday, we have nothing definitive to report at this time. I apologize for the delay, and thank you for your patience. We will get back to you this afternoon.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Halainen, Daniel J. (CIV)
Sent: Wednesday, June 14, 2017 12:22 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; Nina Perales [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

All,

For today's *Texas v. United States* call at 3:00 pm Eastern/2:00 pm Central, please call the conference line at [redacted] and enter the [redacted]

Thanks,

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Monday, June 12, 2017 1:59 PM
To: Nina Perales [redacted]; Halainen, Daniel J. (CIV) [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Daniel:

That is fine.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Nina Perales [mailto[redacted]
Sent: Monday, June 12, 2017 12:57 PM
To: Halainen, Daniel J. (CIV) <[redacted]; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]; Saltman, Julie (CIV) <[redacted]
Subject: RE: Texas v. United States - scheduling order

That's ok with me.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [mailto:[redacted]
Sent: Monday, June 12, 2017 12:27 PM
To: Biggs, Adam
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV); Nina Perales
Subject: Texas v. United States - scheduling order

Adam,

We have nothing further to report today on the proposed scheduling order due to the court by Thursday, June 15. Can we reschedule today's call for Wednesday, June 14, at 3:00 pm Eastern/2:00 pm Central? If we have a response for you before then, I'll let you know. I'm copying Nina Perales of MALDEF, so that we can coordinate among the parties.

Thanks very much.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Halainen, Daniel J. (CIV) <[redacted]
Sent: Thursday, June 15, 2017 8:07 PM
To: Nina Perales [redacted]; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order
Attach: US v. Texas - Motion to Stay 20170615 (for circulation) v2.docx; Exhibit A.pdf

---

Adam and Nina,

Attached is a revised draft styled as Defendants' motion, noting that Plaintiffs do not oppose. Nina, we'll add your position once we have it. Attached is also the memorandum, which will be Exhibit A.

Thanks,

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Nina Perales [mailto:[redacted]
Sent: Thursday, June 15, 2017 7:29 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Halainen, Daniel J. (CIV) <[redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

I have also asked for Mr. Halainen to send Exhibit A and remove language saying the intervenors were unavailable to conference on the motion.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 15, 2017 6:27 PM
To: Halainen, Daniel J. (CIV); Nina Perales
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Daniel:

Please change the draft to an unopposed motion—not a joint motion. Let us know when you have fixed the language.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [mailto[redacted]
Sent: Thursday, June 15, 2017 5:51 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales <[redacted]>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Attached please find a draft motion to stay the merits proceedings for two weeks in light of new guidance signed by the Secretary of Homeland Security today.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 15, 2017 6:29 PM
To: Halainen, Daniel J. (CIV) <[redacted]>; Nina Perales <[redacted]>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy

<Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV)
[redacted]
Subject: RE: Texas v. United States - scheduling order

Fine with us.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [mailt[redacted]
Sent: Thursday, June 15, 2017 5:11 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales <[redacted]>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted] Saltman, Julie (CIV)
<[redacted]>
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Are you available for a call at 6:30 pm Eastern/5:30 pm Central? Please call [redacted] and enter the PIN
[redacted]

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 5:37 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' [redacted]g>
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]; Saltman, Julie (CIV)

[redacted]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Thanks again for your patience. We will make every effort to get back to you within the half hour.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 11:55 AM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' [redacted]>
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]>
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Following up on our call yesterday, we have nothing definitive to report at this time. I apologize for the delay, and thank you for your patience. We will get back to you this afternoon.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Halainen, Daniel J. (CIV)
Sent: Wednesday, June 14, 2017 12:22 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; Nina Perales <[redacted]>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted] Saltman, Julie (CIV) [redacted]>
Subject: RE: Texas v. United States - scheduling order

All,

For today's *Texas v. United States* call at 3:00 pm Eastern/2:00 pm Central, please call the conference line at [redacted]- [redacted] and enter the PIN [redacted]

Thanks,

Daniel Halainen
Trial Attorney, U.S. Department of Justice

Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Monday, June 12, 2017 1:59 PM
To: Nina Perales [redacted]; Halainen, Daniel J. (CIV) <[redacted]>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Daniel:

That is fine.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Nina Perales [mailto:[redacted]]
Sent: Monday, June 12, 2017 12:57 PM
To: Halainen, Daniel J. (CIV) <[redacted] Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

That's ok with me.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)

110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [mailto[redacted]
Sent: Monday, June 12, 2017 12:27 PM
To: Biggs, Adam
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV); Nina Perales
Subject: Texas v. United States - scheduling order

Adam,

We have nothing further to report today on the proposed scheduling order due to the court by Thursday, June 15. Can we reschedule today's call for Wednesday, June 14, at 3:00 pm Eastern/2:00 pm Central? If we have a response for you before then, I'll let you know. I'm copying Nina Perales of MALDEF, so that we can coordinate among the parties.

Thanks very much.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Saltman, Julie (CIV) <b6>
Sent: Friday, July 28, 2017 3:07 PM
To: Markoff, Gabriel <gmarkoff@omm.com>; angela.colmenero@texasattorneygeneral.gov; peggy.hamil@oag.texas.gov; emily.ardolino@oag.texas.gov; adam.bitter@texasattorneygeneral.gov; adam.biggs@oag.texas.gov; Tyler, John (CIV) <b6> <b6>
Cc: Nina Perales [redacted]
Subject: RE: Texas v. United States - Conference on Motion

Gabriel,

We ask that you include the following to indicate Defendants' position on your motion:

"Defendants view the motion as improper while the ongoing stay of the merits in this case remains in place. Defendants take no further position on the proposed motion until they have an opportunity to review and consider the motion."

Thank you,

Julie

Julie Saltman
Trial Attorney
United States Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Ave. NW | Washington, D.C. 20530
b6

From: Markoff, Gabriel [mailto:gmarkoff@omm.com]
Sent: Friday, July 28, 2017 11:46 AM
To: angela.colmenero@texasattorneygeneral.gov; peggy.hamil@oag.texas.gov; emily.ardolino@oag.texas.gov; adam.bitter@texasattorneygeneral.gov; adam.biggs@oag.texas.gov; Saltman, Julie (CIV) <b6>; Tyler, John (CIV) <b6> <b6>
Cc: Nina Perales [redacted]
Subject: Texas v. United States - Conference on Motion

Dear Counsel:

I am writing on behalf of Nina Perales, counsel for the Jane Doe intervenors. We intend to file a motion today to dismiss Plaintiffs' complaint in the *Texas v. United States* litigation pending before Judge Hanen as moot without leave to amend in light of the Secretary's June 15 decision to rescind the November 2014 DAPA Memorandum.

Please let us know your positions on this motion.

Thank you,
Gabriel

O'Melveny

Gabriel Markoff
gmarkoff@omm.com
O: +1-415-984-8890

O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111

This message and any attached documents contain information from the law firm of O'Melveny & Myers LLP that may be confidential and/or privileged. If you are not the intended recipient, you may not read, copy, distribute, or use this information. If you have received this transmission in error, please notify the sender immediately by reply e-mail and then delete this message.

From: Nina Perales <[redacted]>
Sent: Wednesday, June 14, 2017 3:03 PM
To: Halainen, Daniel J. (CIV) <b6>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <b6>; Saltman, Julie (CIV) <b6>
Subject: RE: Texas v. United States - scheduling order

Hello all,

I'm on the line.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [mailto:b6]
Sent: Wednesday, June 14, 2017 11:22 AM
To: Biggs, Adam; Nina Perales
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

All,

For today's *Texas v. United States* call at 3:00 pm Eastern/2:00 pm Central, please call the conference line at b6 b6 and enter the PIN b6

Thanks,

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Monday, June 12, 2017 1:59 PM
To: Nina Perales <[redacted]>; Halainen, Daniel J. (CIV) <b6>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) <b6>; Saltman, Julie (CIV) b6

Subject: RE: Texas v. United States - scheduling order

Daniel:

That is fine.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Nina Perales [mailto:[redacted]]
Sent: Monday, June 12, 2017 12:57 PM
To: Halainen, Daniel J. (CIV) [b6]; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [b6]; Saltman, Julie (CIV) [b6]
Subject: RE: Texas v. United States - scheduling order

That's ok with me.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [mailto: [b6]
Sent: Monday, June 12, 2017 12:27 PM
To: Biggs, Adam
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV); Nina Perales
Subject: Texas v. United States - scheduling order

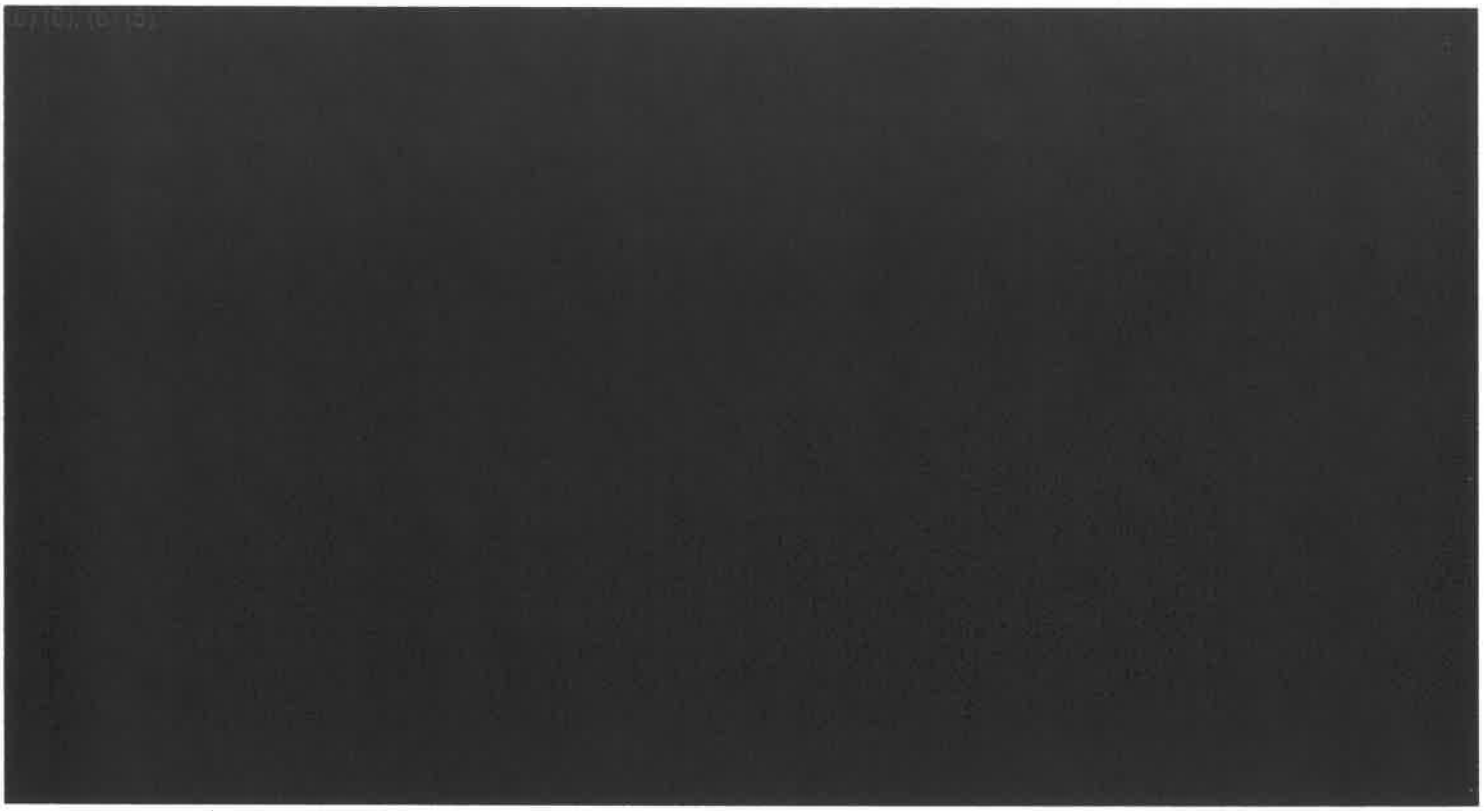
Adam,

We have nothing further to report today on the proposed scheduling order due to the court by Thursday, June 15. Can we reschedule today's call for Wednesday, June 14, at 3:00 pm Eastern/2:00 pm Central? If we have a response for you before then, I'll let you know. I'm copying Nina Perales of MALDEF, so that we can coordinate among the parties.

Thanks very much.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
b6



From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 2:05 PM
To: Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted]; Halainen, Daniel J. (CIV) [redacted]; [redacted] Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Counsel,

In light of the Court's September 8, 2017 order regarding Plaintiffs' notice of voluntary dismissal (ECF No. 471), we propose to file a Stipulation of Voluntary Dismissal in the above-referenced matter. Attached, in Word and PDF form, is a draft of that proposed stipulation for your consideration.

Please let us know if the proposed stipulation is acceptable to Defendants and Intervenors. Assuming the parties are in agreement regarding the stipulation, we ask that you physically sign your respective signature block (with any necessary changes to the block) and send us a scanned version of the hand-signed page. As reflected in the attached proposal, we intend to file the stipulation with the imaged signature pages for Defendants and Intervenors.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Wednesday, July 05, 2017 6:48 PM
To: Saltman, Julie (CIV) [redacted]>; Nina Perales [redacted]; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) [redacted] Halainen, Daniel J. (CIV) [redacted]>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

All:

Please find attached a draft for your consideration. Currently, it assumes no opposition. Please let me know if that is not the case.

Here is the call-in information:

Dial-In: [redacted]

Passcode: [redacted]

Thanks and have a good night everyone.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any

dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Saltman, Julie (CIV) [redacted]
Sent: Wednesday, July 05, 2017 4:12 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales <[redacted]>; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) <[redacted] Halainen, Daniel J. (CIV) [redacted] Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

Thanks, Adam. That would be fine. Could you please provide a call line number? We would also appreciate it if you could share a draft of any stay motion you'd like our position on before the call to facilitate our discussion tomorrow afternoon.

Thanks,

Julie

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Wednesday, July 05, 2017 4:55 PM
To: Nina Perales [redacted]; Saltman, Julie (CIV) <[redacted]>; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) <[redacted]; Halainen, Daniel J. (CIV) [redacted]>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

That works for us. Would you like to use our conference call line?

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Nina Perales [mailto:[redacted]
Sent: Wednesday, July 05, 2017 3:27 PM
To: Saltman, Julie (CIV) <[redacted]>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) <[redacted]>; Halainen, Daniel J. (CIV) <[redacted] Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

I am available.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Saltman, Julie (CIV) [mailto:[redacted]
Sent: Wednesday, July 05, 2017 3:22 PM
To: Biggs, Adam; Bitter, Adam; Nina Perales
Cc: Tyler, John (CIV); Halainen, Daniel J. (CIV); Colmenero, Angela; Hamil, Peggy; Ardolino, Emily
Subject: RE: Texas v United States - call Thursday

We are available at 4:30 pm EST/3:30 pm CST for a call tomorrow. Would that time work for everyone else?

Thanks,

Julie

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Wednesday, July 05, 2017 1:23 PM
To: Saltman, Julie (CIV) <[redacted] Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales [redacted]>
Cc: Tyler, John (CIV) [redacted]V>; Halainen, Daniel J. (CIV) <[redacted]>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

All:

In light of the Friday deadline, we would like to schedule a conference call for later today or tomorrow to discuss how the Defendants intend to proceed. What time works best for everyone?

Please let me know and I will circulate the call in information.

Best,

Adam Arthur Biggs

Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Saltman, Julie (CIV) [mailto:[redacted]
Sent: Thursday, June 29, 2017 3:39 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales <[redacted]>
Cc: Tyler, John (CIV) [redacted]; Halainen, Daniel J. (CIV) <[redacted]>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

All,

In light of Judge Hanen's order extending our deadline to July 7, we wanted to confirm for you that we don't think it's necessary to file the joint motion we discussed on the call today.

Thanks,

Julie

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Wednesday, June 28, 2017 6:50 PM
To: Nina Perales <[redacted] Saltman, Julie (CIV) <[redacted]
Cc: Tyler, John (CIV) <[redacted]>; Halainen, Daniel J. (CIV) [redacted]; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

Julie,

We can talk at 2:00 pm CST tomorrow. Could you please send around the call-in details?

Thanks,

Adam

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

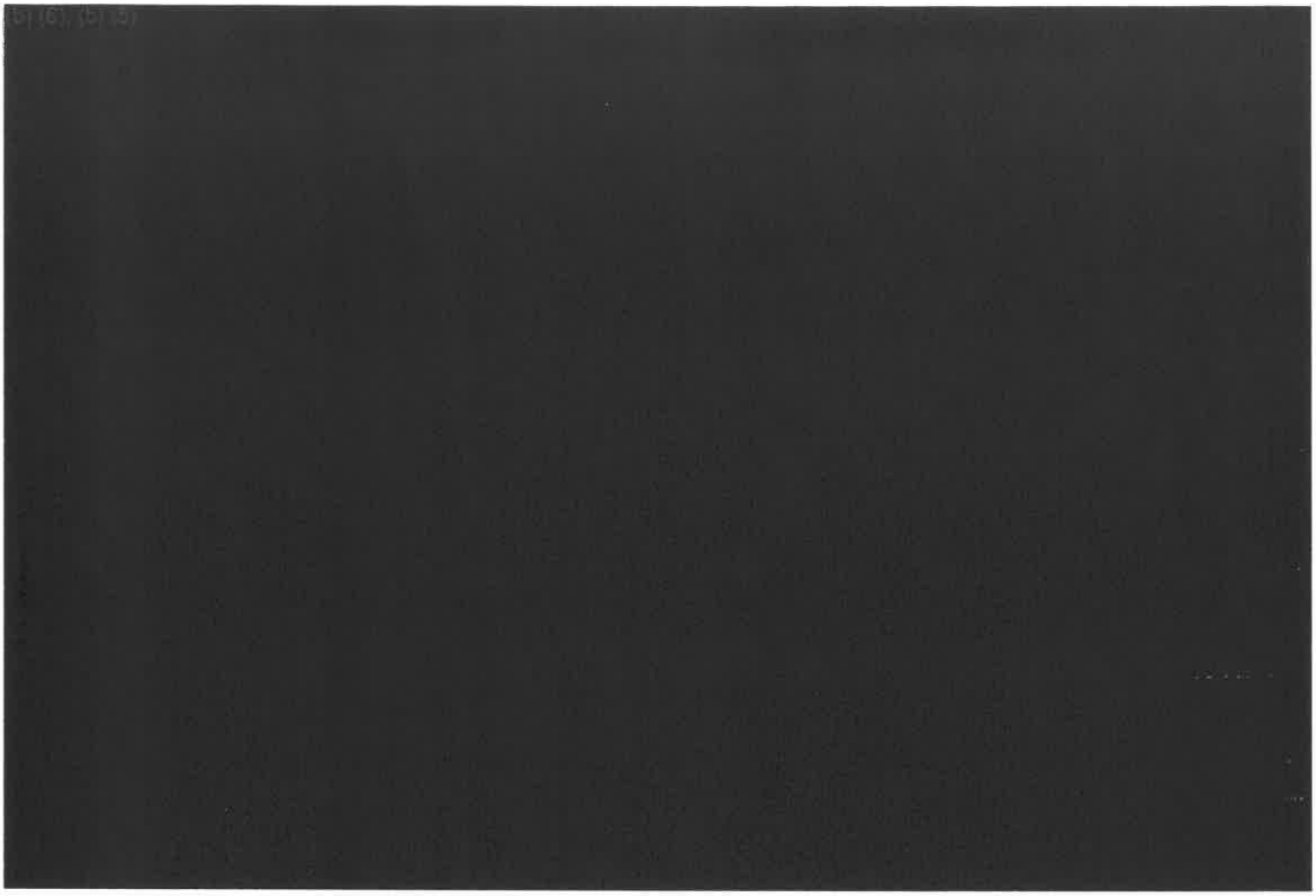
From: Nina Perales [mailto:[redacted]
Sent: Wednesday, June 28, 2017 5:06 PM
To: Saltman, Julie (CIV) [redacted]
Cc: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Tyler, John (CIV) [redacted] Halainen, Daniel J. (CIV) [redacted]; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Re: Texas v United States - call Thursday

Yes

Sent from my iPhone

On Jun 28, 2017, at 4:07 PM, Saltman, Julie (CIV) <[redacted]> wrote:

> Adam and Nina,
>
> I've spoken to you both about a call tomorrow regarding the *Texas* case. I understand you're both unavailable in the morning. Would everyone be available for a call at 2 pm CST/3 pm EST to discuss our status report in this case?
>
> Thanks,
>
> Julie
>
> Julie Saltman
> Trial Attorney
> United States Department of Justice
> Civil Division, Federal Programs Branch
> 20 Massachusetts Ave. NW
> Washington, DC 20530
> [redacted]



From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Wednesday, July 05, 2017 6:48 PM
To: Saltman, Julie (CIV) <[redacted]; Nina Perales <[redacted]>; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) [redacted]; Halainen, Daniel J. (CIV) [redacted]>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

All:

Please find attached a draft for your consideration. Currently, it assumes no opposition. Please let me know if that is not the case.

Here is the call-in information:

Dial-In: [redacted]ree

Passcode:

Thanks and have a good night everyone.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Saltman, Julie (CIV) [mailto:[redacted]]
Sent: Wednesday, July 05, 2017 4:12 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales <[redacted]>; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) <[redacted] Halainen, Daniel J. (CIV) <[redacted]>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

Thanks, Adam. That would be fine. Could you please provide a call line number? We would also appreciate it if you could share a draft of any stay motion you'd like our position on before the call to facilitate our discussion tomorrow afternoon.

Thanks,

Julie

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Wednesday, July 05, 2017 4:55 PM
To: Nina Perales <[redacted]>; Saltman, Julie (CIV) <[redacted]>; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) <[redacted]>; Halainen, Daniel J. (CIV) <[redacted]>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

That works for us. Would you like to use our conference call line?

Best,

Adam Arthur Biggs
Assistant Attorney General

General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Nina Perales [mailto:(b) (6)]
Sent: Wednesday, July 05, 2017 3:27 PM
To: Saltman, Julie (CIV) <(b) (6)>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Cc: Tyler, John (CIV) (b) (6)>; Halainen, Daniel J. (CIV) <(b) (6)>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

I am available.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
(b) (6)
FAX (210 224-5382

From: Saltman, Julie (CIV) [mailto:(b) (6)]
Sent: Wednesday, July 05, 2017 3:22 PM
To: Biggs, Adam; Bitter, Adam; Nina Perales
Cc: Tyler, John (CIV); Halainen, Daniel J. (CIV); Colmenero, Angela; Hamil, Peggy; Ardolino, Emily
Subject: RE: Texas v United States - call Thursday

We are available at 4:30 pm EST/3:30 pm CST for a call tomorrow. Would that time work for everyone else?

Thanks,

Julie

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Wednesday, July 05, 2017 1:23 PM
To: Saltman, Julie (CIV) <(b) (6)>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales <(b) (6)>

Cc: Tyler, John (CIV) <[redacted]>; Halainen, Daniel J. (CIV) [redacted]>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Ardolino, Emily <Emily.Ardolino@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

All:

In light of the Friday deadline, we would like to schedule a conference call for later today or tomorrow to discuss how the Defendants intend to proceed. What time works best for everyone?

Please let me know and I will circulate the call in information.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Saltman, Julie (CIV) [mailto:[redacted]
Sent: Thursday, June 29, 2017 3:39 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales [redacted]
Cc: Tyler, John (CIV) [redacted]>; Halainen, Daniel J. (CIV) <[redacted]; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

All,

In light of Judge Hanen's order extending our deadline to July 7, we wanted to confirm for you that we don't think it's necessary to file the joint motion we discussed on the call today.

Thanks,

Julie

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Wednesday, June 28, 2017 6:50 PM

To: Nina Perales [redacted]; Saltman, Julie (CIV) [redacted]
Cc: Tyler, John (CIV) [redacted]; Halainen, Daniel J. (CIV) [redacted]; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v United States - call Thursday

Julie,

We can talk at 2:00 pm CST tomorrow. Could you please send around the call-in details?

Thanks,

Adam

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Nina Perales [mailto:[redacted]
Sent: Wednesday, June 28, 2017 5:06 PM
To: Saltman, Julie (CIV) [redacted]>
Cc: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Tyler, John (CIV) <[redacted]; Halainen, Daniel J. (CIV) [redacted]; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Re: Texas v United States - call Thursday

Yes

Sent from my iPhone

On Jun 28, 2017, at 4:07 PM, Saltman, Julie (CIV) <[redacted] wrote:

> Adam and Nina,
>
> I've spoken to you both about a call tomorrow regarding the *Texas* case. I understand you're both unavailable in the morning. Would everyone be available for a call at 2 pm CST/3 pm EST to discuss our status report in this case?
>
> Thanks,
>
> Julie
>
> Julie Saltman
> Trial Attorney

United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
(b) (6) [redacted]

From: Saltman, Julie (CIV) <b6>
Sent: Tuesday, September 12, 2017 12:26 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Nina Perales [redacted]; Tyler, John (CIV) <b6>; Halainen, Daniel J. (CIV) <b6>; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: RE: Texas v. United States: Proposed Stipulation of Voluntary Dismissal
Attach: defs signature_stipulation of dismissal.pdf

Adam,

Thanks for your patience. We agree to the stipulation you circulated. Attached is a signed signature page for defendants.

Thank you,

Julie

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 5:53 PM
To: Nina Perales [redacted]; Saltman, Julie (CIV) <b6>; Tyler, John (CIV) <b6>; Halainen, Daniel J. (CIV) <b6>; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: RE: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Nina: Thank you for sending your signed signature block. We have received it and will insert your signed page into the filing.

John, Julie, Daniel: Please let us know if you have any objections or changes to the proposed stipulation. Otherwise, please physically sign the signature block for Defendants and send it back to me for inclusion in the filing. Thank you in advance.

Regards,

Adam

From: Nina Perales [mailto[redacted]g]
Sent: Monday, September 11, 2017 4:44 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Saltman, Julie (CIV) <b6>; Tyler, John (CIV) <b6>; Halainen, Daniel J. (CIV) <b6>; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: RE: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Adam,

Please find my signed page below, thank you.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 1:05 PM
To: Saltman, Julie (CIV); Tyler, John (CIV); Halainen, Daniel J. (CIV); Nina Perales; Markoff, Gabriel
Cc: Colmenero, Angela; Biggs, Adam
Subject: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Counsel,

In light of the Court's September 8, 2017 order regarding Plaintiffs' notice of voluntary dismissal (ECF No. 471), we propose to file a Stipulation of Voluntary Dismissal in the above-referenced matter. Attached, in Word and PDF form, is a draft of that proposed stipulation for your consideration.

Please let us know if the proposed stipulation is acceptable to Defendants and Intervenors. Assuming the parties are in agreement regarding the stipulation, we ask that you physically sign your respective signature block (with any necessary changes to the block) and send us a scanned version of the hand-signed page. As reflected in the attached proposal, we intend to file the stipulation with the imaged signature pages for Defendants and Intervenors.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

[redacted]

-------- Original message --------
From: "Bitter, Adam" <Adam.Bitter@oag.texas.gov>
Date: 9/4/17 11:50 AM (GMT-05:00)
To: "Halainen, Daniel J. (CIV)" [redacted], "Saltman, Julie (CIV)" [redacted], "Tyler, John (CIV)" [redacted], [redacted], "Markoff, Gabriel" <gmarkoff@omm.com>
Cc: "Colmenero, Angela" <Angela.Colmenero@oag.texas.gov>, "Biggs, Adam" <Adam.Biggs@oag.texas.gov>, "Hamil, Peggy" <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v. United States: Conference on motion for leave to amend complaint

All,

Plaintiffs anticipate that their motion for leave to file an amended complaint will exceed the Court's 20-page limit by no more than 5 pages. Please advise if you oppose a request to exceed the page limits on our motion for leave to file an amended complaint.

Sincerely,

Adam Bitter

From: Halainen, Daniel J. (CIV) [mailto:[redacted]
Sent: Thursday, August 31, 2017 2:08 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted]; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v. United States: Conference on motion for leave to amend complaint

Adam,

Defendants will not be able to formulate a position until we have reviewed your filed motion, and we will respond to the motion once it is filed.

Please let me know if you have any questions.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Thursday, August 31, 2017 10:07 AM
To: Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) <[redacted]>; Halainen, Daniel J. (CIV) [redacted]; [redacted]; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Texas v. United States: Conference on motion for leave to amend complaint

Counsel,

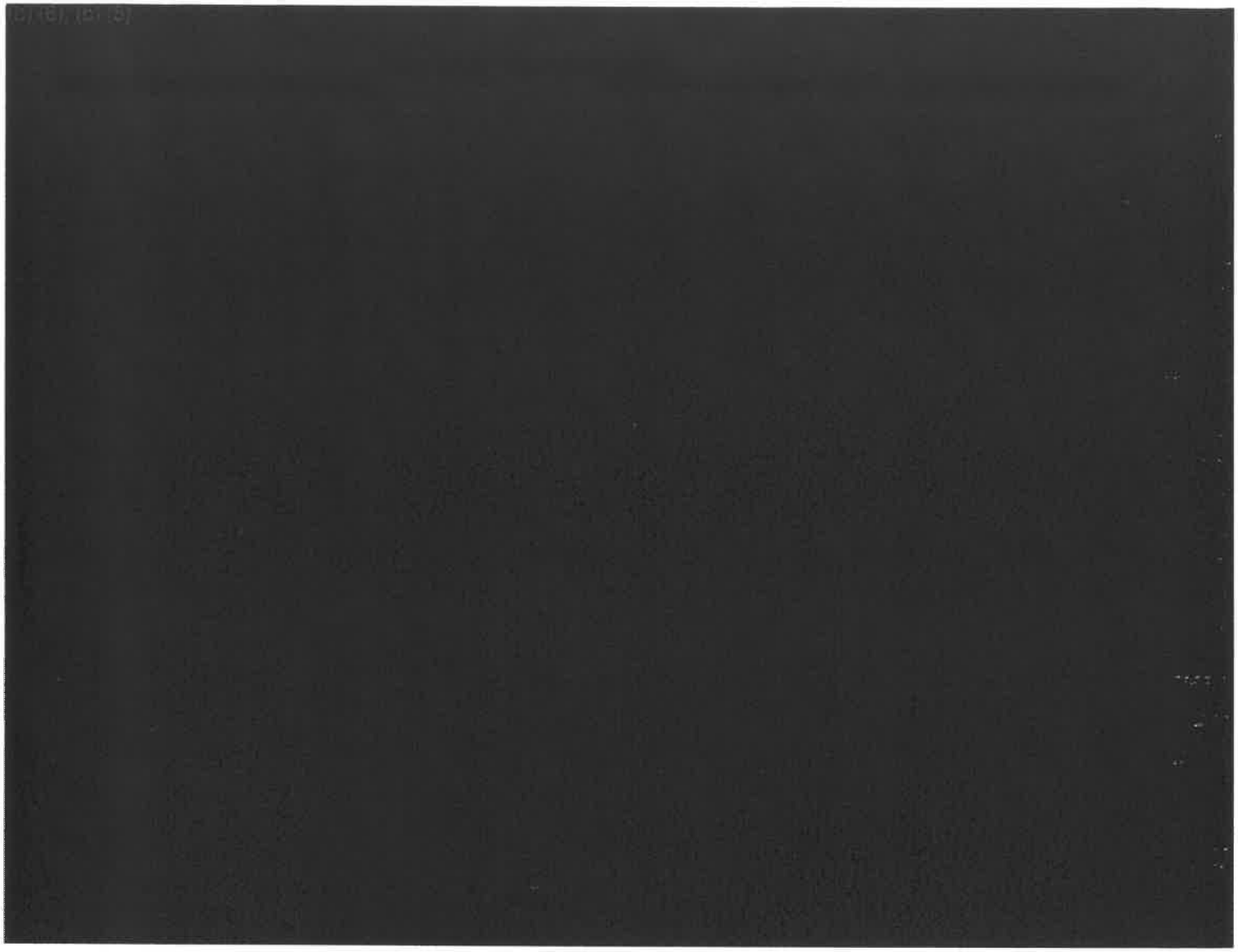
On Tuesday, September 5, 2017, the Plaintiffs intend to file a motion for leave to amend their complaint in the above-referenced matter, consistent with the information contained in Plaintiffs' Motion to Stay filed on July 7, 2017 (ECF No. 447).

Please let me know whether you are opposed or unopposed to Plaintiffs' motion for leave.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov



-------- Original message --------
From: "Bitter, Adam" <Adam.Bitter@oag.texas.gov>
Date: 9/4/17 11:50 AM (GMT-05:00)
To: "Halainen, Daniel J. (CIV)" <[redacted]>, "Saltman, Julie (CIV)" [redacted], "Tyler, John (CIV)" [redacted], [redacted] "Markoff, Gabriel" <gmarkoff@omm.com>
Cc: "Colmenero, Angela" <Angela.Colmenero@oag.texas.gov>, "Biggs, Adam" <Adam.Biggs@oag.texas.gov>, "Hamil, Peggy" <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v. United States: Conference on motion for leave to amend complaint

All,

Plaintiffs anticipate that their motion for leave to file an amended complaint will exceed the Court's 20-page limit by no more than 5 pages. Please advise if you oppose a request to exceed the page limits on our motion for leave to file an amended complaint.

Sincerely,

Adam Bitter

From: Halainen, Daniel J. (CIV) [mailto[redacted]]
Sent: Thursday, August 31, 2017 2:08 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Saltman, Julie (CIV) <[redacted]>; Tyler, John (CIV) <[redacted]; [redacted] Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v. United States: Conference on motion for leave to amend complaint

Adam,

Defendants will not be able to formulate a position until we have reviewed your filed motion, and we will respond to the motion once it is filed.

Please let me know if you have any questions.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Thursday, August 31, 2017 10:07 AM
To: Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) <[redacted]; Halainen, Daniel J. (CIV) [redacted]>; [redacted]; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Texas v. United States: Conference on motion for leave to amend complaint

Counsel,

On Tuesday, September 5, 2017, the Plaintiffs intend to file a motion for leave to amend their complaint in the above-referenced matter, consistent with the information contained in Plaintiffs' Motion to Stay filed on July 7, 2017 (ECF No. 447).

Please let me know whether you are opposed or unopposed to Plaintiffs' motion for leave.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division

Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

[redacted]

-------- Original message --------
From: "Bitter, Adam" <Adam.Bitter@oag.texas.gov>
Date: 9/4/17 11:50 AM (GMT-05:00)
To: "Halainen, Daniel J. (CIV)" [redacted], "Saltman, Julie (CIV)" [redacted], "Tyler, John (CIV)" <[redacted], [redacted], "Markoff, Gabriel" <gmarkoff@omm.com>
Cc: "Colmenero, Angela" <Angela.Colmenero@oag.texas.gov>, "Biggs, Adam" <Adam.Biggs@oag.texas.gov>, "Hamil, Peggy" <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v. United States: Conference on motion for leave to amend complaint

All,

Plaintiffs anticipate that their motion for leave to file an amended complaint will exceed the Court's 20-page limit by no more than 5 pages. Please advise if you oppose a request to exceed the page limits on our motion for leave to file an amended complaint.

Sincerely,

Adam Bitter

From: Halainen, Daniel J. (CIV) [mailto[redacted]]
Sent: Thursday, August 31, 2017 2:08 PM
To: Bitter, Adam <Adam.Bitter@oag.texas.gov>; Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted] Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: RE: Texas v. United States: Conference on motion for leave to amend complaint

Adam,

Defendants will not be able to formulate a position until we have reviewed your filed motion, and we will respond to the motion once it is filed.

Please let me know if you have any questions.

Best,

Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
(b) (6)

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Thursday, August 31, 2017 10:07 AM
To: Saltman, Julie (CIV) (b) (6) >; Tyler, John (CIV) (b) (6) >; Halainen, Daniel J. (CIV) (b) (6) >; (b) (6) ; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Texas v. United States: Conference on motion for leave to amend complaint

Counsel,

On Tuesday, September 5, 2017, the Plaintiffs intend to file a motion for leave to amend their complaint in the above-referenced matter, consistent with the information contained in Plaintiffs' Motion to Stay filed on July 7, 2017 (ECF No. 447).

Please let me know whether you are opposed or unopposed to Plaintiffs' motion for leave.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 2:05 PM
To: Saltman, Julie (CIV) <[redacted]>; Tyler, John (CIV) <[redacted] Halainen, Daniel J. (CIV) <[redacted]>; [redacted]; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Counsel,

In light of the Court's September 8, 2017 order regarding Plaintiffs' notice of voluntary dismissal (ECF No. 471), we propose to file a Stipulation of Voluntary Dismissal in the above-referenced matter. Attached, in Word and PDF form, is a draft of that proposed stipulation for your consideration.

Please let us know if the proposed stipulation is acceptable to Defendants and Intervenors. Assuming the parties are in agreement regarding the stipulation, we ask that you physically sign your respective signature block (with any necessary changes to the block) and send us a scanned version of the hand-signed page. As reflected in the attached proposal, we intend to file the stipulation with the imaged signature pages for Defendants and Intervenors.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

RE: Call between 1pm and 3pm ET today?

Keller, Scott [Scott.Keller@oag.texas.gov]
Sent: Thursday, June 29, 2017 11:08 AM
To: Readler, Chad A. (CIV)

Sounds good.

From: Readler, Chad A. (CIV) [Chad.A.Readler@usdoj.gov]
Sent: Thursday, June 29, 2017 10:04 AM
To: Keller, Scott
Subject: Re: Call between 1pm and 3pm ET today?

How about 1?

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "Keller, Scott" <Scott.Keller@oag.texas.gov>
Date: 6/29/17 10:18 AM (GMT-05:00)
To: "Readler, Chad A. (CIV)" (b)(6) [redacted]
Subject: Call between 1pm and 3pm ET today?

Do you have time for a quick call sometime between 1pm and 3pm ET today? Thanks.

Scott Keller
Solicitor General of Texas
(512) 936-2725
Scott.Keller@oag.texas.gov

From: Tyler, John (CIV)
To: Flentje, August (CIV); Haas, Alex (CIV)
Cc: Halainen, Daniel J. (CIV); Ricketts, Jennifer D (CIV)
Subject: FW: Scheduling Order: Texas v. United States
Date: Wednesday, June 07, 2017 5:22:44 PM
Attachments: (b) (5) [redacted]

(b) (5) [redacted]

From: Flentje, August (CIV)
Sent: Wednesday, June 07, 2017 3:48 PM
To: Tyler, John (CIV) (b) (6) [redacted]>; Haas, Alex (CIV) (b) (6) [redacted]
Cc: Halainen, Daniel J. (CIV) (b) (6) [redacted]>; Ricketts, Jennifer D (CIV) (b) (6) [redacted]>
Subject: RE: Scheduling Order: Texas v. United States

(b) (5) [redacted]

From: Tyler, John (CIV)
Sent: Wednesday, June 07, 2017 10:16 AM
To: Flentje, August (CIV) (b) (6) [redacted] Haas, Alex (CIV) (b) (6) [redacted]
Cc: Halainen, Daniel J. (CIV) (b) (6) [redacted]>; Ricketts, Jennifer D (CIV) (b) (6) [redacted]
Subject: RE: Scheduling Order: Texas v. United States

(b) (5) [redacted]

[redacted]

[redacted]

(b) (5)

[redacted]

From: Flentje, August (CIV)
Sent: Wednesday, June 07, 2017 10:00 AM
To: Tyler, John (CIV) <(b) (6) [redacted] Haas, Alex (CIV) <(b) (6) [redacted]
Cc: Halainen, Daniel J. (CIV) <(b) (6) [redacted]
Subject: Re: Scheduling Order: Texas v. United States

(b) (5)

[redacted]

-------- Original message --------
From: "Tyler, John (CIV)" (b) (6) [redacted]
Date: 6/6/17 5:29 PM (GMT-05:00)
To: "Flentje, August (CIV)" <(b) (6) [redacted], "Haas, Alex (CIV)" (b) (6) [redacted]
Cc: "Halainen, Daniel J. (CIV)" <(b) (6) [redacted]
Subject: RE: Scheduling Order: Texas v. United States

(b) (5)

[redacted]

From: Flentje, August (CIV)
Sent: Tuesday, June 06, 2017 4:32 PM
To: Tyler, John (CIV) (b) (6) [redacted]; Haas, Alex (CIV) (b) (6) [redacted]
Cc: Halainen, Daniel J. (CIV) (b) (6) [redacted]

Subject: RE: Scheduling Order: Texas v. United States

[redacted]

From: Tyler, John (CIV)
Sent: Tuesday, June 06, 2017 3:30 PM
To: Flentje, August (CIV) [redacted]; Haas, Alex (CIV) [redacted]
Cc: Halainen, Daniel J. (CIV) [redacted]
Subject: FW: Scheduling Order: Texas v. United States

[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Tuesday, June 06, 2017 3:24 PM
To: Halainen, Daniel J. (CIV) [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) [redacted]; Tyler, John (CIV) [redacted]
Subject: RE: Scheduling Order: Texas v. United States

Daniel:

In anticipation of our call tomorrow, please find attached a proposed scheduling order. Thanks.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [redacted]
Sent: Friday, June 02, 2017 1:22 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Saltman, Julie (CIV) [redacted] Tyler, John (CIV) [redacted]
Subject: RE: Scheduling Order: Texas v. United States

Adam,

Thank you for reaching out. Are you available to confer on Wednesday afternoon at 3:00 pm Eastern / 2:00 pm Central ? Please let me know if that time doesn't work. Have a nice weekend.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 01, 2017 4:19 PM
To: Saltman, Julie (CIV) [redacted]>; Halainen, Daniel J. (CIV) [redacted]; Tyler, John (CIV) <[redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>
Subject: Scheduling Order: Texas v. United States

All:

As you know, Judge Hanen issued an order in March requiring the parties to confer and propose a scheduling order by June 15. We were hoping to schedule a

conference call for early next week to discuss. Please let us know your availability and I will circulate a call-in number. Thank you and have a good rest of your day.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From:	Readler, Chad A. (CIV)
To:	Brand, Rachel (OASG); Panuccio, Jesse (OASG); Tucker, Rachael (OAG)
Cc:	Flentje, August (CIV); Mooppan, Hashim (CIV); Shumate, Brett A. (CIV)
Subject:	FW: Texas, et al. v. United States, et al.
Date:	Thursday, June 29, 2017 4:40:06 PM
Attachments:	DACA letter 6 29 2017.pdf

Chad A. Readler
Acting Assistant Attorney General, Civil Division
U.S. Department of Justice
(b) (6)

From: Keller, Scott [mailto:Scott.Keller@oag.texas.gov]
Sent: Thursday, June 29, 2017 3:42 PM
To: Readler, Chad A. (CIV) (b) (6)
Subject: FW: Texas, et al. v. United States, et al.

From: Bitter, Adam
Sent: Thursday, June 29, 2017 2:41 PM
To: Keller, Scott <Scott.Keller@oag.texas.gov>
Subject: FW: Texas, et al. v. United States, et al.

From: Bitter, Adam
Sent: Thursday, June 29, 2017 2:37 PM
To: Saltman, Julie (CIV) (b) (6) ; Tyler, John (CIV) <(b) (6)
Halainen, Daniel J. (CIV) (b) (6) ; nperales@maldef.org
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: Texas, et al. v. United States, et al.

Counsel,

Attached is a letter to Attorney General Jeff Sessions from the Attorneys General of Texas, Alabama, Arkansas, Idaho, Kansas, Louisiana, Nebraska, South Carolina, Tennessee, and West Virginia, as well as the Governor of Idaho.

Sincerely,

Adam Bitter

Adam N. Bitter
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4055 (phone)
(512) 320-0667 (fax)
adam.bitter@oag.texas.gov

From: Saltman, Julie (CIV)
To: Tyler, John (CIV); Flentje, August (CIV); Readler, Chad A. (CIV)
Cc: Halainen, Daniel J. (CIV)
Subject: RE: Activity in Case 1:14-cv-00254 State of Texas et al v. United States of America et al Order
Date: Thursday, June 29, 2017 4:30:20 PM
Attachments: (b) (5) [redacted]

All,

A copy of the letter is attached.

Thanks,

Julie

From: Tyler, John (CIV)
Sent: Thursday, June 29, 2017 4:20 PM
To: Flentje, August (CIV) (b) (6) [redacted]; Readler, Chad A. (CIV)
(b) (6) [redacted]
Cc: Saltman, Julie (CIV) (b) (6) [redacted]; Halainen, Daniel J. (CIV)
(b) (6) [redacted]
Subject: FW: Activity in Case 1:14-cv-00254 State of Texas et al v. United States of America et al Order

(b) (5) [redacted]

[redacted]

From: DCECF_LiveDB@txs.uscourts.gov [mailto:DCECF_LiveDB@txs.uscourts.gov]
Sent: Thursday, June 29, 2017 3:58 PM
To: DC_Notices@txsd.uscourts.gov
Subject: Activity in Case 1:14-cv-00254 State of Texas et al v. United States of America et al Order

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

SOUTHERN DISTRICT OF TEXAS

Notice of Electronic Filing

The following transaction was entered on 6/29/2017 at 2:58 PM CDT and filed on 6/29/2017
Case Name: State of Texas et al v. United States of America et al
Case Number: 1:14-cv-00254
Filer:
Document Number: 446

Docket Text:
ORDER entered. The Court hereby orders that this case is stayed until July 7, 2017. After the parties have determined the course of action they wish to pursue, they shall notify the Court by way of a filing a joint status report. (Signed by Judge Andrew S Hanen) Parties notified.(bcampos, 1)

1:14-cv-00254 Notice has been electronically mailed to:

Natural Born Citizen Party National Committee hvanallen@hvc.rr.com

Adam Arthur Biggs adam.biggs@oag.texas.gov, kelly.gall@oag.texas.gov, rita.gier@oag.texas.gov

Adam David Kirschner adam.kirschner@usdoj.gov

Adam Nicholas Bitter adam.bitter@oag.texas.gov, laura.redd@oag.texas.gov, peggy.hamil@oag.texas.gov

Adam P KohSweeney akohsweeney@omm.com

Angela V Colmenero angela.colmenero@oag.texas.gov, peggy.hamil@oag.texas.gov

Anne E Egeler anneE1@atg.wa.gov

Antonio Tony Martinez tony@mbymlaw.com

Cally Younger cally.younger@gov.idaho.gov

Carlos Moctezuma Garcia cgarcia@garciagarcialaw.com, ajauregui@garciagarcialaw.com

Cecillia D. Wang cwang@aclu.org

Chirag G. Badlani cbadlani@hsplegal.com

Cody Wofsy cwofsy@aclu.org

Dale L. Wilcox dwilcox@irli.org

Daniel David Hu daniel.hu@usdoj.gov, CaseView.ECF@usdoj.gov, meiching.chentang@usdoj.gov, sKempen@usa.doj.gov

Daniel P Lennington lenningtondp@doj.state.wi.us, millerac@doj.state.wi.us

Daniel Stephen Garrett Schwei daniel.s.schwei@usdoj.gov

David A. Lopez dave.lopez@nebraska.gov

Dwight Carswell dwight.carswell@ag.ks.gov

Edgar Saldivar esaldivar@aclutx.org, cclay@aclutx.org

Eric Alan Hudson Eric.hudson@texasattorneygeneral.gov, jodie.clopton@texasattorneygeneral.gov, merry.smith@texasattorneygeneral.gov

Eric E Murphy eric.murphy@ohioattorneygeneral.gov

Gabriel Markoff gmarkoff@omm.com

Harold William Van Allen(Terminated) hvanallen@hvc.rr.com

Ilya Shapiro ishapiro@cato.org

J Jorge deNeve jdeneve@omm.com

James J Gilligan james.gilligan@usdoj.gov

Jay Alan Sekulow sekulow@aclj.org

Jennifer D Ricketts jennifer.d.ricketts@usdoj.gov

John Campbell Barker cam.barker@texasattorneygeneral.gov

John R Tyler john.tyler@usdoj.gov

Jonathan D Weissglass jweissglass@altshulerberzon.com, aarkush@altshulerberzon.com, smendez@altshulerberzon.com

Jonathon Alden Moseley Contact@JonMoseley.com

Joseph C Chapelle joe.chapelle@btlaw.com

Julie Shana Saltman julie.saltman@usdoj.gov, crystal.greene@usdoj.gov

Leif A. Olson lolson@cokinoslaw.com, leif@olsonappeals.com, njacobs@cokinoslaw.com

Linda Jane Smith linda.smith@dlapiper.com, ann.lozinski@dlapiper.com, DocketingLA@dlapiper.com

Michael M. Hethmon mhethmon@irli.org, info@irli.org

Mitchell Lee Herren mherren@hinklaw.com, dpalomino@hinklaw.com

Murray J Fogler mfogler@fbfog.com, mhoward@fbfog.com

Nina Perales nperales@maldef.org, cleija@maldef.org

Orly Taitz orly.taitz@hushmail.com

Patrick R. Wyrick patrick.wyrick@oag.ok.gov, cara.gorden@oag.ok.gov

Peter Margulies pmargulies@rwu.edu

Peter J Rusthoven peter.rusthoven@btlaw.com

Richard Dearing rdearing@law.nyc.gov

Ryan S Post ryan.post@nebraska.gov

Scott A. Keller scott.keller@texasattorneygeneral.gov, sabrina.wycoff@texasattorneygeneral.gov, vera.calamusa@texasattorneygeneral.gov

1:14-cv-00254 Notice has not been electronically mailed to:

Justin B Cox
National Immigration Law Center
1989 College Avenue NE
Atlanta, GA 30317

Karen C Tumlin
National Immigration Law Center
3435 Wilshire Blvd
Suite 1600
Los Angeles, CA 90010

Mitchell Williams(Terminated)
PO Box 33
Palatka, FL 32178

Nora A Preciado
National Immigration Law Center
3435 Wilshire Blvd
Suite 1600
Los Angeles, CA 90010

Omar Jadwat
American Civil Liberties Union
Immigrants' Rights Project
125 Broad Street, 18th Floor

New York, NY 10004

Raheleh Ziaei
42548-298
Fed Medical Center-Carswell
P.O. Box 27137
Fort Worth, TX 76127

Rhonda Ann Fleming
20446-009
Fed Medical Center-Carswell
P.O. Box 27137
Fort Worth, TX 76127

Robin Clarice Parezanin
20263-298
Fed Medical Center -Carswell
P.O. Box 27137
Fort Worth, TX 76127

Tammy Willis
32203-001
Fed Medical Center-Carswell
P.O. Box 27137
Fort Worth, TX 76127

William F. Reade, Jr.
24 Wildflower Lane
Yarmouth Port, MA 02675-1474

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1045387613 [Date=6/29/2017] [FileNumber=26058861-0] [9e714c60e7625f6183931e25b6a1a9fc3b772f03731de520e8469289fa78b5eec50d0590fa60305307ffa033602c1dbc2dfb846f3f04d25d2fbbc383841a35a0]]

From: Flentje, August (CIV)
To: Halainen, Daniel J. (CIV)
Cc: Tyler, John (CIV); Saltman, Julie (CIV)
Subject: Re: Texas v. United States - scheduling order
Date: Thursday, June 15, 2017 8:00:22 PM
Attachments: [redacted]

[redacted]

-------- Original message --------
From: "Halainen, Daniel J. (CIV)" [redacted]
Date: 6/15/17 7:54 PM (GMT-05:00)
To: "Flentje, August (CIV)" <[redacted]
Cc: "Tyler, John (CIV)" [redacted] "Saltman, Julie (CIV)" [redacted]
Subject: RE: Texas v. United States - scheduling order

[redacted]

[redacted]

From: Flentje, August (CIV)
Sent: Thursday, June 15, 2017 7:45 PM
To: Halainen, Daniel J. (CIV) [redacted]
Cc: Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted];
Ricketts, Jennifer D (CIV) [redacted]
Subject: Re: Texas v. United States - scheduling order

[redacted].

-------- Original message --------
From: "Halainen, Daniel J. (CIV)" <[redacted]
Date: 6/15/17 7:40 PM (GMT-05:00)
To: "Flentje, August (CIV)" <[redacted]
Cc: "Tyler, John (CIV)" <[redacted]>, "Saltman, Julie (CIV)"
<[redacted], "Ricketts, Jennifer D (CIV)" [redacted]
Subject: FW: Texas v. United States - scheduling order

[redacted]

[redacted]

From: Nina Perales [mailto:[redacted]
Sent: Thursday, June 15, 2017 7:32 PM
To: Halainen, Daniel J. (CIV) <[redacted]
Cc: Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

I would like to see a copy of the exhibit before giving our position on the request for an additional stay.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
[redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) [redacted]
Sent: Thursday, June 15, 2017 6:29 PM
To: Nina Perales
Cc: Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Nina,

Thanks – I will remove that language. Does MALDEF have a position that we can include in the motion?

We are still waiting for a copy of Exhibit A to include with the motion.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Nina Perales [mailto:[redacted]
Sent: Thursday, June 15, 2017 7:24 PM
To: Halainen, Daniel J. (CIV) <[redacted]
Cc: Tyler, John (CIV) <[redacted]>; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Please also provide Exhibit A to the motion.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
(b) (6)
FAX (210 224-5382

From: Nina Perales
Sent: Thursday, June 15, 2017 6:21 PM
To: 'Halainen, Daniel J. (CIV)'
Cc: Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Daniel,

Please remove the language that says: Counsel for Intervenors was not available to state its position on this motion.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
(b) (6)
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) (b) (6)
Sent: Thursday, June 15, 2017 5:51 PM
To: Biggs, Adam; Nina Perales
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV)
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Attached please find a draft motion to stay the merits proceedings for two weeks in light of new guidance signed by the Secretary of Homeland Security today.

Daniel Halainen

Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC [redacted]
(202) 616-8101

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Thursday, June 15, 2017 6:29 PM
To: Halainen, Daniel J. (CIV) <[redacted]; Nina Perales [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Fine with us.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Halainen, Daniel J. (CIV) [redacted]
Sent: Thursday, June 15, 2017 5:11 PM
To: Biggs, Adam <Adam.Biggs@oag.texas.gov>; Nina Perales [redacted]
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Are you available for a call at 6:30 pm Eastern/5:30 pm Central? Please call [redacted] and enter the [redacted]

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 5:37 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' [redacted]
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted] Saltman, Julie (CIV) <[redacted]>
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Thanks again for your patience. We will make every effort to get back to you within the half hour.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
[redacted]

From: Halainen, Daniel J. (CIV)
Sent: Thursday, June 15, 2017 11:55 AM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; 'Nina Perales' [redacted]
Cc: 'Colmenero, Angela' <Angela.Colmenero@oag.texas.gov>; 'Bitter, Adam' <Adam.Bitter@oag.texas.gov>; 'Hamil, Peggy' <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) [redacted]>; Saltman, Julie (CIV) [redacted]
Subject: RE: Texas v. United States - scheduling order

Adam and Nina,

Following up on our call yesterday, we have nothing definitive to report at this time. I apologize for the delay, and thank you for your patience. We will get back to you this afternoon.

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
(b) (6)

From: Halainen, Daniel J. (CIV)
Sent: Wednesday, June 14, 2017 12:22 PM
To: 'Biggs, Adam' <Adam.Biggs@oag.texas.gov>; Nina Perales <(b) (6)
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) (b) (6) Saltman, Julie (CIV) (b) (6)
Subject: RE: Texas v. United States - scheduling order

All,

For today's *Texas v. United States* call at 3:00 pm Eastern/2:00 pm Central, please call the conference line at (b) (6) and enter the PIN (b) (6)

Thanks,

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
(b) (6)

From: Biggs, Adam [mailto:Adam.Biggs@oag.texas.gov]
Sent: Monday, June 12, 2017 1:59 PM
To: Nina Perales <(b) (6) ; Halainen, Daniel J. (CIV) (b) (6)
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) (b) (6) ; Saltman, Julie (CIV) (b) (6)
Subject: RE: Texas v. United States - scheduling order

Daniel:

That is fine.

Best,

Adam Arthur Biggs
Assistant Attorney General
General Litigation Division
Office of the Attorney General of Texas
P.O. Box 12548, Capital Station
Austin, Texas 78711
t. (512) 475-4080
f. (512) 370-9384

This e-mail (including any attachments) may be a privileged attorney-client communication and/or may contain privileged and confidential information intended only for the use of the individual(s) named above. If you are not an intended recipient of this e-mail, or the employee or agent responsible for delivering this to an intended recipient, you are hereby notified that any dissemination or copying of this e-mail or disclosure of the information contained in this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by telephone at (512) 463-2100 or by e-mail reply.

From: Nina Perales [mailto:(b) (6) [redacted]
Sent: Monday, June 12, 2017 12:57 PM
To: Halainen, Daniel J. (CIV) (b) (6) [redacted]; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Hamil, Peggy <Peggy.Hamil@oag.texas.gov>; Tyler, John (CIV) (b) (6) [redacted]; Saltman, Julie (CIV) (b) (6) [redacted]
Subject: RE: Texas v. United States - scheduling order

That's ok with me.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78231
(b) (6) [redacted]
FAX (210 224-5382

From: Halainen, Daniel J. (CIV) (b) (6) [redacted]
Sent: Monday, June 12, 2017 12:27 PM
To: Biggs, Adam
Cc: Colmenero, Angela; Bitter, Adam; Hamil, Peggy; Tyler, John (CIV); Saltman, Julie (CIV); Nina Perales
Subject: Texas v. United States - scheduling order

Adam,

We have nothing further to report today on the proposed scheduling order due to the court by Thursday, June 15. Can we reschedule today's call for Wednesday, June 14, at 3:00 pm Eastern/2:00 pm Central? If we have a response for you before then, I'll let you know. I'm copying Nina Perales of MALDEF, so that we can coordinate among the parties.

Thanks very much.

Best,
Daniel

Daniel Halainen
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
(b) (6) [redacted]

From: Colmenero, Angela [Angela.Colmenero@oag.texas.gov]
Sent: Tuesday, September 12, 2017 12:32:23 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Your message

To:
Subject: Texas v. United States: Proposed Stipulation of Voluntary Dismissal
Sent: Tuesday, September 12, 2017 12:33:18 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Tuesday, September 12, 2017 12:32:23 PM (UTC-05:00) Eastern Time (US & Canada).

From: Colmenero, Angela [Angela.Colmenero@oag.texas.gov]
Sent: Friday, July 07, 2017 1:23:41 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States - call Thursday

Your message

To:
Subject: Texas v United States - call Thursday
Sent: Friday, July 07, 2017 1:24:55 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Friday, July 07, 2017 1:23:41 PM (UTC-05:00) Eastern Time (US & Canada).

From: Colmenero, Angela [Angela.Colmenero@oag.texas.gov]
Sent: Thursday, June 29, 2017 1:20:16 PM
To: Saltman, Julie (CIV)
Subject: Read: RE: Texas v United States - call Thursday

Your message

To:
Subject: Texas v United States - call Thursday
Sent: Thursday, June 29, 2017 1:21:02 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Thursday, June 29, 2017 1:20:16 PM (UTC-05:00) Eastern Time (US & Canada).

From: Colmenero, Angela [Angela.Colmenero@oag.texas.gov]
Sent: Friday, June 23, 2017 3:06:37 PM
To: Saltman, Julie (CIV)
Subject: Read: Texas v United States

Your message

To:
Subject: Texas v United States
Sent: Friday, June 23, 2017 3:06:56 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Friday, June 23, 2017 3:06:37 PM (UTC-05:00) Eastern Time (US & Canada).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

TEXAS, KANSAS, LOUISIANA, INDIANA, WISCONSIN, and NEBRASKA, *Plaintiffs*, v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS E. PRICE, M.D., in his Official Capacity as SECRETARY OF HEALTH AND HUMAN SERVICES, UNITED STATES INTERNAL REVENUE SERVICE, and JOHN KOSKINEN, in his Official Capacity as COMMISSIONER OF INTERNAL REVENUE, *Defendants*.	CIVIL ACTION NO. 7:15-CV-00151-O

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

In accordance with LR 7.1(h), 56.5(a), and ECF No. 61, Plaintiffs provide this reply in support of their motion for summary judgment, ECF No. 53, and in opposition to Defendants' motion for summary judgment, ECF No. 62.

INTRODUCTION

In finally responding to Plaintiffs' motion for summary judgment, the federal Defendants offer the Court little beyond arguments already made and rejected. *See* ECF No. 34. And in responding to whether Plaintiffs should be saddled with the responsibility of the HIPF, Defendants summarily conclude that "basic concepts of both economics and actuarial science preclude virtually any other outcome." ECF No. 64 at 1. But basic concepts of economics do not force Plaintiffs to pay 100% of the HIPF—Defendants do. And therein lies the problem. While Defendants urge "basic concepts," they lose sight of the law. Not only did Congress exclude "governmental entit[ies]" from HIPF responsibility, 124 Stat. 865–66, but the HIPF exceeds the federal government's right to impose tax liability upon the States.

As the unrebutted expert testimony makes clear, the HIPF is not an incidental cost or tax that becomes part of the greater smögåsbord of factors composing capitation rates. Capitation rates are still calculated in a traditional sense, contemplating all of the *normal* factors systemic in the Medicaid MCO world. Then, after all the work is done, the declaration of a private organization—ASOP 49—mandates that the HIPF be *added* to the already-negotiated capitation rate. *See* ASOP 49 § 3.2.12(d) (Mar. 2015). If the components of a capitation rate are an ice cream sundae, the HIPF is no cherry on top; it is a watermelon. Not only is it out of place on an ice cream sundae, but its sheer weight and volume makes unrecognizable that which, since 1965, provided the States with a way to care for their most needy citizens. And if Plaintiffs are unwilling accept the watermelon on their sundae, they are ineligible for Medicaid altogether, removing their best method to pay for health

care primarily for low income families. That Plaintiffs continue to participate in Medicaid, instead of avoiding the HIPF by every theoretical means, does not create a self-inflicted injury. Rather, this conundrum represents the proverbial "gun to the head" that meets the Supreme Court's definition of unconstitutional coercion.

Defendants focus primarily on one step in their unconstitutional process, a 2002 regulation, in order to justify the end result of unlawfully taxing the States. But Defendants' analysis ignores Congress's creation of the actuarial soundness standard, the ACA itself, and its creation of the HIPF, as well as ASOP 49's imposition of the HIPF onto the States. But it is a culmination of factors that produce the unlawful result here, not just one. While Defendants focus single arguments on single occurrences, turning a blind eye to the toxic combination of all things put together does not circumvent the reality of the unlawful result.

As is clear from the Court's prior order denying Defendants' motion to dismiss, the issues presented are largely legal, with few factual disputes. ECF No. 34. As to the handful of factual questions that may have previously existed,[1] Plaintiffs' overwhelming factual and expert testimony leaves no genuine issue before the Court. Here, the undisputed facts demonstrate that every penny of the HIPF is imposed on the States. If the States refuse to pay the HIPF, they forfeit substantial funding for a critical sovereign mission—providing basic health care for underprivileged citizens, including children. Instead of disputing this impact, Defendants attempt to explain it. But this does not a genuine issue of material fact make. Accordingly, summary judgment for Plaintiffs is appropriate.

[1] That Defendants now move for summary judgment is significant. Defendants do not contend that a genuine issue exists, requiring the disposition of a fact-finder. Nor do Defendants plead affirmative defenses that turn on questions of fact. *See* ECF No. 43 at 16–17 (Defendants' five enumerated "DEFENSES").

ARGUMENT

I. PLAINTIFFS HAVE STANDING.

Plaintiffs' allegations establish Article III standing. ECF No. 34 at 12–18. Defendants do not challenge that Plaintiffs paid 100% of the HIPF. Even if Defendants were to question whether Plaintiffs pay 100% of the HIPF, there is no genuine issue as to this point. Thus, Plaintiffs have established "a 'concrete and particularized injury' by virtue of their having already paid, and their continuing obligation to pay in the future, the full HIPF amounts to MCOs." ECF No. 34 at 14. Moreover, Plaintiffs' injuries are redressable, as the Court has many options by which to alleviate Plaintiffs' injuries, past[2] and future.

Through expert testimony, Plaintiffs also establish the causal link between the actions complained of and their injuries, and that there is no genuine issue as to whether their injuries are self-inflicted. Plaintiffs' experts demonstrate intimate and unparalleled knowledge of their respective states, how the Medicaid program works, and the impact of the HIPF. Defendants offer no evidence to rebut or challenge Plaintiffs' expert testimony, but nonetheless argue that Plaintiffs' experts are incorrect. ECF No. 64 at 10–14. But declaring one to be wrong, and offering no evidence to explain why, does not manufacture a genuine issue of material fact.

A. Plaintiffs' Injuries Are Redressable.

Plaintiffs' claims are redressable by at least two remedies: (1) enjoining the collection of the portion of the HIPF attributable to MCOs' services rendered to states; and (2) enjoining the portion of Defendants' regulations that delegates the power to define "actuarially sound" to the ASB.[3] Contrary to Defendants assertions, ECF No.

[2] Plaintiffs maintain that a refund, restitution, or disgorgement of the HIPFs paid in past years will remedy past injuries. However, because the Court already dismissed those claims, ECF No. 34 at 21, Plaintiffs do not re-brief those arguments here, but will presumably be afforded the opportunity to further address those arguments on appeal.

[3] At the time this suit was filed, the delegation was found at 42 C.F.R. § 438.6(c)(1)(i)(C). Defendants have since recodified their regulations such that the delegation is found at 42 C.F.R. §§ 438.2, 438.4.

64 at 16, the first remedy redresses Plaintiffs' injuries if the Court agrees that application of the HIPF to the States violates the Tenth Amendment, the Spending Clause, Section 9010 of the ACA, or is otherwise arbitrary and capricious under the APA. *See* ECF No. 54 at 21–35, 40–42. The second remedy redresses Plaintiffs' injuries, additionally or alternatively, if the Court finds the legislative delegation to the ASB to be unlawful, arbitrary and capricious, or in violation of the notice and comment procedures of the APA. *See* ECF No. 54 at 35–42.

B. Plaintiffs' Injuries Are Not Self-Inflicted.

"Title XIX [Medicaid] is a welfare assistance program with limited funding." *D.C. Podiatry Soc'y et al. v. District of Columbia et al.*, 407 F. Supp. 1259, 1264 (D.D.C. 1975). Thus, Medicaid is not inherently flexible, but "require[s] that state Medicaid plans establish '*reasonable standards* . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of (Title XIX).'" *Beal v. Doe*, 432 U.S. 438, 441 (1977) (quoting 42 U.S.C. § 1396a(a)(17)). As healthcare expands towards the goal of universal coverage, and the resources available to each patient become smaller and smaller, the options available to Plaintiffs in *reasonably* managing their Medicaid programs become fewer and fewer.

Defendants argue from an unreasonable fantasy land where the Medicaid options for Plaintiffs are seemingly endless. For example, Defendants claim that "[n]o federal law requires the States to contract with MCOs subject to the fee." ECF No. 64 at 10. While this may be true, the reality of the circumstances presented to Plaintiffs requires them to contract with MCOs subject to the HIPF. While Defendants posture theoretical arguments based on alternatives supposedly available to Plaintiffs, they fail to counter the veracity of Plaintiffs' evidence and the lack of actual, reasonable choices. Defendants even suggest that Plaintiffs should talk their MCOs into transforming their business model and becoming non-profit, ECF No. 64 at 12, as if

the proper role of government is to drive for-profit entities from the private sector.

Defendants' self-infliction arguments are designed to shift the Court's focus away from Defendants' actions that prompted this dispute—violating the Constitution's prohibition against the federal taxation of state governments, the prohibition of delegation of legislative powers to private parties, and the maxim that the federal government may not abuse its spending power to coerce others into doing its bidding. "The fact that Texas sued in response to a significant change in the defendants' policies shows that its injury is not self-inflicted." *Texas v. United States*, 809 F.3d 134, 158 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

1. HIPF-Exempt MCOs Cannot Cover Plaintiffs' Medicaid Needs.

The unrebutted evidence, including factual and expert testimony submitted by Plaintiffs, demonstrates that HIPF-exempt MCO's are not an actual option for Plaintiffs to avoid the HIPF. As to this point, each Plaintiff presented their own evidence demonstrating that insufficient non-profit MCOs exist to permit the state to avoid the HIPF. Defendants seek to rebut this evidence with argument, not evidence. ECF No. 64 at 10–14.

Texas's expert testimony confirms that parts of Texas are not covered by *any* nonprofit MCOs. As Texas's expert explained, "[g]eographic areas that have no core hospital district around which to organize are clustered as regional Medicaid Rural Service Areas (MRSAs). To my knowledge, no non-profits plans have submitted a procurement response for these MRSAs." ECF No. 54-1 at A1043. And, "[N]o non-profit MCO plan covers more than its own geographic area." *Id.* at 1044. Further,

> Texas MCO model is an at risk model and while the state is required to provide adequate funding for the number of clients eligible and enrolled, the plans assume the risk of such care through a capitated payment. It is my opinion that non-profit and/or public plans will only accept risk and be willing/able to pay expenses that might exceed premiums if they

> are supported by public funds from hospital/health care districts. Not all of Texas's 254 counties are covered by such districts, so ultimately non-profit coverage of every county's population is not feasible."

Id. Thus, there is no genuine issue as to whether Texas may avoid the HIPF by merely contracting with non-profit MCOs.

This is true for all Plaintiffs. Indiana's unrebutted expert testimony confirms that it contracts with its two HIPF-exempt MCOs, ECF No. 54-1 at A0121–22 ¶¶ 6–10, although "they are not capable of handling all Indiana's Medicaid." *Id.* at A0129 ¶ 2. Wisconsin has the same problem, *id.* at A1163 ¶ 7, as does Kansas, *id.* at A133 ¶ 8, Louisiana, *id.* at A293 ¶ 9, and Nebraska, *id.* at A476 ¶ 18.

Defendants do not counter with competing evidence, but complain only about the amount of evidence submitted by Plaintiffs. *See, e.g.*, ECF No. 64 at 11 ("Plaintiffs have not established that in Texas, the necessary number of exempt MCOs does not exist."). And so as to contrive some form of genuine issue, Defendants present their complaint through the guise of expert testimony.[4] But experts are not the arbiters of the sufficiency of the evidence or whether a genuine issue exists—the Court is. Defendants cannot avoid summary judgment by securing an expert to declare that the Plaintiffs have not met their evidentiary burden.

Alternatively, Defendants' arguments regarding whether some of Plaintiffs' HIPF liability could be alleviated by greater usage of non-profit MCOs are actually mitigation arguments, which are not before the Court. Failure to mitigate damages is an affirmative defense that Defendants did not plead. ECF No. 43 at 16–17; *E.E.O.C. v. Serv. Temps Inc.*, 679 F.3d 323, 334 n.30 (5th Cir. 2012) (noting that

[4] The June 5, 2017 submission of the Declaration of James I. Golden, ECF No. 64-1 at 3–11; DA 1–11, and the Declaration of Christopher J. Truffer, ECF No. 64-1 at 148–65; DA 146–63, was the first time that any opinions or conclusions of these witnesses was disclosed to the Plaintiffs. While the identity of these two witnesses was previously disclosed to Plaintiffs, ECF No. 47, the entirety of that 17-page filing was devoid of any substance, opinions, or otherwise. Accordingly, Plaintiffs intend to move to exclude the testimony and all evidence related to Messers Golden and Truffer by the July 13, 2017 deadline.

failure to mitigate is an affirmative defense that must be included in defendant's answer). As an affirmative defense, Defendants have the burden of proof to show that Plaintiffs failed to mitigate. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966). Even if Defendants did properly plead a mitigation defense, and properly move for summary judgment thereon, they have nonetheless failed to offer a scintilla of evidence for their claim that Plaintiffs can provide all necessary managed care via HIPF-exempt MCOs.

2. Contracting Exclusively With HIPF-Exempt MCOs Is Unreasonable.

Because insufficient non-profit MCOs exist to service Plaintiffs' Medicaid beneficiaries, Plaintiffs need not make the decision whether to place all of their Medicaid eggs into the non-profit basket. But even if Plaintiffs were required to choose whether they would service their Medicaid population exclusively through non-profit providers, the unrebutted evidence demonstrates that choosing an exclusive non-profit path is imprudent, both factually and legally. Not only is reasonableness a hallmark of state decisions in managing Medicaid plans,[5] but it is significant to the self-infliction query. This is because the alternative available to Plaintiffs must be reasonable or "similar option[s]" for an injury to be self-inflicted. *Texas*, 809 F.3d at 159. But mere theoretical options, or the existence of a Hobson's Choice, is insufficient to declare an injury self-inflicted. *Id.* Therefore, using only non-profit MCOs is not a reasonable alternative to avoid the HIPF.

Plaintiffs' non-profit MCOs, as a group, do not deliver inherently superior care to Medicaid patients. ECF No. 54-1 at A0122 ¶ 9. Thus, there is nothing for states or

[5] *Cf. Alexander v. Choate*, 469 U.S. 287, 307 n.32 (1985) (discussing "a State's longstanding discretion to set otherwise reasonable Medicaid coverage rules"); *Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275–76 (2006) ("the state agency in charge of Medicaid (here, ADHS) [must] 'take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan.'" (quoting 42 U.S.C. § 1396a(a)(25)(A))).

patients to gain in terms of quality of care through non-profit service providers. More importantly, it is imprudent and dangerous to assign too many Medicaid clients to a single MCO. Since the passage of the ACA, the healthcare market has been in flux, with insurers leaving markets at unprecedented rates. *Id.* at A0122 ¶ 10.[6] And the nonprofit MCOs are generally willing to assume less risk than the for-profit MCOs, leaving them with insufficient scale to provide services to all recipients. *Id.* at A1044. "If a plan is acquired, goes out of business, or pulls out of a market, the state must then place its members in another MCO." *Id.* at A0122 ¶ 10. This is not an abstract concern. "Advantage Health Plan in Indiana recently exited the Medicare and Medicaid business [and] Centene's subsidiary in Kentucky exited the state Medicaid program during their contract period." *Id.*

Meeting the health care needs of underprivileged citizens is a priority of Plaintiffs. The percentage of Plaintiffs' budgets dedicated to Medicaid is more than adequate evidence of this priority. *See* ECF No. 54 at 19–20. And because those that benefit from Medicaid demonstrate a substantial need for the program, playing fast-and-loose with their Medicaid coverage is inappropriate. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (sustaining state programs that limit Medicaid availability based on spouse's income as "reasonable exercises").

Defendants ignore these admonitions and the level of prudence necessary to manage an entitlement program with limited resources. Moreover, Defendants offer no evidence to counter the lack of wisdom and unreasonable risk associated with placing the entirety of its Medicaid services with non-profit providers. That Defendants think less of these concerns than Plaintiffs does not rebut expert

---

[6] *See also* Tami Luhby, *More insurers abandon Obamacare. Who might be next?*, CNN MONEY, April 5, 2017, http://money.cnn.com/2017/04/05/news/economy/obamacare-insurers/index.html; Edmund Haislmaier, *Insurer ACA Exchange Participation Declines in 2016*, HERITAGE FOUNDATION, Mar. 14, 2016, http://www.heritage.org/health-care-reform/report/insurer-aca-exchange-participation-declines-2016.

testimony, nor does it create a genuine issue. *See Webster v. Offshore Food Serv., Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970) (finding summary judgment proper where movant offered "unequivocal, uncontradicted and unimpeached testimony of an expert witness"); *Dean v. Chrysler Corp.*, 38 F.3d 568, 1994 WL 574188 (5th Cir. 1994) (unpublished opinion) (finding summary judgment proper where movant offered expert testimony contradicted only by assertions of lay witness). To the contrary, the evidence proffered by Plaintiffs demonstrates that contracting exclusively with non-profit MCOs is not only a self-inflicted injury, but inconsistent with the reasonableness expectations of the Medicaid program as a whole.

3. Plaintiffs Possess No Reasonable Alternatives to Managed Care.

The Court has already rejected the argument that Plaintiffs may avoid injury by switching back to a fee-for-service model, noting "the possibility that a plaintiff could avoid injury by incurring other costs does not negate standing". ECF No. 34 at 15 (citing *Texas*, 809 F.3d at 156–57). Since that ruling, Plaintiffs submitted unrebutted expert evidence that significant costs are inevitable if Plaintiffs abandon managed care models. *See* ECF No. 54 at 16–19.

No credible alternative model for delivering Medicaid services exists, and abandoning managed care is more costly than paying the HIPF. *Id.* Defendants do not address the cost differences between managed care and fee-for-service as it is impossible for Defendants to argue the economic benefit of fee-for-service healthcare when they are transitioning to managed care, like Plaintiffs. *Id.* at 16–17. Thus, as in *Texas*, "treating the availability of changing state law as a bar to standing would deprive states of judicial recourse for many *bona fide* harms. . . . And states could offset almost any financial loss by raising taxes or fees. The existence of that alternative does not mean they lack standing." *Texas*, 809 F.3d at 157.

While Defendants attack the timing of some Plaintiffs' moves towards

managed care as unreasonable (because they began after enactment of the ACA), ECF No. 64 at 12–13, they do not dispute that such moves result in substantial and necessary savings. That Plaintiffs can avoid their injuries by choosing an even more costly option cannot negate the fact that Plaintiffs suffer an injury either way. Furthermore, Defendants mark time based only on when the ACA was enacted (2010) while ignoring when ASOP No. 49 became law (2015). All Plaintiffs began their managed care transition long before ASOP No. 49 existed,[7] so Defendants cannot argue that Plaintiffs began managed care transitions with the full knowledge of ASOP No. 49 in hand.[8] But even Plaintiffs chose to begin transitions to managed care after ASOP 49, that choice is insufficient to pose as a self-inflicted injury. By transitioning to managed care, Plaintiffs are not "manufactur[ing] standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013). Instead, Plaintiffs are prudently avoiding the certain future harm of not transitioning to managed care. The overwhelming financial savings of managed care makes a non-transition a self-inflicted wound. That Plaintiffs' transition exposes them to the HIPF does not negate standing or resolve the HIPF's unlawfulness.

At bottom, the evidence provided by Plaintiffs clearly shows that there is no

[7] Defendants unfairly label Louisiana's transition to managed care as supposedly beginning in 2016. ECF No. 64 at 12. They inappropriately presume that Director Steele's "February" in paragraph 4 of her report regards February 2016, but they're incorrect. As is made clear by the reports attached to Steele's Declaration, "Lousiana's Medicaid managed-care delivery system" was "[i]nitially implemented in February 2012." ECF No. 54-1 at A0300. Clearly, Director Steele inadvertently neglected to add a "2012" to her Declaration.

[8] Defendants' timing arguments presume that states can flip from fee-for-service to managed care, or vice versa, in the blink of an eye. But overhauling a Medicaid program is more akin to doing a 180-degree turn in an aircraft carrier. Texas's move to managed care began in the late 1990's. ECF No. 54-1 at A1006. By the end of 2005, 40% of Texas's Medicaid clients received managed care services. *Id.* at A1007. By 2012, Texas reached the 80% mark, and then 87% by 2015. *Id.* By the end of 2017, Texas expects 93% of its Medicaid clients to be part of a managed care network. *Id.* at A1007–A1008. Thus, even if Defendants were able to articulate a valid timing argument, that argument must be viewed through the lens of the unreasonable programmatic change that Defendants demand—another massive overhaul of a huge program that takes years, even decades.

genuine issue as to whether transitioning backwards, and returning to a fee-for-service model, is a reasonable or "similar" option for Plaintiffs. Defendants can extol this option only as a theoretical possibility. They offer no evidence that it is "similar."

C. Plaintiffs' Injuries Are Easily Traceable.

Plaintiffs' eleven experts confirm that Defendants' regulations pass the full HIPF to the States. ECF No. 54 at 13–14. This testimony is substantiated by Defendants' experts. ECF No. 54 at 14 n.40. If Plaintiffs fail to pay the HIPF, they are ineligible for federal Medicaid funding. *Id.* at 19, 23.

Defendants argue that Plaintiffs' injury is not fairly traceable to the federal government because the ACA imposes the HIPF on MCOs, not on the States. ECF No. 64 at 9–10. This Congress's reaffirmation of its "actuarial[] sound[ness]" requirement for Medicaid MCOs, 42 U.S.C. § 1396b(m), and that ASOP 49 substantively changed matters, contrary to Defendants' repeated assertions. ECF No. 64 at 3, 26, 28, 30, 31, 40, 41, 50. ASOP 49 removed actuarial discretion over the degree to which the HIPF must be included in capitation rates. Before ASOP 49, addressing the HIPF was at the discretion of the actuary. But ASOP 49 mandates that the actuary "should apply an adjustment to reflect the costs of the tax." ASOP 49 § 3.2.12(d) (Mar. 2015). Subsequent to this shift, Plaintiffs' experts are unware of circumstances in which ASOP 49 does not require full payment of the HIPF by Plaintiffs, and Defendants offer no examples of such a circumstance.

Before ASOP 49, Defendants declared that "[s]tates and their actuaries have flexibility in incorporating the [HIPF] into the state's managed care capitation rates" and that "[s]tates have the flexibility to account for the [HIPF] on a prospective or retroactive basis."[9] To be fair, some actuaries foresaw payment of the HIPF as an

[9] U.S. DEP'T OF HEALTH AND HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICAID AND CHIP FAQS: HEALTH INSURANCE PROVIDERS FEE FOR MEDICAID MANAGED CARE PLANS (Oct. 2014), *available at* https://www.medicaid.gov/federal-policy-guidance/downloads/faq-10-06-2014.pdf.

obligation before ASOP 49 existed. ECF No. 54-1 at A1103. However, even if the discretionary standard before ASOP 49 imputed most of the HIPF to the States, or even 99% of it, ASOP 49 unequivocally creates harm by guaranteeing, in every circumstance, a 100% imputation. Thus, the *de facto* removal of actuarial discretion is a substantive change that injures Plaintiffs. Thus, ASOP 49 injures Plaintiffs, and Defendants waived any argument as to the degree of injury. *See supra* Section I.B.

But even if Defendants' assertions are taken at face value, and the HIPF is merely just another "downstream costs increase for any entity with which the state or one of its instrumentalities does business," ECF No. 64 at 9–10, this only serves to substantiate Plaintiffs' Spending Clause arguments. *See* ECF No. 54 at 21–28; *infra* at Section III. For if it was clear to Defendants, or Congress, that the HIPF would ultimately become the sole responsibility of the States by virtue of the preexisting regulation, 42 C.F.R. § 438.6, then Congress's employment of a preexisting regulation to coerce the States into paying the HIPF, and Defendants' deliberate decision to leave 42 C.F.R. § 438.6 unamended, is unlawful.

II. THE COURT HAS SUBJECT MATTER JURISDICTION.

A. The Anti-Injunction Act Does not Bar Plaintiffs' Claims.

Whether the HIPF is labeled a "fee" or "tax" by Congress, the AIA does not bar jurisdiction. As the Court already held, if the HIPF is a "fee," then AIA prohibition does not apply. ECF No. 34 at 23. And if it is a "tax," it is not a tax on Plaintiffs, but one committed to Plaintiffs' MCOs. *Id.* Because the tax is textually committed to MCOs, the Court dismissed Plaintiffs' refund claims. *Id.* at 21. That leaves Plaintiffs without a remedy for being unlawfully taxed, triggering the exception to the AIA described in *South Carolina v. Regan*, 465 U.S. 367, 378 (1984).

In *Regan*, South Carolina challenged a federal tax on bearer bonds, which it issued. *Id.* at 379. Because of the tax, South Carolina paid a higher interest rate on

the bonds, causing South Carolina to bear part of the tax burden. *Id.* at 371. But because South Carolina did not directly pay the tax, it had no available remedy to challenge its lawfulness. The Supreme Court held that the AIA did not apply:

> In sum, the Act's purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy. . . . Under these circumstances, the State will be unable to utilize any statutory procedure to contest the constitutionality of [the provision]. Accordingly, the Act cannot bar this action.

Id. at 378–80 (footnotes omitted). Here, because the HIPF is initially paid by MCOs, Plaintiffs have no remedy, though they bear the full burden of the HIPF. ECF No. 34 at 21. Thus, the AIA does not bar Plaintiffs' claims. *See Regan*, 465 U.S. at 380.

Defendants assert that *Regan* does not apply because Plaintiffs do not challenge the tax liability of the MCOs. ECF No. 64 at 21. But Plaintiffs *do* challenge the portion of the MCOs' tax liability that is attributable to providing Medicaid services to the States. *See supra* at Section I.A. Thus, *Regan* provides an exception.

Further, the AIA bars suits by "any person," 26 U.S.C. § 7421(a), and States are not defined as "persons" for purposes of that Act. A person is "an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(1). A company or corporation "includes associations, joint-stock companies, and insurance companies," 26 U.S.C. § 7701(3), and does not include Plaintiff States as the term "State" is defined separately. 26 U.S.C. § 7701(10). Thus, the AIA does not apply to Plaintiffs even if the HIPF is considered a "tax" for purposes of the AIA.

B. The Plaintiffs' Claims Are Not Time-Barred.

Since the HIPF was created in 2010, and ASOP 49 was adopted in 2015, Plaintiffs filed this suit well within the statute of limitations. Defendants cling to the 2002 promulgation of 42 C.F.R. § 438.6. ECF No. 64 at 39–43. Though Defendants cite *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, to support their argument, ECF No. 64 at 40, Defendants omit the most significant part.

> It is possible, however, to challenge a regulation after the limitations period has expired, provided that the ground for the challenge is that the issuing agency exceeded its constitutional or statutory authority. To sustain such a challenge, however, the claimant must show some direct, final agency action involving the particular plaintiff within six years of filing suit.
>
> . . .
>
> [A]n agency's application of a rule to a party creates a new, six-year cause of action to challenge to the agency's constitutional or statutory authority.

112 F.3d 1283, 1287 (5th Cir. 1997). "When an agency applies a previously adopted rule in a particular case, the [limitations period] does not bar later judicial review of the substantive statutory authority for their enactment or of their applicability to a particular situation." *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985).

The ACA changed things, creating the HIPF. ASOP 49 also changed things. Unlike prior ASOPs,[10] where taxes *could* impact an actuary's judgment, ASOP 49 removed discretion regarding the HIPF. *See* ECF No. 29 at 11–12. While Defendants call this change a "clarifi[cation]," ECF No. 64 at 41, they cannot circumvent the fact that it is a substantive change that triggered a new statute of limitations period.

The Court has already found that Defendants' application of the actuarial soundness requirement to the HIPF is a new application that begins a new statute of limitations period. ECF No. 34 at 25–26. In 2010, Congress imposed the HIPF on Medicaid MCOs. Knowing the HIPF imposed a massive new financial requirement, Congress simultaneously amended the law to maintain an "actuarially sound[ness]" requirement for Medicaid MCOs subject to the HIPF. 42 U.S.C. § 1396b(m); 124 Stat. 308. Defendant agencies (by inaction)[11] maintained the delegation of authority to ASB, which provided ASOP 49, re-altering the concept of "actuarial[] sound[ness]" by

---

[10] In the original ASOP 1, "tax rates" are one of over 13 different factors, in two different categories, that *could* factor into an actuary's "sound professional judgment."

[11] Under the APA, a claim may proceed "where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). Government is always required to take action necessary to comply with the Constitution.

removing preexisting discretion regarding the HIPF. And once ASOP 49 appeared, Defendants did not disavow ASOP 49 in any way. A multitude of federal actions justifying litigation have occurred since 2010. By any measurement or standard, Plaintiffs' brought their lawsuit well within the time period of 28 U.S.C. § 2401.

III. THE HIPF VIOLATES THE SPENDING CLAUSE.

As to their Spending Clause claims, Plaintiffs challenge *Congressional* action. ECF No. 19 at ¶¶ 46–49, 58–59, 72–75. The HIPF violates the Spending Clause because it threatens to remove Medicaid funds if Plaintiffs fail to fully reimburse MCOs for HIPF payments. Defendants' assertion that the HIPF is an exercise of the taxing power, ECF No. 64 at 22–24,[12] disregards the separate question as to whether the HIPF is a valid condition of the Medicaid program under the Spending Clause.

Indeed, governmental action cannot be partially constitutional, as governmental action must survive scrutiny under all portions of the Constitution, both facially and as applied, in order to warrant sustainer by the Court. *Cf. Texas Democratic Party v. Benkiser*, 459 F.3d 582, 588 n.8 (5th Cir. 2006) (citing *Women's Medical Prof. Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997)). As the Court has already recognized, the HIPF's role as a condition on states receiving Medicaid funds from the federal government implicates the spending power. ECF No. 34 at 29.

Defendants declare that the HIPF does not implicate the Spending Clause because it is a tax, not an expenditure program. ECF No. 64 at 24–25. Wearing blinders, one can take this narrow view—that the HIPF merely imposes a tax, and nothing more. But the HIPF cannot be viewed as a narrow enactment that raises revenue and nothing else. Rather, the HIPF is inextricably intertwined with Medicaid and, by Congress's hand, the HIPF imposes unconstitutional conditions on Medicaid.

[12] In this context, the parties disagree as to whether this exercise of the federal taxing power is valid. *See infra* Section V.

Congress imposed the HIPF on Medicaid MCOs, among others, and Congress requires that Medicaid contracts be "actuarially sound," 42 U.S.C. § 1396b(m). Moreover, Congress decided that the HIPF should be an excise tax, ECF No. 54-1 at A0047, and thus non-deductible, *id.* at A0049, which impacts any analysis of Congress's "actuarial[] sound[ness]" requirement. *See, e.g.*, ECF No. 54-1 at A0199, A0994, A1000, A1049, A1091, A1103, A1148, A1156, A1158. Congress violated the Spending Clause, and Defendants failed to regulatorily remedy that violation.

A. The HIPF Unconstitutionally Coerces States to Pay for Costs of Those Not Covered by Medicaid.

It is coercive for Defendants to condition otherwise qualifying Medicaid funds on participation in new ACA programs. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606 (2012) ("*NFIB*"). Notably, Defendants abandon prior arguments about the threatened of loss of funds to Plaintiffs being insignificant. The penalty for noncompliance makes a provision coercive. The penalty here—loss of Medicaid funds—is identical to that in *NFIB*. *See* ECF No. 54 at 24–25. Plaintiffs demonstrate that the impact on their budgets is constitutionally significant. ECF No. 54 at 19–21.

Defendants now try a different argument—to distinguish *NFIB* based on the nature of the condition. ECF No. 64 at 25–27. Unlike the "new expanded program" in *NFIB*, Defendants contend "the HIPF is not, in any sense a new spending program." *Id.* at 25. But this is not the test for coerciveness—whether the new condition is, in fact, "new" or "expanded." It is the threat of loss attached to the condition that controls. Nonetheless, even if novelty were a factor, the HIPF more than qualifies.

As far as Medicaid capitation rates are concerned, the HIPF is both "new" and "expanded." Experts agree that "there are aspects of the HIPF which do make it a[n] unusual concept." ECF No. 54-1 at A1156. Federal premium taxes on Medicaid plans are unique, *id.*, and the HIPF's non-deductibility sets it apart. Indeed, "[t]he HIPF is a somewhat unique element in capitation rate development." ECF No. 54-1 at A0199.

B. The HIPF Is Insufficiently Related to Medicaid to Be a Legitimate Exercise of Congress's Spending Power.

Conditioning Medicaid spending on the payment of the HIPF is unconstitutional because, as Defendants concede, the HIPF "provides revenue that can be used by the federal government to fund ACA programs." ECF No. 64 at 27. Thus, the HIPF funds the ACA, which is "in reality a new program," not a "mere alteration of existing Medicaid." *NFIB*, 123 S. Ct. at 2605–06. The Court already found that the HIPF is not sufficiently related to Medicaid spending to serve as a valid use of the Spending Clause. ECF No. 34 at 31. Because Medicaid is not an ACA program, the HIPF is unconstitutional. *See NFIB*, 132 S. Ct. at 2605–06.

Defendants concede that the HIPF itself does not expand Medicaid, ECF No 64 at 26–27, and this is the point. The HIPF has nothing to do with Medicaid, yet is a significant Medicaid liability. And though the ACA exists "to increase the number of Americans covered by health insurance," *NFIB*, 132 S. Ct. at 2580, Medicaid exists for a different purpose—"to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care." *Id.* at 2581. Thus, neither the HIPF nor its purposes are sufficiently related to Medicaid to justify the condition. *NFIB*, 132 S. Ct. at 2605–06.

That the proceeds from the HIPF go to the Treasury does not negate the incongruent purposes of the HIPF and Medicaid. Virtually all taxes go to the treasury. Were Plaintiffs required to draw a dollar-for-dollar line from the HIPF to the ACA, ECF No. 64 at 27, Congress could circumvent almost any Spending Clause challenge. Because the HIPF goes to the Treasury, some of it must inevitably end up in Medicaid and other federal programs, as Defendants contend. ECF No. 64-1 at DA 10. But by this reasoning, *no* tax or fee is related to Medicaid, as the majority of federal funding does not go to Medicaid. Defendants' standard must be rejected.

That Plaintiffs could theoretically avoid the HIPF by moving away from

managed care agreements does not negate the coercive nature of the condition. Rather, as Plaintiffs demonstrate, *supra* at Section I.B.; ECF No. 54 at 16–19, such a drastic overhaul of Plaintiffs' healthcare system would cause greater harm, which only enhances the coercive nature of the condition. Indeed, a required reversion to a fee-for-service model for Plaintiffs' Medicaid programs would be such a substantial change to the existing practice of Medicaid that it would itself constitute "a new program." *NFIB*, 132 S. Ct. at 2605.

C. The HIPF Violates Standards of Clear Notice.

Clear notice must be given, by Congress, of spending conditions. Defendants aver that Congress left a gap for the agency to fill, but any gap left by the "actuarial[] sound[ness]" requirement of 42 U.S.C. § 1396b(m) is too narrow for the HIPF. If section 1396b is a garden hose designed to maintain the health of the Medicaid program, the HIPF is a golf ball. It not only doesn't fit, but has no capacity to strengthen Medicaid program by siphoning money from the States. But because Congress pre-placed an "actuarial[] sound[ness]" requirement into the law, Defendants argue that Congress gave clear notice of *any* subsequent burden. By Defendants' rationale, Congress can quadruple the HIPF. Since Medicaid contracts must be "actuarially sound," clear notice of the quadrupled burden was given long ago. The potential for abuse from Defendants' argument is limitless.

But "the power to attach conditions to grants to the States has limits." *NFIB*, 132 S. Ct. at 2659. If the "actuarial[] sound[ness]" requirement of 42 U.S.C. § 1396b(m) is "wielded without concern for the federal balance," as it is here with the HIPF, it "has the potential to obliterate distinctions between national and local spheres of interest and power . . . ." *Id.* Concluding that 42 U.S.C. § 1396b(m) provided clear notice of the HIPF—or whatever else Congress does in the future—is unconscionable. The Constitution demands more. For if clear notice exists for any

future liability Congress may place upon Medicaid, the "actuarial[] sound[ness]" requirement permits Congress to regularly raid state coffers to fund any program or deficit, all while holding hostage Plaintiffs' policy to care for its most needy citizens.

IV. Defendants Lack Statutory Authority to Impose the HIPF on the States.

The HIPF does not apply to "government entities," ECF No. 54-1 at A0045–46, yet Defendants claim power to make Plaintiffs pay the HIPF via delegation and statutory ambiguity. ECF No. 64 at 45–49. But agency interpretations are given no weight if they are "manifestly contrary to the statute." *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984). While Defendants argue that their authority stems from an "express delegation" to define "actuarial soundness," ECF. No. 64 at 46, any delegated authority is cabined by other statutory provisions, such as Section 9010, which exempts the States from the HIPF. ECF No. 54-1 at A0045–46.

The unlawful effects of Defendants' regulations result from three primary decisions. First, the HIPF is applied to MCOs doing business with the States. Second, delegating the power to define actuarial soundness to the ASB. Third, adopting (by silence) ASOP 49, which results in 100% of the HIPF being paid by the States. Even if these steps were lawful individually, their combined effect is contrary to the ACA provision that exempts the States from paying the HIPF. The government cannot accomplish piecemeal what is unlawful if taken as a single action. Because this combination of decisions contradicts the ACA, Defendants actions are unlawful.

The *ultra vires* nature of these decisions is especially evident given that *Chevron* does not apply, *i.e.*, *Chevron* Step Zero. *See infra* Section VII. That is so for three reasons, each of which precludes *Chevron's* application. First, *Chevron* is inapplicable when agency action contradicts Congress. *See City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1874 (2013). As explained above, that is the case here.

Second, *Chevron* deference is not proper when interpreting a statutory

provision raises a "question of deep 'economic and political significance' that is central to th[e] statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citation omitted). Defendants argue that the monetary value of the HIPF, approximately $14 billion/year nationwide, is insignificant and, thus, delegable. But the value of the subsidies in *King* also involved "billions of dollars" and too significant to be delegated. *Id.* However, the Court looked beyond the value of the subsidies to their effects on the broader healthcare market to determine their "deep economic and political significance." *Id.* Here too, the significance of the HIPF as a condition on Medicaid funds is greater than its dollar value. If the States do not pay—just as in *King*—millions of people will lose their healthcare. *Id.* Whether the focus is on the dollar value of the HIPF, or its significance as a condition of Medicaid funding, its application to the States is too significant to be delegated via ambiguity.

Third, Congress cannot delegate the creation of spending conditions to an agency under *Chevron*. While *Chevron* is triggered by ambiguity, spending conditions require "clear notice." These requirements are mutually exclusive and unfulfilled in this instance. *See infra* Section VII.

V. THE HIPF UNCONSTITUTIONALLY TAXES THE STATES IN VIOLATION OF THE TENTH AMENDMENT.

The taxing power does not extend to taxing the States. Defendants go to some length to demonstrate that the federal government has a taxing power. ECF No. 64 at 22–24. But as with any power, the federal government's taxing authority is not limitless. The question is not whether a taxing power exists, but whether that power extends to imposing a tax that is 100% paid by the States.

The HIPF is a pass-through tax on the States. While MCOs initially pay the tax, the Court has acknowledged they are then reimbursed for 100% of the cost by the States. *See* ECF No. 34 at 40; ECF No. 54 at 12–21. Defendants acknowledge that "the economic burden of the HIPF may be passed on to the states . . . ." ECF No. 64

at 29.[13] And because the States assume 100% of the liability of the HIPF, the issue presented does not involve a "downstream economic effect of the tax." ECF No. 64 at 33. There is nothing attenuated or "downstream" about Plaintiffs assuming 100% of the HIPF, and this distinguishes the cases argued by Defendants.

That the States reimburse the full amount of the HIPF is discriminatory, and Defendants do not dispute that the HIPF is functionally imposed on the States. Nor do they dispute that other entities are not required to reimburse 100% of the HIPF to healthcare providers they contract with. While Defendants note that other healthcare providers aside from MCOs pay the HIPF, they offer no suggestion that their customers are require to reimburse the fees paid. ECF No. 64 at 31–33.

The argument that the Constitution bars federal taxes that interfere with state sovereignty is not barred by issue preclusion.[14] Here, the issue is not even analogous to *Florida ex rel. McCollum*. Plaintiffs in that case challenged the "Employer Mandate" of the ACA, not the HIPF. *Florida ex rel. McCollum v. U.S. Dept. of Health & Human Svcs.*, 716 F. Supp. 2d 1120, 1153 (N.D. Fla. 2010). And the Court rejected their argument by analogizing the mandate to other conditions of employment—reasoning inapplicable to the HIPF. *Id.* Further, Plaintiffs Kansas and Wisconsin were not parties to that litigation. *Id.* at 1127 n.1. Thus, the Florida litigation is no basis for issue preclusion or even persuasive authority on this issue.

---

[13] Defendants contend that because the federal government supplies Medicaid funding, it also pays a portion of the HIPF. ECF No. 64 at 29. But this red herring ignores that the HIPF is paid *to Defendants*. To the extent Defendants pay the HIPF, it is akin to taking money out of their wallet only to put it back in again. What Defendants cannot refute is that 100% of the HIPF is removed from the coffers of Plaintiffs, and 100% of the net HIPF payments come from the States. Even if Defendants committed to reimbursing the States for all but $100 of the HIPF, this commitment would only mitigate the harm to Plaintiffs. The pass through tax would still be unconstitutionally discriminatory and an unconstitutional tax on the States; but the harm would merely be reduced.

[14] For issue preclusion to apply, "(1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that would make it unfair to apply the doctrine." *Copeland, et al. v. Merrill Lynch & Co., et al.*, 47 F.3d 1415, 1422 (5th Cir. 1995) (citing *United States v. Shanbaum*, 10 F.3d 305, 311 (5th Cir. 1994)).

That the federal government has long imposed taxes on healthcare providers, including corporate income taxes is inapposite. ECF No. 64 at 34 n.23. Plaintiffs do not dispute that the federal government has a taxing power, or that it can tax MCOs. But the HIPF doesn't stop with the MCOs. Per Congress, *see* 42 U.S.C. § 1396b(m), the HIPF is routed to the States. This makes the HIPF an unconstitutionally discriminatory tax that interferes with state sovereignty and must be enjoined.

VI. ASB Is Exercising Unlawfully Delegated Legislative Power.

Currin does not control this case. The Tobacco growers did not write the regulations and could only vote to block them. *Currin v. Wallace*, 306 U.S. 1, 15–16 (1939). ASB is writing law that the States must follow to receive funding. Thus, a private organization is making law—a clear example of unconstitutional delegation.

While Defendants contend that "Congress did not establish the actuarial soundness standard," ECF No. 64 at 36, though the "actuarial[] sound[ness]" standard of 42 U.S.C. § 1396b(m) speaks for itself. Moreover, Defendants cite no support for their assertion that the ASOPs are merely advisory and not binding. ECF No. 64 at 37. This comprises yet another theoretical argument, detached from reality. Defendants' own regulation requires that MCO contracts

> [h]ave been certified, as meeting the requirements of this paragraph (c), by actuaries *who meet the qualification standards established by the American Academy of Actuaries and follow the practice standards established by the Actuarial Standards Board.*

42 C.F.R. § 438.6(c)(1)(i)(C) (2015) (emphasis added).[15] Moreover, only actuaries can declare contracts "actuarially sound." Actuaries are governed by the Actuarial Board for Counseling and Discipline ("ABCD"), which enforces the Code of Professional Conduct. ECF No. 54 at 10. Actuaries conclude that ASOP 49 must be followed, ECF

[15] Defendants have amended their regulations since this litigation began, but as they note in their brief, they have not changed the relevant definition of "actuarially sound." ECF No. 64 at 7 n.4. The new regulations are codified at 42 C.F.R. §§ 438.2, 438.4.

No. 54 at 13–14, and a "[f]ailure to satisfy ASOP 49 . . . could result in suspension or expulsion from the Academy," ECF No. 54-1 at A0197, A1102. Thus, Defendants' assertion that ASOP 49 isn't binding are without merit. And because ASOP 49 is binding, the delegation to ASB is one of legislative power rather than advisory power.

The Court has already held that Plaintiffs stated a claim that the Defendants had delegated legislative authority to the ASB. ECF No. 34 at 43–44. It did so based on four factual propositions, *id.* at 43–44, for which Plaintiffs have since offered substantial evidence. ECF No. 54 at 9–11, 35–37. Defendants dispute none of it. Therefore, there is no genuine issue of fact on Plaintiffs' delegation claim, and Court should therefore enjoin the Defendants' delegation of legislative power to the ASB.

VII. The Imposition of the HIPF on the States Violates the Administrative Procedure Act.

By action and inaction, Defendants changed the rules applicable to capitation rates to guarantee the imposition of a multibillion dollar tax on the States, though (1) Congress committed the tax to non-governmental entities, and (2) the Constitution prohibits the taxation of the States. These decisions were made without notice and comment, are unlawful, and arbitrary and capricious. *See* ECF No. 54 at 40–42.

ASOP 49 was imposed without Notice and Comment. Defendants' sole claim that notice and comment was unnecessary is that ASOP 49 "changes nothing." ECF No. 64 at 50. But ASOP 49 removed discretion. *See supra* Sections I.C. and II.B. Thus, notice and comment was required.

While Defendants leap headlong into a *Chevron*-based defense, ECF No. 64 at 43, Defendants' regulations fail at each *Chevron* stage. *See Chevron,* 467 U.S. at 842–43. They fail *Chevron* Step Zero, the threshold inquiry of whether agency deference is warranted in the first place. This step cannot be overlooked, as delegation is antecedent to deference, and "there may be reason to hesitate before concluding that Congress" intended to delegate rulemaking authority to a federal agency. *King*, 135

S. Ct. at 2488–89. It fails at *Chevron* Step One, regarding whether "actuarially sound" regarding the HIPF is ambiguous. And it fails again at *Chevron* Step Two, where the inquiry turns on the reasonableness of the interpretation.

Chevron Step Zero is "'the initial inquiry into whether the *Chevron* framework applies at all.'" *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283, 1303 n.1 (Fed. Cir. 2015) (O'Malley, J., concurring) (quoting Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 191 (2006)). It "asks whether Congress delegated authority to make interpretations carrying the force of law." *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 406 (5th Cir. 2014). That the case concerns a "major question" makes the *Chevron* framework inapplicable. *See supra* Section IV.

Moreover, under Step Zero, there is no clear statement from Congress that the States are to be taxed, and it can never be presumed that Congress delegated the authority to act unconstitutionally (taxing the States). Here, Congress said the opposite. ECF No. 54-1 at 45–46. Thus, while Defendants urge "delegation," they do not reconcile Congress's language to the contrary, representing the opposite of *Chevron's* "express delegation." *Chevron*, 467 U.S. at 843–44. Congress cannot simultaneously exempt States from a tax and then delegate authority to exact that same tax on the States. Nor do Defendants explain how an agency delegation, allowing it to unilaterally change the terms of the "contract" inherent in Spending Clause legislation, simultaneously complies with the "clear notice" requirement.

Contrary to Defendants' demands of deference, Courts "must be absolutely certain that Congress intended such an exercise" before they will uphold it. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). To ensure that Congress intended to raid State coffers, the Constitution requires a "clear statement from Congress." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Bond v. United States*, 134 S. Ct. 2077, 2088–90 (2014); *Gregory*, 501 U.S. at 460, 464. "If

Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (citation and quotation marks omitted). Because Congress's clear statement demonstrates the opposite of what Defendants urge, the *Chevron* inquiry ends with Step Zero—there is no delegation.

Even if *Chevron* applies, the agency actions (and inactions) here survive neither Step One nor Step Two. Step One asks whether the agency's answer is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 842–43. Defendants contend that Congress left a gap to be filled, making an "express delegation" consistent with the right of HHS to promulgate rules for Medicaid. ECF No. 64 at 46. Defendants' argument surveys every related statute, except the one where Congress excluded "governmental entities" from the HIPF. ECF No. 54-1 at 45–46.

Step Two asks whether the regulatory actions (and inactions) are arbitrary and capricious. But Defendants assess only whether the initial promulgation of 42 C.F.R. § 438.6 in 2002 was reasonable at the time. ECF No. 64 at 47. But Plaintiffs don't challenge whether 42 C.F.R. § 438.6 was reasonable in 2002. Laws once reasonable may prove unreasonable over time as circumstances change. Plaintiffs re-urge their arguments as to why the complained of regulatory action and inaction is arbitrary and capricious. ECF No. 29 at 24–25; ECF No. 54 at 40–42.

Conclusion

For all the reasons stated herein, in the Court's Order Denying Partially Defendants' Motion to Dismiss, Plaintiffs' pleadings and briefs, and as supported by the evidence contained in Plaintiffs' Appendix, the Court should enter summary judgment in Plaintiffs' favor, permanently enjoin Defendants from enforcing the HIPF against Plaintiffs, and grant Plaintiffs all other relief, in law or in equity, to which they are justly entitled.

Respectfully submitted this the 23rd day of June 2017,

DEREK SCHMIDT
Attorney General of Kansas

JEFF LANDRY
Attorney General of Louisiana

CURTIS HILL
Attorney General of Indiana

BRAD SCHIMEL
Attorney General of Wisconsin

DOUG PETERSON
Attorney General of Nebraska

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY D. STARR
Deputy First Assistant Attorney General

MICHEL C. TOTH
Special Counsel to the First Assistant Attorney General

ANDREW D. LEONIE
Associate Deputy Attorney General

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS
Associate Deputy Attorney General
Texas Bar No. 24002695
austin.nimocks@oag.texas.gov

ANGELA V. COLMENERO
Division Chief – General Litigation

THOMAS A. ALBRIGHT
Assistant Attorney General

ANDREW B. STEPHENS
Assistant Attorney General

DAVID J. HACKER
Senior Counsel

JOEL STONEDALE
Counsel

Office of Special Litigation
ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Mail Code 009
Austin, Texas 78711-2548
Tel: 512-936-1414

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that on the 23rd day of June, 2017, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Joel Stonedale
JOEL STONEDALE

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS, JR., SBN 132099
tboutrous@gibsondunn.com
KATHERINE M. MARQUART, SBN 248043
kmarquart@gibsondunn.com
JESSE S. GABRIEL, SBN 263137
jgabriel@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

ETHAN D. DETTMER, SBN 196046
edettmer@gibsondunn.com
555 Mission Street
San Francisco, CA 94105
Telephone: (415) 393-8200
Facsimile: (415) 393-8306

PUBLIC COUNSEL
MARK D. ROSENBAUM, SBN 59940
mrosenbaum@publiccounsel.org
JUDY LONDON, SBN 149431
jlondon@publiccounsel.org
610 South Ardmore Avenue
Los Angeles, CA 90005
Telephone: (213) 385-2977
Facsimile: (213) 385-9089

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

[*Additional Counsel Listed on Next Page*]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

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

Defendants.

CIVIL CASE NO.:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Additional Counsel for Plaintiffs

BARRERA LEGAL GROUP, PLLC
LUIS CORTES ROMERO, SBN 310852
lcortes@barreralegal.com
19309 68th Avenue South, Suite R102
Kent, WA 98032
Telephone: (253) 872-4730
Facsimile: (253) 237-1591

LAURENCE H. TRIBE, SBN 39441
larry@tribelaw.com
Harvard Law School
Affiliation for identification purposes only
1575 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (617) 495-1767

ERWIN CHEMERINSKY, *pro hac vice* forthcoming
echemerinsky@law.berkeley.edu
University of California, Berkeley School of Law
Affiliation for identification purposes only
215 Boalt Hall
Berkeley, CA 94720-7200
Telephone: (510) 642-6483

LEAH M. LITMAN, *pro hac vice* forthcoming
llitman@law.uci.edu
University of California, Irvine School of Law
Affiliation for identification purposes only
401 East Peltason Drive
Irvine, CA 92697
Telephone: (949) 824-7722

INTRODUCTION

The young women and men filing this lawsuit embody the American Dream. Brought to this country as children and raised in families that often struggled with poverty and homelessness, each has achieved remarkable success through hard work, fierce determination, and incredible resilience. These are characteristics that have defined Americans throughout our Nation's history. Plaintiffs in this case are also alike in that each has committed to helping others, choosing to direct their time, energy, and considerable talents toward defending, healing, educating, and uplifting individuals and communities that are too often ignored. While each of the Plaintiffs is remarkable in his or her own right, their stories of success—and their commitment to serving others—are common among the nearly 800,000 young people who have come to rely on the Deferred Action for Childhood Arrivals ("DACA") program.

The decision to end the DACA program is a broken promise and an unprecedented violation of the constitutional rights of Plaintiffs and other young people who relied on the federal government to honor that promise. The government established the DACA program with great fanfare in 2012. Under DACA, individuals who were brought to the United States as children and meet certain criteria, and who are investigated and found to pose no threat to public safety or national security, are granted deferred action and work authorization for a two-year period, subject to renewal. These young people are commonly referred to as "Dreamers" in recognition of the fact that they have long called this country home and aspire to be part of the American Dream.

To apply for DACA, eligible individuals are required to provide the government with highly sensitive personal information, pay a substantial fee, and submit to a rigorous Department of Homeland Security background check. Initially, the DACA program was met with skepticism in immigrant communities, as many Dreamers were understandably reluctant to voluntarily disclose information (including their current home address) that could facilitate their removal from the United States and place their family members at risk. To combat this fear the government launched an extensive outreach campaign urging Dreamers to apply for DACA, repeatedly promising that they would be able to renew their DACA status and that information they provided in connection with the program would not be used for immigration enforcement purposes. As a result, hundreds of

thousands of young people applied for, and were granted, DACA status. The government quickly realized the administrative, law enforcement, public safety, and economic benefits it sought in establishing the program.

In creating DACA, the government offered Plaintiffs and other Dreamers a straightforward deal—if they stepped forward, shared sensitive personal information, and passed a background check, they would be granted renewable protection and would be allowed to live and work in the United States provided that they played by the rules. DACA also provided access to important benefits, and enabled recipients to open bank accounts, obtain credit cards, start businesses, purchase homes and cars, and conduct other aspects of daily life that were otherwise often unavailable to them. In so doing, DACA has allowed Plaintiffs and nearly 800,000 young people to become contributing members of society and pursue the American Dream.

In taking the irreversible step of identifying themselves to the government, Plaintiffs and other Dreamers trusted the government to honor its word and uphold its end of the bargain. In reliance on the government's promises, DACA recipients took out student loans, accepted job offers, moved to new cities, started businesses, bought homes and cars, and made numerous other life changing decisions. They allowed themselves to fall in love, get married, and start families, trusting that the security and work authorization provided under DACA would enable them to care for (and remain in this country with) their spouses and children.

The transformative impact DACA had for Plaintiffs cannot be overstated. Brought to this country as young children, Plaintiffs have spent virtually their entire lives in the United States. They consider themselves to be Americans and call our nation home. Yet for much of their lives, Plaintiffs were denied basic opportunities and prohibited from realizing their full potential. But DACA changed everything. Beyond a work permit and access to a professional license, DACA provided Plaintiffs the certainty and security necessary to enroll in graduate programs, open businesses, hire employees, build relationships with clients, patients, and students, and begin to start families of their own. Plaintiffs were able to take these risks, and enjoy the benefits of their hard work, because they trusted the government to honor its promises and live up to its word.

Notwithstanding the severe harm it will inflict, the government arbitrarily decided to break its promises to Plaintiffs and hundreds of thousands of other Dreamers by terminating the DACA program. This cruel bait and switch, which was motivated by unconstitutional bias against Mexicans and Latinos, violates the equal protection component of the Fifth Amendment, the due process rights of Plaintiffs and other DACA recipients, and federal law, including the Administrative Procedure Act. Plaintiffs therefore seek equitable and injunctive relief to enjoin this unlawful and unconstitutional action, and respectfully request that the Court compel the government to honor its promises and uphold its end of the DACA bargain.

JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

1. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States. This Court has additional remedial authority under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 701–706.

2. Venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391(b)(2) and (e)(1) because at least one plaintiff resides in this District, a substantial part of the events or omissions giving rise to this action occurred in this District, and each defendant is an agency of the United States or an officer of the United States sued in his or her official capacity.

3. Pursuant to Local Rules 3-2(c) and (d), intradistrict assignment is proper in San Francisco or Oakland because a substantial part of the events or omissions which give rise to the claim occurred in the Counties of San Francisco and Alameda.

PARTIES

4. Plaintiff Dulce Garcia ("Ms. Garcia") is a DACA recipient and an attorney in San Diego, California. Ms. Garcia earned her bachelor's degree from the University of California, San Diego and her law degree from the Cleveland-Marshall College of Law. She was brought to the United States from Mexico when she was four years old. The government's decision to terminate the DACA program will deprive Ms. Garcia of her DACA status and the numerous valuable benefits she is entitled to by virtue of that status. The termination of DACA also will frustrate Ms. Garcia's ability to represent her clients and harm the dozens of individuals who rely on her counsel.

5. Plaintiff Viridiana Chabolla Mendoza ("Ms. Chabolla") is a DACA recipient and a first-year law student at the University of California, Irvine School of Law. Ms. Chabolla was brought to the United States from Mexico when she was two years old. The government's decision to terminate the DACA program will deprive Ms. Mendoza of her DACA status and the numerous valuable benefits she is entitled to by virtue of that status. The termination of DACA also will frustrate Ms. Chabolla's ability to fulfill her dream of working as a lawyer and helping individuals from disadvantaged and underrepresented communities obtain justice through the legal system.

6. Plaintiff Jirayut ("New") Latthivongskorn ("Mr. Latthivongskorn") is a DACA recipient and a fourth-year medical student at the University of California, San Francisco ("UCSF") School of Medicine. He is also a candidate for a Master of Public Health degree from the T.H. Chan School of Public Health at Harvard University. Mr. Latthivongskorn was brought to the United States from Thailand when he was nine years old. The government's decision to terminate the DACA program will deprive Mr. Latthivongskorn of his DACA status and the numerous valuable benefits he is entitled to by virtue of that status. The termination of DACA also will frustrate Mr. Latthivongskorn's ability to fulfill his dream of becoming a doctor and providing care to underserved and unprivileged communities.

7. Plaintiff Norma Ramirez ("Ms. Ramirez") is a DACA recipient and a candidate for a Ph.D. in Clinical Psychology from the Fuller Theological Seminary in Pasadena, California. Ms. Ramirez was brought to the United States from Mexico when she was five years old. The government's decision to terminate the DACA program will deprive Ms. Ramirez of her DACA status and the numerous valuable benefits she is entitled to by virtue of that status. The termination of DACA also will frustrate Ms. Ramirez's ability to realize her dream of opening a free multidisciplinary therapy clinic to immigrant youth and their families.

8. Plaintiff Miriam Gonzalez Avila ("Ms. Gonzalez") is a DACA recipient and a teacher at Crown Preparatory Academy in Los Angeles, California. She is also a candidate for a Master of Arts in Urban Education from Loyola Marymount University. Ms. Gonzalez was brought to the United States from Mexico when she was six years old. The government's decision to terminate the DACA program will deprive Ms. Gonzalez of her DACA status and the numerous

valuable benefits she is entitled to by virtue of that status. The termination of DACA also will frustrate Ms. Gonzalez's ability to teach children in underserved communities, thereby harming the children, families, and community who have come to rely on her.

9. Plaintiff Saul Jimenez Suarez ("Mr. Jimenez") is a DACA recipient and a special education teacher, coach, and mentor in Los Angeles, California. Mr. Jimenez was brought to the United States from Mexico when he was one year old. The government's decision to terminate the DACA program will deprive Mr. Jimenez of his DACA status and the numerous valuable benefits he is entitled to by virtue of that status. The termination of DACA also will frustrate Mr. Jimenez's ability to teach and coach young people, including those with special needs, thereby harming dozens of families and making poorer the community that he is serving and making a better place.

10. Defendant United States of America includes all government agencies and departments responsible for the implementation, administration, and termination of the DACA program.

11. Defendant Donald J. Trump is the President of the United States. President Trump made the decision to terminate the DACA program and is sued in his official capacity.

12. Defendant Department of Homeland Security ("DHS") is a cabinet department of the federal government with responsibility for, among other things, administering and enforcing the nation's immigration laws.

13. Defendant Elaine Duke is the Acting Secretary of Homeland Security and is sued in her official capacity. Secretary Duke is responsible for managing DHS, including the administration and enforcement of policies and practices related to DACA.

STATEMENT OF FACTS

Establishment of the DACA Program

14. On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano issued a memorandum establishing the DACA program (the "2012 DACA Memorandum"). Under DACA, individuals who were brought to the United States as young children and who met certain specific criteria could request deferred action for a period of two years, subject to renewal. In exchange,

DACA applicants were required to provide the government with highly sensitive personal information, submit to a rigorous background check, and pay a considerable fee.[1]

15. Deferred action is a well-established form of prosecutorial discretion under which the government defers removal action against an individual for a specified period, subject to renewal. The 2012 DACA Memorandum explained that DACA covers "certain young people who were brought to this country as children and know only this country as home" and that the immigration laws are not "designed to remove productive young people to countries where they may not have lived or even speak the language."[2]

16. The 2012 DACA Memorandum established specific criteria that "should be satisfied before an individual is considered for an exercise of prosecutorial discretion."[3] They are that the applicant:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for at least five years preceding the date of the memorandum and is present in the United States on the date of the memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.[4]

---

[1] Memorandum from Secretary Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, at 1–2 (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (hereinafter "2012 DACA Memorandum").

[2] *Id.*

[3] *Id.* at 1.

[4] *Id.*

17. The 2012 DACA Memorandum further provided that "[n]o individual should receive deferred action . . . unless they first pass a background check and requests for relief . . . are to be decided on a case by case basis."[5]

18. USCIS describes DACA as follows: "Deferred action is a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion. For purposes of future inadmissibility based upon unlawful presence, an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect. An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer lawful status upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence."[6]

19. Like other forms of deferred action, DACA serves the government's interests by allowing the government to prioritize resources and exercise discretion for its own convenience. DACA also has provided the government with tremendous law enforcement, public safety, and economic benefits. As the government has recognized, our nation "continue[s] to benefit . . . from the contributions of those young people who have come forward and want nothing more than to contribute to our country and our shared future."[7]

The DACA Application and Renewal Process

20. To apply for DACA, applicants must submit extensive documentation establishing that they meet the relevant criteria.[8] Applicants must also submit a Form I-765 Application for Employment Authorization, and pay $495 in fees.[9]

---

[5] *Id.* at 2.

[6] USCIS DACA FAQs (Archived), Question 1, https://www.uscis.gov/archive/frequently-asked-questions (hereinafter "USCIS DACA FAQs").

[7] Letter from Secretary Jeh Charles Johnson to U.S. Representative Judy Chu (Dec. 30, 2016), https://chu.house.gov/sites/chu.house.gov/files/documents/DHS.Signed%20Response%20to%20Chu%2012.30.16.pdf (hereinafter "Secretary Johnson Letter").

[8] USCIS DACA FAQs, Questions 28–41.

[9] *Id.*, Question 7; *see also* USCIS, I-821D, Consideration of Deferred Action for Childhood Arrivals, https://www.uscis.gov/i-821d.

21. DACA applicants must also undergo biometric and biographic background checks. When conducting these checks, DHS reviews the applicant's biometric and biographic information "against a variety of databases maintained by DHS and other federal government agencies."[10] If any information "indicates that [the applicant's] presence in the United States threatens public safety or national security," the applicant will be ineligible for DACA absent "exceptional circumstances."[11]

22. DACA is not limited to a single, two-year deferral of action. On the contrary, the ability to renew DACA status is an essential element of the program and one of the main benefits used to induce Dreamers to step forward, subject themselves to a rigorous background investigation, and share sensitive personal information with the government. Indeed, the government clearly understood from the very beginning that Dreamers would not apply for DACA, and the program would not be successful, unless they were promised the opportunity to renew their DACA status.

23. To that end, the 2012 DACA Memorandum explicitly directs that DACA be "*subject to renewal*, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States."[12] That memorandum also makes clear that DACA is meant to protect "productive young people" who "were brought to this country as children and know only this country as home" and not merely postpone their removal for two years.[13]

24. DHS also established a straightforward renewal process for DACA and "strongly encourage[d]" DACA recipients to submit their renewal request in advance of the relevant expiration date.[14] Moreover, DACA renewal does not require DACA recipients to meet all of the initial criteria for the program, nor does it require them to submit additional documents.[15] On the contrary, to qualify for renewal, DACA recipients are required to meet three basic criteria: (1) they must not have left the United States without advance parole; (2) they must have continuously

---

[10] USCIS DACA FAQs, Question 23.

[11] *Id.*, Question 65.

[12] 2012 DACA Memorandum, at 3 (emphasis added).

[13] *Id.*

[14] USCIS DACA FAQs, Question 49.

[15] *Id.*, Questions 53–54.

resided in the United States after submitting their DACA application; and (3) they must not have been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, or otherwise pose a threat to national security or public safety.[16]

25. DHS "Standard Operating Procedures" also provide that, absent an "Egregious Public Safety" issue or other special circumstances, DACA status should not be revoked until the government has provided a "Notice of Intent to Terminate" which "thoroughly explain[s]" the grounds for the termination.[17] DHS policy further provides that the recipients of such notice should be afforded 33 days to "file a brief or statement contesting the grounds cited in the Notice of Intent to Terminate" prior to termination of DACA status.[18]

26. Collectively, these policies and procedures, and the representations of numerous government officials, created a clear and reasonable expectation among DACA recipients that they would be entitled to continuously renew their DACA status so long as they stayed out of trouble and played by the rules.

Benefits Provided Under the DACA Program

27. DACA confers numerous important benefits on those who apply for and are granted DACA status. Notably, DACA recipients are granted the right not to be arrested or detained based solely on their immigration status during the time period their deferred action is in effect.[19]

28. DACA recipients are also eligible for work authorization under longstanding regulations. As USCIS has explained, "an individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action . . . ."[20]

---

[16] *Id.*, Question 51.

[17] *See* DHS National Standard Operating Procedures (SOP): Deferred Action for Childhood Arrivals (DACA), at 132, 144–45 (Apr. 4, 2013), https://cliniclegal.org/sites/default/files/attachments/daca_sop_4-4-13.pdf (the "DACA SOP").

[18] *Id.*

[19] *See* USCIS DACA FAQs, Question 9 ("[I]f an individual meets the guidelines for DACA, CBP or ICE should exercise their discretion on a case-by-case basis to prevent qualifying individuals from being apprehended."); 2012 DACA Memorandum, at 2; *see also Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1058–59 (9th Cir. 2014).

[20] USCIS DACA FAQs, Question 1.

29. DACA recipients are eligible to receive certain public benefits. These include Social Security, retirement, and disability benefits, and, in certain states, benefits such as driver's licenses, health care, financial aid, tuition benefits, and unemployment insurance.[21]

30. DACA also serves as a gateway to numerous other important public and private practical benefits, and enables recipients to open bank accounts, obtain credit cards, start businesses, purchase homes and cars, and conduct other aspects of daily life that would otherwise often be unavailable to them.

31. DACA also confers certain immigration benefits and the ability to travel abroad. For example, DACA recipients do not accrue time under 8 U.S.C. § 1182(a)(9)(B)(i), and may briefly depart the U.S. and legally return under certain circumstances.[22]

32. As the government has recognized, DACA has enabled hundreds of thousands of young people "to enroll in colleges and universities, complete their education, start businesses that help improve our economy, and give back to our communities as teachers, medical professionals, engineers, and entrepreneurs—all on the books."[23]

The Government's Promises and Its Efforts to Promote DACA

33. When the DACA program was first launched, many eligible Dreamers were understandably reluctant to step forward and voluntarily disclose sensitive personal information (including their current home address) that could facilitate their removal from the United States and place their family members at risk. In response, the government launched an extensive outreach campaign and vigorously promoted the DACA program. Among other efforts, the government provided advice and guidance to civic organizations and education professionals about "best practices" they could use to encourage eligible individuals to apply for the program. The government also hosted informational workshops, and senior government officials—including President Obama—encouraged young people to apply for the program.

---

[21] *See* 8 U.S.C. §§ 1611(b)(2)–(3), 1621(d); *Texas v. United States*, 809 F.3d 134, 148 (5th Cir. 2015); *Ariz. Dream Act Coal. v. Brewer*, 81 F. Supp. 3d 795, 811 (D. Ariz. 2015); *see also, e.g.*, Cal. Educ. Code §§ 66021.6-66021.7, 68130.5, 76300.5; Cal. Code Regs. tit. 22, § 50301.3.

[22] *See* USCIS DACA FAQs, Question 57.

[23] Secretary Johnson Letter, at 2.

34. The government reiterated these promises in its official correspondence, vowing that DACA recipients would not lose their benefits—including the ability to renew their DACA status—absent specified misconduct. For example, the approval notice granting deferred action under DACA lists only "fraud or misrepresentation" in the application process or "[s]ubsequent criminal activity" as grounds for revoking DACA.[24]

35. The government also made promises about information provided by DACA recipients as part of its efforts to promote the program. In particular, since the inception of the DACA program, the government has repeatedly represented to applicants, Congress, and the general public that information provided by DACA applicants about themselves or others (including family members) would not be used for immigration enforcement purposes absent special circumstances.

36. As then-Secretary of Homeland Security Jeh Johnson explained, "[s]ince DACA was announced in 2012, DHS has consistently made clear that information provided by applicants . . . will not later be used for immigration enforcement purposes except where it is independently determined that a case involves a national security or public safety threat, criminal activity, fraud, or limited other circumstances where issuance of a notice to appear is required by law."[25]

37. Secretary Johnson further explained that this approach was the "long-standing and consistent practice of DHS (and its predecessor INS)" for many "decades" in the use of information "submitted by people seeking deferred action" under a wide variety of programs, as well as applicants seeking immigration "benefits or relief" under a number of other programs.[26] According to Secretary Johnson, "DACA applicants most assuredly relied" upon "these representations" and the agency's "consistent practice" stretching back decades.[27]

38. The government's promise not to use information provided by applicants for immigration enforcement purposes also appears in the USCIS's official instructions regarding the DACA application process. Those instructions provide:

---

[24] The University of Washington, I-797 DACA Approval Sample, https://registrar.washington.edu/i-797-daca-approval_sample.

[25] Secretary Johnson Letter, at 1.

[26] *Id.* at 1–2.

[27] *Id.* at 1.

> *Information provided in this request is protected from disclosure to ICE and U.S. Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings* unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance (www.uscis.gov/NTA). The information may be shared with national security and law enforcement agencies, including ICE and CBP, *for purposes other than removal*, including for assistance in the consideration of deferred action for childhood arrivals request itself, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. The above information sharing clause covers family members and guardians, in addition to the requestor.[28]

39. The same promise appears on the DHS website, which states that "[i]nformation provided in this request [for DACA] *is protected from disclosure* to ICE and CBP for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance (www.uscis.gov/NTA). Individuals whose cases are deferred pursuant to DACA will not be referred to ICE."[29]

40. That same promise is also included in DHS's official, and statutorily-required, Privacy Impact Assessment for the DACA program.[30]

41. Numerous public officials from both political parties have reinforced these promises and have recognized that Dreamers have relied on the government to keep its word. For example, in December 2016, then-Secretary of Homeland Security Jeh Charles Johnson acknowledged that there are hundreds of thousands of Dreamers who have "relied on the U.S. government's representations" about DACA, and he asserted that "representations made by the U.S. government, upon which DACA applicants most assuredly relied, must continue to be honored."[31]

---

[28] Instructions for Consideration of Deferred Action for Childhood Arrivals, USCIS Form I-821D at 13 (Jan. 9, 2017 ed.), https://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf (emphasis added).

[29] USCIS DACA FAQs, Question 19. The referenced Notice to Appearance guidance is USCIS Policy Memorandum 602-0050 (Nov. 7, 2011) ("Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens").

[30] DHS, *Privacy Impact Assessment, USCIS, Deferred Action for Childhood Arrivals* 13 (Aug. 15, 2012), https://www.dhs.gov/sites/default/files/publications/privacy/privacy_pia_uscis_daca.pdf; *see* E-Government Act of 2002 Sec. 208(b), Pub L. No. 107-347, 116 Stat. 2899, 2921 (codified as amended at 44 U.S.C. § 3501 note).

[31] Secretary Johnson Letter, at 1.

42. In January 2017, Speaker of the House Paul Ryan stated that the government must ensure that "the rug doesn't get pulled out from under" Dreamers, who have "organize[d] [their] li[ves] around" the DACA program.[32]

43. Also in January 2017, Senator Lindsey Graham stated that the government should not "pull the rug out and push these young men and women—who came out of the shadows and registered with the federal government—back into the darkness."[33]

44. In February 2017, Congressman Raúl Grijalva described DACA as a "commitment," and called for "the federal government to honor its word to protect" Dreamers.[34]

45. On February 20, 2017, then-Secretary of Homeland Security John F. Kelly issued a memorandum that "immediately rescinded" all "conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal," but specifically exempted the 2012 DACA Memorandum.[35]

46. On March 29, 2017, then-Secretary Kelly reaffirmed that "DACA status" is a "commitment . . . by the government towards the DACA person, or the so-called Dreamer."[36]

47. On April 21, 2017, President Trump said that his administration is "not after the dreamers" and suggested that "[t]he dreamers should rest easy." When asked if "the policy of [his] administration [is] to allow the dreamers to stay," President Trump answered, "Yes."[37]

---

[32] Transcript of CNN Town Hall Meeting with House Speaker Paul Ryan, CNN (Jan. 12, 2017), http://cnn.it/2oyJXJJ.

[33] Lindsey Graham, *Graham, Durbin Reintroduce BRIDGE Act To Protect Undocumented Youth From Deportation* (Jan. 12, 2017), https://www.lgraham.senate.gov/public/index.cfm/2017/1/graham-durbin-reintroduce-bridge-act-to-protect-undocumented-youth-from-deportation.

[34] Congressional Progressive Caucus Leaders Respond to ICE Arrest of DACA Recipient (Feb. 16, 2017), https://cpc-grijalva.house.gov/press-releases/congressional-progressive-caucus-leaders-respond-to-ice-arrest-of-daca-recipient.

[35] Memorandum from Secretary John Kelly, Enforcement of the Immigration Laws to Serve the National Interest, at 2 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (hereinafter "Secretary Kelly Memo").

[36] Ted Hesson & Seung Min Kim, Wary Democrats Look to Kelly for Answers on Immigration, Politico (Mar. 29, 2017), http://politi.co/2mR3gSN.

[37] *Transcript of AP Interview With Trump*, CBS News (Associated Press) (Apr. 24, 2017), https://www.cbsnews.com/news/transcript-of-ap-interview-with-trump.

Ms. Garcia Relied on the Government's Promises Regarding DACA

48. Dulce Garcia was brought to the United States from Mexico when she was four years old. Ms. Garcia was raised in a low-income, underserved neighborhood in San Diego, California. Throughout her childhood, Ms. Garcia lacked health care and her family struggled with poverty and occasional periods of homelessness.

49. Although she grew up fearing the police and immigration authorities, Ms. Garcia did not learn that she was undocumented until high school. Around this time, Ms. Garcia began to discover the limitations of being undocumented and was advised by her high school guidance counselor that she would be unable to enroll in college or secure federal financial aid despite her academic record.

50. Refusing to yield to these limitations, Ms. Garcia continuously sought to enroll at a local community college, despite repeatedly being denied admission because of her immigration status. Eventually, Ms. Garcia secured admission to the school. Ms. Garcia later transferred to the University of California, San Diego ("UCSD"), graduating in 2009 with a bachelor's degree in political science and securing honors every quarter she was enrolled at UCSD. During this time, Ms. Garcia worked full time as a legal assistant at a small law firm, which solidified her childhood dream of becoming an attorney, and often sought out second and third jobs in order to pay for tuition and books.

51. Ms. Garcia matriculated at the Cleveland-Marshall College of Law in Cleveland, Ohio in 2011. Because tuition was a flat rate regardless of the number of units, Ms. Garcia sought the Dean's approval to take extra classes during her second and third years. Ms. Garcia also worked throughout law school as legal assistant to cover tuition and her living expenses.

52. During her last year of law school, when money was especially tight, Ms. Garcia's mother gave her $5,000 to help pay for tuition. This sum represented most of Ms. Garcia's mother's life savings, which she had earned working the night shift as a hotel housekeeper.

53. During Ms. Garcia's second year of law school, the government announced the DACA program. Ms. Garcia was overjoyed and broke down in tears when she heard the announcement. Although she was initially skeptical, Ms. Garcia decided that she could trust the

government to honor its promises. In reliance on the government's promises, she applied for DACA, providing the government with her personal information and the required fees. Ms. Garcia passed the background check and was granted DACA status in 2014. In reliance on the government's promises, Ms. Garcia successfully reapplied for DACA status and work authorization in 2016. Ms. Garcia was admitted to the California Bar in May 2016.

54. Being granted DACA status was a transformative experience for Ms. Garcia. DACA freed Ms. Garcia from the constant worry that she would be detained and deported every time she stepped outside her home. It also gave her the confidence to hire several employees, build a thriving law practice, and represent dozens of clients in immigration, civil litigation, and criminal defense cases. Finally, DACA enabled Ms. Garcia to dream about becoming a mother, allowing her to take the first steps toward becoming a foster parent, with the ultimate goal of adopting a child.

55. Ms. Garcia trusted the government to honor its promises and advised others that information provided as part of DACA would not be used for immigration enforcement purposes. Even after the new administration was sworn into office, Ms. Garcia continued to trust the government, helping to create a video encouraging eligible young people to apply for DACA.

Ms. Chabolla Relied on the Government's Promises Regarding DACA

56. Viridiana Chabolla was brought to the United States from Mexico when she was two years old. Ms. Chabolla grew up in Los Angeles, California. Ms. Chabolla confronted the reality of her undocumented status from an early age, and was unable to participate in certain club and community activities that required a Social Security number.

57. Ms. Chabolla was inspired to pursue a career in law by her grandfather, who suggested that becoming an attorney would give her "the power to fight injustice with words." Ms. Chabolla was further inspired after meeting a Latino judge from East Los Angeles, whose eloquence, impressive academic credentials, and commitment to the community left a deep impression on her.

58. Ms. Chabolla enrolled in Pomona College in the fall of 2009 and graduated with a Bachelor of Arts degree in Sociology and Chicana/o-Latina/o Studies in May 2013. Ms. Chabolla received numerous honors and awards and was deeply involved in campus life. At the same time,

Ms. Chabolla sought out ways to give back to her community, helping to coordinate academic and enrichment activities, SAT preparation classes, and college information sessions for hundreds of students from economically disadvantaged and underrepresented backgrounds. Ms. Chabolla also created and taught an elective course on the U.S. Civil Rights Movement to high school students.

59. In 2012, during her final year of college, Ms. Chabolla applied for and was granted DACA status. In reliance on the promises made by the government, Ms. Chabolla disclosed personal information about herself and her family, paid the required fee, and submitted to a DHS background check. In reliance on the government's promises, Ms. Chabolla successfully reapplied for DACA status in 2014 and again in 2016.

60. After graduating from Pomona, Ms. Chabolla was hired as a community organizer at Public Counsel, the nation's largest pro bono law firm. In that capacity, Ms. Chabolla assisted with landmark civil rights litigation involving educational inequities in the public education system, as well as with efforts to provide essential services to homeless veterans, women, and youth in Los Angeles County.

61. Ms. Chabolla's experiences at Public Counsel solidified her interest in helping underserved individuals and communities obtain justice through the legal system. In pursuit of this goal, Ms. Chabolla secured a special fellowship from the law firm of Munger, Tolles & Olson LLP, and enrolled earlier this year as a Public Interest Scholar at the University of California, Irvine School of Law.

Mr. Latthivongskorn Relied on the Government's Promises Regarding DACA

62. New Latthivongskorn was brought to the United States from Thailand when he was nine years old. Mr. Latthivongskorn was raised in California. His parents first settled in Fremont, California, where they worked cleaning toilets and mopping floors, and later waiting tables at various restaurants. In 2004, Mr. Latthivongskorn's parents moved the family to Sacramento to open their own restaurant, hoping that it would allow them to earn enough money to be able to send their children to college.

63. Growing up, Mr. Latthivongskorn lived with the constant fear that he or his parents might be deported. Mr. Latthivongskorn began to more acutely experience the challenges of being

undocumented as he grew older, often searching for excuses such as being "deathly afraid of driving" to explain to classmates why he lacked a driver's license.

64. Mr. Latthivongskorn was inspired to become a doctor after his mother was diagnosed with ovarian tumors during his junior year of high school. Not only did Mr. Latthivongskorn witness the incredible power of medicine to help those in need, but he also experienced the barriers that low-income immigrants face in navigating the health care system. After this experience, Mr. Latthivongskorn decided that he wanted to devote his life to improving access to health care for immigrant and low-income communities.

65. Mr. Latthivongskorn's parents taught him that hard work and education were the keys to success. In addition to waiting tables, washing dishes, and mopping floors in his family's restaurant on nights and weekends, Mr. Latthivongskorn immersed himself in his studies, taking honors and AP classes. As a result of his hard work, Mr. Latthivongskorn graduated as salutatorian of his high school class and was accepted to UC Berkeley.

66. Because he lacked a Social Security number, Mr. Latthivongskorn was ineligible for federal financial aid. However, due to his record of achievement, Mr. Latthivongskorn was offered a prestigious scholarship that promised to cover a significant portion of his educational expenses for four years. This scholarship was revoked only weeks before classes began after UC Berkeley learned that Mr. Latthivongskorn lacked legal status. Mr. Latthivongskorn was devastated and considered attending a community college, but his family insisted that he enroll at UC Berkeley.

67. While Mr. Latthivongskorn thrived at UC Berkeley, he constantly worried about how to finance his education. To help pay for school, Mr. Latthivongskorn worked as a busboy at a Thai restaurant and secured scholarships from several nonprofit organizations. Despite his demanding academic and work commitments, Mr. Latthivongskorn devoted significant time to volunteering with several local nonprofit organizations.

68. In 2011, Mr. Latthivongskorn was robbed at gun point just five blocks from the UC Berkeley campus. He decided not to report the crime to the police out of fear that stepping forward to law enforcement might lead to him being deported.

69. While at UC Berkeley, Mr. Latthivongskorn also developed into an activist and learned the power of grassroots community organizing. Among other efforts, Mr. Latthivongskorn advocated for federal legislation to assist Dreamers, and testified before the California Legislature in support of the California DREAM Act in 2011 and the California TRUST Act in 2013.

70. In 2012, Mr. Latthivongskorn co-founded Pre-Health Dreamers ("PHD"), a national nonprofit organization that provides advising, resources, and advocacy for undocumented students interested in pursuing careers in health care and science. In January 2017, *Forbes* Magazine named Mr. Latthivongskorn to its "30 Under 30 in Education" list, commending him for being "on the frontline of getting undocumented students into medical professions and on the path to becoming physicians and health care professionals."

71. In 2012, Mr. Latthivongskorn graduated with honors from UC Berkeley, earning a degree in Molecular & Cellular Biology and Distinction in General Scholarship. In spite of his excellent academic record, Mr. Latthivongskorn was told by the deans of admissions at several medical schools that he should not apply to their programs because he was undocumented and that no medical school would invest their resources in training someone who might not be able to stay in the United States. Refusing to take "no" for an answer, Mr. Latthivongskorn applied to medical school anyway, but was initially turned down.

72. Exactly one month after Mr. Latthivongskorn graduated from UC Berkeley, the government announced the DACA program. Believing that he could rely on the government to honor its promises, Mr. Latthivongskorn applied for DACA in the fall of 2012. He passed the background check and was granted DACA status on January 24, 2013. In reliance on the government's promises, Mr. Latthivongskorn successfully reapplied for DACA status and work authorization in 2014 and then again in 2016.

73. Being granted DACA status changed Mr. Latthivongskorn's life. Because DACA recipients were granted permission to stay in the United States on a renewable basis, medical schools became willing to invest in these students for the several years it takes to complete medical school and residency programs. Mr. Latthivongskorn reapplied to medical schools, and in 2014, he enrolled at UCSF, one of the most prestigious and selective medical schools in the country.

Mr. Latthivongskorn is part of the Program in Medical Education for the Urban Underserved ("PRIME-US"), and is committed to using his degree to improve health care delivery systems and assist urban underserved communities.

74. In April 2017, Mr. Latthivongskorn was awarded a prestigious U.S. Public Health Service Excellence in Public Health Award, which is given to medical students who have helped to advance the U.S. Public Health Service's mission to "protect, promote, and advance the health and safety of our Nation."

75. In August 2017, Mr. Latthivongskorn began pursuing a Master of Public Health at Harvard University. His goal is to develop a better understanding of health care policy so that he can help to end health disparities and increase access to affordable, quality health care, particularly for immigrants and other underserved communities.

Ms. Ramirez Relied on the Government's Promises Regarding DACA

76. Norma Ramirez was brought to the United States from Mexico when she was five years old. Ms. Ramirez attended public high school, where she was an honor roll student. Her undocumented status made an impact on her in high school when she was denied a driver's license and learned that her dreams of going to college might be out of reach.

77. Ms. Ramirez attended the College of Southern Nevada, and later the University of Nevada, Las Vegas, where she earned a bachelor's degree in psychology in 2014.

78. Ms. Ramirez could not believe the news in 2012 when her pastor sent her a text message telling her about the DACA program. Relying on the government's promises under the DACA program, Ms. Ramirez applied for DACA status on August 15, 2012. Her application was approved on November 1, 2012. In further reliance on the government's promises, Ms. Ramirez twice reapplied for DACA status and work authorization, and was reapproved in September 2014 and October 2016.

79. Ms. Ramirez has been inspired to continue her education in clinical psychology in part because her experiences as a volunteer mentor have exposed her to the suffering of countless individuals who do not have access to mental health services, much less access to practitioners who speak their native language or share an understanding of the immigrant experience. Her motivation

also stems from her own difficulties in finding a supportive environment to discuss the challenges and barriers she has faced as an undocumented immigrant.

80. In 2015, Ms. Ramirez began her graduate work at the Fuller Theological Seminary in Pasadena, California. She earned her Master's degree in Clinical Psychology in 2017 and is currently pursuing her Ph.D. in Clinical Psychology. Since 2016, Ms. Ramirez has worked at an outpatient clinic in Monrovia, California, providing school and home-based therapy to patients in English and Spanish, and also has served as a member of the Board of Directors for the Immigration Resource Center of San Gabriel Valley.

81. DACA enabled Ms. Ramirez to pursue her dream of establishing a free clinic that provides mental health services to immigrant youth, Latinos, and their families. As a Dreamer, Ms. Ramirez understands the challenges faced by many of her patients, and is able to secure their trust in a way that many other mental health practitioners cannot.

Ms. Gonzalez Relied on the Government's Promises Regarding DACA

82. Miriam Gonzalez was brought to the United States from Mexico when she was six years old. She was raised in Los Angeles, California, and graduated from Roosevelt High School in 2011.

83. Ms. Gonzalez first learned she was undocumented in the seventh grade, after talking with her friends about getting a summer job at an elementary school. When she asked her parents for her Social Security number so that she could apply to work with her friends, they informed her that she was undocumented and had no Social Security number.

84. In spite of their undocumented status, Ms. Gonzalez's parents pushed her to get good grades, with the hope that she would go to college. In high school, Ms. Gonzalez began telling her teachers that she was undocumented, and they provided her with resources about the application process and about a California law allowing undocumented students to pay in-state tuition.

85. Relying on the government's promises under the DACA program, Ms. Gonzalez applied for DACA status and work authorization in December 2012. Her application was approved in February 2013. In further reliance on the government's promises, Ms. Gonzalez successfully reapplied for DACA status and work authorization in December 2014 and October 2016.

86. Ms. Gonzalez attended college at the University of California, Los Angeles ("UCLA"), graduating in 2016 with a Bachelor of Arts in Anthropology and a minor in Classical Civilizations. She was named to the Dean's Honors List for her academic performance in the spring of 2015. While at UCLA, Ms. Gonzalez earned money by tutoring elementary, middle, and high school students, and by working as a campus parking assistant.

87. Ms. Gonzalez has been active in community service since a young age, focusing her energy on immigrants' rights and education for the underserved. While at UCLA, she helped to host the 2014 Immigrant Youth Empowerment Conference—the largest immigrant youth conference in the country—as well as an Educators Conference, a DACA clinic, and several additional immigrants' rights workshops. Ms. Gonzalez also mentored two students at Van Nuys High School, motivating them to pursue a higher education and advising them on the college application process.

88. Ms. Gonzalez ultimately decided that she could give the most to her community by teaching students in underserved communities. After graduating from UCLA in 2016, Ms. Gonzalez was accepted into the selective Teach For America ("TFA") program. Through TFA, Ms. Gonzalez currently teaches Math and Reading Intervention to struggling middle school students at Crown Preparatory Academy in Los Angeles.

89. In 2017, Ms. Gonzalez received her Preliminary Multiple Subject Teaching Credential from Loyola Marymount University, which is valid until 2022. Ms. Gonzalez is currently studying at Loyola Marymount to obtain a Master of Arts degree in Urban Education, with a focus in Policy and Administration. Upon her expected completion of her master's program and her service with TFA in the spring of 2018, Ms. Gonzalez hopes to continue to teach in the Los Angeles area, mentoring and inspiring young students from disadvantaged communities to pursue a higher education and achieve their full potential.

Mr. Jimenez Relied on the Government's Promises Regarding DACA

90. Saul Jimenez was brought to the United States from Mexico when he was one year old. Mr. Jimenez was raised in the Boyle Heights neighborhood of Los Angeles, California. He attended Roosevelt High School, where he was a star athlete. Among other achievements, he was captain of the football team and an all-league wide receiver. Mr. Jimenez worked throughout high

school, helping his parents make ends meet by delivering newspapers and washing dishes at an Italian restaurant.

91. Following high school, Mr. Jimenez played football for two years at East Los Angeles Community College, viewing his commitment to the game as a ticket to a four-year university. At the same time, Mr. Jimenez was also working two or three jobs, and often struggled to stay awake during practice and team meetings. Mr. Jimenez explored becoming a firefighter and considered a career in law enforcement, but learned that his legal status prevented him from serving his community in these ways.

92. In 2007, Mr. Jimenez's hard work paid off and he was awarded a football scholarship to Oklahoma Panhandle State University. Mr. Jimenez again served as team captain and was chosen by his teammates as defensive MVP—now playing as an outside linebacker.

93. In Oklahoma, Mr. Jimenez began mentoring high school students through the U.S. Department of Education's Upward Bound program. Mr. Jimenez quickly found that he enjoyed working with young people and was able to connect with and help many of his students.

94. In 2010, Mr. Jimenez returned to Boyle Heights, working in low-wage jobs in warehouses and restaurants to support his parents and himself. However, after the government announced the DACA program in 2012, Mr. Jimenez began to believe that he could build a career for himself, and worked to improve his resume.

95. Relying on the government's promises under the DACA program, Mr. Jimenez successfully applied for DACA status in 2012. In further reliance on the government's promises, Mr. Jimenez successfully reapplied for DACA status and work authorization in 2014.

96. Shortly after receiving DACA status, Mr. Jimenez secured three part-time teaching and mentorship positions, working as a tutor, a sports coach in an after-school program, and as a manager at an adolescent rehabilitation center at night. After a few months, Mr. Jimenez accepted a full-time position as a program coordinator with the national nonprofit HealthCorps, which enabled him to continue to pursue his interest in teaching and mentorship.

97. In August 2016, Mr. Jimenez began working as a substitute teacher in the Los Angeles Unified School District. Mr. Jimenez is now a full-time special education teacher at

Stevenson Middle School, where he helps students with learning disabilities overcome their challenges.

98. Mr. Jimenez has also pursued coaching as a further means to inspire and uplift young people. In recent years, Mr. Jimenez has also served as the head junior varsity football coach, the head girls junior varsity soccer coach, and an assistant varsity football coach at Roosevelt High School. Through coaching, Mr. Jimenez seeks to teach young people skills and lessons that will apply broadly and benefit them throughout their lives.

President Trump's Statements and Actions Prior to Ending DACA

99. The government's decision to end the DACA program was motivated by improper discriminatory intent and animus toward Mexican nationals, individuals of Mexican heritage, and Latinos, who together account for 93 percent of approved DACA applications.

100. According to USCIS, approximately 79 percent of approved DACA applications through March 31, 2017, have been submitted by Mexican nationals.[38] No other nationality makes up more than 4 percent of approved DACA applications.[39] 93 percent of approved DACA applications have been submitted by individuals from Latin American countries.[40]

101. President Trump's statements and actions reflect a pattern of bias against Mexicans and Latinos. For example, on February 24, 2015, President Trump demanded that Mexico "stop sending criminals over our border."[41] On March 5, 2015, President Trump tweeted that he "want[ed] nothing to do with Mexico other than to build an impenetrable WALL . . . ."[42]

---

[38] USCIS, Form I-821D Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012-2017 (Mar. 31, 2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr2.pdf.

[39] *Id.*

[40] *Id.*

[41] Donald J. Trump, Tweet on February 24, 2015 at 4:47 PM.

[42] Donald J. Trump, Tweet on March 5, 2015 at 4:50 PM.

102. On June 16, 2015, during his speech launching his presidential campaign, President Trump characterized immigrants from Mexico as criminals, "rapists," and "people that have lots of problems."[43] President Trump later asserted that these remarks were "100 percent correct."[44]

103. Three days later, President Trump tweeted that "[d]ruggies, drug dealers, rapists and killers are coming across the southern border," and asked, "When will the U.S. get smart and stop this travesty?"[45]

104. On August 6, 2015, during the first Republican presidential debate, President Trump said "the Mexican government is much smarter, much sharper, much more cunning. And they send the bad ones over because they don't want to pay for them, they don't want to take care of them."[46]

105. On August 21, 2015, two men urinated on a sleeping Latino man and then beat him with a metal pole. At the police station, they stated "Donald Trump was right; all these illegals need to be deported." When asked about the incident, President Trump failed to condemn the men, instead stating that they were "passionate." Specifically, President Trump said, "[i]t would be a shame . . . I will say that people who are following me are very passionate. They love this country and they want this country to be great again. They are passionate."[47]

106. On August 24, 2015, President Trump tweeted, "Jeb Bush is crazy, who cares that he speaks Mexican, this is America, English!!"[48]

---

[43] Donald J. Trump, Presidential Announcement Speech (June 16, 2015), *available at* http://time.com/3923128/donald-trump-announcement-speech/.

[44] Sandra Guy, *Trump in Chicago: Says he's '100 percent correct' about Mexicans, blasts U.S. as 'laughingstock' – 'we're all a bunch of clowns'*, Chicago Sun Times (June 24, 2016), http://chicago.suntimes.com/news/trump-in-chicago-says-hes-100-percent-correct-about-mexicans-blasts-u-s-as-laughingstock-were-all-a-bunch-of-clowns/.

[45] Donald J. Trump, Tweet on June 19, 2015, at 7:22 PM.

[46] Andrew O'Reilly, *At GOP debate, Trump says 'stupid' U.S. leaders are being duped by Mexico*, Fox News (Aug. 6, 2015), http://www.foxnews.com/politics/2015/08/06/at-republican-debate-trump-says-mexico-is-sending-criminals-because-us.html.

[47] Adrian Walker, *'Passionate' Trump fans behind homeless man's beating?*, The Boston Globe (Aug. 21, 2015), https://www.bostonglobe.com/metro/2015/08/20/after-two-brothers-allegedly-beat-homeless-man-one-them-admiringly-quote-donald-trump-deporting-illegals/I4NXR3Dr7litLi2NB4f9TN/story.html.

[48] Donald J. Trump, Tweet on August 24, 2015 at 7:14 PM.

107. On September 25, 2015, President Trump suggested that the United States would no longer "take care" of "anchor babies" from Mexico.[49]

108. In May and June 2016, President Trump repeatedly attacked United States District Judge Gonzalo Curiel, asserting that because he was "of Mexican heritage" he had "an absolute" and "inherent conflict of interest" that precluded him from hearing a lawsuit against President Trump's eponymous university.[50] Speaker of the House Paul Ryan characterized President Trump's comments as "the textbook definition of a racist comment."[51] Senator Susan Collins similarly asserted that President Trump's "statement that Judge Curiel could not rule fairly because of his Mexican heritage" was "absolutely unacceptable."[52]

109. On August 31, 2016, President Trump raised concerns about immigrants, saying "we have no idea who these people are, where they come from. I always say Trojan Horse."[53]

110. In August 2017, President Trump asserted that a group of white supremacists marching in Charlottesville, Virginia included "some very fine people."[54] Former Massachusetts Governor Mitt Romney suggested that these comments "caused racists to rejoice,"[55] while Senator Lindsay Graham noted that the President was "now receiving praise from some of the most racist

---

[49] Donald J. Trump, Speech in Oklahoma City, OK at 41:31-42:30 YouTube (Sept. 25, 2015), https://www.youtube.com/watch?v=2j4bY7NAFww.

[50] Daniel White, *Donald Trump Ramps Up Attacks Against Judge in Trump University Case*, Time (June 2, 2016), http://time.com/4356045/donald-trump-judge-gonzalo-curiel/.

[51] Sarah McCammon, *Trump Says Comments About Judge 'Have Been Misconstrued'*, Nat'l Pub. Radio (June 7, 2016), http://www.npr.org/2016/06/07/481013560/ryan-trumps-criticism-of-judge-textbook-definition-of-a-racist-comment.

[52] Susan Collins, *U.S. Senator Susan Collins' Statement on Donald Trump's Comments on the Judiciary* (June 6, 2016), https://www.collins.senate.gov/newsroom/us-senator-susan-collins%E2%80%99-statement-donald-trump%E2%80%99s-comments-judiciary.

[53] *Transcript of Donald Trump's Immigration Speech*, N.Y. Times (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html?mcubz=0.

[54] Meghan Keneally, *Trump lashes out at 'alt-left' in Charlottesville, says 'fine people on both sides'*, ABC News (Aug. 15, 2017), http://abcnews.go.com/Politics/trump-lashes-alt-left-charlottesville-fine-people-sides/story?id=49235032.

[55] Emma Kinery, *Mitt Romney: President Trump's Charlottesville comments 'caused racists to rejoice'*, USA Today (Aug. 18, 2017), https://www.usatoday.com/story/news/politics/onpolitics/2017/08/18/mitt-romney-criticizes-president-trump-charlottesville-statement/579410001/.

and hate-filled individuals and groups in our country."[56] Former Ku Klux Klan leader David Duke thanked President Trump for his "honesty and courage."[57]

111. On August 22, 2017, during a rally in Phoenix, Arizona, President Trump described unauthorized immigrants as "animals" who bring "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking."[58]

112. On August 25, 2017, President Trump pardoned former Maricopa County Sheriff Joseph Arpaio, who had been convicted of criminal contempt by United States District Judge Susan R. Bolton for intentionally disobeying a federal court order to cease targeting Latinos. A comprehensive investigation by the United States Department of Justice found that under Sheriff Arpaio's leadership the Maricopa County Sheriff's Office engaged in a pattern and practice of unconstitutional conduct and violations of federal law based on its blatantly discriminatory practices against Latinos.[59] Among other conclusions, the Justice Department investigation uncovered "a pervasive culture of discriminatory bias against Latinos" and noted that Sheriff Arpaio's officers routinely referred to Latinos as "wetbacks," "Mexican bitches," "fucking Mexicans," and "stupid Mexicans." In pardoning Sheriff Arpaio, President Trump praised him as an "American patriot"[60] and suggested that he was "convicted for doing his job."[61]

---

[56] Eugene Scott & Miranda Green, *Trump, Graham feud over President's Charlottesville response*, CNN Politics (Aug. 17, 2017), http://www.cnn.com/2017/08/16/politics/lindsey-graham-donald-trump-charlottesville/index.html.

[57] Z. Byron Wolf, *Trump's defense of the 'very fine people' at Charlottesville white nationalist march has David Duke gushing*, CNN Politics (Aug. 15, 2017), http://www.cnn.com/2017/08/15/politics/donald-trump-david-duke-charlottesville/index.html.

[58] *President Trump Speaks Live in Phoenix, Arizona with Campaign-Style Rally*, CNN (Aug. 22, 2017), http://www.cnn.com/TRANSCRIPTS/1708/22/cnnt.01.html.

[59] U.S. Dep't of Justice, Office of Pub. Affairs, *Department of Justice Releases Investigative Findings on the Maricopa County Sheriff's Office* (Dec. 15, 2011), https://www.justice.gov/opa/pr/department-justice-releases-investigative-findings-maricopa-county-sheriff-s-office.

[60] Donald J. Trump, Tweet on August 25, 2017, at 7:00 PM.

[61] Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. Times (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html.

113. President Trump's recent comments and actions reflect an ongoing pattern and practice of bias stretching back decades. In 1973, the United States Department of Justice sued President Trump after a federal investigation found that his company had engaged in systematic racial discrimination. To settle this lawsuit, President Trump agreed to a settlement in which he promised not to discriminate further against people of color.[62]

The Termination of the DACA Program

114. Throughout the first eight months of 2017, the Trump Administration sent strong signals that Dreamers could and should continue to rely on the government's promises regarding the DACA program. As noted above, then-Secretary of Homeland Security John D. Kelly specifically exempted DACA from the Administration's broad repeal of other immigration programs, and reaffirmed that DACA status is a "commitment" by the government.[63] On April 21, 2017, President Trump said that his administration is "not after the dreamers," suggested that "[t]he dreamers should rest easy," and responded to the question of whether "the policy of [his] administration [is] to allow the dreamers to stay," by answering "Yes."[64]

115. On June 29, 2017, officials from ten states[65] that had previously challenged another deferred action program, Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"), sent a letter to Attorney General Jeff Sessions, asserting that the DACA

---

[62] Michael Kranish & Robert O'Harrow, Jr., *Inside the government's racial bias case against Donald Trump's company, and how he fought it*, The Washington Post (Jan. 23, 2016), https://www.washingtonpost.com/politics/inside-the-governments-racial-bias-case-against-donald-trumps-company-and-how-he-fought-it/2016/01/23/fb90163e-bfbe-11e5-bcda-62a36b394160_story.html?utm_term=.b640592cbc5a.

[63] Secretary Kelly Memo, *supra* note 35; Hesson & Kim, *supra* note 36.

[64] *Transcript of AP Interview With Trump*, *supra* note 37.

[65] On September 1, 2017, Tennessee Attorney General Herbert H. Slattery III reversed course and decided Tennessee would not join the suit, citing "a human element to this [issue]" that "should not be ignored." *See* Letter from Tennessee Attorney General Herbert H. Slattery III to Sens. Lamar Alexander and Bob Corker (Sept. 1, 2017), http://static1.1.sqspcdn.com/static/f/373699/27673058/1504293882007/DACA%2Bletter%2B9-1-2017.pdf. Attorney General Slattery further acknowledged that DACA recipients "have an appreciation for the opportunities afforded them by our country," and that "[m]any . . . have outstanding accomplishments and laudable ambitions, which if achieved, will be of great benefit and service" to the United States. *Id.*

program is unlawful. The states threatened to challenge DACA in court unless the federal government rescinded the DACA program by September 5, 2017.[66]

116. On July 21, 2017, attorneys general from twenty states sent a letter to President Trump urging him to maintain DACA and defend the program in court, asserting that the arguments of the states which were threatening to bring suit were "wrong as a matter of law and policy."[67]

117. On August 31, 2017, hundreds of America's leading business executives sent a letter to President Trump urging him to preserve the DACA program.[68] The letter explains that "Dreamers are vital to the future of our companies and our economy" and are part of America's "global competitive advantage."[69]

118. On September 4, 2017, Attorney General Sessions wrote to Acting Secretary of Homeland Security Duke, describing his assessment that "DACA was effectuated by the previous administration through executive action, without proper statutory authority;" that DACA "was an unconstitutional exercise of authority by the Executive Branch;" and that "it is likely that potentially imminent litigation would yield similar results [as the DAPA litigation] with respect to DACA."[70]

119. On September 5, 2017, Attorney General Sessions announced the government's decision to end the DACA program. In his remarks, Attorney General Sessions recognized that DACA "essentially provided a legal status for recipients for a renewable two-year term, work authorization and other benefits, including participation in the social security program," but asserted

---

[66] Letter from Texas Attorney General Ken Paxton, *et al.*, to U.S. Attorney General Jeff Sessions (June 29, 2017), https://www.texasattorneygeneral.gov/files/epress/DACA_letter_6_29_2017.pdf.

[67] Letter from California Attorney General Xavier Becerra, *et al.*, to President Donald J. Trump (July 21, 2017), https://oag.ca.gov/system/files/attachments/press_releases/7-21-17%20%20Letter%20from%20State%20AGs%20to%20President%20Trump%20re%20DACA.final_.pdf.

[68] Letter to President Donald J. Trump, *et al.*, (Aug. 31, 2017), https://dreamers.fwd.us/business-leaders.

[69] *Id.*

[70] Letter from U.S. Attorney General Jefferson B. Sessions to Acting Secretary of Homeland Security Elaine C. Duke (Sept. 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf.

that the program "is vulnerable to the same legal and constitutional challenges that the courts recognized with respect to the DAPA program."[71]

120. Attorney General Sessions's comments regarding the legality of the DACA program contradict conclusions previously reached by both the Department of Justice and the Department of Homeland Security. Specifically, the Department of Justice's Office of Legal Counsel ("OLC") provided a detailed analysis of DAPA in 2014, concluding that DAPA—as well as DACA—was a lawful exercise of the Executive Branch's "discretion to enforce the immigration laws."[72] More recently, in its brief before the U.S. Supreme Court in *United States v. Texas*, DHS concluded that programs like DACA are "lawful exercise[s]" of the Executive Branch's "broad statutory authority" to administer and enforce the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*[73]

121. Nonetheless, on the same date as Attorney General Sessions's announcement, Acting Secretary of Homeland Security Duke issued a memorandum formally rescinding the DACA program (the "Rescission Memorandum").[74] Unlike OLC's 2014 analysis, the Rescission Memorandum provides no reasoned evaluation of the legality and merits of the program. Instead, it states that the threat of litigation by numerous state attorneys general provoked the decision to terminate DACA.

122. In addition to the Rescission Memorandum, Secretary Duke also issued an accompanying statement asserting that the government had decided to end DACA rather than "allow the judiciary to *potentially* shut the program down completely and immediately."[75] Secretary Duke

---

[71] U.S. Dep't of Justice, Office of Pub. Affairs, *Attorney General Sessions Delivers Remarks on DACA* (Sept. 5, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca.

[72] Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others, 2014 WL 10788677 (Op. O.L.C. Nov. 19, 2014).

[73] *See* Brief for Petitioners at 42, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 836758 at *42.

[74] Memorandum from Acting Secretary Elaine C. Duke, Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

[75] Statement from Acting Secretary Duke on the Rescission Of Deferred Action For Childhood Arrivals (DACA) (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/statement-acting-secretary-duke-rescission-deferred-action-childhood-arrivals-daca (emphasis added).

also expressed "sympath[y]" and "frustrat[ion]" on "behalf" of DACA recipients, candidly acknowledging that "DACA was fundamentally a lie."[76]

123. Under the Rescission Memorandum, the federal government will continue to process DACA applications received by September 5, 2017. Furthermore, the federal government will issue renewals for recipients whose permits expire before March 5, 2018, provided they apply for renewal by October 5, 2017. The government will not approve any new or pending applications for advanced parole.

124. In a statement also issued on September 5, 2017, President Trump claimed that he decided to end DACA because he had been advised that "the program is unlawful and unconstitutional and cannot be successfully defended in court," and because DACA "helped spur a humanitarian crisis—the massive surge of unaccompanied minors from Central America including, in some cases, young people who would become members of violent gangs throughout our country, such as MS-13."[77]

125. The government also has taken affirmative steps to reduce the protections applicable to information provided in connection with the DACA program. In January 2017, President Trump issued an Executive Order directing all agencies, including DHS, to "ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information."[78] DHS has confirmed that its new privacy policy "permits the sharing of information about immigrants and non-immigrants with federal, state, and local law enforcement."[79]

---

[76] *Id.*

[77] Statement from President Donald J. Trump (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump.

[78] Exec. Order No. 13768, "Enhancing Public Safety in the Interior of the United States" (Jan. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united.

[79] DHS, Privacy Policy 2017-01 Questions & Answers, at 3 (Apr. 27, 2017), https://www.dhs.gov/sites/default/files/publications/Privacy%20Policy%20Questions%20%20Answers%2C%2020170427%2C%20Final.pdf.

126. The Rescission Memorandum also provides no assurance that information provided in connection with DACA applications or renewal requests will not be used for immigration enforcement purposes. To the contrary, DHS posted public guidance about the impact of the rescission on the same day that the Rescission Memorandum was issued. This guidance backtracks on the government's prior repeated assurances that "[i]nformation provided in [a DACA] request ***is protected from disclosure*** to ICE and CBP for the purpose of immigration enforcement proceedings . . . ."[80] Now, rather than affirmatively "protect[ing] [this information] from disclosure," the government represents only that such sensitive information "***will not be proactively provided*** to ICE and CBP for the purpose of immigration enforcement proceedings . . . ."[81] And even this policy "may not be relied upon" by any party and can be changed "at any time without notice."[82]

127. Despite terminating DACA, other uses of deferred action and programs benefitting other groups of immigrants remain in effect.

The Termination of the DACA Program Will Inflict Severe Harm

128. The termination of the DACA program will severely harm Plaintiffs and hundreds of thousands of other young Dreamers. Among other things, Plaintiffs stand to lose their ability to access numerous federal, state, and practical benefits, and to reside in the United States with their families. Nearly 800,000 other young people will similarly face the prospect of losing their jobs, being denied vital benefits, and being separated from the family, friends, colleagues, and communities that love and rely on them. The termination of the DACA program will also harm the students, patients, clients, community members, family, and friends who have come to rely on Plaintiffs for essential services and emotional and financial support.

---

[80] USCIS DACA FAQs, Question 19 (emphasis added). The referenced Notice to Appearance guidance is USCIS Policy Memorandum 602-0050 (Nov. 7, 2011) ("Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens").

[81] DHS, *Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sept. 5, 2017) (emphasis added), https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca.

[82] *Id.*

129. With the sensitive personal information they provided to the federal government no longer "protected from disclosure," Plaintiffs and other DACA recipients face the imminent risk that such information could be used against them "at any time," "without notice," for purposes of immigration enforcement, including detention or deportation.

130. Terminating DACA will also cause widespread economic harm.[83] DACA has enabled approximately 800,000 hardworking, ambitious, and educated young people to enter the labor force. Over 90 percent of DACA recipients are employed, and over 95 percent are bilingual, a valuable skill that is increasingly needed by American companies.[84]

131. Terminating the DACA program will also have a negative impact on the economy and American competitiveness.[85]

132. On August 31, 2017, in recognition of these costs and their concern for Dreamers, hundreds of America's most important business leaders sent a letter to President Trump emphasizing the benefits of the DACA program and urging him to preserve it. The letter explains that "Dreamers are vital to the future of our companies and our economy" and part of America's "global competitive advantage."[86]

CAUSES OF ACTION

FIRST COUNT

FIFTH AMENDMENT – DUE PROCESS

133. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

---

[83] *See, e.g.*, Ike Brannon & Logan Albright, The Economic and Fiscal Impact of Repealing DACA, The Cato Institute (Jan. 18, 2017), https://www.cato.org/blog/economic-fiscal-impact-repealing-daca; Immigrant Legal Resource Center, Money on the Table: The Economic Cost of Ending DACA (Dec. 2016), https://www.ilrc.org/sites/default/files/resources/2016-12-13_ilrc_report_-_money_on_the_table_economic_costs_of_ending_daca.pdf.

[84] *Id.*

[85] *See* Ike Brannon & Logan Albright, *supra* note 83 (concluding that terminating DACA will cost the federal government $60 billion in lost revenue and reduce GDP by $215 billion).

[86] Letter to President Donald J. Trump, Speaker Paul Ryan, Leader Nancy Pelosi, Leader Mitch McConnell, and Leader Charles E. Schumer (Aug. 31, 2017), https://dreamers.fwd.us/business-leaders.

134. Immigrants who are physically present in the United States are guaranteed the protections of the Due Process Clause. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

135. The Constitution "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). A threshold inquiry in any case involving a violation of procedural due process "is whether the plaintiffs have a protected property or liberty interest and, if so, the extent or scope of that interest." *Nozzi v. Hous. Auth. of L.A.*, 806 F.3d 1178, 1190–91 (9th Cir. 2015) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–70 (1972)).

136. The property interests protected by the Due Process Clause "extend beyond tangible property and include anything to which a plaintiff has a 'legitimate claim of entitlement.'" *Nozzi*, 806 F.3d at 1191 (quoting *Roth*, 408 U.S. at 576–77). "A legitimate claim of entitlement is created [by] . . . 'rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Id.* (quoting *Roth*, 408 U.S. at 577).

137. In addition to freedom from detention, *Zadvydas*, 533 U.S. at 690, the term "liberty" also encompasses the ability to work, raise a family, and "form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (citing *Roth*, 408 U.S. at 572).

138. DACA recipients, including Plaintiffs, have constitutionally protected liberty and property interests in their DACA status and the numerous benefits conferred thereunder, including the ability to renew their DACA status every two years. These protected interests exist by virtue of the government's decision to grant DACA recipients certain benefits and its repeated representations and promises regarding the DACA program. *See Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.").

139. In establishing and continuously operating DACA under a well-defined framework of highly specific criteria—including nearly 150 pages of specific instructions for managing the program—the government created a reasonable expectation among Plaintiffs and other DACA

recipients that they are entitled to the benefits provided under the program, including the ability to seek renewal of their DACA status, as long as they continue to play by the rules and meet the program's nondiscretionary criteria for renewal.

140. DACA status is uniquely valuable to Plaintiffs and other Dreamers in that it serves as a gateway to numerous essential benefits. Revocation of DACA effectively deprives these young people of the ability to be fully contributing members of society.

141. The ability to renew DACA status at regular intervals has always been an essential element of the program and part of the deal offered by the government. The prospect of renewal was one of the primary benefits the government used to induce Plaintiffs and other Dreamers to step forward, disclose highly sensitive personal information, and subject themselves to a rigorous background investigation.

142. The government's arbitrary termination of the DACA program and deprivation of the opportunity to renew DACA status violates the due process rights of Plaintiffs and other DACA recipients.

143. The government's decision to terminate DACA after vigorously promoting the program and coaxing hundreds of thousands of highly vulnerable young people to step forward is an unconstitutional bait-and-switch. *See, e.g.*, *Cox v. State of La.*, 379 U.S. 559, 571 (1965); *Raley v. State of Ohio*, 360 U.S. 423, 438–39 (1959). The government promised Plaintiffs and other young people that if they disclosed highly sensitive personal information, passed a background check, and played by the rules, they would be able to live and work in the United States. The government's termination of the DACA program is a breach of that promise. For the government to now "say . . . 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 466 (Fed. Cl. 2017) (quoting *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)).

144. The Due Process Clause also forbids the government from breaking its promises, especially where, as here, individuals, have been induced to undertake actions with potentially devastating consequences in reliance on those promises.

145. The use of information provided by Plaintiffs and other DACA applicants for immigration enforcement actions has particularly egregious due process implications. These individuals disclosed sensitive personal information in reliance on the government's explicit and repeated assurances that it would not be used for immigration enforcement purposes and would in fact be "protected from disclosure" to ICE and CBP. The government has already violated its promises regarding DACA, and there is little reason to believe it will not similarly breach its representations regarding information sharing. *Cf. Raley*, 360 U.S. at 438 ("convicting a citizen for exercising a privilege which the State clearly had told him was available to him," was the "most indefensible sort of entrapment by the State"). Indeed, the government already has breached its prior commitments to affirmatively "protect[] [sensitive information] from disclosure," now asserting only that it will not "proactively provide[]" such information to ICE and CBP for the purpose of immigration enforcement proceedings.

146. The Due Process Clause also requires that the federal government's immigration enforcement actions be fundamentally fair. Here, the government's arbitrary decisions to terminate DACA and change the policy regarding the use of information provided by DACA applicants are fundamentally unfair.

147. Defendants' violations of the Due Process Clause have harmed Plaintiffs and will continue to cause ongoing harm to Plaintiffs.

SECOND COUNT

FIFTH AMENDMENT – EQUAL PROTECTION

148. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

149. The Fifth Amendment forbids federal officials from acting with a discriminatory intent or purpose. *See United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

150. To succeed on an equal protection claim, plaintiffs must show that the defendants "discriminated against them as members of an identifiable class and that the discrimination was intentional." *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134 (9th Cir. 2003) (citation

omitted). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). "The court analyzes whether a discriminatory purpose motivated the defendant by examining the events leading up to the challenged decision and the legislative history behind it, the defendant's departure from normal procedures or substantive conclusions, and the historical background of the decision and whether it creates a disparate impact." *Avenue 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504 (9th Cir. 2016).

151. As set forth above, the termination of DACA was motivated by improper discriminatory intent and bias against Mexican nationals, individuals of Mexican descent, and Latinos, who together account for 93 percent of approved DACA applications.

152. President Trump has a history of tweets, campaign speeches, debate responses, and other statements alleging that Mexican and Latino immigrants are rapists, criminals, and otherwise bad people. Moreover, shortly before terminating DACA, President Trump pardoned former Maricopa County Sheriff Joe Arpaio for a criminal contempt of court conviction related to Sheriff Arpaio's discriminatory practices against Latinos, asserting that the Sheriff had been convicted of contempt merely for "doing his job."

153. President Trump's statements and actions, including the termination of the DACA program, appealed to voters who harbor hostility toward Mexican and Latino immigrants.

154. The government did not follow its normal procedures in reversing course and terminating the DACA program. In 2014, the OLC concluded, after conducting a detailed analysis, that DACA was a lawful exercise of the Executive Branch's discretion. The government has made similar arguments to the Supreme Court. By contrast, Attorney General Sessions's one-page letter to Acting Secretary Duke contained virtually no legal analysis, and Acting Secretary Duke's Rescission Memorandum relied largely on Attorney General Sessions's letter.

155. There are many strong policy reasons to maintain the DACA program. DACA has provided the government with enormous benefits, including an efficient allocation of immigration enforcement resources. DACA has also provided enormous benefits to American businesses and the

broader economy. And DACA has helped communities throughout the United States, who are able to benefit from the talents and contributions of DACA recipients.

156. DACA is a promise from the government to DACA recipients and those who rely on them. Separate from the policy rationales set forth above, the government is obligated to honor its commitments under the DACA program.

157. The government continues to operate programs that benefit other groups of immigrants. Because Mexicans and Latinos account for 93 percent of approved DACA applications, they will be disproportionately impacted by the termination of the DACA program.

158. The history, procedure, substance, context, and impact of the decision to terminate DACA demonstrate that the decision was motivated by discriminatory animus against Mexican and Latino immigrants. Because it was motivated by a discriminatory purpose, the decision to terminate DACA violates the equal protection guarantee of the Due Process Clause of the Fifth Amendment.

159. Defendants' violations have caused ongoing harm to Plaintiffs and other Dreamers.

THIRD COUNT

ADMINISTRATIVE PROCEDURE ACT – CONSTITUTIONAL VIOLATIONS

160. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

161. Defendants are subject to the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 703. The termination of the DACA program is final agency action subject to judicial review because it marks the "consummation of the . . . decisionmaking process" and is one "from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks omitted).

162. The "comprehensive" scope of the APA provides a "default" "remed[y] for all interactions between individuals and all federal agencies." *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1123 (9th Cir. 2009).

163. The APA requires that courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law . . . [or] contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(A), (B).

164. For the reasons set forth above, the decision to terminate the DACA program is unconstitutional in numerous respects and therefore must be vacated.

FOURTH COUNT

ADMINISTRATIVE PROCEDURE ACT – ARBITRARY AND CAPRICIOUS ACTION

165. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

166. Defendants are subject to the APA. *See* 5 U.S.C. § 703. The termination of the DACA program is final agency action subject to judicial review because it marks the "consummation of the . . . decisionmaking process" and is one "from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (internal quotation marks omitted).

167. The "comprehensive" scope of the APA provides a "default" "remed[y] for all interactions between individuals and all federal agencies." *W. Radio Servs. Co.*, 578 F.3d at 1123.

168. The APA requires that courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (E).

169. In creating DACA, the government promised Plaintiffs that if they stepped forward, shared highly sensitive personal information, and passed a background check, they would be granted renewable protection and would be allowed to live and work in the United States as long as they played by the rules. The government also specifically and consistently promised that information disclosed through the DACA program would not be used for immigration enforcement purposes outside certain limited circumstances.

170. Plaintiffs and nearly 800,000 vulnerable young people reasonably relied on the government's assurances and promises in taking the irreversible step of identifying themselves and providing the government with highly sensitive and potentially compromising personal information. DACA recipients also made numerous life-altering personal and professional decisions in reliance on the government's promises regarding DACA.

171. A government decision reversing a prior policy is "arbitrary and capricious" when it fails "tak[e] into account" these types of "serious reliance interests." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015).

172. The government's disregard for the reasonable reliance of Plaintiffs and hundreds of thousands of other vulnerable young people is the hallmark of arbitrary and capricious action and an abuse of discretion, and the decision to terminate the DACA program is therefore in violation of the APA and must be vacated.

173. The government's decision to terminate the DACA program is also arbitrary and capricious because the purported rationale for that decision is inconsistent with DHS's new policy. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 55–56 (1983) (holding that the agency "failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary capricious standard"). In particular, the government terminated DACA because it purportedly concluded that the Executive Branch lacks authority to continue the program, yet DHS will continue to adjudicate pending DACA applications, as well as renewal applications it receives before October 5, 2017 (for individuals whose benefits expire before March 5, 2018), thereby extending DACA for an additional two and a half years.

174. The government's decision to set an October 5, 2017 deadline for accepting DACA renewal applications is also arbitrary. The Rescission Memorandum does not provide a reasoned analysis to support this short deadline, and the government has failed to provide sufficient time and notice to DACA recipients. On information and belief, the government has sent false and misleading renewal notices to certain DACA recipients, which have failed to advise them of the October 5, 2017 deadline. Moreover, this short deadline is especially troubling for low-income DACA recipients, who have little time to gather the significant funds required to submit a DACA renewal application.

175. Moreover, the decision to terminate DACA is also arbitrary and capricious because the government itself previously determined that DACA is a lawful exercise of the Executive Branch's immigration enforcement authority, and the government failed to conduct or provide a reasoned analysis for its change of policy. *See Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989) ("a shift from settled policy requires a showing of reasoned analysis").

176. The government's decision to terminate DACA is also in violation of the APA because the stated rationale for ending the program is pretextual and incorrect as a matter of law.

FIFTH COUNT

ADMINISTRATIVE PROCEDURE ACT – NOTICE-AND-COMMENT RULEMAKING

177. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

178. The APA, 5 U.S.C. §§ 553 and 706(2)(D), requires that federal agencies conduct rulemaking before engaging in action that impacts substantive rights.

179. DHS is an "agency" under the APA, and the Rescission Memorandum and the actions that DHS has taken to implement the Rescission Memorandum are "rules" under the APA. *See* 5 U.S.C. § 551(1), (4).

180. In implementing the Rescission Memorandum, federal agencies have changed the substantive criteria by which individual DACA grantees work, live, attend school, obtain credit, and travel in the United States. Defendants did not follow the procedures required by the APA before taking action impacting these substantive rights.

181. With exceptions that are not applicable here, agency rules must go through notice-and-comment rulemaking. *See* 5 U.S.C. § 553.

182. Defendants promulgated and implemented these rules without authority and without notice-and-comment rulemaking in violation of the APA.

183. Plaintiffs will be impacted because they have not had the opportunity to comment on the rescission of DACA.

184. Defendants' violation has caused ongoing harm to Plaintiffs and other Dreamers.

SIXTH COUNT

REGULATORY FLEXIBILITY ACT – REGULATORY FLEXIBILITY ANALYSES

185. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

186. The Regulatory Flexibility Act, 5 U.S.C. §§ 601–12 ("RFA"), requires federal agencies to analyze the impact of rules they promulgate on small entities and publish initial and final versions of those analyses for public comment. 5 U.S.C. §§ 603–04.

187. "Small entit[ies]" for purposes of the RFA includes "small organization[s]" and "small business[es]." *See* 5 U.S.C. §§ 601(3), (4), (6).

188. The actions that DHS has taken to implement the DHS Memorandum are "rules" under the RFA. *See* 5 U.S.C. § 601(2).

189. Defendants have not issued the required analyses of DHS's new rules.

190. Defendants' failure to issue the initial and final Regulatory Flexibility Analyses violates the RFA and is unlawful.

191. Defendants' violations cause ongoing harm to Plaintiffs and other Dreamers.

SEVENTH COUNT

EQUITABLE ESTOPPEL

192. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

193. Through its conduct and statements, the government represented to Plaintiffs and other DACA applicants that DACA was lawful and that information collected in connection with the DACA program would not be used for immigration enforcement purposes absent special circumstances.

194. In reliance on the government's repeated assurances, Plaintiffs and other DACA applicants risked removal and deportation and came forward and identified themselves to the government, and provided sensitive personal information, including their fingerprints and personal history, in order to participate in DACA.

195. Throughout the life of DACA, the government has continued to make affirmative representations about the use of information as well as the validity and legality of DACA. Plaintiffs and other DACA applicants relied on the government's continuing representations to their detriment.

196. DACA beneficiaries rearranged their lives to become fully visible and contributing members of society, including by seeking employment, pursuing higher education, and paying taxes, but are now at real risk of removal and deportation.

197. Accordingly, Defendants should be equitably estopped from terminating the DACA program or from using information provided pursuant to DACA for immigration enforcement purposes, except as previously authorized under DACA.

198. An actual controversy between Plaintiffs and Defendants exists as to whether Defendants should be equitably estopped.

199. Plaintiffs are entitled to a declaration that Defendants are equitably estopped.

EIGHTH COUNT

DECLARATORY JUDGMENT THAT DACA IS LAWFUL

200. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

201. The DACA program was a lawful exercise of the Executive Branch's discretion to enforce the immigration laws. Indeed, after performing a thorough analysis, the government itself concluded that DACA was lawful.[87] However, the government now claims, as the basis for its rescission of the program, that DACA is unlawful.[88]

202. The Declaratory Judgment Act, 28 U.S.C. § 2201, allows the court, "[i]n a case of actual controversy within its jurisdiction," to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

203. As DACA beneficiaries, Plaintiffs have an interest in the legality of the DACA program. The government's decision to terminate DACA on the purported basis that the DACA program was unlawful has harmed Plaintiffs and continues to cause ongoing harm to Plaintiffs.

---

[87] *See* Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others, 2014 WL 10788677 (Op. O.L.C. Nov. 19, 2014).

[88] *See* Memorandum from Acting Secretary Elaine C. Duke, Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

204. There is an actual controversy regarding whether the DACA program is lawful.

205. Plaintiffs are entitled to a declaratory judgment pursuant to 28 U.S.C. § 2201(a) that the DACA program was lawful and is lawful today.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court grant the following relief:

(1) Issue a declaratory judgment pursuant to 28 U.S.C. § 2201(a) that the DACA program is lawful and constitutional;

(2) Issue a declaratory judgment pursuant to 28 U.S.C. § 2201(a) and 5 U.S.C. § 706(2) that the termination of the DACA program was unlawful and unconstitutional;

(3) Issue a declaratory judgment pursuant to 28 U.S.C. § 2201(a) that Defendants are equitably estopped from terminating the DACA program or from using information provided pursuant to DACA for immigration enforcement purposes, except as previously authorized under the program;

(4) Issue an injunction invalidating the Rescission Memorandum, preserving the status quo, and enjoining Defendants from terminating the DACA program;

(5) Issue an injunction enjoining Defendants from sharing or otherwise using information provided pursuant to the DACA program for immigration enforcement purposes except as previously authorized under the DACA program; and

(6) Grant any other and further relief that this Court may deem just and proper.

DATED: September 18, 2017
San Francisco, California

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP

/s/ Mark D. Rosenbaum
PUBLIC COUNSEL

/s/ Luis Cortes Romero
BARRERA LEGAL GROUP, PLLC

/s/ Laurence H. Tribe

/s/ Erwin Chemerinsky

/s/ Leah Litman

Attorneys for Plaintiffs DULCE GARCIA, MIRIAM GONZALEZ AVILA, SAUL JIMENEZ SUAREZ, VIRIDIANA CHABOLLA MENDOZ NORMA RAMIREZ, and JIRAYUT LATTHIVONGSKORN

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS, JR., SBN 132099
tboutrous@gibsondunn.com
KATHERINE M. MARQUART, SBN 248043
kmarquart@gibsondunn.com
JESSE S. GABRIEL, SBN 263137
jgabriel@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

ETHAN D. DETTMER, SBN 196046
edettmer@gibsondunn.com
555 Mission Street
San Francisco, CA 94105
Telephone: (415) 393-8200
Facsimile: (415) 393-8306

PUBLIC COUNSEL
MARK D. ROSENBAUM. SBN 59940
mrosenbaum@publiccounsel.org
JUDY LONDON, SBN 149431
jlondon@publiccounsel.org
610 South Ardmore Avenue
Los Angeles, CA 90005
Telephone: (213) 385-2977
Facsimile: (213) 385-9089

Attorneys for non-parties Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

[*Additional Counsel Listed on Next Page*]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

The Regents of the University of California and Janet Napolitano, *in her official capacity as President of the University of California*,

Plaintiffs,

v.

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

Defendants.

CIVIL CASE NO.: 17-CV-05211-WHA

ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED

Trial Date: Not Set
Action Filed: September 8, 2017

The Honorable William H. Alsup

Additional Counsel for Non-Parties

BARRERA LEGAL GROUP, PLLC
LUIS CORTES ROMERO, SBN 310852
lcortes@barreralegal.com
19309 68th Avenue South, Suite R102
Kent, WA 98032
Telephone: (253) 872-4730
Facsimile: (253) 237-1591

LAURENCE H. TRIBE, SBN 39441
larry@tribelaw.com
Harvard Law School
Affiliation for identification purposes only
1575 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (617) 495-1767

ERWIN CHEMERINSKY, *pro hac vice* forthcoming
echemerinsky@law.berkeley.edu
University of California, Berkeley School of Law
Affiliation for identification purposes only
215 Boalt Hall
Berkeley, CA 94720-7200
Telephone: (510) 642-6483

LEAH M. LITMAN, *pro hac vice* forthcoming
llitman@law.uci.edu
University of California, Irvine School of Law
Affiliation for identification purposes only
401 East Peltason Drive
Irvine, CA 92697
Telephone: (949) 824-7722

INTRODUCTION

Pursuant to Civil Local Rule 3-12(b), Non-Parties Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn, respectfully request that the Court consider whether the action of *Garcia, et al. v. United States of America, et al.*, No. 3:17-cv-05380 (the "Garcia Action"), should be related to the instant case, *The Regents of the University of California v. U.S. Department of Homeland Security*, No. 3:17-cv-05211-WHA (the "University of California Action"), and another already-related case, *State of California, et al. v. U.S. Department of Homeland Security*, et al., No. 3:17-cv-05235 (the "Multi-State Action").[1]

DISCUSSION

Cases are related when: "(1) The actions concern substantially the same parties, property, transaction or event; and (2) It appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges." Civ. L.R. 3-12(a). The Garcia Action, the University of California Action, and the Multi-State Action are related under this standard.

First, all of these actions are based on the many of the same events and the same (or similar) legal theories against many of the same defendants. On September 5, 2017, Defendant Acting Secretary of the Department of Homeland Security Elaine Duke ("Secretary Duke") issued a memorandum rescinding the Deferred Action for Childhood Arrivals program ("DACA"). The University of California and its President Janet Napolitano challenge the decision to rescind DACA by bringing suit against Defendants U.S. Department of Homeland Security ("DHS") and Secretary Duke. A group of four states, including California, challenge the decision to rescind DACA by bringing suit against Defendants DHS and Secretary Duke, as well as the United States of America. And the plaintiffs in the Garcia Action challenge the decision to rescind DACA by bringing suit against Defendants DHS and Secretary Duke, the United States of America, and President Donald J. Trump. These cases concern substantially the same parties and events.

[1] The Court has already determined that the University of California Action and the Multi-State Action are related. *See* Dkt. Nos. 33, 36.

Second, the three actions present many of the same legal questions and request virtually identical relief. All three cases bring causes of action under the Due Process Clause of the Fifth Amendment and the Administrative Procedure Act. Both the Multi-State Action and the Garcia Action also include causes of action based on principles of Equal Protection, the Regulatory Flexibility Act, and the doctrine of equitable estoppel. All of these cases seek a declaration that the rescission of the DACA program was unlawful, and an injunction preventing the federal government from rescinding the program. The Garcia Action also seeks a declaration that DACA was and is lawful. There is substantial overlap in the claims raised and relief sought in these three actions.

Requiring another Judge of this District to separately consider the issues presented in the Garcia Action, after the University of California Action and the Multi-State Action have already been related, would create an "unduly burdensome duplication of labor and expense," and would also create the risk of "conflicting results." *See* Civil L.R. 3-12(a). Accordingly, the Garcia Action should be related to the University of California Action and the Multi-State Action.

CONCLUSION

For the foregoing reasons, the plaintiffs in the Garcia Action request that this Court order that it be related to the University of California Action and the Multi-State Action.

DATED: September 19, 2017
San Francisco, California

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP

Attorneys for Dulce Garcia,
Miriam Gonzalez Avila, Saul Jimenez Suarez,
Viridiana Chabolla Mendoza, Norma Ramirez,
and Jirayut Latthivongskorn

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS, JR., SBN 132099
tboutrous@gibsondunn.com
KATHERINE M. MARQUART, SBN 248043
kmarquart@gibsondunn.com
JESSE S. GABRIEL, SBN 263137
jgabriel@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

ETHAN D. DETTMER, SBN 196046
edettmer@gibsondunn.com
555 Mission Street
San Francisco, CA 94105
Telephone: (415) 393-8200
Facsimile: (415) 393-8306

PUBLIC COUNSEL
MARK D. ROSENBAUM, SBN 59940
mrosenbaum@publiccounsel.org
JUDY LONDON, SBN 149431
jlondon@publiccounsel.org
610 South Ardmore Avenue
Los Angeles, CA 90005
Telephone: (213) 385-2977
Facsimile: (213) 385-9089

Attorneys for Non-Parties Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

[*Additional Counsel Listed on Next Page*]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

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

Defendants.

CIVIL CASE NO.: 17-CV-05211-WHA

DECLARATION OF ETHAN D. DETTMER IN SUPPORT OF ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED

Trial Date: Not Set
Action Filed: September 8, 2017

The Honorable William H. Alsup

Additional Counsel for Non-Parties

BARRERA LEGAL GROUP, PLLC
LUIS CORTES ROMERO, SBN 310852
lcortes@barreralegal.com
19309 68th Avenue South, Suite R102
Kent, WA 98032
Telephone: (253) 872-4730
Facsimile: (253) 237-1591

LAURENCE H. TRIBE, SBN 39441
larry@tribelaw.com
Harvard Law School
Affiliation for identification purposes only
1575 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (617) 495-1767

ERWIN CHEMERINSKY, *pro hac vice* forthcoming
echemerinsky@law.berkeley.edu
University of California, Berkeley School of Law
Affiliation for identification purposes only
215 Boalt Hall
Berkeley, CA 94720-7200
Telephone: (510) 642-6483

LEAH M. LITMAN, *pro hac vice* forthcoming
llitman@law.uci.edu
University of California, Irvine School of Law
Affiliation for identification purposes only
401 East Peltason Drive
Irvine, CA 92697
Telephone: (949) 824-7722

I, Ethan D. Dettmer, declare and state as follows:

1. I am an attorney at law and member of the Bar of this Court. I am a partner with the law firm of Gibson, Dunn & Crutcher LLP, attorneys of record for non-parties Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn, plaintiffs in the action *Garcia, et al. v. United States of America, et al.*, No. 17-cv-05380-JCS (the "Garcia Action") filed in this District on September 18, 2017. I make this declaration of my own personal knowledge, and if called upon to do so, I could and would testify to the matters stated herein.
2. I make this declaration in support of the Administrative Motion to Consider Whether Cases Should Be Related.
3. Attached hereto as Exhibit A is a true and correct copy of the complaint filed by the plaintiffs in the Garcia Action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on September 19, 2017.

/s/ Ethan D. Dettmer
Ethan D. Dettmer

Exhibit A

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS, JR., SBN 132099
tboutrous@gibsondunn.com
KATHERINE M. MARQUART, SBN 248043
kmarquart@gibsondunn.com
JESSE S. GABRIEL, SBN 263137
jgabriel@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

ETHAN D. DETTMER, SBN 196046
edettmer@gibsondunn.com
555 Mission Street
San Francisco, CA 94105
Telephone: (415) 393-8200
Facsimile: (415) 393-8306

PUBLIC COUNSEL
MARK D. ROSENBAUM, SBN 59940
mrosenbaum@publiccounsel.org
JUDY LONDON, SBN 149431
jlondon@publiccounsel.org
610 South Ardmore Avenue
Los Angeles, CA 90005
Telephone: (213) 385-2977
Facsimile: (213) 385-9089

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

[*Additional Counsel Listed on Next Page*]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

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

Defendants.

CIVIL CASE NO.:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Additional Counsel for Plaintiffs

BARRERA LEGAL GROUP, PLLC
LUIS CORTES ROMERO, SBN 310852
lcortes@barreralegal.com
19309 68th Avenue South, Suite R102
Kent, WA 98032
Telephone: (253) 872-4730
Facsimile: (253) 237-1591

LAURENCE H. TRIBE, SBN 39441
larry@tribelaw.com
Harvard Law School
Affiliation for identification purposes only
1575 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (617) 495-1767

ERWIN CHEMERINSKY, *pro hac vice* forthcoming
echemerinsky@law.berkeley.edu
University of California, Berkeley School of Law
Affiliation for identification purposes only
215 Boalt Hall
Berkeley, CA 94720-7200
Telephone: (510) 642-6483

LEAH M. LITMAN, *pro hac vice* forthcoming
llitman@law.uci.edu
University of California, Irvine School of Law
Affiliation for identification purposes only
401 East Peltason Drive
Irvine, CA 92697
Telephone: (949) 824-7722

INTRODUCTION

The young women and men filing this lawsuit embody the American Dream. Brought to this country as children and raised in families that often struggled with poverty and homelessness, each has achieved remarkable success through hard work, fierce determination, and incredible resilience. These are characteristics that have defined Americans throughout our Nation's history. Plaintiffs in this case are also alike in that each has committed to helping others, choosing to direct their time, energy, and considerable talents toward defending, healing, educating, and uplifting individuals and communities that are too often ignored. While each of the Plaintiffs is remarkable in his or her own right, their stories of success—and their commitment to serving others—are common among the nearly 800,000 young people who have come to rely on the Deferred Action for Childhood Arrivals ("DACA") program.

The decision to end the DACA program is a broken promise and an unprecedented violation of the constitutional rights of Plaintiffs and other young people who relied on the federal government to honor that promise. The government established the DACA program with great fanfare in 2012. Under DACA, individuals who were brought to the United States as children and meet certain criteria, and who are investigated and found to pose no threat to public safety or national security, are granted deferred action and work authorization for a two-year period, subject to renewal. These young people are commonly referred to as "Dreamers" in recognition of the fact that they have long called this country home and aspire to be part of the American Dream.

To apply for DACA, eligible individuals are required to provide the government with highly sensitive personal information, pay a substantial fee, and submit to a rigorous Department of Homeland Security background check. Initially, the DACA program was met with skepticism in immigrant communities, as many Dreamers were understandably reluctant to voluntarily disclose information (including their current home address) that could facilitate their removal from the United States and place their family members at risk. To combat this fear the government launched an extensive outreach campaign urging Dreamers to apply for DACA, repeatedly promising that they would be able to renew their DACA status and that information they provided in connection with the program would not be used for immigration enforcement purposes. As a result, hundreds of

thousands of young people applied for, and were granted, DACA status. The government quickly realized the administrative, law enforcement, public safety, and economic benefits it sought in establishing the program.

In creating DACA, the government offered Plaintiffs and other Dreamers a straightforward deal—if they stepped forward, shared sensitive personal information, and passed a background check, they would be granted renewable protection and would be allowed to live and work in the United States provided that they played by the rules. DACA also provided access to important benefits, and enabled recipients to open bank accounts, obtain credit cards, start businesses, purchase homes and cars, and conduct other aspects of daily life that were otherwise often unavailable to them. In so doing, DACA has allowed Plaintiffs and nearly 800,000 young people to become contributing members of society and pursue the American Dream.

In taking the irreversible step of identifying themselves to the government, Plaintiffs and other Dreamers trusted the government to honor its word and uphold its end of the bargain. In reliance on the government's promises, DACA recipients took out student loans, accepted job offers, moved to new cities, started businesses, bought homes and cars, and made numerous other life changing decisions. They allowed themselves to fall in love, get married, and start families, trusting that the security and work authorization provided under DACA would enable them to care for (and remain in this country with) their spouses and children.

The transformative impact DACA had for Plaintiffs cannot be overstated. Brought to this country as young children, Plaintiffs have spent virtually their entire lives in the United States. They consider themselves to be Americans and call our nation home. Yet for much of their lives, Plaintiffs were denied basic opportunities and prohibited from realizing their full potential. But DACA changed everything. Beyond a work permit and access to a professional license, DACA provided Plaintiffs the certainty and security necessary to enroll in graduate programs, open businesses, hire employees, build relationships with clients, patients, and students, and begin to start families of their own. Plaintiffs were able to take these risks, and enjoy the benefits of their hard work, because they trusted the government to honor its promises and live up to its word.

Notwithstanding the severe harm it will inflict, the government arbitrarily decided to break its promises to Plaintiffs and hundreds of thousands of other Dreamers by terminating the DACA program. This cruel bait and switch, which was motivated by unconstitutional bias against Mexicans and Latinos, violates the equal protection component of the Fifth Amendment, the due process rights of Plaintiffs and other DACA recipients, and federal law, including the Administrative Procedure Act. Plaintiffs therefore seek equitable and injunctive relief to enjoin this unlawful and unconstitutional action, and respectfully request that the Court compel the government to honor its promises and uphold its end of the DACA bargain.

JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

1. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States. This Court has additional remedial authority under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 701–706.

2. Venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391(b)(2) and (e)(1) because at least one plaintiff resides in this District, a substantial part of the events or omissions giving rise to this action occurred in this District, and each defendant is an agency of the United States or an officer of the United States sued in his or her official capacity.

3. Pursuant to Local Rules 3-2(c) and (d), intradistrict assignment is proper in San Francisco or Oakland because a substantial part of the events or omissions which give rise to the claim occurred in the Counties of San Francisco and Alameda.

PARTIES

4. Plaintiff Dulce Garcia ("Ms. Garcia") is a DACA recipient and an attorney in San Diego, California. Ms. Garcia earned her bachelor's degree from the University of California, San Diego and her law degree from the Cleveland-Marshall College of Law. She was brought to the United States from Mexico when she was four years old. The government's decision to terminate the DACA program will deprive Ms. Garcia of her DACA status and the numerous valuable benefits she is entitled to by virtue of that status. The termination of DACA also will frustrate Ms. Garcia's ability to represent her clients and harm the dozens of individuals who rely on her counsel.

5. Plaintiff Viridiana Chabolla Mendoza ("Ms. Chabolla") is a DACA recipient and a first-year law student at the University of California, Irvine School of Law. Ms. Chabolla was brought to the United States from Mexico when she was two years old. The government's decision to terminate the DACA program will deprive Ms. Mendoza of her DACA status and the numerous valuable benefits she is entitled to by virtue of that status. The termination of DACA also will frustrate Ms. Chabolla's ability to fulfill her dream of working as a lawyer and helping individuals from disadvantaged and underrepresented communities obtain justice through the legal system.

6. Plaintiff Jirayut ("New") Latthivongskorn ("Mr. Latthivongskorn") is a DACA recipient and a fourth-year medical student at the University of California, San Francisco ("UCSF") School of Medicine. He is also a candidate for a Master of Public Health degree from the T.H. Chan School of Public Health at Harvard University. Mr. Latthivongskorn was brought to the United States from Thailand when he was nine years old. The government's decision to terminate the DACA program will deprive Mr. Latthivongskorn of his DACA status and the numerous valuable benefits he is entitled to by virtue of that status. The termination of DACA also will frustrate Mr. Latthivongskorn's ability to fulfill his dream of becoming a doctor and providing care to underserved and unprivileged communities.

7. Plaintiff Norma Ramirez ("Ms. Ramirez") is a DACA recipient and a candidate for a Ph.D. in Clinical Psychology from the Fuller Theological Seminary in Pasadena, California. Ms. Ramirez was brought to the United States from Mexico when she was five years old. The government's decision to terminate the DACA program will deprive Ms. Ramirez of her DACA status and the numerous valuable benefits she is entitled to by virtue of that status. The termination of DACA also will frustrate Ms. Ramirez's ability to realize her dream of opening a free multidisciplinary therapy clinic to immigrant youth and their families.

8. Plaintiff Miriam Gonzalez Avila ("Ms. Gonzalez") is a DACA recipient and a teacher at Crown Preparatory Academy in Los Angeles, California. She is also a candidate for a Master of Arts in Urban Education from Loyola Marymount University. Ms. Gonzalez was brought to the United States from Mexico when she was six years old. The government's decision to terminate the DACA program will deprive Ms. Gonzalez of her DACA status and the numerous

valuable benefits she is entitled to by virtue of that status. The termination of DACA also will frustrate Ms. Gonzalez's ability to teach children in underserved communities, thereby harming the children, families, and community who have come to rely on her.

9. Plaintiff Saul Jimenez Suarez ("Mr. Jimenez") is a DACA recipient and a special education teacher, coach, and mentor in Los Angeles, California. Mr. Jimenez was brought to the United States from Mexico when he was one year old. The government's decision to terminate the DACA program will deprive Mr. Jimenez of his DACA status and the numerous valuable benefits he is entitled to by virtue of that status. The termination of DACA also will frustrate Mr. Jimenez's ability to teach and coach young people, including those with special needs, thereby harming dozens of families and making poorer the community that he is serving and making a better place.

10. Defendant United States of America includes all government agencies and departments responsible for the implementation, administration, and termination of the DACA program.

11. Defendant Donald J. Trump is the President of the United States. President Trump made the decision to terminate the DACA program and is sued in his official capacity.

12. Defendant Department of Homeland Security ("DHS") is a cabinet department of the federal government with responsibility for, among other things, administering and enforcing the nation's immigration laws.

13. Defendant Elaine Duke is the Acting Secretary of Homeland Security and is sued in her official capacity. Secretary Duke is responsible for managing DHS, including the administration and enforcement of policies and practices related to DACA.

STATEMENT OF FACTS

Establishment of the DACA Program

14. On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano issued a memorandum establishing the DACA program (the "2012 DACA Memorandum"). Under DACA, individuals who were brought to the United States as young children and who met certain specific criteria could request deferred action for a period of two years, subject to renewal. In exchange,

DACA applicants were required to provide the government with highly sensitive personal information, submit to a rigorous background check, and pay a considerable fee.[1]

15. Deferred action is a well-established form of prosecutorial discretion under which the government defers removal action against an individual for a specified period, subject to renewal. The 2012 DACA Memorandum explained that DACA covers "certain young people who were brought to this country as children and know only this country as home" and that the immigration laws are not "designed to remove productive young people to countries where they may not have lived or even speak the language."[2]

16. The 2012 DACA Memorandum established specific criteria that "should be satisfied before an individual is considered for an exercise of prosecutorial discretion."[3] They are that the applicant:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for at least five years preceding the date of the memorandum and is present in the United States on the date of the memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.[4]

[1] Memorandum from Secretary Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, at 1–2 (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (hereinafter "2012 DACA Memorandum").

[2] *Id.*

[3] *Id.* at 1.

[4] *Id.*

17. The 2012 DACA Memorandum further provided that "[n]o individual should receive deferred action . . . unless they first pass a background check and requests for relief . . . are to be decided on a case by case basis."[5]

18. USCIS describes DACA as follows: "Deferred action is a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion. For purposes of future inadmissibility based upon unlawful presence, an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect. An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer lawful status upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence."[6]

19. Like other forms of deferred action, DACA serves the government's interests by allowing the government to prioritize resources and exercise discretion for its own convenience. DACA also has provided the government with tremendous law enforcement, public safety, and economic benefits. As the government has recognized, our nation "continue[s] to benefit . . . from the contributions of those young people who have come forward and want nothing more than to contribute to our country and our shared future."[7]

The DACA Application and Renewal Process

20. To apply for DACA, applicants must submit extensive documentation establishing that they meet the relevant criteria.[8] Applicants must also submit a Form I-765 Application for Employment Authorization, and pay $495 in fees.[9]

---

[5] *Id.* at 2.

[6] USCIS DACA FAQs (Archived), Question 1, https://www.uscis.gov/archive/frequently-asked-questions (hereinafter "USCIS DACA FAQs").

[7] Letter from Secretary Jeh Charles Johnson to U.S. Representative Judy Chu (Dec. 30, 2016), https://chu.house.gov/sites/chu.house.gov/files/documents/DHS.Signed%20Response%20to%20Chu%2012.30.16.pdf (hereinafter "Secretary Johnson Letter").

[8] USCIS DACA FAQs, Questions 28–41.

[9] *Id.*, Question 7; *see also* USCIS, I-821D, Consideration of Deferred Action for Childhood Arrivals, https://www.uscis.gov/i-821d.

21. DACA applicants must also undergo biometric and biographic background checks. When conducting these checks, DHS reviews the applicant's biometric and biographic information "against a variety of databases maintained by DHS and other federal government agencies."[10] If any information "indicates that [the applicant's] presence in the United States threatens public safety or national security," the applicant will be ineligible for DACA absent "exceptional circumstances."[11]

22. DACA is not limited to a single, two-year deferral of action. On the contrary, the ability to renew DACA status is an essential element of the program and one of the main benefits used to induce Dreamers to step forward, subject themselves to a rigorous background investigation, and share sensitive personal information with the government. Indeed, the government clearly understood from the very beginning that Dreamers would not apply for DACA, and the program would not be successful, unless they were promised the opportunity to renew their DACA status.

23. To that end, the 2012 DACA Memorandum explicitly directs that DACA be "*subject to renewal*, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States."[12] That memorandum also makes clear that DACA is meant to protect "productive young people" who "were brought to this country as children and know only this country as home" and not merely postpone their removal for two years.[13]

24. DHS also established a straightforward renewal process for DACA and "strongly encourage[d]" DACA recipients to submit their renewal request in advance of the relevant expiration date.[14] Moreover, DACA renewal does not require DACA recipients to meet all of the initial criteria for the program, nor does it require them to submit additional documents.[15] On the contrary, to qualify for renewal, DACA recipients are required to meet three basic criteria: (1) they must not have left the United States without advance parole; (2) they must have continuously

---

[10] USCIS DACA FAQs, Question 23.

[11] *Id.*, Question 65.

[12] 2012 DACA Memorandum, at 3 (emphasis added).

[13] *Id.*

[14] USCIS DACA FAQs, Question 49.

[15] *Id.*, Questions 53–54.

resided in the United States after submitting their DACA application; and (3) they must not have been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, or otherwise pose a threat to national security or public safety.[16]

25. DHS "Standard Operating Procedures" also provide that, absent an "Egregious Public Safety" issue or other special circumstances, DACA status should not be revoked until the government has provided a "Notice of Intent to Terminate" which "thoroughly explain[s]" the grounds for the termination.[17] DHS policy further provides that the recipients of such notice should be afforded 33 days to "file a brief or statement contesting the grounds cited in the Notice of Intent to Terminate" prior to termination of DACA status.[18]

26. Collectively, these policies and procedures, and the representations of numerous government officials, created a clear and reasonable expectation among DACA recipients that they would be entitled to continuously renew their DACA status so long as they stayed out of trouble and played by the rules.

Benefits Provided Under the DACA Program

27. DACA confers numerous important benefits on those who apply for and are granted DACA status. Notably, DACA recipients are granted the right not to be arrested or detained based solely on their immigration status during the time period their deferred action is in effect.[19]

28. DACA recipients are also eligible for work authorization under longstanding regulations. As USCIS has explained, "an individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action . . . ."[20]

---

[16] *Id.*, Question 51.

[17] *See* DHS National Standard Operating Procedures (SOP): Deferred Action for Childhood Arrivals (DACA), at 132, 144–45 (Apr. 4, 2013), https://cliniclegal.org/sites/default/files/attachments/daca_sop_4-4-13.pdf (the "DACA SOP").

[18] *Id.*

[19] *See* USCIS DACA FAQs, Question 9 ("[I]f an individual meets the guidelines for DACA, CBP or ICE should exercise their discretion on a case-by-case basis to prevent qualifying individuals from being apprehended."); 2012 DACA Memorandum, at 2; *see also Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1058–59 (9th Cir. 2014).

[20] USCIS DACA FAQs, Question 1.

29. DACA recipients are eligible to receive certain public benefits. These include Social Security, retirement, and disability benefits, and, in certain states, benefits such as driver's licenses, health care, financial aid, tuition benefits, and unemployment insurance.[21]

30. DACA also serves as a gateway to numerous other important public and private practical benefits, and enables recipients to open bank accounts, obtain credit cards, start businesses, purchase homes and cars, and conduct other aspects of daily life that would otherwise often be unavailable to them.

31. DACA also confers certain immigration benefits and the ability to travel abroad. For example, DACA recipients do not accrue time under 8 U.S.C. § 1182(a)(9)(B)(i), and may briefly depart the U.S. and legally return under certain circumstances.[22]

32. As the government has recognized, DACA has enabled hundreds of thousands of young people "to enroll in colleges and universities, complete their education, start businesses that help improve our economy, and give back to our communities as teachers, medical professionals, engineers, and entrepreneurs—all on the books."[23]

The Government's Promises and Its Efforts to Promote DACA

33. When the DACA program was first launched, many eligible Dreamers were understandably reluctant to step forward and voluntarily disclose sensitive personal information (including their current home address) that could facilitate their removal from the United States and place their family members at risk. In response, the government launched an extensive outreach campaign and vigorously promoted the DACA program. Among other efforts, the government provided advice and guidance to civic organizations and education professionals about "best practices" they could use to encourage eligible individuals to apply for the program. The government also hosted informational workshops, and senior government officials—including President Obama—encouraged young people to apply for the program.

---

[21] *See* 8 U.S.C. §§ 1611(b)(2)–(3), 1621(d); *Texas v. United States*, 809 F.3d 134, 148 (5th Cir. 2015); *Ariz. Dream Act Coal. v. Brewer*, 81 F. Supp. 3d 795, 811 (D. Ariz. 2015); *see also, e.g.*, Cal. Educ. Code §§ 66021.6-66021.7, 68130.5, 76300.5; Cal. Code Regs. tit. 22, § 50301.3.

[22] *See* USCIS DACA FAQs, Question 57.

[23] Secretary Johnson Letter, at 2.

34. The government reiterated these promises in its official correspondence, vowing that DACA recipients would not lose their benefits—including the ability to renew their DACA status—absent specified misconduct. For example, the approval notice granting deferred action under DACA lists only "fraud or misrepresentation" in the application process or "[s]ubsequent criminal activity" as grounds for revoking DACA.[24]

35. The government also made promises about information provided by DACA recipients as part of its efforts to promote the program. In particular, since the inception of the DACA program, the government has repeatedly represented to applicants, Congress, and the general public that information provided by DACA applicants about themselves or others (including family members) would not be used for immigration enforcement purposes absent special circumstances.

36. As then-Secretary of Homeland Security Jeh Johnson explained, "[s]ince DACA was announced in 2012, DHS has consistently made clear that information provided by applicants . . . will not later be used for immigration enforcement purposes except where it is independently determined that a case involves a national security or public safety threat, criminal activity, fraud, or limited other circumstances where issuance of a notice to appear is required by law."[25]

37. Secretary Johnson further explained that this approach was the "long-standing and consistent practice of DHS (and its predecessor INS)" for many "decades" in the use of information "submitted by people seeking deferred action" under a wide variety of programs, as well as applicants seeking immigration "benefits or relief" under a number of other programs.[26] According to Secretary Johnson, "DACA applicants most assuredly relied" upon "these representations" and the agency's "consistent practice" stretching back decades.[27]

38. The government's promise not to use information provided by applicants for immigration enforcement purposes also appears in the USCIS's official instructions regarding the DACA application process. Those instructions provide:

---

[24] The University of Washington, I-797 DACA Approval Sample, https://registrar.washington.edu/i-797-daca-approval_sample.

[25] Secretary Johnson Letter, at 1.

[26] *Id.* at 1–2.

[27] *Id.* at 1.

> *Information provided in this request is protected from disclosure to ICE and U.S. Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings* unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance (www.uscis.gov/NTA). The information may be shared with national security and law enforcement agencies, including ICE and CBP, *for purposes other than removal*, including for assistance in the consideration of deferred action for childhood arrivals request itself, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. The above information sharing clause covers family members and guardians, in addition to the requestor.[28]

39. The same promise appears on the DHS website, which states that "[i]nformation provided in this request [for DACA] *is protected from disclosure* to ICE and CBP for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance (www.uscis.gov/NTA). Individuals whose cases are deferred pursuant to DACA will not be referred to ICE."[29]

40. That same promise is also included in DHS's official, and statutorily-required, Privacy Impact Assessment for the DACA program.[30]

41. Numerous public officials from both political parties have reinforced these promises and have recognized that Dreamers have relied on the government to keep its word. For example, in December 2016, then-Secretary of Homeland Security Jeh Charles Johnson acknowledged that there are hundreds of thousands of Dreamers who have "relied on the U.S. government's representations" about DACA, and he asserted that "representations made by the U.S. government, upon which DACA applicants most assuredly relied, must continue to be honored."[31]

---

[28] Instructions for Consideration of Deferred Action for Childhood Arrivals, USCIS Form I-821D at 13 (Jan. 9, 2017 ed.), https://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf (emphasis added).

[29] USCIS DACA FAQs, Question 19. The referenced Notice to Appearance guidance is USCIS Policy Memorandum 602-0050 (Nov. 7, 2011) ("Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens").

[30] DHS, *Privacy Impact Assessment, USCIS, Deferred Action for Childhood Arrivals* 13 (Aug. 15, 2012), https://www.dhs.gov/sites/default/files/publications/privacy/privacy_pia_uscis_daca.pdf; *see* E-Government Act of 2002 Sec. 208(b), Pub L. No. 107-347, 116 Stat. 2899, 2921 (codified as amended at 44 U.S.C. § 3501 note).

[31] Secretary Johnson Letter, at 1.

42. In January 2017, Speaker of the House Paul Ryan stated that the government must ensure that "the rug doesn't get pulled out from under" Dreamers, who have "organize[d] [their] li[ves] around" the DACA program.[32]

43. Also in January 2017, Senator Lindsey Graham stated that the government should not "pull the rug out and push these young men and women—who came out of the shadows and registered with the federal government—back into the darkness."[33]

44. In February 2017, Congressman Raúl Grijalva described DACA as a "commitment," and called for "the federal government to honor its word to protect" Dreamers.[34]

45. On February 20, 2017, then-Secretary of Homeland Security John F. Kelly issued a memorandum that "immediately rescinded" all "conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal," but specifically exempted the 2012 DACA Memorandum.[35]

46. On March 29, 2017, then-Secretary Kelly reaffirmed that "DACA status" is a "commitment . . . by the government towards the DACA person, or the so-called Dreamer."[36]

47. On April 21, 2017, President Trump said that his administration is "not after the dreamers" and suggested that "[t]he dreamers should rest easy." When asked if "the policy of [his] administration [is] to allow the dreamers to stay," President Trump answered, "Yes."[37]

---

[32] Transcript of CNN Town Hall Meeting with House Speaker Paul Ryan, CNN (Jan. 12, 2017), http://cnn.it/2oyJXJJ.

[33] Lindsey Graham, *Graham, Durbin Reintroduce BRIDGE Act To Protect Undocumented Youth From Deportation* (Jan. 12, 2017), https://www.lgraham.senate.gov/public/index.cfm/2017/1/graham-durbin-reintroduce-bridge-act-to-protect-undocumented-youth-from-deportation.

[34] Congressional Progressive Caucus Leaders Respond to ICE Arrest of DACA Recipient (Feb. 16, 2017), https://cpc-grijalva.house.gov/press-releases/congressional-progressive-caucus-leaders-respond-to-ice-arrest-of-daca-recipient.

[35] Memorandum from Secretary John Kelly, Enforcement of the Immigration Laws to Serve the National Interest, at 2 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (hereinafter "Secretary Kelly Memo").

[36] Ted Hesson & Seung Min Kim, Wary Democrats Look to Kelly for Answers on Immigration, Politico (Mar. 29, 2017), http://politi.co/2mR3gSN.

[37] *Transcript of AP Interview With Trump*, CBS News (Associated Press) (Apr. 24, 2017), https://www.cbsnews.com/news/transcript-of-ap-interview-with-trump.

Ms. Garcia Relied on the Government's Promises Regarding DACA

48. Dulce Garcia was brought to the United States from Mexico when she was four years old. Ms. Garcia was raised in a low-income, underserved neighborhood in San Diego, California. Throughout her childhood, Ms. Garcia lacked health care and her family struggled with poverty and occasional periods of homelessness.

49. Although she grew up fearing the police and immigration authorities, Ms. Garcia did not learn that she was undocumented until high school. Around this time, Ms. Garcia began to discover the limitations of being undocumented and was advised by her high school guidance counselor that she would be unable to enroll in college or secure federal financial aid despite her academic record.

50. Refusing to yield to these limitations, Ms. Garcia continuously sought to enroll at a local community college, despite repeatedly being denied admission because of her immigration status. Eventually, Ms. Garcia secured admission to the school. Ms. Garcia later transferred to the University of California, San Diego ("UCSD"), graduating in 2009 with a bachelor's degree in political science and securing honors every quarter she was enrolled at UCSD. During this time, Ms. Garcia worked full time as a legal assistant at a small law firm, which solidified her childhood dream of becoming an attorney, and often sought out second and third jobs in order to pay for tuition and books.

51. Ms. Garcia matriculated at the Cleveland-Marshall College of Law in Cleveland, Ohio in 2011. Because tuition was a flat rate regardless of the number of units, Ms. Garcia sought the Dean's approval to take extra classes during her second and third years. Ms. Garcia also worked throughout law school as legal assistant to cover tuition and her living expenses.

52. During her last year of law school, when money was especially tight, Ms. Garcia's mother gave her $5,000 to help pay for tuition. This sum represented most of Ms. Garcia's mother's life savings, which she had earned working the night shift as a hotel housekeeper.

53. During Ms. Garcia's second year of law school, the government announced the DACA program. Ms. Garcia was overjoyed and broke down in tears when she heard the announcement. Although she was initially skeptical, Ms. Garcia decided that she could trust the

government to honor its promises. In reliance on the government's promises, she applied for DACA, providing the government with her personal information and the required fees. Ms. Garcia passed the background check and was granted DACA status in 2014. In reliance on the government's promises, Ms. Garcia successfully reapplied for DACA status and work authorization in 2016. Ms. Garcia was admitted to the California Bar in May 2016.

54. Being granted DACA status was a transformative experience for Ms. Garcia. DACA freed Ms. Garcia from the constant worry that she would be detained and deported every time she stepped outside her home. It also gave her the confidence to hire several employees, build a thriving law practice, and represent dozens of clients in immigration, civil litigation, and criminal defense cases. Finally, DACA enabled Ms. Garcia to dream about becoming a mother, allowing her to take the first steps toward becoming a foster parent, with the ultimate goal of adopting a child.

55. Ms. Garcia trusted the government to honor its promises and advised others that information provided as part of DACA would not be used for immigration enforcement purposes. Even after the new administration was sworn into office, Ms. Garcia continued to trust the government, helping to create a video encouraging eligible young people to apply for DACA.

Ms. Chabolla Relied on the Government's Promises Regarding DACA

56. Viridiana Chabolla was brought to the United States from Mexico when she was two years old. Ms. Chabolla grew up in Los Angeles, California. Ms. Chabolla confronted the reality of her undocumented status from an early age, and was unable to participate in certain club and community activities that required a Social Security number.

57. Ms. Chabolla was inspired to pursue a career in law by her grandfather, who suggested that becoming an attorney would give her "the power to fight injustice with words." Ms. Chabolla was further inspired after meeting a Latino judge from East Los Angeles, whose eloquence, impressive academic credentials, and commitment to the community left a deep impression on her.

58. Ms. Chabolla enrolled in Pomona College in the fall of 2009 and graduated with a Bachelor of Arts degree in Sociology and Chicana/o-Latina/o Studies in May 2013. Ms. Chabolla received numerous honors and awards and was deeply involved in campus life. At the same time,

Ms. Chabolla sought out ways to give back to her community, helping to coordinate academic and enrichment activities, SAT preparation classes, and college information sessions for hundreds of students from economically disadvantaged and underrepresented backgrounds. Ms. Chabolla also created and taught an elective course on the U.S. Civil Rights Movement to high school students.

59. In 2012, during her final year of college, Ms. Chabolla applied for and was granted DACA status. In reliance on the promises made by the government, Ms. Chabolla disclosed personal information about herself and her family, paid the required fee, and submitted to a DHS background check. In reliance on the government's promises, Ms. Chabolla successfully reapplied for DACA status in 2014 and again in 2016.

60. After graduating from Pomona, Ms. Chabolla was hired as a community organizer at Public Counsel, the nation's largest pro bono law firm. In that capacity, Ms. Chabolla assisted with landmark civil rights litigation involving educational inequities in the public education system, as well as with efforts to provide essential services to homeless veterans, women, and youth in Los Angeles County.

61. Ms. Chabolla's experiences at Public Counsel solidified her interest in helping underserved individuals and communities obtain justice through the legal system. In pursuit of this goal, Ms. Chabolla secured a special fellowship from the law firm of Munger, Tolles & Olson LLP, and enrolled earlier this year as a Public Interest Scholar at the University of California, Irvine School of Law.

Mr. Latthivongskorn Relied on the Government's Promises Regarding DACA

62. New Latthivongskorn was brought to the United States from Thailand when he was nine years old. Mr. Latthivongskorn was raised in California. His parents first settled in Fremont, California, where they worked cleaning toilets and mopping floors, and later waiting tables at various restaurants. In 2004, Mr. Latthivongskorn's parents moved the family to Sacramento to open their own restaurant, hoping that it would allow them to earn enough money to be able to send their children to college.

63. Growing up, Mr. Latthivongskorn lived with the constant fear that he or his parents might be deported. Mr. Latthivongskorn began to more acutely experience the challenges of being

undocumented as he grew older, often searching for excuses such as being "deathly afraid of driving" to explain to classmates why he lacked a driver's license.

64. Mr. Latthivongskorn was inspired to become a doctor after his mother was diagnosed with ovarian tumors during his junior year of high school. Not only did Mr. Latthivongskorn witness the incredible power of medicine to help those in need, but he also experienced the barriers that low-income immigrants face in navigating the health care system. After this experience, Mr. Latthivongskorn decided that he wanted to devote his life to improving access to health care for immigrant and low-income communities.

65. Mr. Latthivongskorn's parents taught him that hard work and education were the keys to success. In addition to waiting tables, washing dishes, and mopping floors in his family's restaurant on nights and weekends, Mr. Latthivongskorn immersed himself in his studies, taking honors and AP classes. As a result of his hard work, Mr. Latthivongskorn graduated as salutatorian of his high school class and was accepted to UC Berkeley.

66. Because he lacked a Social Security number, Mr. Latthivongskorn was ineligible for federal financial aid. However, due to his record of achievement, Mr. Latthivongskorn was offered a prestigious scholarship that promised to cover a significant portion of his educational expenses for four years. This scholarship was revoked only weeks before classes began after UC Berkeley learned that Mr. Latthivongskorn lacked legal status. Mr. Latthivongskorn was devastated and considered attending a community college, but his family insisted that he enroll at UC Berkeley.

67. While Mr. Latthivongskorn thrived at UC Berkeley, he constantly worried about how to finance his education. To help pay for school, Mr. Latthivongskorn worked as a busboy at a Thai restaurant and secured scholarships from several nonprofit organizations. Despite his demanding academic and work commitments, Mr. Latthivongskorn devoted significant time to volunteering with several local nonprofit organizations.

68. In 2011, Mr. Latthivongskorn was robbed at gun point just five blocks from the UC Berkeley campus. He decided not to report the crime to the police out of fear that stepping forward to law enforcement might lead to him being deported.

69. While at UC Berkeley, Mr. Latthivongskorn also developed into an activist and learned the power of grassroots community organizing. Among other efforts, Mr. Latthivongskorn advocated for federal legislation to assist Dreamers, and testified before the California Legislature in support of the California DREAM Act in 2011 and the California TRUST Act in 2013.

70. In 2012, Mr. Latthivongskorn co-founded Pre-Health Dreamers ("PHD"), a national nonprofit organization that provides advising, resources, and advocacy for undocumented students interested in pursuing careers in health care and science. In January 2017, *Forbes* Magazine named Mr. Latthivongskorn to its "30 Under 30 in Education" list, commending him for being "on the frontline of getting undocumented students into medical professions and on the path to becoming physicians and health care professionals."

71. In 2012, Mr. Latthivongskorn graduated with honors from UC Berkeley, earning a degree in Molecular & Cellular Biology and Distinction in General Scholarship. In spite of his excellent academic record, Mr. Latthivongskorn was told by the deans of admissions at several medical schools that he should not apply to their programs because he was undocumented and that no medical school would invest their resources in training someone who might not be able to stay in the United States. Refusing to take "no" for an answer, Mr. Latthivongskorn applied to medical school anyway, but was initially turned down.

72. Exactly one month after Mr. Latthivongskorn graduated from UC Berkeley, the government announced the DACA program. Believing that he could rely on the government to honor its promises, Mr. Latthivongskorn applied for DACA in the fall of 2012. He passed the background check and was granted DACA status on January 24, 2013. In reliance on the government's promises, Mr. Latthivongskorn successfully reapplied for DACA status and work authorization in 2014 and then again in 2016.

73. Being granted DACA status changed Mr. Latthivongskorn's life. Because DACA recipients were granted permission to stay in the United States on a renewable basis, medical schools became willing to invest in these students for the several years it takes to complete medical school and residency programs. Mr. Latthivongskorn reapplied to medical schools, and in 2014, he enrolled at UCSF, one of the most prestigious and selective medical schools in the country.

Mr. Latthivongskorn is part of the Program in Medical Education for the Urban Underserved ("PRIME-US"), and is committed to using his degree to improve health care delivery systems and assist urban underserved communities.

74. In April 2017, Mr. Latthivongskorn was awarded a prestigious U.S. Public Health Service Excellence in Public Health Award, which is given to medical students who have helped to advance the U.S. Public Health Service's mission to "protect, promote, and advance the health and safety of our Nation."

75. In August 2017, Mr. Latthivongskorn began pursuing a Master of Public Health at Harvard University. His goal is to develop a better understanding of health care policy so that he can help to end health disparities and increase access to affordable, quality health care, particularly for immigrants and other underserved communities.

Ms. Ramirez Relied on the Government's Promises Regarding DACA

76. Norma Ramirez was brought to the United States from Mexico when she was five years old. Ms. Ramirez attended public high school, where she was an honor roll student. Her undocumented status made an impact on her in high school when she was denied a driver's license and learned that her dreams of going to college might be out of reach.

77. Ms. Ramirez attended the College of Southern Nevada, and later the University of Nevada, Las Vegas, where she earned a bachelor's degree in psychology in 2014.

78. Ms. Ramirez could not believe the news in 2012 when her pastor sent her a text message telling her about the DACA program. Relying on the government's promises under the DACA program, Ms. Ramirez applied for DACA status on August 15, 2012. Her application was approved on November 1, 2012. In further reliance on the government's promises, Ms. Ramirez twice reapplied for DACA status and work authorization, and was reapproved in September 2014 and October 2016.

79. Ms. Ramirez has been inspired to continue her education in clinical psychology in part because her experiences as a volunteer mentor have exposed her to the suffering of countless individuals who do not have access to mental health services, much less access to practitioners who speak their native language or share an understanding of the immigrant experience. Her motivation

also stems from her own difficulties in finding a supportive environment to discuss the challenges and barriers she has faced as an undocumented immigrant.

80. In 2015, Ms. Ramirez began her graduate work at the Fuller Theological Seminary in Pasadena, California. She earned her Master's degree in Clinical Psychology in 2017 and is currently pursuing her Ph.D. in Clinical Psychology. Since 2016, Ms. Ramirez has worked at an outpatient clinic in Monrovia, California, providing school and home-based therapy to patients in English and Spanish, and also has served as a member of the Board of Directors for the Immigration Resource Center of San Gabriel Valley.

81. DACA enabled Ms. Ramirez to pursue her dream of establishing a free clinic that provides mental health services to immigrant youth, Latinos, and their families. As a Dreamer, Ms. Ramirez understands the challenges faced by many of her patients, and is able to secure their trust in a way that many other mental health practitioners cannot.

Ms. Gonzalez Relied on the Government's Promises Regarding DACA

82. Miriam Gonzalez was brought to the United States from Mexico when she was six years old. She was raised in Los Angeles, California, and graduated from Roosevelt High School in 2011.

83. Ms. Gonzalez first learned she was undocumented in the seventh grade, after talking with her friends about getting a summer job at an elementary school. When she asked her parents for her Social Security number so that she could apply to work with her friends, they informed her that she was undocumented and had no Social Security number.

84. In spite of their undocumented status, Ms. Gonzalez's parents pushed her to get good grades, with the hope that she would go to college. In high school, Ms. Gonzalez began telling her teachers that she was undocumented, and they provided her with resources about the application process and about a California law allowing undocumented students to pay in-state tuition.

85. Relying on the government's promises under the DACA program, Ms. Gonzalez applied for DACA status and work authorization in December 2012. Her application was approved in February 2013. In further reliance on the government's promises, Ms. Gonzalez successfully reapplied for DACA status and work authorization in December 2014 and October 2016.

86. Ms. Gonzalez attended college at the University of California, Los Angeles ("UCLA"), graduating in 2016 with a Bachelor of Arts in Anthropology and a minor in Classical Civilizations. She was named to the Dean's Honors List for her academic performance in the spring of 2015. While at UCLA, Ms. Gonzalez earned money by tutoring elementary, middle, and high school students, and by working as a campus parking assistant.

87. Ms. Gonzalez has been active in community service since a young age, focusing her energy on immigrants' rights and education for the underserved. While at UCLA, she helped to host the 2014 Immigrant Youth Empowerment Conference—the largest immigrant youth conference in the country—as well as an Educators Conference, a DACA clinic, and several additional immigrants' rights workshops. Ms. Gonzalez also mentored two students at Van Nuys High School, motivating them to pursue a higher education and advising them on the college application process.

88. Ms. Gonzalez ultimately decided that she could give the most to her community by teaching students in underserved communities. After graduating from UCLA in 2016, Ms. Gonzalez was accepted into the selective Teach For America ("TFA") program. Through TFA, Ms. Gonzalez currently teaches Math and Reading Intervention to struggling middle school students at Crown Preparatory Academy in Los Angeles.

89. In 2017, Ms. Gonzalez received her Preliminary Multiple Subject Teaching Credential from Loyola Marymount University, which is valid until 2022. Ms. Gonzalez is currently studying at Loyola Marymount to obtain a Master of Arts degree in Urban Education, with a focus in Policy and Administration. Upon her expected completion of her master's program and her service with TFA in the spring of 2018, Ms. Gonzalez hopes to continue to teach in the Los Angeles area, mentoring and inspiring young students from disadvantaged communities to pursue a higher education and achieve their full potential.

Mr. Jimenez Relied on the Government's Promises Regarding DACA

90. Saul Jimenez was brought to the United States from Mexico when he was one year old. Mr. Jimenez was raised in the Boyle Heights neighborhood of Los Angeles, California. He attended Roosevelt High School, where he was a star athlete. Among other achievements, he was captain of the football team and an all-league wide receiver. Mr. Jimenez worked throughout high

school, helping his parents make ends meet by delivering newspapers and washing dishes at an Italian restaurant.

91. Following high school, Mr. Jimenez played football for two years at East Los Angeles Community College, viewing his commitment to the game as a ticket to a four-year university. At the same time, Mr. Jimenez was also working two or three jobs, and often struggled to stay awake during practice and team meetings. Mr. Jimenez explored becoming a firefighter and considered a career in law enforcement, but learned that his legal status prevented him from serving his community in these ways.

92. In 2007, Mr. Jimenez's hard work paid off and he was awarded a football scholarship to Oklahoma Panhandle State University. Mr. Jimenez again served as team captain and was chosen by his teammates as defensive MVP—now playing as an outside linebacker.

93. In Oklahoma, Mr. Jimenez began mentoring high school students through the U.S. Department of Education's Upward Bound program. Mr. Jimenez quickly found that he enjoyed working with young people and was able to connect with and help many of his students.

94. In 2010, Mr. Jimenez returned to Boyle Heights, working in low-wage jobs in warehouses and restaurants to support his parents and himself. However, after the government announced the DACA program in 2012, Mr. Jimenez began to believe that he could build a career for himself, and worked to improve his resume.

95. Relying on the government's promises under the DACA program, Mr. Jimenez successfully applied for DACA status in 2012. In further reliance on the government's promises, Mr. Jimenez successfully reapplied for DACA status and work authorization in 2014.

96. Shortly after receiving DACA status, Mr. Jimenez secured three part-time teaching and mentorship positions, working as a tutor, a sports coach in an after-school program, and as a manager at an adolescent rehabilitation center at night. After a few months, Mr. Jimenez accepted a full-time position as a program coordinator with the national nonprofit HealthCorps, which enabled him to continue to pursue his interest in teaching and mentorship.

97. In August 2016, Mr. Jimenez began working as a substitute teacher in the Los Angeles Unified School District. Mr. Jimenez is now a full-time special education teacher at

Stevenson Middle School, where he helps students with learning disabilities overcome their challenges.

98. Mr. Jimenez has also pursued coaching as a further means to inspire and uplift young people. In recent years, Mr. Jimenez has also served as the head junior varsity football coach, the head girls junior varsity soccer coach, and an assistant varsity football coach at Roosevelt High School. Through coaching, Mr. Jimenez seeks to teach young people skills and lessons that will apply broadly and benefit them throughout their lives.

President Trump's Statements and Actions Prior to Ending DACA

99. The government's decision to end the DACA program was motivated by improper discriminatory intent and animus toward Mexican nationals, individuals of Mexican heritage, and Latinos, who together account for 93 percent of approved DACA applications.

100. According to USCIS, approximately 79 percent of approved DACA applications through March 31, 2017, have been submitted by Mexican nationals.[38] No other nationality makes up more than 4 percent of approved DACA applications.[39] 93 percent of approved DACA applications have been submitted by individuals from Latin American countries.[40]

101. President Trump's statements and actions reflect a pattern of bias against Mexicans and Latinos. For example, on February 24, 2015, President Trump demanded that Mexico "stop sending criminals over our border."[41] On March 5, 2015, President Trump tweeted that he "want[ed] nothing to do with Mexico other than to build an impenetrable WALL . . . ."[42]

---

[38] USCIS, Form I-821D Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012-2017 (Mar. 31, 2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr2.pdf.

[39] *Id.*

[40] *Id.*

[41] Donald J. Trump, Tweet on February 24, 2015 at 4:47 PM.

[42] Donald J. Trump, Tweet on March 5, 2015 at 4:50 PM.

102. On June 16, 2015, during his speech launching his presidential campaign, President Trump characterized immigrants from Mexico as criminals, "rapists," and "people that have lots of problems."[43] President Trump later asserted that these remarks were "100 percent correct."[44]

103. Three days later, President Trump tweeted that "[d]ruggies, drug dealers, rapists and killers are coming across the southern border," and asked, "When will the U.S. get smart and stop this travesty?"[45]

104. On August 6, 2015, during the first Republican presidential debate, President Trump said "the Mexican government is much smarter, much sharper, much more cunning. And they send the bad ones over because they don't want to pay for them, they don't want to take care of them."[46]

105. On August 21, 2015, two men urinated on a sleeping Latino man and then beat him with a metal pole. At the police station, they stated "Donald Trump was right; all these illegals need to be deported." When asked about the incident, President Trump failed to condemn the men, instead stating that they were "passionate." Specifically, President Trump said, "[i]t would be a shame . . . I will say that people who are following me are very passionate. They love this country and they want this country to be great again. They are passionate."[47]

106. On August 24, 2015, President Trump tweeted, "Jeb Bush is crazy, who cares that he speaks Mexican, this is America, English!!"[48]

---

[43] Donald J. Trump, Presidential Announcement Speech (June 16, 2015), *available at* http://time.com/3923128/donald-trump-announcement-speech/.

[44] Sandra Guy, *Trump in Chicago: Says he's '100 percent correct' about Mexicans, blasts U.S. as 'laughingstock' – 'we're all a bunch of clowns'*, Chicago Sun Times (June 24, 2016), http://chicago.suntimes.com/news/trump-in-chicago-says-hes-100-percent-correct-about-mexicans-blasts-u-s-as-laughingstock-were-all-a-bunch-of-clowns/.

[45] Donald J. Trump, Tweet on June 19, 2015, at 7:22 PM.

[46] Andrew O'Reilly, *At GOP debate, Trump says 'stupid' U.S. leaders are being duped by Mexico*, Fox News (Aug. 6, 2015), http://www.foxnews.com/politics/2015/08/06/at-republican-debate-trump-says-mexico-is-sending-criminals-because-us.html.

[47] Adrian Walker, *'Passionate' Trump fans behind homeless man's beating?*, The Boston Globe (Aug. 21, 2015), https://www.bostonglobe.com/metro/2015/08/20/after-two-brothers-allegedly-beat-homeless-man-one-them-admiringly-quote-donald-trump-deporting-illegals/I4NXR3Dr7litLi2NB4f9TN/story.html.

[48] Donald J. Trump, Tweet on August 24, 2015 at 7:14 PM.

107. On September 25, 2015, President Trump suggested that the United States would no longer "take care" of "anchor babies" from Mexico.[49]

108. In May and June 2016, President Trump repeatedly attacked United States District Judge Gonzalo Curiel, asserting that because he was "of Mexican heritage" he had "an absolute" and "inherent conflict of interest" that precluded him from hearing a lawsuit against President Trump's eponymous university.[50] Speaker of the House Paul Ryan characterized President Trump's comments as "the textbook definition of a racist comment."[51] Senator Susan Collins similarly asserted that President Trump's "statement that Judge Curiel could not rule fairly because of his Mexican heritage" was "absolutely unacceptable."[52]

109. On August 31, 2016, President Trump raised concerns about immigrants, saying "we have no idea who these people are, where they come from. I always say Trojan Horse."[53]

110. In August 2017, President Trump asserted that a group of white supremacists marching in Charlottesville, Virginia included "some very fine people."[54] Former Massachusetts Governor Mitt Romney suggested that these comments "caused racists to rejoice,"[55] while Senator Lindsay Graham noted that the President was "now receiving praise from some of the most racist

---

[49] Donald J. Trump, Speech in Oklahoma City, OK at 41:31-42:30 YouTube (Sept. 25, 2015), https://www.youtube.com/watch?v=2j4bY7NAFww.

[50] Daniel White, *Donald Trump Ramps Up Attacks Against Judge in Trump University Case*, Time (June 2, 2016), http://time.com/4356045/donald-trump-judge-gonzalo-curiel/.

[51] Sarah McCammon, *Trump Says Comments About Judge 'Have Been Misconstrued'*, Nat'l Pub. Radio (June 7, 2016), http://www.npr.org/2016/06/07/481013560/ryan-trumps-criticism-of-judge-textbook-definition-of-a-racist-comment.

[52] Susan Collins, *U.S. Senator Susan Collins' Statement on Donald Trump's Comments on the Judiciary* (June 6, 2016), https://www.collins.senate.gov/newsroom/us-senator-susan-collins%E2%80%99-statement-donald-trump%E2%80%99s-comments-judiciary.

[53] *Transcript of Donald Trump's Immigration Speech*, N.Y. Times (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html?mcubz=0.

[54] Meghan Keneally, *Trump lashes out at 'alt-left' in Charlottesville, says 'fine people on both sides'*, ABC News (Aug. 15, 2017), http://abcnews.go.com/Politics/trump-lashes-alt-left-charlottesville-fine-people-sides/story?id=49235032.

[55] Emma Kinery, *Mitt Romney: President Trump's Charlottesville comments 'caused racists to rejoice'*, USA Today (Aug. 18, 2017), https://www.usatoday.com/story/news/politics/onpolitics/2017/08/18/mitt-romney-criticizes-president-trump-charlottesville-statement/579410001/.

and hate-filled individuals and groups in our country."[56] Former Ku Klux Klan leader David Duke thanked President Trump for his "honesty and courage."[57]

111. On August 22, 2017, during a rally in Phoenix, Arizona, President Trump described unauthorized immigrants as "animals" who bring "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking."[58]

112. On August 25, 2017, President Trump pardoned former Maricopa County Sheriff Joseph Arpaio, who had been convicted of criminal contempt by United States District Judge Susan R. Bolton for intentionally disobeying a federal court order to cease targeting Latinos. A comprehensive investigation by the United States Department of Justice found that under Sheriff Arpaio's leadership the Maricopa County Sheriff's Office engaged in a pattern and practice of unconstitutional conduct and violations of federal law based on its blatantly discriminatory practices against Latinos.[59] Among other conclusions, the Justice Department investigation uncovered "a pervasive culture of discriminatory bias against Latinos" and noted that Sheriff Arpaio's officers routinely referred to Latinos as "wetbacks," "Mexican bitches," "fucking Mexicans," and "stupid Mexicans." In pardoning Sheriff Arpaio, President Trump praised him as an "American patriot"[60] and suggested that he was "convicted for doing his job."[61]

---

[56] Eugene Scott & Miranda Green, *Trump, Graham feud over President's Charlottesville response*, CNN Politics (Aug. 17, 2017), http://www.cnn.com/2017/08/16/politics/lindsey-graham-donald-trump-charlottesville/index.html.

[57] Z. Byron Wolf, *Trump's defense of the 'very fine people' at Charlottesville white nationalist march has David Duke gushing*, CNN Politics (Aug. 15, 2017), http://www.cnn.com/2017/08/15/politics/donald-trump-david-duke-charlottesville/index.html.

[58] *President Trump Speaks Live in Phoenix, Arizona with Campaign-Style Rally*, CNN (Aug. 22, 2017), http://www.cnn.com/TRANSCRIPTS/1708/22/cnnt.01.html.

[59] U.S. Dep't of Justice, Office of Pub. Affairs, *Department of Justice Releases Investigative Findings on the Maricopa County Sheriff's Office* (Dec. 15, 2011), https://www.justice.gov/opa/pr/department-justice-releases-investigative-findings-maricopa-county-sheriff-s-office.

[60] Donald J. Trump, Tweet on August 25, 2017, at 7:00 PM.

[61] Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. Times (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html.

113. President Trump's recent comments and actions reflect an ongoing pattern and practice of bias stretching back decades. In 1973, the United States Department of Justice sued President Trump after a federal investigation found that his company had engaged in systematic racial discrimination. To settle this lawsuit, President Trump agreed to a settlement in which he promised not to discriminate further against people of color.[62]

The Termination of the DACA Program

114. Throughout the first eight months of 2017, the Trump Administration sent strong signals that Dreamers could and should continue to rely on the government's promises regarding the DACA program. As noted above, then-Secretary of Homeland Security John D. Kelly specifically exempted DACA from the Administration's broad repeal of other immigration programs, and reaffirmed that DACA status is a "commitment" by the government.[63] On April 21, 2017, President Trump said that his administration is "not after the dreamers," suggested that "[t]he dreamers should rest easy," and responded to the question of whether "the policy of [his] administration [is] to allow the dreamers to stay," by answering "Yes."[64]

115. On June 29, 2017, officials from ten states[65] that had previously challenged another deferred action program, Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"), sent a letter to Attorney General Jeff Sessions, asserting that the DACA

---

[62] Michael Kranish & Robert O'Harrow, Jr., *Inside the government's racial bias case against Donald Trump's company, and how he fought it*, The Washington Post (Jan. 23, 2016), https://www.washingtonpost.com/politics/inside-the-governments-racial-bias-case-against-donald-trumps-company-and-how-he-fought-it/2016/01/23/fb90163e-bfbe-11e5-bcda-62a36b394160_story.html?utm_term=.b640592cbc5a.

[63] Secretary Kelly Memo, *supra* note 35; Hesson & Kim, *supra* note 36.

[64] *Transcript of AP Interview With Trump*, *supra* note 37.

[65] On September 1, 2017, Tennessee Attorney General Herbert H. Slattery III reversed course and decided Tennessee would not join the suit, citing "a human element to this [issue]" that "should not be ignored." *See* Letter from Tennessee Attorney General Herbert H. Slattery III to Sens. Lamar Alexander and Bob Corker (Sept. 1, 2017), http://static1.1.sqspcdn.com/static/f/373699/27673058/1504293882007/DACA%2Bletter%2B9-1-2017.pdf. Attorney General Slattery further acknowledged that DACA recipients "have an appreciation for the opportunities afforded them by our country," and that "[m]any . . . have outstanding accomplishments and laudable ambitions, which if achieved, will be of great benefit and service" to the United States. *Id.*

program is unlawful. The states threatened to challenge DACA in court unless the federal government rescinded the DACA program by September 5, 2017.[66]

116. On July 21, 2017, attorneys general from twenty states sent a letter to President Trump urging him to maintain DACA and defend the program in court, asserting that the arguments of the states which were threatening to bring suit were "wrong as a matter of law and policy."[67]

117. On August 31, 2017, hundreds of America's leading business executives sent a letter to President Trump urging him to preserve the DACA program.[68] The letter explains that "Dreamers are vital to the future of our companies and our economy" and are part of America's "global competitive advantage."[69]

118. On September 4, 2017, Attorney General Sessions wrote to Acting Secretary of Homeland Security Duke, describing his assessment that "DACA was effectuated by the previous administration through executive action, without proper statutory authority;" that DACA "was an unconstitutional exercise of authority by the Executive Branch;" and that "it is likely that potentially imminent litigation would yield similar results [as the DAPA litigation] with respect to DACA."[70]

119. On September 5, 2017, Attorney General Sessions announced the government's decision to end the DACA program. In his remarks, Attorney General Sessions recognized that DACA "essentially provided a legal status for recipients for a renewable two-year term, work authorization and other benefits, including participation in the social security program," but asserted

---

[66] Letter from Texas Attorney General Ken Paxton, *et al.*, to U.S. Attorney General Jeff Sessions (June 29, 2017), https://www.texasattorneygeneral.gov/files/epress/DACA_letter_6_29_2017.pdf.

[67] Letter from California Attorney General Xavier Becerra, *et al.*, to President Donald J. Trump (July 21, 2017), https://oag.ca.gov/system/files/attachments/press_releases/7-21-17%20%20Letter%20from%20State%20AGs%20to%20President%20Trump%20re%20DACA.final_.pdf.

[68] Letter to President Donald J. Trump, *et al.*, (Aug. 31, 2017), https://dreamers.fwd.us/business-leaders.

[69] *Id.*

[70] Letter from U.S. Attorney General Jefferson B. Sessions to Acting Secretary of Homeland Security Elaine C. Duke (Sept. 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf.

that the program "is vulnerable to the same legal and constitutional challenges that the courts recognized with respect to the DAPA program."[71]

120. Attorney General Sessions's comments regarding the legality of the DACA program contradict conclusions previously reached by both the Department of Justice and the Department of Homeland Security. Specifically, the Department of Justice's Office of Legal Counsel ("OLC") provided a detailed analysis of DAPA in 2014, concluding that DAPA—as well as DACA—was a lawful exercise of the Executive Branch's "discretion to enforce the immigration laws."[72] More recently, in its brief before the U.S. Supreme Court in *United States v. Texas*, DHS concluded that programs like DACA are "lawful exercise[s]" of the Executive Branch's "broad statutory authority" to administer and enforce the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*[73]

121. Nonetheless, on the same date as Attorney General Sessions's announcement, Acting Secretary of Homeland Security Duke issued a memorandum formally rescinding the DACA program (the "Rescission Memorandum").[74] Unlike OLC's 2014 analysis, the Rescission Memorandum provides no reasoned evaluation of the legality and merits of the program. Instead, it states that the threat of litigation by numerous state attorneys general provoked the decision to terminate DACA.

122. In addition to the Rescission Memorandum, Secretary Duke also issued an accompanying statement asserting that the government had decided to end DACA rather than "allow the judiciary to *potentially* shut the program down completely and immediately."[75] Secretary Duke

---

[71] U.S. Dep't of Justice, Office of Pub. Affairs, *Attorney General Sessions Delivers Remarks on DACA* (Sept. 5, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca.

[72] Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others, 2014 WL 10788677 (Op. O.L.C. Nov. 19, 2014).

[73] *See* Brief for Petitioners at 42, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 836758 at *42.

[74] Memorandum from Acting Secretary Elaine C. Duke, Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

[75] Statement from Acting Secretary Duke on the Rescission Of Deferred Action For Childhood Arrivals (DACA) (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/statement-acting-secretary-duke-rescission-deferred-action-childhood-arrivals-daca (emphasis added).

also expressed "sympath[y]" and "frustrat[ion]" on "behalf" of DACA recipients, candidly acknowledging that "DACA was fundamentally a lie."[76]

123. Under the Rescission Memorandum, the federal government will continue to process DACA applications received by September 5, 2017. Furthermore, the federal government will issue renewals for recipients whose permits expire before March 5, 2018, provided they apply for renewal by October 5, 2017. The government will not approve any new or pending applications for advanced parole.

124. In a statement also issued on September 5, 2017, President Trump claimed that he decided to end DACA because he had been advised that "the program is unlawful and unconstitutional and cannot be successfully defended in court," and because DACA "helped spur a humanitarian crisis—the massive surge of unaccompanied minors from Central America including, in some cases, young people who would become members of violent gangs throughout our country, such as MS-13."[77]

125. The government also has taken affirmative steps to reduce the protections applicable to information provided in connection with the DACA program. In January 2017, President Trump issued an Executive Order directing all agencies, including DHS, to "ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information."[78] DHS has confirmed that its new privacy policy "permits the sharing of information about immigrants and non-immigrants with federal, state, and local law enforcement."[79]

---

[76] *Id.*

[77] Statement from President Donald J. Trump (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump.

[78] Exec. Order No. 13768, "Enhancing Public Safety in the Interior of the United States" (Jan. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united.

[79] DHS, Privacy Policy 2017-01 Questions & Answers, at 3 (Apr. 27, 2017), https://www.dhs.gov/sites/default/files/publications/Privacy%20Policy%20Questions%20%20Answers%2C%2020170427%2C%20Final.pdf.

126. The Rescission Memorandum also provides no assurance that information provided in connection with DACA applications or renewal requests will not be used for immigration enforcement purposes. To the contrary, DHS posted public guidance about the impact of the rescission on the same day that the Rescission Memorandum was issued. This guidance backtracks on the government's prior repeated assurances that "[i]nformation provided in [a DACA] request ***is protected from disclosure*** to ICE and CBP for the purpose of immigration enforcement proceedings . . . ."[80] Now, rather than affirmatively "protect[ing] [this information] from disclosure," the government represents only that such sensitive information "***will not be proactively provided*** to ICE and CBP for the purpose of immigration enforcement proceedings . . . ."[81] And even this policy "may not be relied upon" by any party and can be changed "at any time without notice."[82]

127. Despite terminating DACA, other uses of deferred action and programs benefitting other groups of immigrants remain in effect.

The Termination of the DACA Program Will Inflict Severe Harm

128. The termination of the DACA program will severely harm Plaintiffs and hundreds of thousands of other young Dreamers. Among other things, Plaintiffs stand to lose their ability to access numerous federal, state, and practical benefits, and to reside in the United States with their families. Nearly 800,000 other young people will similarly face the prospect of losing their jobs, being denied vital benefits, and being separated from the family, friends, colleagues, and communities that love and rely on them. The termination of the DACA program will also harm the students, patients, clients, community members, family, and friends who have come to rely on Plaintiffs for essential services and emotional and financial support.

---

[80] USCIS DACA FAQs, Question 19 (emphasis added). The referenced Notice to Appearance guidance is USCIS Policy Memorandum 602-0050 (Nov. 7, 2011) ("Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens").

[81] DHS, *Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sept. 5, 2017) (emphasis added), https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca.

[82] *Id.*

129. With the sensitive personal information they provided to the federal government no longer "protected from disclosure," Plaintiffs and other DACA recipients face the imminent risk that such information could be used against them "at any time," "without notice," for purposes of immigration enforcement, including detention or deportation.

130. Terminating DACA will also cause widespread economic harm.[83] DACA has enabled approximately 800,000 hardworking, ambitious, and educated young people to enter the labor force. Over 90 percent of DACA recipients are employed, and over 95 percent are bilingual, a valuable skill that is increasingly needed by American companies.[84]

131. Terminating the DACA program will also have a negative impact on the economy and American competitiveness.[85]

132. On August 31, 2017, in recognition of these costs and their concern for Dreamers, hundreds of America's most important business leaders sent a letter to President Trump emphasizing the benefits of the DACA program and urging him to preserve it. The letter explains that "Dreamers are vital to the future of our companies and our economy" and part of America's "global competitive advantage."[86]

CAUSES OF ACTION

FIRST COUNT

FIFTH AMENDMENT – DUE PROCESS

133. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

---

[83] *See, e.g.*, Ike Brannon & Logan Albright, The Economic and Fiscal Impact of Repealing DACA, The Cato Institute (Jan. 18, 2017), https://www.cato.org/blog/economic-fiscal-impact-repealing-daca; Immigrant Legal Resource Center, Money on the Table: The Economic Cost of Ending DACA (Dec. 2016), https://www.ilrc.org/sites/default/files/resources/2016-12-13_ilrc_report_-_money_on_the_table_economic_costs_of_ending_daca.pdf.

[84] *Id.*

[85] *See* Ike Brannon & Logan Albright, *supra* note 83 (concluding that terminating DACA will cost the federal government $60 billion in lost revenue and reduce GDP by $215 billion).

[86] Letter to President Donald J. Trump, Speaker Paul Ryan, Leader Nancy Pelosi, Leader Mitch McConnell, and Leader Charles E. Schumer (Aug. 31, 2017), https://dreamers.fwd.us/business-leaders.

134. Immigrants who are physically present in the United States are guaranteed the protections of the Due Process Clause. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

135. The Constitution "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). A threshold inquiry in any case involving a violation of procedural due process "is whether the plaintiffs have a protected property or liberty interest and, if so, the extent or scope of that interest." *Nozzi v. Hous. Auth. of L.A.*, 806 F.3d 1178, 1190–91 (9th Cir. 2015) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–70 (1972)).

136. The property interests protected by the Due Process Clause "extend beyond tangible property and include anything to which a plaintiff has a 'legitimate claim of entitlement.'" *Nozzi*, 806 F.3d at 1191 (quoting *Roth*, 408 U.S. at 576–77). "A legitimate claim of entitlement is created [by] . . . 'rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Id.* (quoting *Roth*, 408 U.S. at 577).

137. In addition to freedom from detention, *Zadvydas*, 533 U.S. at 690, the term "liberty" also encompasses the ability to work, raise a family, and "form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (citing *Roth*, 408 U.S. at 572).

138. DACA recipients, including Plaintiffs, have constitutionally protected liberty and property interests in their DACA status and the numerous benefits conferred thereunder, including the ability to renew their DACA status every two years. These protected interests exist by virtue of the government's decision to grant DACA recipients certain benefits and its repeated representations and promises regarding the DACA program. *See Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.").

139. In establishing and continuously operating DACA under a well-defined framework of highly specific criteria—including nearly 150 pages of specific instructions for managing the program—the government created a reasonable expectation among Plaintiffs and other DACA

recipients that they are entitled to the benefits provided under the program, including the ability to seek renewal of their DACA status, as long as they continue to play by the rules and meet the program's nondiscretionary criteria for renewal.

140. DACA status is uniquely valuable to Plaintiffs and other Dreamers in that it serves as a gateway to numerous essential benefits. Revocation of DACA effectively deprives these young people of the ability to be fully contributing members of society.

141. The ability to renew DACA status at regular intervals has always been an essential element of the program and part of the deal offered by the government. The prospect of renewal was one of the primary benefits the government used to induce Plaintiffs and other Dreamers to step forward, disclose highly sensitive personal information, and subject themselves to a rigorous background investigation.

142. The government's arbitrary termination of the DACA program and deprivation of the opportunity to renew DACA status violates the due process rights of Plaintiffs and other DACA recipients.

143. The government's decision to terminate DACA after vigorously promoting the program and coaxing hundreds of thousands of highly vulnerable young people to step forward is an unconstitutional bait-and-switch. *See, e.g.*, *Cox v. State of La.*, 379 U.S. 559, 571 (1965); *Raley v. State of Ohio*, 360 U.S. 423, 438–39 (1959). The government promised Plaintiffs and other young people that if they disclosed highly sensitive personal information, passed a background check, and played by the rules, they would be able to live and work in the United States. The government's termination of the DACA program is a breach of that promise. For the government to now "say . . . 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 466 (Fed. Cl. 2017) (quoting *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)).

144. The Due Process Clause also forbids the government from breaking its promises, especially where, as here, individuals, have been induced to undertake actions with potentially devastating consequences in reliance on those promises.

145. The use of information provided by Plaintiffs and other DACA applicants for immigration enforcement actions has particularly egregious due process implications. These individuals disclosed sensitive personal information in reliance on the government's explicit and repeated assurances that it would not be used for immigration enforcement purposes and would in fact be "protected from disclosure" to ICE and CBP. The government has already violated its promises regarding DACA, and there is little reason to believe it will not similarly breach its representations regarding information sharing. *Cf. Raley*, 360 U.S. at 438 ("convicting a citizen for exercising a privilege which the State clearly had told him was available to him," was the "most indefensible sort of entrapment by the State"). Indeed, the government already has breached its prior commitments to affirmatively "protect[] [sensitive information] from disclosure," now asserting only that it will not "proactively provide[]" such information to ICE and CBP for the purpose of immigration enforcement proceedings.

146. The Due Process Clause also requires that the federal government's immigration enforcement actions be fundamentally fair. Here, the government's arbitrary decisions to terminate DACA and change the policy regarding the use of information provided by DACA applicants are fundamentally unfair.

147. Defendants' violations of the Due Process Clause have harmed Plaintiffs and will continue to cause ongoing harm to Plaintiffs.

SECOND COUNT

FIFTH AMENDMENT – EQUAL PROTECTION

148. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

149. The Fifth Amendment forbids federal officials from acting with a discriminatory intent or purpose. *See United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

150. To succeed on an equal protection claim, plaintiffs must show that the defendants "discriminated against them as members of an identifiable class and that the discrimination was intentional." *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134 (9th Cir. 2003) (citation

omitted). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). "The court analyzes whether a discriminatory purpose motivated the defendant by examining the events leading up to the challenged decision and the legislative history behind it, the defendant's departure from normal procedures or substantive conclusions, and the historical background of the decision and whether it creates a disparate impact." *Avenue 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504 (9th Cir. 2016).

151. As set forth above, the termination of DACA was motivated by improper discriminatory intent and bias against Mexican nationals, individuals of Mexican descent, and Latinos, who together account for 93 percent of approved DACA applications.

152. President Trump has a history of tweets, campaign speeches, debate responses, and other statements alleging that Mexican and Latino immigrants are rapists, criminals, and otherwise bad people. Moreover, shortly before terminating DACA, President Trump pardoned former Maricopa County Sheriff Joe Arpaio for a criminal contempt of court conviction related to Sheriff Arpaio's discriminatory practices against Latinos, asserting that the Sheriff had been convicted of contempt merely for "doing his job."

153. President Trump's statements and actions, including the termination of the DACA program, appealed to voters who harbor hostility toward Mexican and Latino immigrants.

154. The government did not follow its normal procedures in reversing course and terminating the DACA program. In 2014, the OLC concluded, after conducting a detailed analysis, that DACA was a lawful exercise of the Executive Branch's discretion. The government has made similar arguments to the Supreme Court. By contrast, Attorney General Sessions's one-page letter to Acting Secretary Duke contained virtually no legal analysis, and Acting Secretary Duke's Rescission Memorandum relied largely on Attorney General Sessions's letter.

155. There are many strong policy reasons to maintain the DACA program. DACA has provided the government with enormous benefits, including an efficient allocation of immigration enforcement resources. DACA has also provided enormous benefits to American businesses and the

broader economy. And DACA has helped communities throughout the United States, who are able to benefit from the talents and contributions of DACA recipients.

156. DACA is a promise from the government to DACA recipients and those who rely on them. Separate from the policy rationales set forth above, the government is obligated to honor its commitments under the DACA program.

157. The government continues to operate programs that benefit other groups of immigrants. Because Mexicans and Latinos account for 93 percent of approved DACA applications, they will be disproportionately impacted by the termination of the DACA program.

158. The history, procedure, substance, context, and impact of the decision to terminate DACA demonstrate that the decision was motivated by discriminatory animus against Mexican and Latino immigrants. Because it was motivated by a discriminatory purpose, the decision to terminate DACA violates the equal protection guarantee of the Due Process Clause of the Fifth Amendment.

159. Defendants' violations have caused ongoing harm to Plaintiffs and other Dreamers.

THIRD COUNT

ADMINISTRATIVE PROCEDURE ACT – CONSTITUTIONAL VIOLATIONS

160. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

161. Defendants are subject to the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 703. The termination of the DACA program is final agency action subject to judicial review because it marks the "consummation of the . . . decisionmaking process" and is one "from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks omitted).

162. The "comprehensive" scope of the APA provides a "default" "remed[y] for all interactions between individuals and all federal agencies." *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1123 (9th Cir. 2009).

163. The APA requires that courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law . . . [or] contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(A), (B).

164. For the reasons set forth above, the decision to terminate the DACA program is unconstitutional in numerous respects and therefore must be vacated.

FOURTH COUNT

ADMINISTRATIVE PROCEDURE ACT – ARBITRARY AND CAPRICIOUS ACTION

165. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

166. Defendants are subject to the APA. *See* 5 U.S.C. § 703. The termination of the DACA program is final agency action subject to judicial review because it marks the "consummation of the . . . decisionmaking process" and is one "from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (internal quotation marks omitted).

167. The "comprehensive" scope of the APA provides a "default" "remed[y] for all interactions between individuals and all federal agencies." *W. Radio Servs. Co.*, 578 F.3d at 1123.

168. The APA requires that courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (E).

169. In creating DACA, the government promised Plaintiffs that if they stepped forward, shared highly sensitive personal information, and passed a background check, they would be granted renewable protection and would be allowed to live and work in the United States as long as they played by the rules. The government also specifically and consistently promised that information disclosed through the DACA program would not be used for immigration enforcement purposes outside certain limited circumstances.

170. Plaintiffs and nearly 800,000 vulnerable young people reasonably relied on the government's assurances and promises in taking the irreversible step of identifying themselves and providing the government with highly sensitive and potentially compromising personal information. DACA recipients also made numerous life-altering personal and professional decisions in reliance on the government's promises regarding DACA.

171. A government decision reversing a prior policy is "arbitrary and capricious" when it fails "tak[e] into account" these types of "serious reliance interests." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015).

172. The government's disregard for the reasonable reliance of Plaintiffs and hundreds of thousands of other vulnerable young people is the hallmark of arbitrary and capricious action and an abuse of discretion, and the decision to terminate the DACA program is therefore in violation of the APA and must be vacated.

173. The government's decision to terminate the DACA program is also arbitrary and capricious because the purported rationale for that decision is inconsistent with DHS's new policy. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 55–56 (1983) (holding that the agency "failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary capricious standard"). In particular, the government terminated DACA because it purportedly concluded that the Executive Branch lacks authority to continue the program, yet DHS will continue to adjudicate pending DACA applications, as well as renewal applications it receives before October 5, 2017 (for individuals whose benefits expire before March 5, 2018), thereby extending DACA for an additional two and a half years.

174. The government's decision to set an October 5, 2017 deadline for accepting DACA renewal applications is also arbitrary. The Rescission Memorandum does not provide a reasoned analysis to support this short deadline, and the government has failed to provide sufficient time and notice to DACA recipients. On information and belief, the government has sent false and misleading renewal notices to certain DACA recipients, which have failed to advise them of the October 5, 2017 deadline. Moreover, this short deadline is especially troubling for low-income DACA recipients, who have little time to gather the significant funds required to submit a DACA renewal application.

175. Moreover, the decision to terminate DACA is also arbitrary and capricious because the government itself previously determined that DACA is a lawful exercise of the Executive Branch's immigration enforcement authority, and the government failed to conduct or provide a reasoned analysis for its change of policy. *See Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989) ("a shift from settled policy requires a showing of reasoned analysis").

176. The government's decision to terminate DACA is also in violation of the APA because the stated rationale for ending the program is pretextual and incorrect as a matter of law.

FIFTH COUNT

ADMINISTRATIVE PROCEDURE ACT – NOTICE-AND-COMMENT RULEMAKING

177. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

178. The APA, 5 U.S.C. §§ 553 and 706(2)(D), requires that federal agencies conduct rulemaking before engaging in action that impacts substantive rights.

179. DHS is an "agency" under the APA, and the Rescission Memorandum and the actions that DHS has taken to implement the Rescission Memorandum are "rules" under the APA. *See* 5 U.S.C. § 551(1), (4).

180. In implementing the Rescission Memorandum, federal agencies have changed the substantive criteria by which individual DACA grantees work, live, attend school, obtain credit, and travel in the United States. Defendants did not follow the procedures required by the APA before taking action impacting these substantive rights.

181. With exceptions that are not applicable here, agency rules must go through notice-and-comment rulemaking. *See* 5 U.S.C. § 553.

182. Defendants promulgated and implemented these rules without authority and without notice-and-comment rulemaking in violation of the APA.

183. Plaintiffs will be impacted because they have not had the opportunity to comment on the rescission of DACA.

184. Defendants' violation has caused ongoing harm to Plaintiffs and other Dreamers.

SIXTH COUNT

REGULATORY FLEXIBILITY ACT – REGULATORY FLEXIBILITY ANALYSES

185. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

186. The Regulatory Flexibility Act, 5 U.S.C. §§ 601–12 ("RFA"), requires federal agencies to analyze the impact of rules they promulgate on small entities and publish initial and final versions of those analyses for public comment. 5 U.S.C. §§ 603–04.

187. "Small entit[ies]" for purposes of the RFA includes "small organization[s]" and "small business[es]." *See* 5 U.S.C. §§ 601(3), (4), (6).

188. The actions that DHS has taken to implement the DHS Memorandum are "rules" under the RFA. *See* 5 U.S.C. § 601(2).

189. Defendants have not issued the required analyses of DHS's new rules.

190. Defendants' failure to issue the initial and final Regulatory Flexibility Analyses violates the RFA and is unlawful.

191. Defendants' violations cause ongoing harm to Plaintiffs and other Dreamers.

SEVENTH COUNT

EQUITABLE ESTOPPEL

192. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

193. Through its conduct and statements, the government represented to Plaintiffs and other DACA applicants that DACA was lawful and that information collected in connection with the DACA program would not be used for immigration enforcement purposes absent special circumstances.

194. In reliance on the government's repeated assurances, Plaintiffs and other DACA applicants risked removal and deportation and came forward and identified themselves to the government, and provided sensitive personal information, including their fingerprints and personal history, in order to participate in DACA.

195. Throughout the life of DACA, the government has continued to make affirmative representations about the use of information as well as the validity and legality of DACA. Plaintiffs and other DACA applicants relied on the government's continuing representations to their detriment.

196. DACA beneficiaries rearranged their lives to become fully visible and contributing members of society, including by seeking employment, pursuing higher education, and paying taxes, but are now at real risk of removal and deportation.

197. Accordingly, Defendants should be equitably estopped from terminating the DACA program or from using information provided pursuant to DACA for immigration enforcement purposes, except as previously authorized under DACA.

198. An actual controversy between Plaintiffs and Defendants exists as to whether Defendants should be equitably estopped.

199. Plaintiffs are entitled to a declaration that Defendants are equitably estopped.

EIGHTH COUNT

DECLARATORY JUDGMENT THAT DACA IS LAWFUL

200. Plaintiffs repeat and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

201. The DACA program was a lawful exercise of the Executive Branch's discretion to enforce the immigration laws. Indeed, after performing a thorough analysis, the government itself concluded that DACA was lawful.[87] However, the government now claims, as the basis for its rescission of the program, that DACA is unlawful.[88]

202. The Declaratory Judgment Act, 28 U.S.C. § 2201, allows the court, "[i]n a case of actual controversy within its jurisdiction," to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

203. As DACA beneficiaries, Plaintiffs have an interest in the legality of the DACA program. The government's decision to terminate DACA on the purported basis that the DACA program was unlawful has harmed Plaintiffs and continues to cause ongoing harm to Plaintiffs.

---

[87] *See* Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others, 2014 WL 10788677 (Op. O.L.C. Nov. 19, 2014).

[88] *See* Memorandum from Acting Secretary Elaine C. Duke, Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

204. There is an actual controversy regarding whether the DACA program is lawful.

205. Plaintiffs are entitled to a declaratory judgment pursuant to 28 U.S.C. § 2201(a) that the DACA program was lawful and is lawful today.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court grant the following relief:

(1) Issue a declaratory judgment pursuant to 28 U.S.C. § 2201(a) that the DACA program is lawful and constitutional;

(2) Issue a declaratory judgment pursuant to 28 U.S.C. § 2201(a) and 5 U.S.C. § 706(2) that the termination of the DACA program was unlawful and unconstitutional;

(3) Issue a declaratory judgment pursuant to 28 U.S.C. § 2201(a) that Defendants are equitably estopped from terminating the DACA program or from using information provided pursuant to DACA for immigration enforcement purposes, except as previously authorized under the program;

(4) Issue an injunction invalidating the Rescission Memorandum, preserving the status quo, and enjoining Defendants from terminating the DACA program;

(5) Issue an injunction enjoining Defendants from sharing or otherwise using information provided pursuant to the DACA program for immigration enforcement purposes except as previously authorized under the DACA program; and

(6) Grant any other and further relief that this Court may deem just and proper.

DATED: September 18, 2017
San Francisco, California

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP

/s/ Mark D. Rosenbaum
PUBLIC COUNSEL

/s/ Luis Cortes Romero
BARRERA LEGAL GROUP, PLLC

/s/ Laurence H. Tribe

/s/ Erwin Chemerinsky

/s/ Leah Litman

Attorneys for Plaintiffs DULCE GARCIA, MIRIAM GONZALEZ AVILA, SAUL JIMENEZ SUAREZ, VIRIDIANA CHABOLLA MENDOZ. NORMA RAMIREZ, and JIRAYUT LATTHIVONGSKORN

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS, JR., SBN 132099
tboutrous@gibsondunn.com
KATHERINE M. MARQUART, SBN 248043
kmarquart@gibsondunn.com
JESSE S. GABRIEL, SBN 263137
jgabriel@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

ETHAN D. DETTMER, SBN 196046
edettmer@gibsondunn.com
555 Mission Street
San Francisco, CA 94105
Telephone: (415) 393-8200
Facsimile: (415) 393-8306

PUBLIC COUNSEL
MARK D. ROSENBAUM. SBN 59940
mrosenbaum@publiccounsel.org
JUDY LONDON, SBN 149431
jlondon@publiccounsel.org
610 South Ardmore Avenue
Los Angeles, CA 90005
Telephone: (213) 385-2977
Facsimile: (213) 385-9089

Attorneys for Non-Parties Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

[*Additional Counsel Listed on Next Page*]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

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

Defendants.

CIVIL CASE NO.: 17-CV-05211-WHA

STIPULATION AND [PROPOSED] ORDER GRANTING ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED

Trial Date: Not Set
Action Filed: September 8, 2017

The Honorable William H. Alsup

Additional Counsel for Non-Parties

BARRERA LEGAL GROUP, PLLC
LUIS CORTES ROMERO, SBN 310852
lcortes@barreralegal.com
19309 68th Avenue South, Suite R102
Kent, WA 98032
Telephone: (253) 872-4730
Facsimile: (253) 237-1591

LAURENCE H. TRIBE, SBN 39441
larry@tribelaw.com
Harvard Law School
Affiliation for identification purposes only
1575 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (617) 495-1767

ERWIN CHEMERINSKY, *pro hac vice* forthcoming
echemerinsky@law.berkeley.edu
University of California, Berkeley School of Law
Affiliation for identification purposes only
215 Boalt Hall
Berkeley, CA 94720-7200
Telephone: (510) 642-6483

LEAH M. LITMAN, *pro hac vice* forthcoming
llitman@law.uci.edu
University of California, Irvine School of Law
Affiliation for identification purposes only
401 East Peltason Drive
Irvine, CA 92697
Telephone: (949) 824-7722

On September 19, 2017, non-parties Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn filed an Administrative Motion to Consider Whether Cases Should Be Related. Plaintiffs the Regents of the University of California, Janet Napolitano, the State of California, the State of Maine, the State of Maryland, and the State of Minnesota, and Defendants U.S. Department of Homeland Security, Elaine Duke, and the United States of America, as well as non-party President Donald J. Trump, hereby stipulate to that motion.[1]

IT IS SO STIPULATED.

DATED: September 19, 2017
San Francisco, California

/s/ Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP

/s/ Mark D. Rosenbaum
PUBLIC COUNSEL

Attorneys for Non-Parties Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Vir Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

U.S. DEPARTMENT OF JUSTICE
CHAD A. READLER
Acting Assistant Attorney General
BRIAN J. STRETCH
Unites States Attorney
JENNIFER D. RICKETTS
Director, Federal Programs Branch
JOHN R. TYLER
Assistant Director, Federal Programs Branch

/s/ Brad P. Rosenberg
BRAD P. ROSENBERG
Senior Trial Counsel

Attorneys for Defendants U.S. Department of Homeland Security, Elaine Duke, in her official capacity as Acting Secretary of the Department of Homeland Security, and United States of America, and for Non-Party Donald J. Trump, in his official capacity as President of the United States

[1] Service of process of Plaintiffs' Complaint in *Garcia, et al. v. United States of America, et al.*, No. 3:17-cv-05380-JCS, has not yet been completed, and the Defendants in that case reserve their right to object to unperfected service.

COVINGTON & BURLING LLP

/s/ Jeffrey M. Davidson
JEFFREY M. DAVIDSON

Attorneys for Plaintiffs The Regents of the University of California and Janet Napolitano, in her official capacity as President of the University of California

XAVIER BECERRA
Attorney General of California

/s/ James F. Zahradka II
JAMES F. ZAHRADKA II

Deputy Attorney General
Attorneys for Plaintiff State of California

JANET T. MILLS
Attorney General of Maine

/s/ Susan P. Herman
SUSAN P. HERMAN
Deputy Attorney General

Attorneys for Plaintiff State of Maine

BRIAN E. FROSH
Attorney General of Maryland

/s/ Steven M. Sullivan
STEVEN M. SULLIVAN
Solicitor General

Attorneys for Plaintiff State of Maryland

LORI SWANSON
Attorney General
State of Minnesota

/s/ Julianna F. Passe
JULIANNA F. PASSE
Assistant Attorney General

Attorneys for Plaintiff State of Minnesota

Filer's Attestation:

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

DATED: September 19, 2017
San Francisco, California

/s/ Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP

[PROPOSED] ORDER

Having considered the papers and pleadings on file, the Court GRANTS the Administrative Motion to Consider Whether Cases Should Be Related and ORDERS that the following cases be related:

- *The Regents of the University of California v. U.S. Department of Homeland Security, et al.*, No. 3:17-cv-05211-WHA;
- *State of California, et al. v. U.S. Department of Homeland Security, et al.*, No. 3:17-cv-05235-WHA; and
- *Garcia, et al. v. United States of America, et al.*, No. 3:17-cv-05380-JCS.

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: _____

THE HONORABLE WILLIAM H. ALSUP
UNITED STATES DISTRICT JUDGE

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS, JR., SBN 132099
tboutrous@gibsondunn.com
KATHERINE M. MARQUART, SBN 248043
kmarquart@gibsondunn.com
JESSE S. GABRIEL, SBN 263137
jgabriel@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

ETHAN D. DETTMER, SBN 196046
edettmer@gibsondunn.com
555 Mission Street
San Francisco, CA 94105
Telephone: (415) 393-8200
Facsimile: (415) 393-8306

PUBLIC COUNSEL
MARK D. ROSENBAUM. SBN 59940
mrosenbaum@publiccounsel.org
JUDY LONDON, SBN 149431
jlondon@publiccounsel.org
610 South Ardmore Avenue
Los Angeles, CA 90005
Telephone: (213) 385-2977
Facsimile: (213) 385-9089

Attorneys for Non-Parties Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

[*Additional Counsel Listed on Next Page*]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

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

Defendants.

CIVIL CASE NO.: 17-CV-05211-WHA

CERTIFICATE OF SERVICE OF ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED

Trial Date: Not Set
Action Filed: September 8, 2017

The Honorable William H. Alsup

Additional Counsel for Non-Parties

BARRERA LEGAL GROUP, PLLC
LUIS CORTES ROMERO, SBN 310852
lcortes@barreralegal.com
19309 68th Avenue South, Suite R102
Kent, WA 98032
Telephone: (253) 872-4730
Facsimile: (253) 237-1591

LAURENCE H. TRIBE, SBN 39441
larry@tribelaw.com
Harvard Law School
Affiliation for identification purposes only
1575 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (617) 495-1767

ERWIN CHEMERINSKY, *pro hac vice* forthcoming
echemerinsky@law.berkeley.edu
University of California, Berkeley School of Law
Affiliation for identification purposes only
215 Boalt Hall
Berkeley, CA 94720-7200
Telephone: (510) 642-6483

LEAH M. LITMAN, *pro hac vice* forthcoming
llitman@law.uci.edu
University of California, Irvine School of Law
Affiliation for identification purposes only
401 East Peltason Drive
Irvine, CA 92697
Telephone: (949) 824-7722

CERTIFICATE OF SERVICE

I, Kelsey Helland, declare as follows:

I am employed in the County of San Francisco, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, CA 94105-0921, in said County and State.

I hereby certify that on September 19, 2017, I caused the foregoing Administrative Motion to Consider Whether Cases Should Be Related to be filed with the Clerk of the Court via CM/ECF. Notice of this filing will be sent by email to all registered parties by operation of the Court's electronic filing systems.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 19, 2017 By: */s/ Kelsey Helland*
Kelsey Helland

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

FRANCISCAN ALLIANCE, INC.; SPECIALTY PHYSICIANS OF ILLINOIS, LLC,; CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS; - and - STATE OF TEXAS; STATE OF WISCONSIN; STATE OF NEBRASKA; COMMONWEALTH OF KENTUCKY, by and through Governor Matthew G. Bevin; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF ARIZONA; and STATE OF MISSISSIPPI, by and through Governor Phil Bryant, *Plaintiffs*, v. SYLVIA BURWELL, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Defendants*.	**BRIEF IN SUPPORT OF STATE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION** Civ. Action No. 7:16-cv-00108-O

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

This case concerns a federal agency's attempt to use its rulemaking power to rewrite the meaning of "sex" in statutory law, without any Congressional authority to do so, and invade the States' sovereign power to provide healthcare and regulate healthcare professionals. Earlier this year, the Department of Health and Human Services ("HHS") issued a Rule that dramatically redefines the meaning of "sex" under the Affordable Care Act ("ACA"), 42 U.S.C. § 18116. Like other federal laws, Section 1557 of the ACA prohibits invidious discrimination on the basis of "sex," and it borrows its definition of "sex" from Title IX. Since its enactment, Title IX has always defined "sex" as a biological category regarding the two sexes, but the new Rule redefines "sex" to include "gender identity" and "termination of pregnancy." 45 C.F.R. § 92.4. As such, the Rule violates the Spending Clause's clear-statement doctrine, because Congress never unambiguously conditioned the State Plaintiffs' receipt of Medicare and Medicaid funding on HHS's new definition of "sex."

Because the Rule violates the Spending Clause, and also commandeers healthcare and regulatory powers reserved to the States, it is contrary to law, and in excess of HHS's authority, in violation of the Administrative Procedure Act ("APA"). The Rule forces state-run healthcare facilities, and state-regulated healthcare providers, to participate in "all health services related to gender transition," 45 C.F.R. § 92.207, to cover those procedures in state health insurance plans, and to risk legal liability through litigation by employees and patients. States that fail to comply with the Rule risk losing billions of dollars in federal healthcare funding. Texas alone could lose over $42.4 billion a year, but those who stand to lose the most are the nation's most vulnerable citizens who participate in Medicare and Medicaid programs.

The State Plaintiffs seek partial summary judgment or, in the alternative, a preliminary injunction, on Counts I, II, III, and XVI because the Rule violates the Spending Clause of Article I, Section 8 of the United States Constitution and the APA.

The State Plaintiffs join in the motion for partial summary judgment on Counts I, II, and III filed by Franciscan Alliance, et al. (collectively, "Franciscan"), but file this separate motion to focus on their Spending Clause claim in Count XVI, and to articulate additional, sovereign-specific reasons to hold the Rule invalid under the APA. Thus, the State Plaintiffs respectfully request that the Court enter summary judgment in their favor on Counts I, II, III, and XVI. In the alternative, they request that the Court issue a preliminary injunction no later than December 31, 2016.

STATEMENT OF FACTS

The State Plaintiffs adopt and incorporate by reference the Statement of Facts filed by Franciscan in its motion for partial summary judgment.

ARGUMENT

Summary judgment is warranted on Counts I, II, III, and XVI because there are no genuine issues of material fact and State Plaintiffs are entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *see Pratt v. Harris Cty.*, 822 F.3d 174, 180 (5th Cir. 2016) (summary judgment is appropriate if "'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

I. The Rule Violates the Clear-Statement Doctrine of the Spending Clause.

The Rule violates the Spending Clause's clear-statement doctrine because no State could fathom that Title IX, as incorporated by the ACA, would impose on it new "gender identity" and "termination of pregnancy" requirements in contravention of decades of statutory and case law. While the Spending Clause gives Congress broad power when it acts alone, there are limitations on the manner in which Congress may exercise its spending power. *See, e.g., Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 300 (2006) (holding Individuals with Disabilities Education Act failed to provide clear notice to states that as a condition of accepting funds

litigants may recover expert fees); *accord Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013) (holding congressional act to address HIV/AIDS, which required funding recipients to adopt certain views on the topic, violated the recipients' First Amendment rights).

One of those limitations is the clear-statement doctrine, which provides that the conditions attached to federal funds appropriated to the States must be unambiguous and enable a state official to "clearly understand" from the language of the law itself the conditions to which a State is agreeing. *Arlington Cent.*, 548 U.S. at 296. Spending power "legislation is 'in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions.'" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181–82 (2005) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Statutory and regulatory clarity is a "concrete safeguard" in our federal system and "guard[s] against excessive federal intrusion into state affairs." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 655 (1999) (Kennedy, J., dissenting); *Jackson*, 544 U.S. at 182 ("As we have recognized, there can . . . be no knowing acceptance of the terms of the contract if a State is unaware of the conditions imposed by the legislation on its receipt of funds." (internal citations and quotations omitted)). "The legitimacy of Congress's exercise of the spending power 'thus rests on whether the [entity] voluntarily and knowingly accepts the terms of the 'contract.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius ("NFIB")*, 132 S. Ct. 2566, 2602 (2012) (quoting *Pennhurst*, 451 U.S. at 17).

Under Supreme Court and Fifth Circuit precedent, the Rule violates the clear-statement doctrine because Congress did not unambiguously state that "sex" meant "gender identity" and "termination of pregnancy" when the States chose to participate in Medicare and Medicaid funding decades ago.[1] Congress has never expressed its

[1] Congress created the Medicaid program in 1965. *See* Social Security Amendments Act of 1965, Pub.

intent to cover "gender identity" or "termination of pregnancy" as protected classes under Title IX—the operative statute providing the definition of "sex" for Section 1557 of the ACA. In Title IX, "sex" retains its original and only meaning—one's immutable, biological sex as male or female, as acknowledged at or before birth. 20 U.S.C. § 1681. Title IX also remains unequivocally neutral on the topic of abortion. *Id.* § 1688. No State could fathom, much less "clearly understand," that the ACA would impose on it the conditions created by HHS's new Rule—namely, a new "gender identity" nondiscrimination requirement, as well as a provision to require coverage, funding, or facilities for abortion. Thus, summary judgment is proper for the State Plaintiffs on Count XVI.

A. Article I Gives Congress Broad Spending Power When It Acts Alone.

"No one has ever doubted that the Constitution authorizes the Federal Government to spend money." *NFIB*, 132 S. Ct. at 2657. "The power to make any expenditure that furthers 'the general welfare' is obviously very broad." *Id.* at 2658. But "from 'the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase' 'the general welfare.'" *Id.* at 2657 (quoting *United States v. Butler*, 297 U.S. 1, 65 (1936)).

Congress's spending authority is not a freestanding power, but a limitation on the taxing power. Unlike the other enumerated powers in Article I, the Framers articulated the spending power as a condition on the Congress's taxing power. Article I establishes that Congress shall have the power to tax "to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S.

L. 89-97, 79 Stat. 286 (1965). All 50 States participate in the Medicaid program. *Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2014 to September 30, 2015*, 79 Fed. Reg. 3385 (Jan. 21, 2014). Texas has participated in the Medicaid program since shortly after its creation. United States Advisory Commission on Intergovernmental Relations, *Intergovernmental Problems in Medicaid* 91 (Sept. 1968), *available at* http://digital. library.unt.edu/ark:/67531/metadc1397/.

CONST. art. I, § 8, cl. 1; *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 926–27 (1833) (describing the spending power as "a qualification or limitation" on the taxing power).

The scope of the spending power generated immediate debate. James Madison contended that Congress was authorized to spend only in furtherance of its enumerated powers. In 1800, Madison explained:

> Money cannot be applied to the general welfare, otherwise than by an application of it to some particular measure, conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it. If it be not, no such application can be made. This fair and obvious interpretation coincides with, and is enforced by, the clause in the Constitution which declares that "no money shall be drawn from the treasury but in consequence of appropriations made by law." An appropriation of money to the general welfare would be deemed rather a mockery than an observance of this constitutional injunction.

5 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 552 (2d ed. 1881); *see also NFIB*, 132 S. Ct. at 2657. Similarly, Thomas Jefferson wrote that to construe the spending power "as giving a distinct and independent power" to Congress "would render all the preceding, and subsequent enumerations of power completely useless." Story, *supra*, § 923 (quoting from Jefferson's 1791 opinion on the Bank of the United States).

Alexander Hamilton took a much broader view of the spending power. *See NFIB*, 132 S. Ct. at 2657–58 (noting Hamilton "maintained the clause confers a power separate and distinct from those later enumerated [and] is not restricted in meaning by the grant of them."). Like Jefferson and Madison, Hamilton interpreted the spending power as a qualification of the taxing power, but he also believed that it is "left to the discretion of the National Legislature, to pronounce, upon the objects, which concern the general Welfare, and for which under that description, an

appropriation of money is requisite and proper." 2 *The Founders' Constitution* (Kurland & Learner eds. 1987), Art. 1, § 8, cl. 1, Doc. 21 (Hamilton's Report on Manufacturers). Under Hamilton's interpretation, the real limit on spending power was not the enumeration of Congress's powers—Madison and Jefferson's view—but the requirement that Congress direct federal appropriations to the "general welfare," and not to matters that were "local" or "confined to a particular spot." *Id.*

The scope of Congress's spending power continued to divide leading political figures throughout the nineteenth century. In vetoing an internal improvement bill, President James Monroe argued that the spending power is "restricted only by the duty to appropriate it to purposes of common defence, and of general, not local, national, not state, benefit." *The Heritage Guide to the Constitution* 93 (Meese, Spalding & Forte eds., 2005) (quoting President James Monroe, Veto Message (May 4, 1822)). President Jackson, on the other hand, dismissed the "fallacy" that the spending clause permitted Congressional measures designed "to conduce to the public good." *Id.* at 95. And President James Buchanan espoused Madison's position that the spending power is "confined to the execution of the enumerated powers delegated to Congress." *Id.*

Finally, in *United States v. Butler*, 297 U.S. 1 (1936), the Supreme Court adopted Hamilton's view on the scope of the spending power. *NFIB*, 132 S. Ct. at 2658. While acknowledging that "sharp differences of opinion have persisted as to the true interpretation" of the spending power, *Butler*, 297 U.S. at 65, the Court concluded that the "confines" of the spending power "are set in the clause which confers it," and not limited by Congress's enumerated powers, *id.* at 66. Importantly, however, *Butler* does not resolve the spending power when the federal government gives the States money to carry out its legislative goals. In that case, as discussed below, the Court places clear limitations on the way in which Congress may spend.

B. Article I Limits Congress's Exercise of its Spending Power When Engaged in Cooperative Federalism.

Since the spending power is so broad, the Supreme Court has "long held that the power to attach conditions to grants to the States has limits." *NFIB*, 132 S. Ct. at 2659. "[T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *NFIB*, 132 S. Ct. at 2659 (quoting *Davis*, 526 U.S. at 654–55 (Kennedy, J., dissenting)). Determining these principles is increasingly important with the mid-20th century ascent of "cooperative federalism," where various spending programs are "financed largely by the Federal Government" but "administered by the States." *King v. Smith*, 392 U.S. 309, 316 (1968).

Ultimately, the Supreme Court adopted the clear-statement requirement, which requires that the conditions attached to federal funds appropriated to the States must be unambiguous. State participants may not be surprised by post-acceptance or retroactive conditions that are not clearly stated in the text of the law itself—such as HHS's new Rule here. For over three decades, the Supreme Court and lower federal courts have repeatedly affirmed the clear-statement requirement. Because the HHS Rule flouts this well-established doctrine, it must be enjoined.

1. The clear-statement doctrine requires conditions attached to federal funds to be unambiguous.

The Supreme Court first applied the clear-statement doctrine to the Spending Clause in *Pennhurst State School and Hospital v. Halderman*. The case involved the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.*, a federal-state program in which the federal government provided aid and, in return, participating states created programs for the developmentally disabled. *Pennhurst*, 451 U.S. at 11. "Like other federal-state cooperative programs," the Court noted, "the

Act is voluntary and the States are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding." *Id.* The issue was whether the Act's "bill of rights" provisions were mandatory conditions on the participating states.

The Supreme Court established an exacting standard for conditions on the receipt of federal monies to be validly imposed on the States. The Court characterized the exercise of Article I spending power in cooperative federalism programs as a contract between the federal government and the States whereby "in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 17. It reasoned that the spending power could only be legitimately exercised where the States "voluntarily and knowingly accept[ ] the terms of the 'contract,'" and not when they are "unaware of the conditions" or "unable to ascertain" their contractual obligations. *Id.* Spending conditions must be stated "unambiguously." *Id.*

The Supreme Court held that the "bill of rights" provision did not satisfy the clear-statement doctrine. Other sections of the statute explicitly imposed conditions on the States. The "bill of rights" provision, however, employed generalized language that provided encouragement for certain kinds of treatment, but did not "express clearly its intent to impose conditions on the grant of federal funds." *Id.* at 24. The lack of express language in the "bill of rights" imposing a condition was significant. As the Court explained, "where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." *Id.* at 17–18. Since the "bill of rights" provision was not a clear, unambiguous, express requirement in the statute, the Court concluded that the States could not now be made to follow it.

In *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006), the Supreme Court delivered a strong reaffirmation of the clear-statement doctrine as applied to the Spending Clause. At issue was whether the provision in the

Individual with Disabilities Education Act ("IDEA") allowing "reasonable attorneys' fees" authorized prevailing litigants to recover expert consultant fees incurred in the course of the proceeding. The Court conducted the clear-statement doctrine analysis not from Congress's point of view, but from that of a state official:

> [W]e must view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds. We must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees. In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case.

Id. at 296.

Using this framework, the Court concluded that the IDEA did not provide a clear-statement that expert fees were permitted, because the statutory text "does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts." *Id.* at 297. Although one section of the IDEA provided that "costs" could be reimbursed, other earlier decisions construed that term as excluding expert fees. *Id.* at 300–03. And while there was legislative history showing that members of Congress intended to permit the reimbursement of expert fees, the Court determined that such evidence was insufficient where the unambiguous text and precedent suggested that expert fees may not be recovered. *Id.* at 304. "In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told [by Congress] regarding the conditions that go along with the acceptance of those funds." *Id.* Likewise, notwithstanding what Article II agencies think, believe, or portend, the buck stops with the language of Congress and "whether such a state official would clearly understand" their obligations from the text of Congress's Act. *Id.* at 296.

2. The clear-statement doctrine is stringent.

The clear-statement doctrine is so stringent that a sovereign's consent to "appropriate relief" for an aggrieved individual does not actually amount to a waiver of sovereign immunity. *Sossamon v. Texas*, 563 U.S. 277 (2011). *Sossamon* involved an inmate suit against Texas where the state asserted sovereign immunity. The Court addressed whether Texas's receipt of federal monies for the purposes of housing "institutionalized persons" under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 ("RLUIPA"), subjected it to lawsuits for damages in federal court. Though Texas consented to provisions granting "appropriate relief," *id.* § 2000cc–2(a), by accepting RLUIPA funds, "that was not the unequivocal expression of state consent that our precedents require," *Sossamon*, 562 U.S. at 285. "'Appropriate relief' does not so clearly and unambiguously waive sovereign immunity to private suits for damages that we can 'be certain that the State in fact consents' to such a suit." *Id.* at 285–86 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999)). Indeed, "'[a]ppropriate relief' is open-ended and ambiguous about what types of relief it includes . . . ." *Id.* at 286.

The Fifth Circuit also applies the clear-statement doctrine strictly. In *Hurst v. Texas Department of Assistive and Rehabilitative Services*, 482 F.3d 809 (5th Cir. 2007), it refused to recognize a waiver of sovereign immunity under the Rehabilitation Act. The court noted that "[i]n seeking to determine whether the language of a condition is sufficiently clear, courts must view the statute 'from the perspective of a state official who is engaged in the process of deciding whether the state should accept federal funds and the obligations that go with those funds.'" *Id.* at 811 (quoting *Arlington Cent.*, 548 U.S. at 296). "In a Spending Clause case, the key is not [the intention of Congress] but what the States are clearly told regarding the conditions that go along with the acceptance of . . . funds." *Id.* (citing *Arlington Cent.*,

548 U.S. at 304). The Fifth Circuit held that although the Rehabilitation Act provided for a right to review agency decisions in federal court, the language was not clear enough to abrogate a state's sovereign immunity under the Eleventh Amendment. *Id.* at 811–12.

Likewise, in *Canutillo Independent School District v. Leija*, 101 F.3d 393, 398–99 (5th Cir. 1996), the Fifth Circuit held that Title IX did not unambiguously place school districts on notice that they will be strictly liable for their teachers' criminal acts. "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* at 398. Because the conditions Title IX imposed on recipients were "limited to those anti-discrimination factors found in its sparse wording," and there was "no mention of liability standards," Congress did not provide a clear-statement that schools would be liable for the criminal acts of their employees. *Id.* at 399; *see also Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 271 (6th Cir. 2009) (holding that No Child Left Behind ("NCLB") "does not include any specific, unambiguous mandate requiring the expenditure of non-NCLB funds.").

Thus, the clear-statement doctrine is rigid and demanding, leaving little, if any, room for federal agencies to contrive ambiguities in Congressional language. This is especially so where, as here, Defendants and other Article II agencies are concocting new definitions of well-understood terms not only decades after their enactment, but decades after the States agreed to the terms of participation within the Medicaid and Medicare programs.

C. The Rule Violates the Clear-Statement Doctrine.

Defendants' *ex-post* Rule violates the clear-statement doctrine because it is not in accord with the understanding of "sex" that existed when the States chose to begin

accepting Medicare and Medicaid as payment for medical services provided,[2] and which still exists today. Section 1557 of the ACA prohibits denial of certain federally-funded health benefits because of the individual's sex, among other things. 42 U.S.C. § 18116. Section 1557 does not independently define "sex," but relies on the definition provided in Title IX, 20 U.S.C. § 1681. Defendants issued the new Rule to "interpret" Section 1557 of the ACA, and redefined Title IX's definition of "sex" to include "gender identity," "sex stereotypes," and "termination of pregnancy." 45 C.F.R. § 92.4.

When Congress enacted Title IX, the common understanding within the scientific, medical, academic, and general communities was that "sex" meant the biological differences between male and female. When enacting other statutes, Congress has always construed "sex" narrowly to refer to the biological differences between men and women. The Rule's redefinition of "sex" to include "gender identity" or "termination of pregnancy" was not clear from the text of Title IX during its enactment, nor in the ensuing years of congressional lawmaking. Thus, the Rule violates the clear-statement doctrine of the Spending Clause.

1. When Congress enacted Title IX, "sex" meant the biological differences between male and female.

When Congress enacted Title IX in 1972, the common understanding of "sex" regarded the biological differences between men and women, and not the contemporary concepts of "gender identity" or "termination of pregnancy" that Defendants' embrace in their new Rule. According to standard legal treatises, "gender identity" is not within the ambit of Titles VII or IX. *See, e.g.*, Margaret C. Jasper, *Employment Discrimination Law Under Title VII* 45 (2d ed. 2008) (stating that Title VII makes it unlawful "to discriminate against any employee or applicant for

[2] When the States began their involvement with Medicare and Medicaid is the operative timeframe relevant to understanding the meaning of the conditions at issue. *See Bennett v. New Jersey*, 470 U.S. 632, 638 (1985) (providing that a state's obligation under cooperative federalism program "generally should be determined by reference to the law in effect when the grants were made").

employment because of his or her sex"); Mack A. Player, *Employment Discrimination Law* 239 (1988) (providing that the term "sex" for the purposes of Title VII generally refers to the division of organisms into biological sexes); Charles A. Sullivan, et al., *Federal Statutory Law of Employment Discrimination* 161 (1980) (same). Indeed, "gender identity" was a virtually unrecognized construct among legal academics when Title VII and Title IX became law. It was not even mentioned in a law review article on the subject of Title VII or Title IX until the 1980s.

"Gender identity" is a recent addition to the social science lexicon. The 1992 National Health and Social Life Survey did not ask about men or women that identify as the opposite sex, nor did the first four waves of data collection of the National Longitudinal Study of Adolescent Health (begun in 1994 and last fielded in 2008). And the Centers for Disease Control and Prevention ("CDC") has not done so. Brian W. Ward et al, *Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013*, 77 NAT'L HEALTH STATISTICS REPORTS 2 (2014).

Among the general public, "gender identity" is a familiar concept only as of late. Law professor Gail Heriot, of the United States Commission on Civil Rights, noted recently before Congress that the 1991 Compact Oxford English Dictionary does not define "transgender." *The Federal Government on Autopilot: Delegation of Regulatory Authority to an Unaccountable Bureaucracy: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 13 (2016) (statement of Gail Heriot, Member, U.S. Comm'n on Civil Rights). Likewise, newspapers such as the *Washington Post* and the *New York Times* did not use the term throughout the 1960s and 1970s. *Id.*

While not a widely used term at the time President Nixon signed Title IX into law, "gender identity" was first used in 1963 at the 23rd International Psycho-Analytical Congress in Stockholm. David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles*, 1945–2001, ARCHIVES OF SEXUAL

BEHAVIOR 93 (Apr. 2004). Notably, early users of "gender" and "gender identity" understood these terms to mean something *different* than "sex."

In the 1950s, John Money, a psychologist at Johns Hopkins University, introduced "gender"—previously a grammatical term only—into scientific discourse. Joanne Meyerowitz, *A History of "Gender,"* 113 THE AM. HISTORICAL REVIEW 1346, 1353 (2008). Money believed that an individual's "gender role" was not determined at birth but was acquired early in a child's development much in the same fashion that a child learns a language. John Money, et al., *Imprinting and the Establishment of Gender Role*, 77 A.M.A. ARCHIVES OF NEUROLOGY & PSYCHIATRY 333–36 (1957). Robert Stoller, the UCLA psychoanalyst who first used the term "gender identity," was another early adopter of the terminology of "gender." He wrote in 1968 that gender had "psychological or cultural rather than biological connotations." Robert J. Stoller, *Sex and Gender: On the Development of Masculinity and Femininity* 9 (1968). To him, "sex was biological but gender was social." Haig, *supra*, at 93.

In 1969, Virginia Prince, who is credited with coining the term "transgender," echoed the view that "sex" and "gender" are distinct: "I, at least, know the difference between sex and gender and have simply elected to change the latter and not the former. . . . I should be termed 'transgenderal.'" *The Federal Government on Autopilot*, 114th Cong. 13 (Heriot statement) (quoting Virginia Prince, *Change of Sex or Gender*, 10 TRANSVESTIA 53, 60 (1969)). And in the 1970s, feminist scholars joined the chorus differentiating "biological sex" from "socially assigned gender." Haig, *supra*, at 93 (quoting Ethel Tobach, *Some Evolutionary Aspects of Human Gender*, 41 AM. J. OF ORTHOPSYCHIATRY 710 (1971)).

Congress clearly intended the term "sex" in Title IX to be defined based on the biological and anatomical differences between males and females, and the meaning of the term "sex" has remained unchanged since that time. To be sure, around the time that Title IX was enacted, nearly every dictionary definition of "sex" referred to

physiological distinctions between females and males, particularly with respect to their reproductive functions. *See, e.g.*, AMERICAN HERITAGE DICTIONARY 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . ."); 9 OXFORD ENGLISH DICTIONARY 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these."). Even today, "sex" continues to refer to biological differences between females and males. *See, e.g.*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); Sari L. Reisner, et al., *"Counting" Transgender and Gender-Nonconforming Adults in Health Research*, 2 TRANSGENDER STUD. Q. 37 (Feb. 2015) ("Sex refers to biological differences among females and males, such as genetics, hormones, secondary sex characteristics, and anatomy.").

The meaning of "gender" has also remained essentially the same since the term was introduced as a means of drawing a distinction between biological "sex" and social "gender." *See, e.g.*, Reisner, *supra*, at 37 ("Gender typically refers to cultural meanings ascribed to or associated with patterns of behavior, experience, and personality that are labeled as feminine or masculine."). This usage of "gender" is also more commonplace now. For example, the 2010 New Oxford American Dictionary distinguishes between "sex," defined in biological terms, and "gender," defined in social and cultural terms. NEW OXFORD AMERICAN DICTIONARY 721–22, 1600 (3d ed.

2010). Accordingly, at the time of Title IX's enactment, "sex" referred to the biological differences between male and female, and "gender identity" was a separate concept.

2. Since Title IX's enactment, when using "sex" in other statutes, Congress construed the term narrowly to refer to one's biological sex as male or female.

Congress has consistently and repeatedly followed this understanding, construing its prohibitions against invidious "sex" discrimination narrowly. In 1974, Representatives Bella Abzug and Edward Koch proposed to amend the Civil Rights Act to *add* the *new* category of "sexual orientation." H.R. 14752, 93rd Cong. (1974). Congress considered other similar bills during the 1970s. *See* H.R. 166, 94th Cong. (1975); H.R. 2074, 96th Cong. (1979); S. 2081, 96th Cong. (1979). In 1994, lawmakers introduced the Employment Non-Discrimination Act ("ENDA") which, like Rep. Abzug and Koch's earlier effort, was premised on the understanding that Title VII's protections against invidious "sex" discrimination related only to one's biological sex as male or female. H.R. 4636, 103rd Cong. (1994). In 2007, 2009, and 2011, lawmakers proposed a broader version of EDNA to codify protections for "gender identity" in the employment context. H.R. 2015, 110th Cong. (2007); H.R. 2981, 111th Cong. (2009); S. 811, 112th Cong. (2011). In addition, in 2013 and 2015, proposals were made to *add* to Title IX the *new* category of "gender identity." H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015). Notwithstanding the success or failure of the aforementioned Congressional proposals, they all affirmed Congress's enduring understanding that "sex," as a protected class, refers only to one's biological sex, as male or female, and not the element of "gender identity" promulgated by Defendants.

And when Congress actually did, in one instance, redefine the term "sex" for the purposes of its prohibitions against invidious "sex" discrimination, the new definition did not encompass "gender identity" or "termination of pregnancy." Rather, in 1978, Congress broadened the statutory term "sex" to include discrimination "on the basis of pregnancy, childbirth, or related conditions," *see* Pregnancy

Discrimination Act of 1978, Pub. L. No. 95-555, § (k), 92 Stat. 2076, 2076 (1978) (codified as 42 U.S.C. § 2000e(k)), while maintaining neutrality regarding abortion, *see* 20 U.S.C. § 1688. In amending the law in this way, Congress indicated that invidious "sex" discrimination occurs when females and males are not afforded the same avenues for advancement (*i.e.*, when pregnant women may be legally fired or not hired). Thus, this amendment affirmed Congress's long-held view that "sex" refers to biological sex, and not to an individual's self-perception of his or her "gender identity," and did not alter its enduring neutrality regarding abortion.

3. No State could clearly understand when it began accepting Medicare and Medicaid funding decades ago that "sex" included "gender identity" and "termination of pregnancy."

The text employed by Congress in Title IX does not support the understanding of the term "sex" put forth by Defendants. Title IX defines "sex" in a binary way. *See* 20 U.S.C. § 1681 (referring to "students of one sex," "both sexes," "students of the other sex"). It also maintains neutrality on the topic of abortion. *See id.* § 1688 ("Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion."). Defendants' Rule, however, redefines Title IX's prohibition against invidious "sex" discrimination, providing that:

> a covered entity shall treat individuals consistent with their gender identity, except that a covered entity may not deny or limit health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available.

45 C.F.R. § 92.206 (2016); 81 Fed. Reg. 31471. And in defining "gender identity," Defendants purport that it "means an individual's internal sense of gender, which may be different from an individual's sex assigned at birth." 81 Fed. Reg. 31384. But Defendants go even further. Not only do they redefine "sex" to include "gender identity," they simultaneously unharness the binary understanding of the sexes.

According to HHS, one's "gender identity" means that a person can identify as "male, female, neither, or a combination of male and female." 45 C.F.R. § 92.4; 81 Fed. Reg. 31467. According to Defendants, "[t]he insertion of this clause helps clarify that those individuals with non-binary gender identities are protected under the [regulation]." 81 Fed. Reg. 31384.

As a separate, distinct category from "sex," Congress expressed its intent to cover "gender identity," as a protected class, in *other* pieces of legislation. *See, e.g.*, 18 U.S.C. § 249(a)(2)(A); 42 U.S.C. § 13925(b)(13)(A). Yet, it has *not* done so regarding Title IX. In *other* legislation, Congress included "gender identity," along with "sex," thus evidencing its intent for "sex" to retain its original and only meaning—one's immutable, biological sex as acknowledged at or before birth. The Rule here was promulgated under the authority Congress delegated to HHS in Section 1557 of the ACA. Section 1557 does *not* add a new non-discrimination provision to the federal code, but merely incorporates by reference pre-existing provisions under, *inter alia*, Title IX ("sex"). Section 1557 does not independently define "sex," or seek to redefine its well-understood meaning. At the time that the ACA was passed in 2010, no federal courts or agencies had interpreted "sex" in Title IX to include "gender identity."

The well-grounded and enduring meaning of "sex," along with the absence of Congressional authorization, can mean only that Defendants insert "gender identity" into the law without authorization. Indeed, Defendants' only purported authority for redefining "sex" are the similarly flawed (and recent) proclamations of other executive

agencies engaged in the mischief of Article I lawmaking.[3] Conveniently, Defendants even cite themselves as an authority for their actions.[4]

Therefore, no State could fathom, much less "clearly understand," that Title IX imposes on it the conditions created by HHS's Rule—namely the absence of neutrality on abortion, plus a new "gender identity" requirement that is, interestingly, untethered from the binary reality of the sexes. The sovereign Plaintiffs did not, therefore, by their actions "voluntarily and knowingly" relinquish their rights. *Pennhurst*, 451 U.S. at 17. Accordingly, the new Rule violates the clear-statement principles of the Spending Clause.

II. The Rule Violates the Administrative Procedure Act.

The State Plaintiffs adopt and incorporate by reference the APA arguments on Counts I, II, and III made by Franciscan in its motion for partial summary judgment. The State Plaintiffs assert that the Rule violates the APA for an additional and independent reason: Congress may not exercise its Article I power in a way that commandeers state sovereignty in violation of the Tenth Amendment.

Congress exercises its conferred powers in Article I subject to the limitations contained in the Constitution. *New York v. United States*, 505 U.S. 144, 156 (1992). One of those limitations is the Tenth Amendment, which restrains the power of Congress by reserving powers for the States that are not delegated to Congress in Article I. "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz v. United States*, 521 U.S. 898, 928 (1997). Defendants may not compel the State

[3] *See* 81 Fed. Reg. 31384 n.42 (citing agency guidance from the U.S. Office of Personnel Management, U.S. Equal Employment Opportunity Commission, U.S. Office of Special Counsel, U.S. Merit Systems Protection Board); 81 Fed. Reg. 31387 n.56 (citing U.S. Office of Personnel Management regulations, U.S. Dep't of Labor, U.S. Dep't of Justice, U.S. Dep't of Educ. statements).

[4] 81 Fed. Reg. 31387 n.57 (citing Letter from Leon Rodriguez, Director, U.S. Dep't of Health & Human Servs., Office for Civil Rights, to Maya Rupert, Federal Policy Director, National Center for Lesbian Rights (Jul. 12, 2012), https://www.nachc.com/client/OCRLetterJuly2012.pdf).

Plaintiffs to implement, by legislation or executive action, federal regulatory programs. *Id.* at 925. Moreover, once federal and state governments engage in cooperative federalism through a federal spending program, Congress may not "effectively engage in [ ] impermissible compulsion" "so that the States' choice whether to enact or administer a federal regulatory program is rendered illusory." *NFIB*, 132 S. Ct. at 2660. "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* (internal quotation marks and citation omitted).

The Rule "commandeers [the State Plaintiffs'] legislative or administrative apparatus for federal purposes," *id.* at 2602, by running headlong into their sovereign power, forcing them to accept and apply new and different standards of medical care, state authority over medical facilities, and state employers' decisions not to cover "all health services related to gender transition," 45 C.F.R. § 92.207, and abortion procedures.

First, the State Plaintiffs zealously protect the independent medical judgment of physicians. Each State regulates the standard of care that physicians must provide patients. "[T]he State has a significant role to play in regulating the medical profession," *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007), as well as "an interest in protecting the integrity and ethics of the medical profession," *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). This includes "maintaining high standards of professional conduct" in the practice of medicine. *Barsky v. Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 451 (1954).

Texas zealously protects the physician-patient relationship. Numerous Texas laws and regulations ensure that physicians honor their duties to their patients. The statewide standard of medical practice rests on the principle that Texas doctors must exercise "independent medical judgment" when treating patients under their care. *See, e.g., Murk v. Scheele*, 120 S.W.3d 865, 867 (Tex. 2003) (per curiam); *see also*

Garcia v. Tex. State Bd. of Med. Exam'rs, 384 F. Supp. 434, 439 (W.D. Tex. 1974) (upholding regulations designed to preserve the "vitally important doctor-patient relationship"). In 2011, the Texas Legislature prohibited medical organizations from interfering with, controlling, or directing "a physician's professional judgment," TEX. OCC. CODE § 162.0021, and it mandated that they permit physicians to exercise "independent medical judgment when providing care to patients," *id.* § 162.0022.

Texas hospitals must appoint a chief medical officer to supervise "all matters relating to the practice of medicine." TEX. HEALTH & SAFETY CODE § 311.083, which includes adopting policies to ensure that physicians have the ability to exercise independent medical judgment, *id.* This officer must report to the Texas Medical Board ("TMB")—the executive agency responsible for regulating the practice of medicine in Texas—any action or event that constitutes a compromise of the independent medical judgment of a physician in caring for a patient. *Id.* TMB regulations provide that doctors retain "independent medical judgment and discretion in providing and supervising care to patients," and may not be disciplined for "reasonably advocating for patient care." 22 TEX. ADMIN. CODE § 177.5. In addition, they reserve important decisions concerning quality assurance, the medical necessity of treatment, credentialing and peer review to the physician-only boards that direct health organizations. *Id.* §§ 177.3, 177.5.

Likewise, the other State Plaintiffs require the same independence for their physicians. Wisconsin protects the physician-patient relationship by requiring physician employment contracts to "[p]ermit the physician to exercise professional judgment without supervision or interference by the hospital or medical education and research organization," and by requiring physicians to inform patients "about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments." WIS. STAT. ANN. §§ 448.08(5)(a)2, 448.30. Nebraska safeguards the right of health care providers to decline to take part in

activities that are contrary to the provider's religious, ethical, or moral convictions. NEB. REV. STAT. ANN. § 30-3428. Louisiana requires physicians to "exercise independent medical judgment in the sole interest of the patient" and refrain from "allow[ing] a non-physician to impose or substitute his, her, or its judgment for that of the physician." LA. ADMIN. CODE 46:XLV § 7603. Kansas, Arizona, Mississippi, and Kentucky treat physicians as fiduciaries of their patients, obligating physicians to act in the best interests of patients based on the physician's informed, independent judgment. *See Natanson v. Kline*, 350 P.2d 1093, 1105–06 (Kan.), *decision clarified on denial of reh'g*, 354 P.2d 670 (Kan. 1960); *Walk v. Ring*, 44 P.3d 990, 999 (Ariz. 2002); *Madden v. Rhodes*, 626 So. 2d 608, 618 (Miss. 1993); *Adams v. Ison*, 249 S.W.2d 791, 793 (Ky. 1952).

The standard of care established in Texas, and around the country, enables patients to obtain quality healthcare as determined by medical professionals, and not those outside the doctor-patient relationship. The Rule, however, commandeers this standard of care. It discards independent medical judgment and a physician's duty to his or her patient's permanent well-being and replaces them with rigid commands. The Rule forces physicians who accept Medicare and Medicaid payments, and who operate, offer, or contract for health programs and activities that receive federal financial assistance, to subject their patients to procedures that permanently alter or remove well-functioning organs, even though the physician's independent medical judgment advises against such a course of action. And beyond compelling physicians to act against their medical judgment, the Rule requires them to express opinions contrary to what they deem to be in the patient's best interest, or to avoid even describing medical transition procedures as risky or experimental. Yet, physicians are "under a duty to make reasonable disclosure of that diagnosis, and risk of the proposed treatment . . ., as would have been made by a reasonable medical practitioner under the circumstances." *Jacobs v. Theimer*, 519 S.W.2d 846, 848 (Tex.

1975) (citing *Wilson v. Scott*, 412 S.W.2d 299 (Tex. 1967); W. M. Moldoff, *Annotation, Malpractice: physician's duty to inform patient of nature and hazards of disease or treatment*, 79 A.L.R.2d 1028 (1961)).

Second, the Rule commandeers the State Plaintiffs' provisions of healthcare services directly to citizens through various mechanisms of government. Texas, for example, provides health services directly to patients through the Health and Human Services Commission ("HHSC"). TEX. GOV'T CODE § 531.0055; TEX. HEALTH & SAFETY CODE § 12.0115. HHSC superintends operations and resource allocation at many healthcare facilities, which are owned by Texas and receive federal funding administered by HHS, TEX. GOV'T CODE §§ 531.008, 531.0055, including the North Texas State Hospital. These entities will have to offer all manner of (and referrals for) medical transition procedures and treatments. As a result of the Rule, Texas and other states must allocate personnel, resources, and facility spaces to offer and accommodate myriad medical transition procedures now required under the new Rule. Healthcare facilities will also be required to open up sex-separated showers, locker rooms, or other intimate facilities based on individual preference.[5] This is true even in controlled medical locations where patient access to intimate facilities is often under the control of healthcare professionals that are supposed to act in the best interests of the patient. Thus, the requirements of the new Rule commandeer the

[5] This becomes especially complicated, or perhaps impossible, under the new Rule's non-binary approach to "sex." As stated by HHS, "those individuals with non-binary gender identities are protected under the rule." 81 Fed. Reg. 31384. Indeed, HHS declares that it is an unlawful "sex stereotype" to have the "belief" or "the expectation that individuals consistently identify with only one of two genders (male or female)." 81 Fed. Reg. 31392. According to HHS, "the gender identity spectrum includes an array of possible gender identities beyond male and female." *Id.* Thus, one can only conclude that the Rule is violated when the intimate facilities within a medical building are labeled in a binary sense, or not otherwise designed for the "array of possible gender identities" that may befall that location on any given day. And "[t]he rule makes clear that in order to meet their obligations under § 92.206, covered entities must treat all individuals consistent with their gender identity, including with regard to access to facilities." 81 Fed. Reg. 31428.

control that Texas and other states legitimately exercise over their healthcare facilities.

Third, the Rule commandeers powers reserved to the States by attempting to force states to provide insurance coverage for "gender transition services" and abortion procedures to all state employees. HHS provides that a state's Medicaid program constitutes a covered "health program or activity" under the Rule. Thus, "the State will be governed by Section 1557 in the provision of employee health benefits for its Medicaid employees." 81 Fed. Reg. 31437. The exclusions Texas and other states currently possess in their employee insurance policies related to pregnancy termination and medical transition procedures will now be illegal under the new Rule. As a result, Texas and other states will be required to change their insurance coverage.

For these reasons, and those articulated in the APA section of Franciscan's motion, the new Rule is contrary to law and in excess of statutory authority because it commandeers powers reserved to the States. The Court should declare that the Rule violates the APA and permanently enjoin its enforcement.

III. Alternatively, the Court Should Issue a Preliminary Injunction.

The State Plaintiffs adopt and incorporate by reference Franciscan's arguments as to why the Court, in the alternative, should issue a preliminary injunction against the Rule before December 31, 2016. (Franciscan Partial Mot. for Sum. J., Part VIII.) The State Plaintiffs add an additional reason why they will suffer irreparable injury absent a preliminary injunction.

Defendants' Rule threatens the State Plaintiffs' interest in establishing policies and managing their own medical professionals, hospitals, and facilities. It also threatens their interests as employers providing health benefits to the state workforce. Sovereigns suffer an irreparable harm when their duly enacted laws or policies are enjoined. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (quoting *New Motor*

Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)) ("It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws"); *Texas v. United States*, -- F. Supp. 3d --, No. 7:16-cv-00054-O, 2016 WL 4426495, at *16 (N.D. Tex. Apr. 21, 2016) (finding the same); *Texas v. United States*, 95 F. Supp. 3d 965, 981 (N.D. Tex. 2015) ("[W]henever an enactment of a state's people is enjoined, the state suffers irreparable injury.").

Here, the new Rule removes from all non-federal officials their own authority to create and enforce their own rules and regulations for state healthcare facilities and professionals. This unlawful interference amounts to irreparable harm to Plaintiffs' sovereign interest. *See Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (holding that erroneous tribal gaming commission decision amounts to an irreparable injury to the state's sovereign interest); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015) (states suffer irreparable harm where defective federal regulation would divest them of their sovereignty over intrastate waters); *Texas*, 95 F. Supp. 3d at 981–82 (irreparable injury occurs when invalid federal rules require states to disregard its laws). For these reasons, and those articulated in Franciscan's motion, the Court should, alternatively, issue a preliminary injunction.

CONCLUSION

Defendants' new Rule violates the Spending Clause of Article I by changing the unambiguous conditions upon which the State Plaintiffs agreed to take Medicare and Medicaid funds. The Rule also violates the APA and other constitutional provisions identified in the summary judgment brief of Franciscan. Thus, for the reasons articulated above and in Franciscan's motion, the State Plaintiffs respectfully

request that the Court declare the Rule unconstitutional and unlawful, and permanently (or preliminarily) enjoin its enforcement.

Respectfully submitted this the 21st day of October, 2016.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY D. STARR
Deputy First Assistant Attorney General

PRERAK SHAH
Senior Counsel to the Attorney General

ANDREW D. LEONIE
Associate Deputy Attorney General

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS
Associate Deputy Attorney General
Texas Bar No. 24002695
austin.nimocks@oag.texas.gov

MICHAEL C. TOTH
Senior Counsel

JOEL STONEDALE
Counsel

Office of Special Litigation
ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Mail Code 009
Austin, Texas 78711-2548
(512) 936-1414

ATTORNEYS FOR PLAINTIFFS STATE OF TEXAS; STATE OF WISCONSIN; STATE OF NEBRASKA; COMMONWEALTH OF KENTUCKY, by and through Governor Matthew G. Bevin; STATE OF KANSAS; STATE OF LOUISIANA, STATE OF ARIZONA, and STATE OF MISSISSIPPI, by and through Governor Phil Bryant

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2016, I electronically filed the foregoing document through the Court's ECF system, which automatically serves notification of the filing on counsel for all parties. In addition, I also will personally serve a copy of this document on the United States Attorney for the Northern District of Texas, and send a copy by certified U.S. Mail to the Attorney General of the United States and to the Honorable Sylvia Burwell, Secretary of the United States Department of Health and Human Services.

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

FRANCISCAN ALLIANCE, INC.; SPECIALTY PHYSICIANS OF ILLINOIS, LLC,; CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS; - and - STATE OF TEXAS; STATE OF WISCONSIN; STATE OF NEBRASKA; COMMONWEALTH OF KENTUCKY, by and through Governor Matthew G. Bevin; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF ARIZONA; and STATE OF MISSISSIPPI, by and through Governor Phil Bryant, *Plaintiffs*, v. SYLVIA BURWELL, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Defendants*.	**REPLY BRIEF IN SUPPORT OF STATE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Civ. Action No. 7:16-cv-00108-O

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

In less than a month, an HHS Rule will take full effect and force Plaintiffs to fundamentally alter the way they regulate and provide healthcare under Medicare and Medicaid. This deadline looms because, in yet another case of Executive overreach, Defendants created a Rule, six years after passage of the Affordable Care Act ("ACA"), that redefines the statutory definition of "sex" in Title IX to include "gender identity" and "termination of pregnancy." 45 C.F.R. § 92.4. The Rule eviscerates State laws protecting physicians' independent medical judgment on what Defendants admit is an "evolving" topic, Defs.' Opp. to Mot. Prelim. Inj. 13, ECF No. 50 ("Defs. Br."), by prohibiting them from advising against gender transition procedures and abortion. The Rule also intrudes upon State sovereignty by dictating standards of care and health insurance coverage, and changes the conditions of federal Medicare and Medicaid grants to the States.

Plaintiffs—a multistate coalition joined by private healthcare providers—brought this lawsuit shortly after the Rule began to take effect and moved for injunctive relief immediately after adding several plaintiffs.[1] The State Plaintiffs adopt and incorporate by reference the preliminary injunction briefs filed by the private plaintiffs ("Franciscan"), and herein reply in support of their own motion for preliminary injunction, seeking nationwide relief before December 31, 2016 to prevent enforcement of the Rule.

Rather than responding to the merits of the State Plaintiffs' Spending Clause and Tenth Amendment claims, Defendants attempt to minimize and explain away the unlawful and unconstitutional aspects of their Rule redefining "sex," and assert

[1] Plaintiffs did not delay their pursuit of injunctive relief. Pls.' Suppl. Br. 4, ECF No. 37. Defendants' contention that the U.S. Attorney for the Northern District of Texas was not immediately served with the complaint is belied by the fact that Plaintiffs immediately served Defendants and did not learn of this alleged deficiency until a month later.

the Court should evaluate the Rule under the deferential agency action standard in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). But *Chevron* is inapplicable here because Congress did not clearly delegate rulemaking power to HHS to redefine "sex" in Title IX, and because that issue involves a major political question reserved to Congress. Moreover, Spending Clause cases do not apply *Chevron* when evaluating cooperative federalism programs.

The State Plaintiffs are suffering irreparable injuries that are ripe for adjudication. Texas is under investigation by HHS, and other states have been in the past. Moreover, to comply with the Rule, States must modify their health insurance plans by January 1, 2017 to remove exclusions for gender transition procedures and abortion, as well as rewriting laws and policies to comply with aspects of the Rule that went into effect in July and October 2016. Because these harms are felt by healthcare providers and states throughout the country, a nationwide injunction is needed to prohibit enforcement of the definition of "on the basis of sex" in the Rule, 45 C.F.R. § 92.4. The Court should grant the Plaintiffs' motions.

ARGUMENT

I. The Rule Is Invalid Under *Chevron* Step Zero Because Congress Did Not Delegate to HHS Rulemaking Power under Title IX.

Defendants are quick to argue that the Rule survives *Chevron* deference. Not so fast. In *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015), the Supreme Court held that *Chevron* does not always apply to agency actions and declined to apply it to the health exchange scheme created by the ACA. It did so because there is often good "reason to hesitate before concluding that Congress" intended to delegate rulemaking authority to a federal agency on a particular topic. *Id.* Thus, before applying *Chevron*, the Court must apply *Chevron* Step Zero and assess whether deference even applies. Here, it does not. Instead, this case falls squarely into two of the circumstances when

courts do not defer to agency rulemaking: those involving congressional conditions on state participation in federal funding mechanisms and "major questions."

A. The clear-statement doctrine precludes the application of *Chevron* deference.

Chevron deference does not apply to unclear federal conditions on grants offered to States. As stated in the State Plaintiffs' Brief in Support of Motion for Partial Summary Judgment or, in the alternative, a Preliminary Injunction, ECF No. 23 ("State Pls. Br."), Congress may legitimately exercise cooperative federalism under Article I's spending power only when States "voluntarily and knowingly" accept the "terms of the contract," and not when States are "unaware of the conditions" or "unable to ascertain" their contractual obligations. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Conditions on federal funds directed to States must be stated "unambiguously," *id.*, so that "a state official would clearly understand" them, *Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

To ensure that Congress actually intended to interfere with areas that are traditionally within the States' sovereign domain, the Spending Clause, Tenth Amendment and concerns of federalism require a "clear statement from Congress." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Gregory v. Ashcroft*, 501 U.S. 452, 460, 463 (1991). "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (citation and quotation marks omitted).

In the ACA, and specifically section 1557, Congress did not make a clear statement that it was redefining "sex" in Title IX, or giving Defendants authority to do so. Section 1557 provides, in relevant part, that

> an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), . . . be excluded from participation in, be denied the benefits of, or be subjected

> to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance . . . .

42 U.S.C. § 18116. Thus, section 1557 states clearly that Title IX's prohibition of "sex" discrimination may be applied in the healthcare context, but not that the definition of "sex" may be fundamentally rewritten by Defendants to achieve new policy goals.

When the States began accepting Medicare and Medicaid funding, "sex" did not mean "gender identity" and "termination of pregnancy." State Pls. Br. 15–16. If Congress intended to give Defendants authority to fundamentally change the definition of "sex" in Title IX, and apply that change to Medicare and Medicaid funding program, it would have done so "unambiguously" through a "clear statement" in the ACA. But rather than creating a new definition of "sex" or authorizing HHS to do so, the plain language of section 1557 shows that Congress relied on the longstanding definition of "sex" contained in Title IX. If anything, Congress's clear statement in the ACA was that the definition of "sex" should *not* change. Congress did not write a new nondiscrimination statute; it relied on existing law. But Defendants, relying on self-serving letters and memoranda penned by themselves and other federal agencies, 81 Fed. Reg. 31387–88, and not the understanding of "sex" at the time of its enactment, strayed far beyond the congressionally-delegated framework of the ACA and illegally rewrote Title IX through Executive rulemaking, *see Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 646 & n.34 (1986) ("The fact that the agency's interpretation has been neither consistent nor longstanding . . . substantially diminishes the deference to be given to HEW's [now HHS's] present interpretation of the statute.") (quotation marks and citation omitted); *cf. Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("the agency's interpretation [of a regulation] must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation") (quotation marks omitted).

The terms of Defendants' Rule were not clearly stated when Title IX was originally enacted, nor were they clearly rewritten in the ACA. "'In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (quoting *United States v. An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 800 (1969)). Because Congress gave no clear statement that "sex" now means "gender identity" and "termination of pregnancy," Defendants are powerless to impose those provisions of the Rule and the Rule merits no *Chevron* deference.

B. The "major question" exception precludes application of *Chevron* deference.

A second circumstance when *Chevron* deference does not apply to agency rulemaking arises from "major questions." *Chevron* presupposes "that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *King*, 135 S. Ct. at 2488 (quoting *Brown & Williamson*, 529 U.S. at 159). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* Indeed, if Congress intended to assign "questions of deep 'economic and political significance'" to an agency, "it surely would have done so expressly." *Id.* at 2489.

In an influential 1986 article, then-Judge Breyer said that courts look to the "practical features of the particular circumstance to determine whether it 'makes sense'" to presume a congressional intent for agency deference. Stephen P. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986). The nature of the question at issue is a relevant inquiry. Judge Breyer explained:

> Is the particular question one that the agency or the court is more likely to answer correctly? Does the question, for example, concern common law or constitutional law, or does it concern matters of agency administration? A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and

> answered major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.

Id.

The Supreme Court recognizes the "major question" exception articulated by Justice Breyer. In *King*, the Court declined to apply *Chevron* to the ACA's tax credit scheme because the legal question at issue was one of "deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly." 135 S. Ct. at 2489 (internal quotations omitted); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.") (internal citations and quotations omitted).

During our nation's history, we have addressed major political questions by enacting statutes, not agency rules like the one at issue here. Congress does not "delegate [] decision[s] of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160. "[N]o matter how 'important, conspicuous, and controversial' the issue, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Id.* at 161.

Reading Defendants' brief, one might think that the ACA granted HHS broad power to address any topic remotely implicating "sex" in ways never considered until this year. But section 1557 merely reaffirms that men and women (the immutable, biological categories of "sex") should be treated equally. Section 1557 does not create new statutory protections, but merely incorporates by reference Title IX. The text of Title IX prohibits invidious discrimination "on the basis of sex." And because Title IX does not define "sex," the ordinary meaning prevails. *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined,

we give them their ordinary meaning."). When Title IX was enacted, virtually every dictionary definition of "sex" referred to physiological distinctions between females and males, particularly with respect to their reproductive functions. *See* State Pls. Br. 14–15. Clearly, a biologically-grounded meaning of "sex" is what Congress had in mind when it enacted Title IX.

Defendants brief also leads one to believe that "on the basis of sex" in Title IX has long been interpreted to refer to "gender identity" and "termination of pregnancy." But "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159). "Thus, an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' does not merit deference." *Id.* at 2442 (quoting *Univ. of Tex. S. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013)).

Both "gender identity" and abortion are major questions that remove the presumption of delegation under *Chevron* Step Zero. Only recently have Defendants asserted that "gender identity" is encompassed within Congress's 1972 enactment of "sex." But when Congress enacted Title IX, "gender" was wholly distinct from "sex." State Pls. Br. 15–16. Lawmakers have attempted to add "gender identity" to other laws, but not as a subpart to "sex." *Id.* at 16. And courts are only now beginning to wrestle with the issue in the Title IX context. *See, e.g., G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir.), *recalling mandate & issuing stay*, 136 S. Ct. 2442, *cert. granted*, 2016 WL 4565643 (U.S. Oct. 28, 2016) (No. 16-273); *Texas v. United States*, No. 7:16-cv-00054-O, 2016 WL 4426495, at *1 (N.D. Tex. Aug. 21, 2016). Given the importance of this issue, one can hardly say that Congress delegated rulemaking power to HHS.

The same can be said of Defendants adding "termination of pregnancy" to "on the basis of sex" under Title IX. As Defendants acknowledge, several federal and state laws prohibit the government from dictating that medical professionals and States participate in abortions. Defs. Br. 8–9. After all, to say that abortion is a major political question in our nation is a gross understatement of the feelings by both sides.

Since the issues of sex discrimination and abortion are major political issues, Congress did not delegate rulemaking authority so that HHS may to fundamentally rewrite federal law and thereby undercut the very political debate these issues deserve. Based on the clear statement by Congress that it was not rewriting Title IX to include "gender identity" and "termination of pregnancy," and based on the major political questions raised by these issues, the Rule deserves no *Chevron* deference. Thus, the Court should evaluate the Rule under the State Plaintiffs' Spending Clause and Tenth Amendment claims, not *Chevron*.

II. Violations of the Spending Clause Are Not Analyzed Under *Chevron*.

Defendants also wrongly assert that Spending Clause claims are analyzed under *Chevron* because both inquiries assess ambiguity. Defs. Br. 33 & 43–44. Whether Congress spoke clearly in placing conditions on a federal funding program is a different question from whether a court should defer to agency rulemaking when a statute is ambiguous. *Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary*, 93 F.3d 103, 109 n.6 (3d Cir. 1996) ("we are not at all convinced that statutory ambiguity in the sense of *Chevron* is the same thing as statutory ambiguity in the sense of *Pennhurst*").

Spending Clause case law does not "reprise[]" *Chevron* deference. Defs. Br. 43. The predominant Spending Clause cases that post-date *Chevron* make no mention of it. *See, e.g.*, *Arlington Cent.*, 548 U.S. 291; *Sossamon v. Texas*, 563 U.S. 277 (2011); *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996); *see also* David Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of*

the Spending Power, Federalism, and the Administrative State, 82 TEX. L. REV. 1197, 1203–04 (2004) (discussing the differences between the doctrines).

The Spending Clause asks whether a statute clearly states the "unambiguous" conditions states must accept to receive federal funding. *Chevron* asks whether a court should defer to an agency interpretation of statutory ambiguity. And *Chevron* applies only if Congress clearly delegates rulemaking authority. If it does not apply, then the Supreme Court indicates that the statute is interpreted in its normal fashion under the Spending Clause, not *Chevron*. *Cf. King*, 135 S. Ct. at 2489 (declining to apply *Chevron* deference and instead reading the statute in context). Based on the reasons the State Plaintiffs articulate in their prior briefs, the Court should preliminarily enjoin the Rule under the Spending Clause.

III. Plaintiffs Are Suffering Injuries Ripe for Review.

In challenging Plaintiffs' standing to bring this suit, Defendants assert that Plaintiffs' injuries are conjectural and hypothetical. They claim the Rule allows for "application of medical judgment," protects religious and conscience-based objections, retains protections from abortion procedures, and does not require the performance or coverage of any particular medical service. Defs. Br. 25–26. Defendants also assert that the State Plaintiffs' claims are not ripe. They are wrong in all respects.

"Standing and ripeness are jurisdictional questions which must be resolved as a preliminary matter." *Am. S. Ins. Co. v. Buckley*, 748 F. Supp. 2d 610, 618 (E.D. Tex. 2010). Standing is concerned with whether a proper party is bringing suit while ripeness is concerned with whether the suit is being brought at the proper time. *Texas v. United States*, 497 F.3d 491, 496 (5th Cir. 2007) (citing *Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006)). Although standing and ripeness are two distinct doctrines, "the doctrines often overlap in practice, particularly in an examination of whether a plaintiff has suffered a concrete injury." *Id.*

To establish federal jurisdiction, a plaintiff must show an injury-in-fact: "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotation marks omitted). "A challenge to administrative regulations is fit for review if (1) the questions presented are 'purely legal one[s],' (2) the challenged regulations constitute 'final agency action,' and (3) further factual development would not 'significantly advance [the court's] ability to deal with the legal issues presented.'" *Texas*, 497 F.3d at 498 (quoting *Nat'l Park Hosp. Ass'n v. U.S. Dep't of Interior*, 538 U.S. 803, 812 (2003)). This is not a pre-enforcement challenges as Defendants' assert. Defs. Br. 30. The State Plaintiffs are suffering ripe injuries because HHS is currently investigating Texas for compliance with the Rule. The State Plaintiffs exclude gender transition procedures/services, as well as abortion services, from both their Medicaid and health insurance programs. Moreover, all State Plaintiffs are already beginning to comply with aspects of the Rule that took effect in July 2016. And looming is a January 1, 2017 deadline, under the Rule, for the State Plaintiffs' Medicaid and health insurance programs to begin covering gender transition procedures/services, as well as abortion services.

First, in September, HHS's Office for Civil Rights contacted Texas's Health and Human Services Commission to investigate a complaint concerning the Texas Medicaid Program. HHS is investigating whether Texas covers "sex change therapy," who determines the "medical necessity" for such therapy, and "whether there is a different process for determining medical necessity criteria for hormonal fertility treatment and cosmetic surgery." Decl. of Dana Williamson Ex. 1, Dec. 2, 2016; *accord* Decl. of Doneshia Ates Ex. 2, Dec. 2, 2016, attached hereto. Texas does not cover these procedures, but the Rule prohibits categoricals exclusion. 45 C.F.R. § 92.207(b)(4). So HHS's investigation is an actual injury. After all, in another enforcement action HHS already determined that denying coverage for a gender transition procedure was

unlawful. Defs. Br. 40 n.20. And, even before promulgating the Rule, HHS enforced section 1557 against providers in other States.[2] The investigation and HHS's previous activities show that Defendants are enforcing the Rule against the States and that the State Plaintiffs are suffering concrete injuries as a result.

Second, the Rule mandates that States "as a condition of any application for Federal financial assistance, submit an assurance" that their "health programs and activities will be operated in compliance with Section 1557 and this part." 45 C.F.R. § 92.5. "[H]ealth program or activity" includes "health-related services, health-related insurance coverage, or other health-related coverage," and "all . . . operations" of an entity engaged in providing health services or insurance. *Id.* § 92.4. The Rule requires the States to provide insurance coverage for gender transition procedures and abortions. *Id.* § 92.207(b). But, as Defendants acknowledge, the State Plaintiffs prohibit coverage for abortions. Defs. Br. 20 n.10. In addition, the State Plaintiffs categorically exclude coverage for gender transition procedures and/or sex change operations.[3] Thus, States who exclude transition procedures and abortions from Medicaid coverage, must now modify their health plans to provide for these procedures.

---

[2] U.S. Dep't of Health & Human Servs., *OCR Enforcement under Section 1557 of the Affordable Care Act Sex Discrimination Cases*, *available at* http://www.hhs.gov/civil-rights/for-individuals/section-1557/ocr-enforcement-section-1557-aca-sex-discrimination/.

[3] *See* Tex. Medicaid Provider Procedures Manual § 1.11, *available at* http://www.tmhp.com/HTMLmanuals/TMPPM/Current/ Vol1_01_Provider_Enrollment.02.90.html ("sex change operations" under Medicaid); ARIZ. ADMIN. CODE R9-22-205(B)(4) ("gender reassignment surgeries"); Kan. Medicaid State Plan 107 & 119, *available at* http://www.kdheks.gov/hcf/Medicaid/download/StatePlan/Kansas_SPA_Volume1.pdf (no coverage for elective or experimental surgery); Ky. Medicaid Member Handbook 18, *available at* http://chfs.ky.gov/nr/rdonlyres/f6b5f330-ee69-4cc8-83a8-1a1c0dc4bf46/0/finalhandbook62014.pdf (same); 23-200 MISS. CODE R. § 2.2(A)(7) ("Any operative procedure . . . performed primarily to . . . treat a mental condition through change in bodily form"); 210 NEB. ADMIN. CODE § 44-006 ("gender transformation or changes"); 471 NEB. ADMIN. CODE § 10-004.01(31) ("sex change procedures"); WIS. ADMIN. CODE DHS §§ 107.03(23–24), § 107.10(4)(p) ("transsexual surgery" and "hormone therapy").

Finally, some aspects of the Rule, including the replacement of physicians' medical judgment for federal judgment, took effect in July. The Rule purports to accommodate medical judgment, but when a physician advises against gender transition, the patient can accuse him of "gender identity" discrimination under the Rule. And when HHS investigates, the physician's reasoned medical judgment is not the end of the query, as it should be. Rather, the physician's medical judgment is only one of several factors HHS uses to evaluate compliance with the Rule. Defs. Br. 21. Thus, the Rule invades the sovereignty of the State Plaintiffs by supplanting their laws deferring to the "independent medical judgment" of physicians, *see, e.g.*, *Murk v. Scheele*, 120 S.W.3d 865, 867 (Tex. 2003) (*per curiam*); TEX. OCC. CODE §§ 162.0021–0022, with a federal standard that reduces medical judgment to a mere factor.

These injuries are ripe for review because they are organized under a purely legal question: whether Defendants exceeded their authority under the Spending Clause and APA in rewriting the definition of "sex" in Title IX. Defendants do not dispute that the challenged Rule is final agency action. And further factual development will not advance the Court's ability to deal with the legal issues presented. *Texas*, 497 F.3d at 498. Indeed, "Texas [will] suffer hardship if we [] withhold consideration of its claims," *id.* at 499, including the "harmful creation of legal rights or obligations; practical harms on the interests advanced by the party seeking relief; and the harm of being 'force[d] . . . to modify [one's] behavior in order to avoid future adverse consequences,'" *id.* (quoting *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998)). The Rule forces the State Plaintiffs to modify their laws, policies, and procedures, and has subjected at least one plaintiff state to investigation. These injuries are ripe for review.

IV. Plaintiffs' Injuries Are Irreparable.

As articulated above and in the Plaintiffs' prior briefing, the State Plaintiffs are suffering irreparable injuries because the Rule forces them to modify their own

laws, policies, practices, and health insurance plans. For example, the State Plaintiffs currently exclude from their health insurance coverage both gender transition procedures and abortion. They have hundreds of thousands of employees who are covered by health insurance plans, and those employees have myriad dependents enrolled on their coverage. The sheer number of covered beneficiaries undoubtedly means that someone covered by state health insurance will request that the Rule be honored and coverage extended for gender transition procedures and/or abortion. Even putative intervenors acknowledge this point. *See, e.g.*, Decl. of Cheryl Newcomb ¶¶ 4–5, Sept. 15, 2016, attached as Ex. 2 to Putative Intervenors' Mot. to Intervene, ECF No. 8. But for a preliminary injunction by year's end, the Rule will force the State Plaintiffs to modify their health insurance coverage and Medicaid plans to include the currently prohibited transition procedures and abortions. This injury is more than financial; it forces the Plaintiff States to expend resources and energy undoing their sovereign choice in lieu of that imposed upon them by Defendants.

Moreover, Defendants assert that the Rule does not displace "scientific or medical reasons" for making distinctions based on sex. Defs. Br. 19. But as stated above, in Texas and other states, the independent medical judgment of physicians is paramount. The Rule lowers this standard of care by making medical judgment just one of many factors HHS may consider when deciding whether a covered entity has violated the Rule. Curtailing the laws of the State Plaintiffs that extol the judgment of their medical professionals is irreparable injury.

The Rule also threatens the State-sovereigns with private lawsuits and enforcement actions by HHS for not providing gender transition services, or abortions, to state employees or patients at State hospitals. Defendants plead that the threat of enforcement is not an irreparable injury because none have materialized in the six years since section 1557 was enacted. But the Rule was not made final until this year. Moreover, HHS is currently investigating Texas and reports multiple

enforcement actions in other States, including some States who are party to this lawsuit, for noncompliance with the Rule, despite the fact that it has only been on the books for six months. *See OCR Enforcement under Section 1557*, *supra* note 2. Thus, the State Plaintiffs are suffering irreparable harm from the mandate that they reform their laws, policies, procedures, and health plans, and from the threat of lawsuits and investigations from private parties and HHS.

V. The Court Should Issue a Nationwide Injunction Against the Rule.

"[D]istrict courts enjoy broad discretion in awarding injunctive relief." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408 (D.C. Cir. 1998). This includes the issuance of nationwide injunctions, because the judicial power "is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction." *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). Indeed, "courts should not be loathe to issue injunctions of general applicability," *Hodgson v. First Fed. Sav. & Loan Ass'n of Broward Cty.*, 455 F.2d 818, 826 (5th Cir. 1972), as "[t]he injunctive processes are a means of effecting general compliance with national policy as expressed by Congress, a public policy judges too must carry out—actuated by the spirit of the law and not begrudgingly as if it were a newly imposed fiat of a presidium," *Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962).

A nationwide injunction is appropriate when a party challenges an agency regulation on its face under the APA. The Supreme Court has indirectly affirmed this principle. In *Lujan v. National Wildlife Federation*, Justice Blackmun noted this in dissent, but apparently consistently with the views of the other eight justices:

> The Administrative Procedure Act permits suit to be brought by any person "adversely affected or aggrieved by agency action." In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply

> that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court.

497 U.S. 871, 913 (1990) (Blackmun, J., dissenting) (citation omitted); *cf. id.* at 890 n.2 (majority opinion) (noting under the APA, a successful challenge by an aggrieved individual can affect the entire agency program); *see also Nat'l Min. Ass'n*, 145 F.3d at 1410 ("APA's command that rules 'found to be . . . in excess of statutory jurisdiction' shall be not only 'h[e]ld unlawful' but 'set aside.'") (quoting 5 U.S.C. § 706(2)(C)).

A nationwide injunction is appropriate here. The Rule is applicable to all fifty states and Plaintiffs represent a coalition of private parties and State-sovereigns affected by the Rule. The scope of the injury extends to medical practitioners, providers, and regulators in all corners of the country. Thus, the Rule should be enjoined nationwide as other courts have done in similar contexts. *See, e.g., Nevada, Texas, et al. v. U.S. Dep't of Labor*, No. 4:16-cv-00731, 2016 WL 6879615, at *9 (E.D. Tex. Nov. 22, 2016) (Mazzant, J.); *Associated Builders & Contractors of S.E. Texas v. Rung*, No. 1:16-cv-425, slip op. at 32, ECF No. 22 (E.D. Tex. Oct. 24, 2016) (Crone, J.); *Texas*, 2016 WL 4426495, at *17 (O'Connor, J.); *Nat'l Fed. of Indep. Bus. v. Perez*, No. 5:16-cv-00066-C, 2016 WL 3766121, *46 (N.D. Tex. June 27, 2016) (Cummings, J.); *Texas v. United States*, 86 F. Supp. 3d 591, 677–78 (S.D. Tex.) (Hanen, J.), *aff'd*, 809 F.3d 134, 188 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs prior briefs, the Court should issue a preliminary injunction against the definition of "on the basis of sex" in the Rule, 45 C.F.R. § 92.4.

Respectfully submitted this the 2nd day of December, 2016.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY D. STARR
Deputy First Assistant Attorney General

PRERAK SHAH
Senior Counsel to the Attorney General

ANDREW D. LEONIE
Associate Deputy Attorney General

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS
Associate Deputy Attorney General
Texas Bar No. 24002695
austin.nimocks@oag.texas.gov

MICHAEL C. TOTH
Senior Counsel

JOEL STONEDALE
Counsel

Office of Special Litigation
ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Mail Code 009
Austin, Texas 78711-2548
(512) 936-1414

ATTORNEYS FOR PLAINTIFFS STATE OF TEXAS; STATE OF WISCONSIN; STATE OF NEBRASKA; COMMONWEALTH OF KENTUCKY, by and through Governor Matthew G. Bevin; STATE OF KANSAS; STATE OF LOUISIANA, STATE OF ARIZONA, and STATE OF MISSISSIPPI, by and through Governor Phil Bryant

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2016, I electronically filed the foregoing document through the Court's ECF system, which automatically serves notification of the filing on counsel for all parties.

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

FRANCISCAN ALLIANCE, INC., *et al.*, *Plaintiffs*, v. SYLVIA BURWELL, *et al.*, *Defendants.*	**No. 7:16-cv-00108** **DECLARATION OF DANA WILLIAMSON**

I, Dana Williamson, state that the following statements are true and correct and based upon my personal knowledge:

1. I am a citizen of the United States, am over the age of eighteen, and am competent to testify.

2. I am the Director of Policy Development Support for the Texas Health and Human Services Commission ("HHSC").

3. HHSC provides millions of Texans with Medicaid and CHIP services each year.

4. On September 29, 2016, HHSC received an email from Ford J. Blunt III, from the Centers for Medicare and Medicaid Services. A true and correct copy of his email is attached as Exhibit 1 to this declaration.

DECLARATION UNDER PENALTY OF PERJURY

I, Dana Williamson, a citizen of the United States and a resident of the State of Texas, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing Declaration is true and correct.

Executed this 2nd day of December, 2016.

Dana Williamson

SWORN TO AND SUBSCRIBED BEFORE ME this 2nd day of December, 2016, to certify which witness my hand and seal of office.

Notary Public in and for the State of Texas

EXHIBIT 1

From: Blunt, Ford J. (CMS/CMCHO) [mailto:Ford.Blunt@cms.hhs.gov]
Sent: Thursday, September 29, 2016 2:14 PM
To: Top,JR (HHSC) <JR.Top@hhsc.state.tx.us>; Dutra,Beren (HHSC) <Berengere.Dutra@hhsc.state.tx.us>; Williamson,Dana (HHSC) <Dana.Williamson@hhsc.state.tx.us>
Cc: Farrell, Billy B. (CMS/CMCHO) <Billy.Farrell@cms.hhs.gov>
Subject: Two Letters for Cosmetic Surgery

JR,

The HHS Office of Civil Rights (OCR) has a couple of questions for Texas on sex change therapy:

1. Does the state of Texas cover sex change therapy?

2. Who determines medical necessity for such surgery or the treatment thereof?

3. Is there any difference in the process for determining medical necessity criteria for hormonal fertility treatment and cosmetic surgery? We ask this because there is an 064 policy that the health plans are asking to submit 2 letters from mental health professionals as part of the claim review. Does this requirement apply only to this group of individuals or is that applied across all groups of individuals who request cosmetic medically necessary surgery, or other treatment that is similarly situated such as hormonal fertility treatment?

Thanks for your time,

Ford J. Blunt III
New Mexico/Texas State Leads/Health Insurance Specialist

Division of Medicaid and Children's Health
Centers for Medicare and Medicaid Services
Dallas Regional Office
(214) 767-6381
(443) 380-6472 (Fax)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

FRANCISCAN ALLIANCE, INC., *et al.*, *Plaintiffs,* v. SYLVIA BURWELL, *et al.*, *Defendants.*	**No. 7:16-cv-00108** **DECLARATION OF DONESHIA ATES**

I, Doneshia Ates, state that the following statements are true and correct and based upon my personal knowledge:

1. I am a citizen of the United States, am over the age of eighteen, and am competent to testify.

2. I am the state plan advisor for the Texas Health and Human Services Commission ("HHSC").

3. HHSC provides millions of Texans with Medicaid and CHIP services each year.

4. On November 2, 2016, HHSC received an email response from Cecilia Velastegui from the Office for Civil Rights at the U.S. Department of Health and Human Services. A true and correct copy of her email is attached as Exhibit 2 to this declaration.

DECLARATION UNDER PENALTY OF PERJURY

I, Doneshia Ates, a citizen of the United States and a resident of the State of Texas, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing Declaration is true and correct.

Executed this 2nd day of December, 2016.

Doneshia Ates

SWORN TO AND SUBSCRIBED BEFORE ME this 2nd day of December, 2016, to certify which witness my hand and seal of office.

RITA GOODING
Notary Public, State of Texas
My Commission Expires
April 23, 2017

Notary Public in and for the State of Texas

EXHIBIT 2

From: Velastegui, Cecilia (HHS/OCR)
Sent: Wednesday, November 02, 2016 12:13 PM
To: 'Ates,Doneshia (HHSC)'
Subject: Information for the Office of Civil Rights Contact

Ms. Ates:

Thank you for making it possible for our Office to meet with you.

I want to make sure that we are both understanding the purpose of the meeting. I have been assigned a case that involves a question regarding eligibility benefits under the Medicaid Program of Texas. The investigation is not against the administration of the Texas Medicaid Program. However, I need to understand what is covered and what is excluded under the Texas Medicaid Program. I tried to do a search of the Texas Medicaid Program but failed to locate the correct link. Are you able to direct me to the correct link to read more and understand better the general terms of the Texas Medicaid Program?

The questions below are on target for the investigation but my search is not limited to those questions. I had a valuable contact at HHSC but he has retired and so I am glad to have your contact information as I hope that we can continue working together beyond this initial meeting.

Please give me a little time to coordinate the schedule with OCR staff before I tell you that Nov. 14th week is OK. I will get back later today.

Cecilia

Supervisor

Equal Opportunity Specialist

Office for Civil Rights

214-767-3919

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CITY OF EL CENIZO, et al., *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants.*	No. 5:17-cv-404-OG [Lead Case]
EL PASO COUNTY, et al., *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants.*	No. 5:17-cv-459-OG [Consolidated Case]
CITY OF SAN ANTONIO, et al., *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants.*	No. 5:17-cv-489-OG [Consolidated Case] **DEFENDANTS' RESPONSE TO APPLICATIONS FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

RESPONSE TO MOTIONS FOR PRELIMINARY INJUNCTION

Defendants file this response to the motions for a preliminary injunction.[1] Because movants have not made the showings required for that relief, the motions should be denied.

INTRODUCTION

The Texas Legislature passed Senate Bill 4 ("SB4") for the purpose of improving the co-operation between the State and its localities with the federal government in aiding the federal government with enforcing existing federal immigration laws. SB4 is thus consonant with immigration policy set by Congress: "Consultation between federal and state officials is an important feature of the immigration system." *Arizona v. United States*, 567 U.S. 387, 411 (2012).

SB4 does two main things. First, SB4's anti-sanctuary provisions prohibit the State and localities from categorically banning officials from inquiring about immigration status. Notably, this does *not* require officials to take any specific action. Rather, it displaces policies that *never* permit officials to ask about immigration status. SB thus allows—not requires—officers to voluntarily ask about immigration status in proper circumstances. Consequently, SB4 does not go even as far as the state law *upheld* by the Supreme Court in *Arizona v. United States*, which "*requires*" officials to ask about "immigration status" if they have "reasonable suspicion" to believe someone was "unlawfully present." 567 U.S. at 411 (emphasis added). The Court held that this law requiring officials to ask about immigration status was not preempted, as Congress "has encouraged the

[1] "El Cenizo Mot." cites the Memorandum in Support of Plaintiffs' Application for Preliminary Injunction, ECF No. 24-1, in No. 5:17-cv-00404. "El Paso Mot." cites the Memorandum in Support of Plaintiffs El Paso County, et al.'s Application for Preliminary Injunction, ECF No.56-1, in No. 5:17-cv-00404. "San Antonio Mot." cites the Memorandum of Law in Support of Application for Preliminary Injunction by City of San Antonio, Texas, Rey A. Saldana, Texas Association of Chicanos in Higher Education, La Union del Pueblo Entero, and Workers Defense Project, ECF No. 77, in No. 5:17-cv-00404. "Austin Mot." cites the City of Austin's Opposed Motion for Preliminary Injunction, ECF No. 57, in No. 5:17-cv-00404. "Travis County Mot." cites the Plaintiff-Intervenors Travis County, Travis County Judge Sarah Eckhardt and Travis County Sheriff Sally Hernandez's Application for Preliminary Injunction, ECF No. 58, in No. 5:17-cv-00404.

sharing of information about possible immigration violations." *Id.* at 412. If Arizona's law *requiring* officials to ask about immigration status is not preempted, then Texas's law merely allowing and not requiring officials to ask about immigration status cannot be preempted.

Second, SB4 requires the State and localities to comply with "ICE detainers"—requests from the federal government to detain those already in custody for a brief additional time so that they can be transferred into federal custody. Importantly, current federal policy requires all ICE detainers to be accompanied by a warrant issued by a federal immigration official, certifying that the federal government has probable cause to believe that the person in question is unlawfully present. *See infra* pp. 48-49. Thus, in honoring federal ICE detainer requests, the State and its localities are *not* engaging in "unilateral state action to detain." *Arizona*, 567 U.S. at 410. Rather, the State and localities rely directly on the federal government's expressed interest in detaining the person in federal custody, the federal government's representation of probable cause, and on the federal government's interpretation of federal immigration classifications. Especially in light of the federal government's express representation of probable cause, there is no Fourth Amendment violation when States and localities honor ICE detainers. But even if there could be a Fourth Amendment violation as applied to a particular individual, that discrete scenario could not possibly justify a finding of facial invalidity—which requires a showing that SB4's ICE-detainer provision is unconstitutional in *all* applications.

There is an ongoing debate in our country about whether federal immigration statutes should be amended. Plaintiffs' claims largely track those overarching policy disputes. But such policy disagreements must be resolved by Congress. A judicial finding that enforcement of federal immigration policy is somehow motivated by a racially discriminatory purpose, or is an unconstitutional Fourth Amendment seizure, would jeopardize countless federal immigration laws. Here, Texas took the moderate step of ensuring that its state and local officials were permitted—but not required—to inquire about immigration status in appropriate circumstances, and were required to honor federal immigration detainer requests. This is lawful and does not conflict with federal law.

STATUTORY BACKGROUND

In recent years, some local officials in Texas have adopted policies that prohibit local law-enforcement officers from cooperating with the federal government when it seeks to enforce federal immigration law. For instance, some local officials direct officers not to honor requests to detain aliens briefly for transfer to federal immigration authorities, even for convicted criminals.[2] Travis County is one example, as described by Travis County Sally Hernandez:

> The Travis County Sheriff's Office will not "conduct or initiate any immigration status investigation" into those in custody. The Travis County Sheriff's Office prohibits the use of county resources to communicate with ICE about an "inmate's release date, incarceration status, or court dates, unless ICE presents a judicial warrant or court order." Absent such a warrant or order, ICE will not be allowed to conduct "civil immigration status investigations at the jail or [Travis County Sheriff's Office]." Further "no [Travis County Sheriff's Office] personnel in the jail, on patrol, or elsewhere may inquire about a person's immigration status."[3]

Policies like that one result in criminals being released rather than turned over to federal authorities, a result that promotes certain localities as sanctuaries from federal immigration law.

Because one of this Nation's most prized ideals is the rule of law, not the defiance of it, the State exercised its prerogative to control local governments and law enforcement officials. The result is SB4, set to take effect September 1, 2017. Act of May 3, 2017, 85th Leg., R.S. By ending local policies that block the federal government's ability to enforce immigration law, SB4 aims to ensure that suspected and convicted criminals are not released back onto the streets and that the respect for the rule of law continues as a beacon of safety and prosperity throughout the State.

A. SB4 does not broadly require local-level enforcement activities, but rather bans categorical interference with immigration-law enforcement.

Plaintiffs misrepresent SB4 as requiring "[u]nregulated local enforcement" of or "[u]nlimited local participation" in the enforcement of immigration law. El Cenizo Mot. 6. Except for a

---

[2] *See, e.g.*, U.S. ICE, Weekly Declined Detainer Outcome Report for Jan. 28-Feb. 3, 2017, at 9-20, 23, https://www.ice.gov/doclib/ddor/ddor2017_01-28to02-03.pdf.

[3] Travis County Sheriff's Office, ICE Policy Video, at http://www.tcsheriff.org/inmate-jail-info/ice-video (last visited June 16, 2017); ECF No. 58-1 (Hernandez Decl.) ¶¶ 26, 48.

few provisions about the transfer of aliens from local or state custody to federal immigration custody, *see infra* pp. 6-7, SB4 does not require affirmative conduct from law-enforcement officers or agencies. Peace officers' law-enforcement functions are virtually untouched by SB4.

SB4 does not require peace officers to initiate immigration interrogations or arrests. *Cf.* El Cenizo Mot. 17. Instead, SB4 *prohibits* local policies that categorically ban cooperation in immigration-law enforcement. Specifically, new Texas Government Code § 752.053 contains general prohibitions in subsection (a) followed by concrete examples of prohibited acts in subsection (b):

> § 752.053. Policies and Actions Regarding Immigration Enforcement.
>
> (a) A local entity or campus police department may not:
> (1) adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws;
> (2) as demonstrated by pattern or practice, prohibit or materially limit the enforcement of immigration laws; or
> (3) for an entity that is a law enforcement agency or for a department, as demonstrated by pattern or practice, intentionally violate Article 2.251, Code of Criminal Procedure.
>
> (b) In compliance with Subsection (a), a local entity or campus police department may not prohibit or materially limit a person who is a commissioned peace officer [or other specific official] and who is employed by or otherwise under the direction or control of the entity or department from doing any of the following:
> (1) inquiring into the immigration status of a person under a lawful detention or under arrest;
> (2) with respect to information relating to the immigration status, lawful or unlawful, of any person under a lawful detention or under arrest, including information regarding the person 's place of birth:
> (A) sending the information to or requesting or receiving the information from United States Citizenship and Immigration Services, United States Immigration and Customs Enforcement, or another relevant federal agency;
> (B) maintaining the information; or
> (C) exchanging the information with another local entity or campus police department or a federal or state governmental entity;
> (3) assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance; or
> (4) permitting a federal immigration officer to enter and conduct enforcement activities at a jail to enforce federal immigration laws.

SB4 § 1.01 (§ 752.053). As shown, subsections (a)(1) and (2) establish a general ban on policies and practices that prohibit or materially limit the enforcement of immigration laws—the sort of

sanctuary-city policies prompting SB4. Subsections (b)(1) through (4) then provide four concrete examples of actions that a regulated entity may not take.

First, under subsection (b)(1), a regulated entity may not prohibit or limit its officers from inquiring into the immigration status of a person under arrest or under detention "for the investigation of a criminal offense," excluding detention solely because an individual "is a victim of or witness to a criminal offense" or "is reporting a criminal offense." *Id.* (§ 752.051(4)). This is a ban on local-level policies blocking immigration-status questioning. Contrary to plaintiffs' hyperbole, SB4 does not require police to demand that everyone they encounter "show papers" to prove their citizenship or immigration status. *Cf.* El Cenizo Mot. 4; San Antonio Mot. 18. Likewise, SB4 does not require "asking every single motorist about their immigration status." El Cenizo Mot. 2, 16. Nor does SB4 "authorize[] individual police officers to conduct investigations of immigration status." Austin Mot. 9. SB4 merely establishes that, during an arrest or lawful criminal detention, police cannot be *blocked* from gathering information regarding immigration status.

Subsection (b)(2) then bans covered entities from prohibiting or limiting their officers from collecting and sharing important immigration-status information, such as place of birth, with other law-enforcement agencies. Again, this is not some sort of requirement that officers must ask each person they encounter to "show papers." Rather, this protects the free flow of information between law-enforcement agencies.

Lastly, under subsections (b)(3) and (4), covered entities may not block their officers from assisting or cooperating with a federal immigration officer as reasonable or necessary, including allowing federal officers to enter and conduct enforcement activities at a local jail. An exception is made for assistance at places of worship. SB4 § 1.01 (§ 752.053(c)). Federal immigration officials thus cannot be singled out by local officials for categorical exclusion from cooperation efforts. But SB4 does not require that local officers join federal immigration-enforcement task forces or preclude busy local officers from turning down such federal requests to join enforcement task forces. *Cf.* El Cenizo Mot. 8.

B. SB4 requires affirmative cooperation from peace officers in two ways.

SB4 does require affirmative cooperation from law enforcement in two main respects: assistance with federal immigration arrest authority pursuant to detainer requests made by the federal government, and ensuring that offenders completing their sentences in the custody of the Texas Department of Criminal Justice or a county jail are turned over to federal custody when subject to an immigration detainer request from the federal government.[4]

1. First, SB4 obligates covered agencies to fulfill requests by U.S. Customs & Immigration Enforcement to detain aliens for federal arrest ("ICE detainers"):

> A law enforcement agency that has custody of a person subject to an immigration detainer request issued by United States Immigration and Customs Enforcement shall: (1) comply with, honor, and fulfill any request made in the detainer request provided by the federal government; and (2) inform the person that the person is being held pursuant to an immigration detainer request issued by United States Immigration and Customs Enforcement.

SB4 § 2.01 (art. 2.251(a)); *see id.* § 1.01 (§ 752.053(a)(3)) (banning local prohibitions on compliance with immigration detainers); *id.* § 1.01 (§ 772.0073(a)(2)) (defining immigration detainer as a federal request to a local entity to keep temporary custody of an alien, including on a U.S. Department of Homeland Security Form I-247 document or a similar or successor form). The Austin plaintiffs misrepresent that SB4 inevitably results in "extended detention for purposes of communication with ICE." Austin Mot. 9. To the contrary, SB4 does not require investigatory detentions to determine whether an alien is subject to an immigration detainer request (Austin Mot. 9), but instead triggers compliance duties when a detainer request has in fact been "*provided by* the federal government." SB4 § 2.01 (art. 2.251(a)).

SB4 contains an exception to this rule: A law-enforcement agency is not required to comply with an ICE detainer if the person in custody demonstrates his or her United States citizenship or

[4] SB4 also amends certain surety-bond provisions in the Texas Code of Criminal Procedure so that a surety is not relieved if an accused "is in federal custody to determine whether the accused is lawfully present in the United States." SB4 § 4.01 (amending Tex. Code Crim. Proc. art. 17.16).

lawful immigration status through government-issued identification such as a Texas driver's license. *Id.* § 2.01 (art. 2.251(b)). SB4 thus directs that, if the subject of the detainer "has provided proof" of lawful immigration status, compliance with the ICE detainer request is not required. SB4 § 2.01 (art. 2.251(b)). Officials therefore can accept, for example, a Texas driver's license as proof of lawful status—without having to make an independent determination, as a matter of federal immigration law, whether the individual has violated the terms of that status or is otherwise "present in the United States in violation of [federal law]" and therefore removable. 8 U.S.C. § 1227(a)(1)(B).

2. Second, if the subject of an ICE detainer is serving a sentence in a Texas correctional facility, SB4 requires that person to be transferred to federal custody to serve the final seven days of the sentence "following the facility's . . . determination that the change in the place of confinement will facilitate the seamless transfer of the defendant into federal custody." *Id.* § 2.02 (art. 42.039(a)-(b)). If a sentenced defendant is under an ICE detainer, a trial judge must order such a transfer either during sentencing or when detainer information becomes available. *Id.* (art. 42.039(b)). These transfer provisions, however, apply "only if appropriate officers of the federal government consent to the transfer of the defendant into federal custody under the circumstances described by this subsection." *Id.*

C. SB4 enacts important law-enforcement limits.

While removing obstacles to cooperating with federal officials, SB4 also limits state officials' conduct in important ways. SB4 strictly *prohibits* unconstitutional discrimination in the immigration-enforcement context:

> [A regulated entity under SB4] may not consider race, color, religion, language, or national origin while enforcing immigration laws except to the extent permitted by the United States Constitution or Texas Constitutions.

Id. § 1.01 (§ 752.054). Plaintiffs are thus wrong that SB4 defines police conduct "that may never be limited." *Cf.* El Cenizo Mot. 10. Unlawful discrimination is squarely prohibited by SB4.

And preexisting Texas law already bans racial profiling. Tex. Code Crim. Proc. art. 2.131 ("A peace officer may not engage in racial profiling."); *id.* art. 2.132(b) ("Each law enforcement agency in this state shall adopt a detailed written policy on racial profiling. The policy must . . . strictly prohibit peace officers employed by the agency from engaging in racial profiling."); *see, e.g.*, Decl. of Sheriff Bill Waybourn (Exh. 2) ¶ 13 ("My Office has a policy prohibiting racial profiling that complies with Article 2.132"); Decl. of Steven McCraw (Exh. 1) ¶ 9 ("The Department has a zero-tolerance policy regarding racial profiling.").

SB4 also offers protections for crime victims and witnesses. It permits police investigating a crime to ask about a victim's or witness's immigration status *only* if necessary to investigate the crime or provide the victim or witness with information about federal visas designed to protect individuals who assist law enforcement. SB4 § 6.01 (art. 2.13(d)). If a victim or witness is himself suspected of a criminal offense, the officer may of course inquire into his or her nationality or immigration status. *Id.* (art. 2.13(e)). The import of these provisions is not, as plaintiffs state (El Cenizo Mot. 10 n.3), that officers may "ask about immigration status to provide information about visas." SB4 expressly limits visa-based interactions to a narrow class of visas for *assisting* law enforcement. And SB4 expressly permits local outreach to educate communities about these limits on immigration inquiries. SB4 § 1.01 (§ 752.057(a)-(b)). Indeed, any such outreach program must include outreach to victims of family violence and sexual assault. *Id.* (§ 752.057(b)).

D. SB4 is enforced through penalties and removal from office.

SB4 creates a number of consequences for agencies and officials who disregard their state-law responsibilities and obstruct federal immigration-enforcement efforts.

The first potential consequence is an injunction and monetary penalty. A person residing within the jurisdiction of the local law-enforcement agency may file a complaint about that agency with the Attorney General of Texas, who may seek equitable relief in court against that agency to compel compliance. *Id.* § 1.01 (§ 752.055(a)-(b)). The agency is also subject to a civil penalty. *Id.*

(§ 752.056(a)) (penalty of $1,000-$1,500 for first violation, and $25,000-$25,500 for subsequent violations). These civil penalties are deposited into a fund for crime victims. *Id.* (§ 752.056(d)).

A second potential consequence is removal from office. SB4 states that "a person holding an elective or appointive office of a political subdivision of this state does an act that causes the forfeiture of the person's office if the person violates Section 752.053," which is the ban on local obstruction of immigration law enforcement. *Id.* (§ 752.0565(a)). The Texas Attorney General may petition for removal upon "probable grounds that the public officer" categorically prohibited officers or employees from inquiring into a person's immigration status when that person is under lawful detention or arrest; from maintaining information about a person's immigration status or sharing it with law-enforcement authorities; from cooperating with federal immigration officers; or from allowing federal immigration officers to enter and conduct enforcement activities within jails. *Id.* (§ 752.0565(b)). Upon an adverse finding, a court must enter judgment removing the person from office. *Id.* (§ 752.0565(c)).

Lastly, certain officials' failure to comply with SB4's detainer provisions is a misdemeanor offense. *Id.* § 5.02 (§ 39.07(a)-(c)). This is a "misdemeanor involving official misconduct," *id.* § 5.01 (§ 87.031(c)), which under existing state law "operates as an immediate removal from office of that officer" upon conviction. Tex. Local Gov't Code § 87.031(a).[5] SB4 also creates civil liability for a law-enforcement agency or department that, as demonstrated by pattern or practice, "intentionally violate[s]" SB4's duty regarding detainer requests. SB4 § 1.01 (§ 752.053(a)(3)). SB4 does not attach criminal consequences to any other failure to participate in immigration-law enforcement.

[5] The Texas Attorney General is authorized to defend a local entity in any action before any court if the entity requests the Attorney General's assistance and the "cause of action arises out of a claim involving the local entity's good-faith compliance with an immigration detainer request." SB4 § 3.01 (§ 402.0241(b)). The State is "liable for the expenses, costs, judgment, or settlement of the claims arising out of the representation." *Id.* (§ 402.0241(c)). SB4 also creates a grant program for local law-enforcement entities to offset costs related to fulfilling immigration-detainer requests, or for otherwise enforcing immigration laws. *Id.* § 1.02 (§ 772.0073).

ARGUMENT

Plaintiffs are not entitled to a preliminary injunction, which requires them to show their likely success in the lawsuit and that three equitable factors warrant an injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

I. Defendants' Objections to Venue Require Resolution at the Outset.

As a threshold matter, a preliminary injunction cannot issue without overcoming properly raised venue objections. *Hendricks v. Bank of Am., N.A.*, 408 F.3d 1127, 1135 (9th Cir. 2005) ("Because Mutual's [venue and personal jurisdiction] defenses were properly raised, and because they attacked the district court's authority to grant relief, the district court had to consider the defenses as a logical predicate to its preliminary injunction order.") (quotation marks omitted). Defendants have objected to improper venue, *see El Cenizo* ECF Nos. 14-1; 32-1; *El Paso* ECF No. 5-1, and those objections therefore require resolution before any injunctive relief could possibly be issued. *Hendricks*, 408 F.3d at 1135. In all events, plaintiffs do not show a likelihood of success on the merits or equitable entitlement to a preliminary injunction.

II. SB4 Is Not Preempted by Federal Law.

SB4 is not preempted because it is not in conflict with federal immigration law, and federal law does not field-preempt SB4. *Cf.* El Cenizo Mot. 13-19; San Antonio Mot. 32-37; Austin Mot. 10 (joining El Cenizo's preemption arguments); El Paso Mot. 4 n.1 (same); Travis County Mot. 1 (same). Rather, SB4 is fully consonant with federal immigration statutes evincing a policy in favor of States sharing immigration-related information with the federal government. *See* 8 U.S.C. §§ 1373, 1644. As the Supreme Court recently made clear, "[c]onsultation between federal and state officials is an important feature of the immigration system." *Arizona*, 567 U.S. at 411. Far from usurping federal immigration power, SB4 promotes it by encouraging greater cooperation between state and local officials and the federal government.

A. SB4's anti-sanctuary provisions do not conflict with the federal scheme for cooperative immigration enforcement.

Preemption analysis begins "'with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). An express preemption clause will manifest that purpose. But the Supreme Court has admonished that "[i]mplied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'" *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment). To do so "would undercut the principle that it is Congress rather than the courts that preempts state law." *Id.* The touchstones for conflict preemption are whether the state law would make compliance with federal law a "physical impossibility" or if the state law would present an "obstacle" to federal law. *Arizona*, 567 U.S. at 399-400. SB4 does neither.

1. As an initial matter, and as Plaintiffs tacitly recognize, the "physical impossibility" test for conflict preemption is not met. Law-enforcement agencies can easily comply with SB4 and federal immigration law simply by not prohibiting their officers from cooperating with federal immigration officials. Doing so would satisfy both SB4 § 1.01 (§ 752.053) and 8 U.S.C. § 1373.

2. SB4 also does not meet the obstacle-preemption test: SB4 does not impliedly conflicting with federal immigration law by impeding the achievement of federal immigration objectives. *Contra* El Cenizo Mot. 13-15; San Antonio Mot. 35-37. SB4 does not "stand[] as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress." *Gade*, 505 U.S. at 98 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). It does just the opposite. SB4 furthers Congress's goal of encouraging local law-enforcement agencies to cooperate with federal immigration officials. It does so by prohibiting local law-enforcement agencies from having policies categorically prohibiting or limiting their officers or employees from inquiring into a detained individual's immigration status and from sharing that information with federal officials. *See* SB4

§ 1.01 (§ 752.053). Federal immigration law promotes just that type of cooperative arrangement between localities and federal immigration officials. *See* 8 U.S.C. §§ 1373(a), (b), 1644 (encouraging state and local law enforcement agencies to communicate with federal immigration officials regarding the unauthorized presence of aliens).

a. Preemption is a question of congressional purpose. *Medtronic*, 518 U.S. at 485. Here, far from acting to preempt state involvement in the effort to cooperate with federal immigration officials, Congress has broadly encouraged it. As the Supreme Court recognized in *Arizona*, "[c]onsultation between federal and state officials is an important feature of the immigration system." 567 U.S. at 411. And Congress has "done nothing to suggest it is inappropriate to communicate with ICE." *Id.* at 412; *see id.* (holding that "[t]he federal scheme . . . leaves room for a policy requiring state officials to contact ICE as a routine matter."). To the contrary, Congress actively "encourage[s] the sharing of information about possible immigration violations." *Id.* (citing 8 U.S.C. § 1357(g)(10)(A)).

The text of 8 U.S.C. §§ 1373 and 1644 state Congress's goal of facilitating cooperation between law enforcement and federal immigration officials. *See generally* 8 U.S.C. §§ 1373, 1644 (encouraging local communication with federal immigration authorities regarding unlawfully present aliens). To promote this cooperation, Congress requires federal immigration authorities to respond to state and local inquiries seeking to "verify or ascertain the citizenship or immigration status of any individual." 8 U.S.C. § 1373(c). Similarly, § 1357(g)(10) expressly contemplates the States' inherent authority to cooperate with the federal government in enforcing immigration laws. *See* 8 U.S.C. § 1357(g)(10) (formal agreement between federal government and state or locality is not necessary for state or locality to "communicate" or "cooperate" with the U.S. Attorney General's enforcement of immigration laws); *see, e.g.*, *United States v. Di Re*, 332 U.S. 581, 589 (1948) (authority of state officers to make arrests for federal crimes is, absent federal statutory instruction, a matter of state law); *Gonzales v. City of Peoria*, 722 F.2d 468, 475-76 (9th Cir. 1983) (concluding that Arizona officers have authority to enforce the criminal provisions of federal immigration law),

overruled on other grounds in Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999), *cited in Arizona*, 567 U.S. at 413-14.

Congress's encouragement of state and local cooperation has gone beyond mere words. It has appropriated funds for state and local governments to assist in enforcing immigration laws. *E.g.*, 8 U.S.C. § 1103(a)(11) (authorizing payments and cooperative agreements to cover local costs for the provision of facilities, supplies, medical care, and security related to the administrative detention of illegal immigrants in non-federal facilities); *see Arizona*, 567 U.S. at 408, 411-12 (discussing these and other provisions confirming that "[c]onsultation between federal and state officials is an important feature of the immigration system").

The legislative history of 8 U.S.C. §§ 1373 and 1644 provide yet further support that SB4 would be a boon, not an obstacle, to Congress's goal of the States' law-enforcement officials at all levels working cooperatively with federal immigration authorities. In passing 8 U.S.C. § 1373, Congress recognized that "[e]ffective immigration law enforcement requires a cooperative effort between all levels of government." S. Rep. No. 104-249, at 19 (1996) (Cmte. Rep.). Such cooperation promotes rather than detracts from the federal government's ability to enforce immigration laws. After all, "[t]he acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act." *Id.* at 19-20. Section 1644, passed by the same Congress as section 1373, was enacted for similar reasons: "to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens." H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.).

More broadly, SB4 promotes the aims of federal immigration law as a whole. As the Second Circuit observed in the context of rejecting a Tenth Amendment commandeering challenge to 8 U.S.C. § 1373, the successful implementation of a complex federal program like immigration enforcement necessarily depends on "informed, extensive, and cooperative interaction" between federal, state, and local officials. *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999).

Without that cooperation, "federal programs may fail or fall short of their goals." *Id.* In fact, what poses a conflict with federal law are the very policies that SB4 aims to prevent—local law-enforcement policies blocking the gathering and sharing with federal officials of immigration information. What would "frustrate[the] federal program[]," *id.*, is not SB4 but, rather, allowing "localities to engage in passive resistance" to the goals of federal immigration law. *Id.*

b. In promoting this type of cooperative arrangement, SB4 does not create its own classification of aliens or in any other way attempt to supplant the federal government's control of immigration policy and enforcement. SB4 "simply seeks to enforce" the cooperation between local law enforcement and federal immigration officials that federal law itself promotes, thus "trac[ing] the federal law" in all respects. *Whiting*, 563 U.S. at 602, 607. Federal immigration officials are the ones who will ultimately determine what steps to take (or not to take) to detain or remove any unlawfully present alien. There is no risk, then, of putting "local officials in the impermissible position of arresting and detaining persons based on their immigration status without federal direction and supervision." *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 532 (5th Cir. 2013) (en banc) (plurality op.).

In this way, SB4 differs significantly from the ordinance held preempted in *Farmers Branch*. There, "[b]ased on a classification that does not exist in federal law," the city "criminalized the occupancy of rental housing by those non-citizens found to be 'not lawfully present.'" *Id.* at 534 (quoting Ordinance 2952 §§ 1(C)(1), 3(C)(3)). The Fifth Circuit held that the ordinance effectively provided local officers the authority to criminalize what the local officers unilaterally determined in their minds to be unlawful presence. *Id.* ("The Ordinance allows for local authorities to prosecute as well as arrest based on perceived unlawful presence."). In sharp contrast, SB4 does not classify, criminalize, or in any other way regulate aliens. Nor does it authorize freestanding authority to arrest for civil immigration violations. It merely ensures that state and local officials can cooperate with federal immigration officials. *See generally* SB4; *see also infra* pp. 3-7.

When, as here, the challenged state law is not an obstacle to the federal government's stated goals, but actually furthers them, finding implied preemption would be quite inappropriate. *See,*

e.g., *Wyeth v. Levine*, 555 U.S. 555, 578-79 (2009) (holding that a state law mandating drug warnings was not preempted in part because it furthered the federal regulatory goal of providing information to patients about the potential dangers of prescription drugs); *Midatlantic Nat'l Bank v. N.J. Dep't of Envt'l Protection*, 474 U.S. 489, 505 (1986) (holding that a state law was not preempted because it furthered the federal "goal of protecting the environment against pollution").

c. In an attempt to fashion a conflict where one does not exist, plaintiffs contend that SB4 would upend "the careful balance Congress has struck between encouraging local assistance and preserving local discretion" in cooperating with federal immigration officials. El Cenizo Mot. 13; *see also* El Cenizo Mot. 14 (describing immigration statutes that encourage voluntary cooperation between local law enforcement agencies and federal immigration officials); *accord* San Antonio Mot. 35. But Congress struck no such balance, and plaintiffs erroneously imply that there was a middle ground that Congress could have possibly struck. In reality, Congress could not have legislated a "compulsory local role" (El Cenizo Mot. 19) in federal immigration enforcement, because that would be unconstitutional commandeering under the Tenth Amendment. *See Printz v. United States*, 521 U.S. 898, 935 (1997). Thus, Congress's decision to encourage voluntary local cooperation could not possibly have preempted State-enacted policies regulating—or even requiring—local cooperation.

Moreover, plaintiffs' argument is foreclosed by *Arizona v. United States*. The Supreme Court in *Arizona* upheld a state law that *required* officials to ask about immigration status if they had reasonable suspicion of unlawful presence. 567 U.S. at 411-15. And that Arizona law had its own state penalty provisions. *See* S.B. 1070, § 2 (Ariz. Rev. Stat. Ann. § 11-1051(H)) ("[A]ny official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws" is subject to civil penalties of up to $5000 per day.").

By prohibiting localities from having policies that hinder information sharing with federal officials, *see* 8 U.S.C. §§ 1373, 1644, Congress went right up to the line of what it could do without running afoul of the Tenth Amendment's anti-commandeering doctrine. Indeed, Sections 1373 and

1644 were themselves subject to Tenth Amendment facial challenges from New York City officials. *See generally City of New York*, 179 F.3d 29. The Second Circuit ultimately upheld these federal statutes because they did "not directly compel states or localities to require or prohibit anything" but, rather, "prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS." *Id.* at 35; *see also id.* at 36 (noting that, by contrast, an as-applied challenge to a federal immigration-gathering requirement would raise "not insubstantial" commandeering concerns).[6]

Congress cannot compel state or local governments to enact or administer a federal regulatory program. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 175-76 (1992) (holding that Congress cannot command state governments to provide for the disposal of nuclear waste within their borders pursuant to a federal regulatory program). Nor can Congress require local law enforcement agencies directly to perform federal immigration functions. *See, e.g.*, *Printz*, 521 U.S. at 935 (holding that Congress cannot compel local law enforcement officials to conduct background checks pursuant to a federal regulatory program).

Importantly, by contrast, States do not face similar constraints from the U.S. Constitution on their ability to direct localities or local enforcement officials, whose power is set at "the absolute discretion of the State." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). Plaintiffs go on at length about the supposedly unfettered power of localities to decide whether and to what extent they will cooperate with federal immigration authorities. *See* El Cenizo Mot. 13-14, 16-17; San Antonio Mot. 35-36. They suggest that any local government, or even a single local official, has the unfettered discretion either to cooperate with, or to frustrate, the uniform administration of federal immigration law. That would be an extraordinary assertion of control by localities that does not square with the structure of state government. *See Hunter*, 207 U.S. at 178; *accord, e.g.*, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (States have "extraordinarily wide latitude

[6] Defendants maintain that 8 U.S.C. §§ 1373 and 1644 do not unconstitutionally commandeer States. But if Defendants are wrong and these federal statutes are unconstitutional, then these statutes would be unlawful and thus could not preempt state laws like SB4—as these federal statutes would not be part of the "supreme Law of the Land." U.S. Const. art. VI, cl. 2.

. . . in creating various types of political subdivisions and conferring authority upon them."); *Williams v. Mayor*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges . . . under the Federal Constitution which it may invoke in opposition to the will of its creator."). Here, the Texas Legislature enacted a law that prohibits any local practice, codified or otherwise, restricting cooperation with federal immigration officials in several respects. As a result, any contrary local ordinance, policy, or practice that would be inconsistent with SB4—a general law enacted by the Texas Legislature—is null and void under Texas state law. *See BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, *8 (Tex. 2016) (holding that clear and unmistakable state legislation preempts local ordinances); *see also* Tex. Const. art. XI, § 1 (counties are "legal subdivisions of the State"); *id.* art. V, § 23 (sheriffs' "duties . . . shall be prescribed by the Legislature").[7]

d. Plaintiffs also claim that SB4 conflicts with federal immigration law because it "impose[s] different penalties than Congress has chosen" to employ in 8 U.S.C. § 1373. El Cenizo Mot. 15; San Antonio Mot. 35. SB4 does indeed provide civil (Tex. Gov't Code § 752.056(a)) and criminal (Tex. Penal Code § 39.07) penalties. It is inaccurate, however, to say that Congress "carefully calibrated the amount of pressure" (El Cenizo Mot. 13) to induce local participation in federal immigration enforcement efforts. Sections 1373 and 1644 merely state a federal directive, and Congress did not impose—or attempt to impose—any particular penalties or enforcement mechanisms under these federal statutes. Congress thus did not even enter the field of whether and how to penalize state or local officials who violated 8 U.S.C. §§ 1373 and 1644. And that makes perfect sense, as these statutes already test the limits of the Tenth Amendment anti-commandeering doctrine, and Congress could have rationally concluded that it wanted to leave to the States how to

[7] Some larger Texas cities, unlike El Cenizo, have "home-rule" status under the Texas Constitution that allows them to exercise self-governance. *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993). But even these cities are subordinate to the State. *See id.* ("An ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute."); *see also* Tex. Const. art. XI, § 5(a) ("[Ordinances] shall not contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.").

enforce these directives—especially when any penalties would be incurred by state or local officials.

It is not the case, then, that "two separate remedies are brought to bear on the same activity." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (quotations omitted). Congress did not even attempt to enter the field of what penalties were appropriate for States or state officials who block the sharing of immigration information with the federal government. Section 1373 prohibits such categorical local bans on information-sharing and thus would in theory allow injunctive relief against a state official to require compliance with federal law, if the State official enacted a policy categorically prohibiting immigration-related information sharing with the federal government. But Congress pointedly left any penalties for non-compliance up to the States. *See, e.g.*, *Hines*, 312 U.S. at 68 n.22 ("[W]here the Congress, while regulating related matters, has purposely left untouched a distinctive part of a subject which is peculiarly adapted to local regulation, the state may legislate concerning such local matters which Congress could have covered but did not."); *Whiting*, 563 U.S. at 606-07 (holding that a State could tailor specific sanctions for the violation of federal immigration laws under state licensing laws in the absence of congressional prohibition on those sanctions).

That makes good sense, as it respects the federal-state balance of power by allowing States to determine the degree of penalty to which their own officials should be subjected. There is a sound reason for Congress's decision to allow States to calibrate penalties for their own localities' failure to cooperate with federal immigration officials: States are not creatures of Congress, and States are not dependent on federal authorization to proscribe and provide penalties for conduct within their jurisdiction. *E.g.*, *Sturges v. Crowninshield*, 17 U.S. 122, 193 (1819). As part of Texas's independent sovereign right to protect the health, welfare, and safety of its residents, the State enacted SB4 to affirm its policy of cooperating with federal immigration authorities—a policy that is necessarily exercised through state and local law-enforcement agencies. *See, e.g.*, Tex. Const. arts. V, § 23; XI, § 1.

The State's ability to shape these sort of policies adopted by its political subdivisions, and regulate its own officials, is unquestionably an exercise of the State's traditional police powers. *See, e.g.*, *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power."). The penalties at issue here, directed entirely at local law-enforcement agencies and their officials, strike at the heart of state power. *See Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) (observing that "federal legislation threatening to trench on the States' arrangements for conducting their own governments [is to] be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power"). And as the Supreme Court has explained, courts must assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565.

Even aside from federal-state comity, Congress could well have decided not to test the boundaries of the Tenth Amendment by creating federal penalties for localities' refusal to cooperate. For instance, there is litigation currently pending in the Northern District of California as to whether an Executive Order potentially authorizing the withholding of federal funds in order to encourage compliance with federal immigration laws constitutes unconstitutional coercion. *See Cty. of Santa Clara v. Trump*, No. 3:17-cv-00574 (N.D. Cal.). States, by contrast, do not have similar constraints on their power to direct recalcitrant localities. *See supra* pp. 16-17.

Nothing in the legislative history of §§ 1373 and 1644 suggests that Congress's failure to include penalties for these provisions somehow intended to *foreclose* the States from enacting their own penalties—which would regulate their own officials—through state legislation pursuing similar goals. *Compare, e.g.*, *Arizona*, 567 U.S. at 405 ("A commission established by Congress to study immigration policy and to make recommendations concluded these penalties [on aliens seeking unauthorized employment] would be 'unnecessary and unworkable.'"), *with Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 (2008) (holding that regulated entities under the Clean Water Act could be liable for damages not expressly provided in the Act given the absence of "clear indication of congressional intent to occupy the entire field of pollution remedies").

The lack of any penalties in §§ 1373 and 1644 is significant evidence against preemption. There is no "careful framework" of federal sanctions with which the state sanctions could conflict. *Arizona*, 567 U.S. at 402. A principal concern when a federal law chooses *different* penalties than a parallel state law is that the latter might disrupt the enforcement priorities of the former. *See, e.g., id.* at 402-03 (holding preempted Arizona's attempt to make the federal misdemeanor of failure to carry an alien registration document a separate state misdemeanor because "the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies"). But there is no enforcement scheme in § 1373 to frustrate because there is no "broad and comprehensive" federal regulatory framework governing cooperation between state and local officials and federal immigration officials, complete with penalties subject to the federal government's enforcement priority and prosecutorial discretion. *Hines*, 312 U.S. at 69.

e. The City of Austin claims that SB4 "conflicts with Executive Branch policy" because SB4 applies more broadly than the definition given to "sanctuary jurisdiction" by the Department of Justice in recent litigation and in a policy memorandum from Attorney General Sessions. Austin Mot. 17. But, of course, executive-branch court filings and policy memos cannot preempt state law. Only congressional action can. "It is Congress—not the [Executive]—that has the power to pre-empt otherwise valid state laws." *North Dakota v. United States*, 495 U.S. 423, 442 (1990). "Executive branch communications" may "express federal policy" but they lack the "force of law." *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329-30 (1994); *see also id.* (holding that "[e]xecutive branch actions [like] press releases, letters, and *amicus* briefs" are not law). The question for preemption purposes is only what "Congress has done" or delegated through statutes. *Arizona*, 567 U.S. at 412. And, here, Congress has not foreclosed Texas from encouraging its localities to cooperate with federal immigration enforcement efforts. *See supra* pp. 12-19.

At its base, Austin's argument about a conflict with executive branch policy seems to be nothing more than that SB4 goes further than section 1373. *See* Austin Mot. 18. But, as discussed

above, *see supra* pp. 15-16, far from evincing an intent to foreclose States from doing more to encourage cooperation with federal immigration officials, Congress had a good reason for stopping where it did with section 1373: It cannot compel state and local officials to administer or enforce a federal regulatory program. *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 175-76; *see also City of New York*, 179 F.3d at 35-36 (rejecting a Tenth Amendment challenge to section 1373 but noting that a federal immigration-gathering requirement would raise "not insubstantial" commandeering concerns). Similarly, section 1373 does not have sanctions that were "carefully-calibrated measures permitted by Congress and the Department of Justice" in a way that impliedly forecloses States from fashioning their own penalties to ensure local compliance. Austin Mot. 18. Congress did not attempt to impose any sanctions or enforcement mechanisms in section 1373. *See supra* pp. 15-18.

B. SB4's anti-sanctuary provisions are not field preempted by the federal scheme for cooperative immigration enforcement.

Plaintiffs suggest that the State has no power to promote cooperation with federal immigration authorities over matters on which Congress has not legislated. *See* El Cenizo Mot. 16-17; San Antonio 32-35. That theory is untenable. Nothing shows that it was Congress's "clear and manifest purpose," *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992), to preempt the field underlying SB4 by enacting a regulatory scheme "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," *Gade*, 505 U.S. at 98; *accord Arizona*, 567 U.S. at 399; *cf. Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982) ("Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.").

1. Plaintiffs point to several proposed bills that were ultimately not enacted where Congress considered taking additional steps to address sanctuary cities. El Cenizo Mot. 16. But it is "settled law" that "inaction by Congress cannot serve as justification for finding federal preemption of state law." *Graham v. R.J. Reynolds Tobacco Co.*, No. 13-14590, 2017 WL 2176488, *14

(11th Cir. May 18, 2017); *see also P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) ("There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it."); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act."); *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999) ("[D]eductions from congressional inaction are notoriously unreliable.").

2. Nor does even extensive congressional action in a field like immigration evince an intent to preclude *any* state regulation. *Contra* San Antonio Mot. 34 n.62. In *DeCanas*, the Supreme Court observed that it "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised." *DeCanas v. Bica*, 424 U.S. 351, 355 (1976). This is all the more true for a law like SB4, which is not a "regulation of immigration" because it has nothing at all to say about "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain" (*id.*). *See infra* pp. 23-26.

a. The City of San Antonio argues that section 1357(g) of the Immigration and Naturalization Act provides a "carefully constructed structure for cooperation with federal authorities," occupying the field of SB4. San Antonio Mot. 33. Through section 1357(g), States or their political subdivisions can formally enter into agreements with the federal government to have their officers enforce federal immigration law as de facto federal officers. 8 U.S.C. § 1357(g). But that provision merely provides *one* way for States and localities to cooperate with federal immigration officials, not the *only* way. That much is clear from section 1357 itself. The statute expresses Congress's clear intent that the scheme outlined in section 1357(g) does not preempt alternative forms of State and local cooperation with the federal immigration officials:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State

> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

Id. § 1357(g)(10). There is, thus, nothing to the argument that by setting up a formal process to allow State officials directly to enforce federal immigration law, Congress meant to preempt lesser means of cooperation. *Contra* San Antonio Mot. 33-34.

It is not enough that aliens can be thought of as a "subject" of the state statute. *DeCanas*, 424 U.S. at 355. SB4 does not in any way regulate alien conduct. It does not make it a crime for aliens to be present in the State. It does not criminalize or otherwise regulate aliens seeking employment. And it says nothing about arresting aliens for any immigration-related offense. Rather, SB4 is concerned with doing one thing: Ensuring that law-enforcement officials who are answerable to the State (*see* Tex. Const. arts. V, § 23; XI, § 1) do not prohibit line officers from voluntarily cooperating with the federal government in the enforcement of immigration laws. SB4 § 1.01 (§ 752.053).

Thus, SB4 differs markedly from the sort of state laws that have been held preempted for encroaching upon the federal government's immigration powers. For example, SB4 does not encroach upon a "broad and comprehensive plan describing the terms and conditions upon which aliens may enter this country, how they may acquire citizenship, and the manner in which they may be deported." *Hines*, 312 U.S. at 69 (holding preempted a state law requiring alien registration and card-carrying). Nor does the law attempt to set up its own de facto immigration system by "impos[ing] discriminatory burdens upon the entrance or residence of aliens." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418-19 (1948) (orig. proceeding) (holding preempted a state law that precluded lawful aliens from obtaining certain licenses).

b. SB4 is not at all like the statutory provisions the Supreme Court held were preempted in *Arizona v. United States*. *Cf.* El Cenizo Mot. 15-19; San Antonio Mot. 34-37. Unlike SB4, the Arizona law was aimed directly at aliens; its design was to "'discourage and deter the unlawful

entry and presence of aliens and economic activity by persons unlawfully present in the United States.'" *Arizona*, 567 U.S. at 393 (quoting Ariz. Rev. Stat. Ann. § 11-1051 note). More importantly, most of Arizona's regulations were at odds with federal immigration law and federal enforcement priorities. The state attempted an end-run around the federal government to promote the more aggressive enforcement of the nation's immigration laws. Here, Texas is about as far as conceivably possible from pursuing "policies that undermine federal law." *Id.* at 416. The point of SB4, after all, is not to erect some state-based immigration law alongside the federal system, but to foster better communication and cooperation with federal immigration officials in the *federal* enforcement of immigration law.

Section 3 of Arizona's statute made it a state offense to be unlawfully present in the United States and fail to register with the federal government. *Id.* at 400 (discussing Ariz. Rev. Stat. Ann. § 13-1509(A)). The Court held that Arizona was not free to create its own offense for failing to register because Congress had occupied the field of alien regulation. *Id.* at 401-02. The Court pointed to detailed federal regulation on the topic—statutes prescribing registering and fingerprinting, 8 U.S.C. § 1302(a)), reporting, *id.* §§ 1304(a), 1305(a)), and, most notably, federal penalties for willfully failing to comply with the registration requirements, *id.* § 1306(a). *Arizona*, 567 U.S. at 401. The federal government preempted the field of alien registration because its framework was comprehensive, providing "a full set of standards governing alien registration, including the punishment for noncompliance." *Id.* And not only did Arizona impose state penalties for the violation of federal law where federal penalties already existed, its penalties conflicted with those in federal law. *Id.* at 402-03. Under federal law, a failure to register could be punished by probation, a less-severe punishment that Arizona law foreclosed. *Id.* at 403 (discussing Ariz. Rev. Stat. Ann. § 13-1509(D)). The resulting "inconsistency between § 3 and federal law with respect to penalties," the Court held, counseled in favor of preemption. *Id.* at 402-03.

By contrast, SB4 does not create any state offense for aliens, and the federal government has not created a comprehensive framework, including penalties, regulating prohibitions on local law-enforcement officials from having policies that prevent cooperating with federal immigration

officials. Sections 1373 and 1644 do not establish anything near the comprehensive regulatory framework that 8 U.S.C. 1302 *et seq.* does. And as discussed above, in passing §§ 1373 and 1644 Congress did not even enter the field of fashioning penalties for non-compliance localities, instead leaving that up to the States. *See supra* pp. 15-18.

Section 5 of the Arizona law made it a state crime for unlawfully present aliens to seek work or to work without authorization, with penalties including a $2,500 fine and incarceration. *Arizona*, 567 U.S. at 403 (discussing Ariz. Rev. Stat. Ann. §§ 13-2928(C), (F)). The Court held that this conflicted with a comprehensive set of federal laws and regulations concerning alien employment that already punished these crimes "through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions." *Id.* at 404 (citing 8 U.S.C. § 1324a(e)(4), (f); 8 C.F.R. § 274a.10). Moreover, federal law only imposed these penalties on employers who hired unlawfully present aliens, not the aliens themselves. And that was Congress's deliberate decision to do so. The Court pointed to the legislative history of the Immigration Reform and Control Act ("IRCA")—which fashioned the alien employment laws and imposed penalties on employers—as underscoring the "fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." *Id.* at 405. Congress debated whether or not to impose penalties on prospective employees, with members—including, explicitly, the eventual House sponsor of the IRCA—deciding not to. *Id.* at 405-06. Only because of this could the Court determine that Congress made "a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives." *Id.* at 405.

Here, SB4 created no state offense for aliens, and there is no such "conflict in the method of enforcement" (*id.* at 406) between the federal and state government. Congress did not enter the field of providing penalties on any entity for having policies that frustrate local-federal cooperation on immigration matters. And unlike the alien employment statutes at issue in *Arizona*, nothing in the legislative history of §§ 1373 or 1644 indicates that Congress determined that States should

not have the ability to discourage, through appropriately targeted penalties, the local-federal cooperation over immigration matters contemplated by federal law. *See supra* p. 19.

Section 6 of the Arizona statute authorized state officers to conduct warrantless arrests of aliens believed to be removable from the United States based on probable cause. *Arizona*, 567 U.S. at 407 (discussing Ariz. Rev. Stat. Ann. § 13-3883(A)(5)). The Court concluded that the Arizona law would be an obstacle to federal immigration law because it would have given state officers "even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers." *Id.* at 408. For instance, state officials would have had the power to make immigration arrests regardless of whether a federal warrant had been issued. *Id.* The Court reasoned that alien removal is a federal government function: Congress expressed in 8 U.S.C. § 1357(g) the "limited circumstances in which state officers may perform the functions of an immigration officer." *Id.* By going beyond that—including entrusting to state officials the "determination whether a person is removable"—the Arizona law intruded upon the federal government's immigration authority. *Id.* at 409.

In sharp contrast, SB4 does not attempt to give Texas officials greater authority to detain aliens than that possessed by federal immigration officers. SB4 merely prevents regulated entities in the State from prohibiting their officers from enquiring about immigration status during an otherwise lawful arrest or detention and sharing that information with federal immigration officials, SB4 § 1.01 (§ 752.053), and then requires cooperating with the federal governments' detainer requests, *id.* § 2.01 (art. 2.251(a)); *see id.* § 1.01 (§ 752.053(a)(3)). The federal government, not state officials, remains in control at all points as to who is an unlawfully present alien and who should be detained. *Id.* This is not the "unilateral state action" in immigration enforcement that rendered Arizona's section 6 preempted. *Arizona*, 567 U.S. at 410. Indeed, in the course of finding § 6 preempted, *Arizona* observed that state officials were of course *not* foreclosed from working cooperatively with federal immigration officials. They could, for instance, "provide operational support in executing a warrant," "allow federal immigration officials to gain access to detainees

held in state facilities," or "assist the Federal Government by responding to requests for information about when an alien will be released from their custody." *Id.* (discussing 8 U.S.C. § 1357(d)). SB4 simply seeks to ensure that permissible cooperation.

The only *Arizona* provision resembling SB4 is the one *upheld* by the Supreme Court against a preemption challenge: Section 2(B) of the Arizona law required state and local officers to verify the citizenship or alien status of people arrested, stopped, or detained by contacting federal immigration officials. *Arizona*, 567 U.S. at 411 (discussing Ariz. Rev. Stat. Ann. § 11-1051(B)). The Court canvassed federal immigration statutes and determined that far from Congress intending to foreclose these communications, it actively encourages state and local officers to communicate with federal immigration officials regarding immigration status. *Id.* at 411 ("Consultation between federal and state officials is an important feature of the immigration system."). Although the Court noted that as-applied issues might arise after the law is implemented, it held that, facially, nothing about requiring state officers to verify citizenship of those arrested, stopped, or detained, and then communicating that information to ICE conflicted with the federal scheme of immigration enforcement. *Id.* at 414-15.

SB4 does not even go so far as Arizona's § 2(b), which was upheld by the Supreme Court. SB4 does not *require* state officials to verify the citizenship status of those lawfully detained, but rather prevents local policies that block inquiries about the status of persons arrested or detained. SB4 § 1.01 (§ 752.053). This allows peace officers to communicate and cooperate with federal immigration officials—a goal that accords precisely with why the Supreme Court upheld the Arizona law provision furthering the same goal. By encouraging local law-enforcement agencies to obtain information and communicate with federal immigration officials regarding alien status, SB4 promotes the very sort of cooperation that Congress has "encouraged"—that is, "the sharing of information about possible immigration violations." *Arizona*, 567 U.S. at 412; *see also id.* (discussing 8 U.S.C. § 1373(c)).

Tellingly, the same section of the law upheld by the Supreme Court in *Arizona* (S.B. 1070, § 2) contained a provision strikingly similar to SB4: "No official or agency of this state or a county,

city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law." S.B. 1070, § 2 (Ariz. Rev. Stat. Ann. § 11-1051(A)); *see* SB4 § 1.01 (§ 752.053(a)(1)) ("A local entity or campus police department may not . . . adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws."). And Arizona enforced compliance with that provision with penalties, just like Texas did in SB4. *See* S.B. 1070, § 2 (§ 11-1051(H)) ("[A]ny official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws" is subject to civil penalties of up to $5000 per day."); SB4 § 1.01 (§ 752.056(a)) (providing civil penalties for an intentional violation of § 752.053). The Court was fully aware of these provisions: The United States discussed both provisions in its brief to the Court in support of its argument that S.B. 1070 § 2 was preempted. *See* Brief for the United States, *Arizona v. United States*, 2012 WL 939048, at *47-48 (9th Cir. March 19, 2012) (No. 11-182).

In many ways, SB4 bears more similarity to *Chamber of Commerce v. Whiting*, where the Supreme Court found a different Arizona law was not preempted. That case concerned an Arizona law providing that licenses of state employers that knowingly or intentionally employed unauthorized aliens could be suspended or revoked, and required that all Arizona employers use the federal E-Verify system to ensure that applicants were legally authorized to work. 563 U.S. at 591-92 The Court determined that, although there was significant federal regulation of alien employment, federal law did not provide for licensing penalties of the sort at issue in the Arizona law or otherwise prohibit the states from having those kind of penalties. *Id.* at 599-601. The Court also observed that the Arizona law tracked the provisions in federal law, required state officials to verify their lawful-status determinations with the federal government, and forbade state officials from attempting to make an independent determination. *Id.* at 601. Because the federal government remained in control, the Court reasoned, "there can by definition be no conflict between state and federal law as to worker authorization." *Id.* The Court also highlighted that regulating in-state businesses—even when the subject matter of that regulation touches upon immigration—is not an area

of uniquely federal concern. *Id.* at 604. Finally, the Court held that although Congress created E-Verify as a voluntary system for employers, the federal government "has consistently expended and encouraged" its use, and thus Arizona's requiring its employers to use that system "in no way obstructs achieving those [federal] aims." *Id.* at 609.

Likewise, 8 U.S.C §§ 1373 and 1644 do not provide for conflicting federal penalties or in any way foreclose States from creating their own penalties. SB4 carefully tracks the federal policy of encouraging cooperation between local law-enforcement officers and federal immigration officials, *see* 8 U.S.C. §§ 1373(a), and keeps immigration-status determinations in the hands of the federal government, *see* SB4 § 1.01 (§ 752.053) (discussing sharing information with, receiving information from, and otherwise cooperating with federal immigration authorities). Just as much as the Arizona-based businesses in *Whiting*, the entities regulated in SB4 are properly the subject of state regulation as an exercise of Texas's traditional police powers over its law-enforcement officials. *See supra* pp. 18-19. And the State's methods—from providing tailored penalties to discouraging local officials from non-cooperation policies to requiring regulated entities to comply with ICE detainers—fit with the aims of federal law to promote cooperation in immigration enforcement (8 U.S.C. §§ 1373(a), (b), 1644) and to allow the federal government to take into custody those persons unlawfully present in the United States (*id.* § 1357(d)(3)).

C. The SB4 detainer mandate is not preempted, and it does not require local officers to make unilateral determinations of immigration status.

1. The City of San Antonio claims preemption of SB4's requirement that a law enforcement agency with custody of an alien subject to an ICE detainer shall honor the federal government's detainer request (SB4 § 2.01 (art. 2.251(a)); *see also id.* § 1.01 (§ 752.053(a)(3)) (banning local prohibitions on compliance with immigration detainers)). San Antonio Mot. 34, 37. It argues that by requiring local law-enforcement agencies to comply with ICE detainers, SB4 impermissibly makes mandatory what a Department of Homeland Security regulation makes voluntary given

that the regulation's description of the detainer is as a "request." *Id.* at 34 (discussing 8 C.F.R. § 287.7(a)).[8] This comes nowhere close to a congressional purpose to preempt.

The Supreme Court rejected essentially the same argument in *Whiting*—that an Arizona statute making the E-Verify system mandatory for employers in the state was preempted because Congress made that system voluntary. 563 U.S. at 607-08. As with the E-Verify system in *Whiting*, here, the statutory authority for ICE detainers "contains no language circumscribing state action." *Id.* at 608; *see* 8 U.S.C. § 1357(d)(3).[9] As in *Whiting*, the statute "does, however, constrain federal action." *Whiting*, 563 U.S. at 608. Section 1357(d)(3) provides that federal immigration officers "*shall* promptly determine whether or not to issue" a detainer, and if one is issued and "the alien is not otherwise detained by Federal, State, or local officials," the "Attorney General *shall* effectively and expeditiously take custody of the alien." 8 U.S.C. § 1357(d) (emphases added). The entire point of an ICE detainer request is to allow the federal government to take custody to effectuate removal: The detainer "advise[s] another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien." 8 C.F.R. § 287.7(a). As in *Whiting*, given that purpose, Texas's requirement that law-enforcement agencies in the State honor ICE detainer requests "in no way obstructs achieving those aims." *Whiting*, 563 U.S. at 609. To the contrary, it helps fulfill them. The Court in *Arizona* recognized as much when it cited to the detainer provision in section 1357(d) as a permissible example of how "[s]tate officials can . . . assist the Federal Government by responding to requests for information about when an alien will be released from their custody." 567 U.S. at 410.

Moreover, there is no reason to believe that making compliance with ICE detainers voluntary was some carefully considered federal choice to "steer a middle path" or effect some "careful balance." San Antonio Mot. 37. It is not difficult to see why the Department of Homeland Security

[8] The City cites 8 C.F.R. § 287.7(d)(3), but the handful of words it quotes are in 8 C.F.R. § 287.7(a).

[9] 8 C.F.R. § 287.7 was promulgated under section 287(d)(3) of the Immigration and Nationality Act—*i.e.*, 8 U.S.C. § 1357(d)(3). Indeed, "Congress's only specific mention of detainers appears in INA § 287, 8 U.S.C. § 1357(d)." *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014).

would characterize its interactions with state and local law-enforcement officials regarding ICE detainers as "request[s]." 8 C.F.R. § 287.7(a). As with requiring more concrete forms of cooperation in sections 1373 and 1644, *see supra* pp. 15-18, the federal government's mandating that States and local officials comply with ICE detainers would brush up against the Tenth Amendment. In fact, one court of appeals has held that, "[u]nder the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government" because "the federal government cannot command the government agencies of the states to imprison persons of interest to federal officials." *Galarza*, 745 F.3d at 643. States are not similarly constrained. *See supra* pp. 16-17.

2. Plaintiffs also claim that SB4's detainer mandate is preempted because it allegedly requires local officers to make "unilateral determinations of immigration status" in enforcing federal immigration detainers. El Cenizo Mot. 19; *accord* San Antonio Mot. 37 ("[SB4] requires local officers to make immigration determinations"). But SB4 does no such thing. SB4 expressly contemplates that the federal government, not the State or a local law enforcement agency, is the entity that determines whether an immigration detainer issues. *See* SB4 § 2.01 (art. 2.251(a)(1)) (concerning detainer requests "by the federal government").

Because an alien will only be detained under SB4's detainer mandate when the federal government makes the detainer request, the process is necessarily subject to the "federal government's supervisory role." *Farmers Branch*, 726 F.3d at 531. And there is "no possibility of conflict" since "the state statute makes federal law its own" as to who is and is not subject to detention. *People of the State of California v. Zook*, 336 U.S. 725, 735 (1949); *cf. Plyler*, 457 U.S. at 212 n.19 ("[I]f the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction."). The State therefore is not creating its own immigration classifications; rather, it is relying on the existing federal immigration classifications and the information provided to the State by the federal government's detainer request.

The statutory language at which plaintiffs take aim is SB4's *exception* that allows a local official *not* to honor a federal detainer request when the individual detained has provided evidence to disprove probable cause of unlawful presence. SB4 § 2.01(b) (art. 2.251(b)); *see* El Cenizo Mot. 19; San Antonio Mot. 37. This provision is not asking a local official to create his own immigration classifications. Nor does this provision even concern a final determination of immigration status; it merely excuses law-enforcement agencies from state-law duties, SB4 § 2.01 (art. 2.251(b)), and any penalties, *id.* § 5.02 (§ 39.07(c)), under SB4 for not enforcing an ICE detainer request when a person in custody presents proof of lawful immigration status.[10] It is similar in both substance and operative effect to the "limit[] . . . built into the state provision" in the Arizona provision upheld by the Supreme Court, by which "a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification." *Arizona*, 567 U.S. at 411; *compare with* SB4 § 2.01 (art. 2.251(b)) ("a person who has provided proof that the person is a citizen of the United States or that the person has lawful immigration status in the United States, such as a Texas driver's license or similar government-issued identification"). This exception is wholly ameliorative in nature and could only possibly operate to the *benefit* of the alien. Accordingly, this exception cannot possibly be preempted as a "unilateral state action to detain." *Arizona*, 567 U.S. at 410.

Even if the ameliorative exception somehow constituted impermissible intrusion on the federal domain to be preempted, the remedy would be to simply eliminate this exception, not any of the other provisions of SB4. SB4 contains a broad severability provision.[11] Plaintiffs have not claimed—because they cannot claim—that striking the ameliorative provision would affect the "functional coherence" of the statutory provision requiring compliance with federal immigration

[10] This is, at the very least, a plausible reading of SB4 §§ 2.01 (art. 2.251(b)) and 5.02 (§ 39.07(c)). And when statutory provisions are "susceptible [to] more than one plausible reading," courts "should accept the reading that disfavors pre-emption." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).

[11] SB4 § 7.01 ("It is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act to each person or entity, are several from each other.").

detainers, much less the statute as a whole. *Farmers Branch*, 726 F.3d at 537. The appropriate remedy therefore would be to sever that provision and uphold the rest of the statute. *See, e.g.*, *Leavitt v. Jane L.*, 518 U.S. 137, 139-40 (1996) (per curiam) (reversing the Tenth Circuit's total invalidation of a Utah statute on a facial challenge, and holding that federal courts must apply a state-law severability provision to preserve the valid scope of the statute to the maximum extent possible); *BCCA Appeal Grp.*, 496 S.W.3d at *8; Tex. Gov't Code § 311.032(a) ("If any statute contains a provision for severability, that provision prevails in interpreting that statute.").

III. Plaintiffs' Vagueness Challenge Is Meritless.

Several plaintiffs contend that SB4's anti-sanctuary and ICE-detainer provisions violate due process as unconstitutionally vague. El Cenizo Mot. 20-28; El Paso Mot. 25-29; San Antonio Mot. 46-48. That is meritless. A heavy burden applies to this challenge because of its facial posture. Plaintiffs cannot meet that requirement because some of plaintiffs' conduct is undisputedly prohibited by SB4, and thus SB4 is not facially void for vagueness. *See infra* Part 0.A. And even considering the specific hypothetical as-applied scenarios envisioned by plaintiffs, SB4 is not unconstitutionally vague because it neither deprives regulated entities of fair notice nor invites arbitrary enforcement. *See infra* Part 0.B.

A. Plaintiffs' challenge fails because SB4 is not facially vague.

The pre-enforcement posture of plaintiffs' vagueness challenge requires them to show that SB4 is facially vague, meaning impermissibly vague in *all* of its applications. They cannot meet that burden. Plaintiffs readily understand that some of their desired policies or actions are prohibited by SB4. Whether plaintiffs can imagine taking yet other actions that might arguably present closer as-applied questions under SB4 cannot fuel a facial vagueness challenge at this pre-enforcement stage. Such an as-applied challenge must await any eventual enforcement proceeding against that conduct—which may very well never arise.

1. Because plaintiffs bring a pre-enforcement challenge to SB4, they are necessarily raising a facial challenge and thus must show that the challenged provisions are invalid in *all* applications. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5, 497 (1982) ("A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague . . . . mean[ing] a claim that the law is invalid *in toto*—and therefore incapable of any valid application" (citation and quotation marks omitted)). Outside of a First Amendment free speech challenge, the overbreadth doctrine does not apply. *Id.* at 495 & n.7. So when "laws that do not threaten to infringe constitutionally protected conduct" are "challenged facially as unduly vague, in violation of due process," the challenger "'must demonstrate that the law is impermissibly vague in all of its applications.'" *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 546 (5th Cir. 2008) (quoting *Hoffman Estates*, 455 U.S. at 494-95, 497).

That standard applies here because—apart from their First Amendment free speech claims dealt with separately below, *see infra* Parts IV-V—plaintiffs do not argue that SB4 regulates activity protected by the Constitution.[12] SB4 regulates policing in the State of Texas, which is not constitutionally protected conduct.

A pre-enforcement, facial vagueness challenge is particularly "difficult, perhaps impossible, because facts are generally scarce." *Roark & Hardee LP*, 522 F.3d at 547. In *Roark & Hardee* there was an "adequate record of the ordinance's operation and particularized harmful effect on all Plaintiff bars and owners" only once the defendant issued several post-suit citations, which then "permit[ted] a determination of whether the [challenged] provision [wa]s impermissibly vague in all its applications." *Id.* Here, SB4 has not yet gone into effect. Claims that SB4 could *never* be validly enforced are "entirely hypothetical" and require "sheer speculation," and thus plaintiffs

[12] Plaintiffs allege that SB4 "threatens to *inhibit* the exercise of constitutional rights." Mot. 21 (quoting *Hoffman Estates*, 455 U.S. at 498-99). Plaintiffs offer no support for that statement, which in any event is not an assertion that SB4 itself regulates constitutionally protected conduct.

"cannot prevail in [a] preenforcement challenge" based on those allegations. *Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 24, 25 (2010).

2. Not only is it speculative to claim that SB4 could *never* have clear application, but plaintiffs themselves offer numerous examples of their own conduct that SB4 clearly proscribes. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates*, 455 U.S. at 494-95. The court must "therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Id.*

Plaintiffs' own declarations demonstrate that SB4 is not "impermissibly vague in all its applications, including its application to the party bringing the vagueness challenge." *United States v. Clark*, 582 F.3d 607, 612-13 (5th Cir. 2009) (quoting *Hoffman Estates*, 455 U.S. at 495; *Roark & Hardee*, 522 F.3d at 546-47, 551 n.19). For example, El Cenizo's mayor alleges it has a "sanctuary city" policy that "limits the situations in which [city] . . . officials can engage in immigration enforcement or collect and disseminate such information." ECF No. 24-8 (Reyes Decl.) ¶ 19. El Cenizo admits that "SB4 would prohibit the enforcement of [its] ordinance." *Id.* Likewise, the Maverick County Sheriff claims that he "currently instruct[s] [his] deputies not to inquire as to an individual's immigration status during a law enforcement contact" but that he must abandon that policy. ECF No. 24-5 (Schmerber Decl.) ¶ 19; *accord* ECF No. 58-1 (Hernandez Decl.) ¶ 48 (stating that SB4 prohibits her "written policy [that] currently instructs [her] deputies not to inquire about a person's immigration status in the jail, on patrol, or elsewhere"); *see also* San Antonio Mot. 8 (describing San Antonio Police Department policy). Sherriff Schmerber also states that he has announced a policy that "Maverick County Sheriff's Office will not participate or cooperate in the arrests of individuals for civil immigration violations," ECF No. 24-5 ¶ 9, whereas SB4 removes his "discretion" to "decline detainer requests from the federal government," *id.* ¶¶ 15-16; *accord* ECF No. 58-1 ¶¶ 37, 46 (indicating that Sheriff Hernandez could comply with SB4 by no longer declining "requests from federal immigration authorities to assist them in the apprehension of individuals" and by "honor[ing] all detainer requests from ICE"); *see also* San Antonio Mot. 9

(describing current "discretion[ary]" practice of honoring ICE detainers). The Maverick County Constable similarly identifies measures he can take to avoid an SB4 violation, but would like to forego some of those measures that he views as not the "main purpose of [his] job," notwithstanding the State's control over the job duties of its officers. ECF No. 58-1 (Hernandez Decl.) ¶¶ 12-13, 15; *accord* ECF No. 24-6 (Hernandez Decl.) ¶ 46; ECF No. 57-4 (Manley Decl.) ¶ 23 (Austin Police Chief).[13]

As these examples and admissions demonstrate, SB4 has clear applications—embracing some of plaintiffs' own desired conduct and policies. Because SB4 undoubtedly prohibits at least some of plaintiffs' own conduct, it is facially valid regardless of plaintiffs' arguments about how SB4 could hypothetically apply in other scenarios. *Holder*, 561 U.S. at 22; *Roark & Hardee LP*, 522 F.3d at 547. Outside actual enforcement proceedings, those as-applied arguments would lead to unnecessary advisory rulings. *See, e.g.*, *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 686 (2d Cir. 1996) (refraining from "ruling on an as-applied challenge to an allegedly vague statute when the ordinance would be valid as applied to at least one activity in which plaintiff is engaged"). Particularly with respect to sanctions for noncompliance, "gradations of fact or charge would make a difference as to criminal liability," and so "adjudication of the reach and constitutionality of [the statute] must await a concrete fact situation." *Holder*, 561 U.S. at 25 (quoting *Zemel v. Rusk*, 381 U.S. 1, 20 (1965)).

Plaintiffs' argument that SB4 is void for vagueness because it invites standardless prosecution should be rejected for similar reasons. *See* El Cenizo Mot. 26-27; San Antonio Mot. 47-48. Where a plaintiff's conduct is clearly foreclosed by a statute, a preenforcement challenge as inviting arbitrary prosecution is inappropriate. *See, e.g.*, *Hoffman Estates*, 455 U.S. at 503-04 (rejecting a similar claim).[14]

---

[13] The alleged costs of compliance arise from Constable Hernandez's "own decision to obey the statute rather than risk prosecution," and thus do not support pre-enforcement relief. *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1351 (11th Cir. 2011).

[14] The San Antonio plaintiffs are also wrong that SB4 "imbues individual officers with authority to make ad hoc interpretations of 'state and federal immigration laws' with no oversight or repercussions" and

B. Even considering SB4 as applied to hypothetical scenarios beyond those that plaintiffs' recognize are clearly prohibited, SB4 is not unconstitutionally vague.

As just discussed, under case law governing this pre-enforcement posture, plaintiffs' facial vagueness claim must fail because plaintiffs cannot show facial invalidity in *all* applications in which SB4 might apply. But even considering the hypothetical scenarios raised by plaintiffs, their vagueness argument as applied in those scenarios would still fail.

When a law carries criminal or significant civil penalties, the vagueness test asks whether the law is definite enough "to provide a person of ordinary intelligence fair notice of what is prohibited" or is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder*, 561 U.S. at 18 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)); *see Roark & Hardee LP*, 522 F.3d at 552-53. This is a high standard for a challenger, as he "must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that *no standard of conduct is specified at all*." *Hoffman Estates*, 455 U.S. at 495 n.7. Legislators therefore need not "delineate the exact actions" a party must take to avoid liability, as "[o]nly a *reasonable degree of certainty* is required." *Roark*, 522 F.3d at 552-53.

The hallmark of a vague statute is tying culpability to "untethered, subjective judgments." *Holder*, 561 U.S. at 21. For example, statutes cannot criminalize "annoying" or "indecent" conduct. *Williams*, 553 U.S. at 306. Those terms are "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id.* But where statutory definitions, narrowing context, or settled meanings for legal terms indicate a particular meaning for a statutory term, a court must avoid holding the term vague, as "every reasonable construction must be resorted to[] in order to save a statute from unconstitutionality." *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1998).

---

that the attorney general has no criteria to determine whether "'facts support[] an allegation'" in an SB4 citizen complaint. San Antonio Mot. 47-48. That SB4 does not provide additional guidance in those respects is best understood as leaving intact the existing responsibilities of law enforcement officers and the Attorney General as provided elsewhere under Texas law.

As shown below, SB4's anti-sanctuary and detainer-compliance provisions provide fair notice of what is prohibited. SB4 and common usage provide meaning to each term challenged by plaintiffs. *Cf.* El Cenizo Mot. 22-28; El Paso Mot. 26-27.

1. ***Anti-sanctuary provisions.*** Plaintiffs allege that terms such as "policy," "materially," "limit," "reasonable," "necessary," "assist," and "cooperate" are unconstitutionally vague. But terms such as these are used routinely throughout judicial opinions and in scores of statutes to delineate what conduct is covered by a certain law. They are not fatally vague unless all sorts of other federal and state statutes are. A context-specific analysis of these terms in SB4 confirms that they specify a standard of conduct.

The term "materially limit" in SB4's anti-sanctuary provisions is not untethered to meaning. *Cf.* El Cenizo Mot. 23; El Paso Mot. 26. SB4 bars a policy or conduct that "prohibits or materially limits the enforcement of immigration laws," including several enumerated activities. SB4 § 1.01 (§ 752.053(a)(1), (a)(2), (b)). SB4 broadly defines *policy* to include a "formal, written rule, order, ordinance, or policy," as well as an "informal, unwritten policy." *Id.* § 1.01 (§ 752.051(6)). In that context, a "material limit" on "immigration law" enforcement is a policy or action addressing immigration-law enforcement specifically, as opposed to routine police matters, and either prohibits immigration law-enforcement activity or significantly limits that activity from its otherwise-prevailing scope. Under that straightforward reading, "simple, day-to-day decision[s] regarding how a city or county allocates its scarce police resources" are not a "material[] limit" on the enforcement of immigration law. *Cf.* El Cenizo Mot. 24.[15]

This contextual meaning of "materially limit" comports with dictionary definitions. A "material" limit is one that is "substantial," as opposed to insignificant. Webster's New International Dictionary 1392 (3d ed. 2002). "[M]aterial" also suggests a "logical connection" between

[15] The El Paso plaintiffs also challenge "policy" as "circular and confusing" because that term is defined as including both a "'formal . . . policy" and an "informal . . . policy" (El Paso Mot. 26 (citing Tex. Gov't Code § 752.051(6)), but SB4's definition merely captures that this term is intended broadly to encompass both formal and informal expressions of "policy," a term used in countless cases and statutes.

the action and the "consequential facts" creating the action's significance—here, the effect on enforcement of immigration law enforcement, here. Black's Law Dictionary 1124 (10th ed. 2014).

Plaintiffs' related complaint that SB4 does not define "assisting or cooperating" with a federal immigration officer as "reasonable or necessary" is also misplaced. El Cenizo Mot. 24-25. Both phrases address cooperation in the context of participation with "a federal immigration officer." SB4 § 1.01 (§ 752.053(b)(3)). SB4 does not require regulated entities to themselves affirmatively decide whether enforcement participation through assistance or cooperation is "reasonable or necessary." Rather, a request from a federal immigration officer for "enforcement assistance," *id.* (§ 752.053(b)(3)), puts covered entities on notice of when SB4's prohibition of blocking immigration-law enforcement activity comes into play.[16] Insofar as plaintiffs argue that SB4 gives no guidance on "whether it is reasonable or necessary to refuse cooperation where they believe federal agents are using excessive force or are failing to comply with Fourth Amendment search requirements," El Cenizo Mot. 25, plaintiffs ignore that in those scenarios, those independent legal doctrines, not local policy or practice, function as the limits on officers' participation.

Finally, any purported vagueness in other terms does not warrant relief. *See* El Cenizo Mot. 25-26. "[P]attern or practice" is not unconstitutionally vague. El Cenizo Mot. 25; El Paso Mot. 26. That phrase appears in various legal contexts. *See, e.g.*, *Rogers v. Pearland Indep. Sch. Dist.*, 827 F.3d 403, 408 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 820 (2017) (Title VII employment discrimination); *Duvall v. Dallas County*, 631 F.3d 203, 206 (5th Cir. 2011) (per curiam) (*Monell* liability). Nor is "immigration laws" impermissibly vague. El Cenizo Mot. 25-26; San Antonio Mot. 47. SB4 defines "immigration laws" as "the laws of this state or federal law relating to aliens, immigrants, or immigration, including the federal Immigration and Nationality Act (8 U.S.C. Section 1101 et seq.)." SB4 § 1.01 (§ 752.051(2)); *id.* § 1.01 (§ 772.0073(3)).

[16] The same goes for El Paso's argument that local entities "must allow federal immigration officers to enter jails to 'conduct enforcement activities,' but there is no explanation of what precisely those 'activities' include." El Paso Mot. 27 (quoting § 752.053(b)(4)).

2. ***ICE-detainer provisions.*** Plaintiffs' vagueness challenge regarding ICE detainers is not aimed at the detainer *mandate* but, rather, at the *exception* allowing peace officers not to fulfill an ICE detainer if an individual presents proof of "lawful immigration status." El Cenizo Mot. 27-28. Thus, any potential vagueness with that provision would only justify a remedy that strikes the exception—and not the rest of the detainer mandate. *See infra* Part IV.B.[17]

In any event, none of SB4's detainer provisions are detached from all meaning. Plaintiffs note that an individual with lawful presence in this country might not have identification, or an individual with identification might not actually have "formal lawful immigration status." El Cenizo Mot. 27. The El Paso plaintiffs similarly argue that "officers will simply not be able to know whether a person may have 'lawful immigration status.'" El Paso Mot. 27.[18] But that argument overlooks that all adult aliens in the country are *required at all times*, under federal law, to carry documentation of their alien status. *See* 8 U.S.C. § 1304(e).[19] This argument also overlooks that the statute upheld in *Arizona* similarly provided that "a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification." 567 U.S. at 411. In any event, SB4's detainer exception applies when an individual has "provided proof" of immigration status, regardless of whether that documentation is accurate and establishes that the alien is lawfully present in the country. SB4 § 2.01 (art.

[17] The same is true of El Paso's contention that "place of worship" is vague in § 752.053(c). El Paso Mot. 27. If that term is vague, then the remedy is to strike that exception to SB4's enforcement-assistance provision. *See* SB4 § 1.01 (§ 752.053(c)). In any event, that term is not vague simply because it is undefined, as it should be ascribed its commonly understood meaning as it is used in dozens of Texas laws.

[18] The El Paso plaintiffs further suggest that SB4 "provides no explanation for what local officials are supposed to do" when faced with an individual who "may be a United States citizen or have authorization to be in the country but not have a document to prove it." El Paso Mot. 28. That argument is wrong because it merely describes purported uncertainty about an *exception* to the detainer mandate—officials can comply with SB4 by honoring the detainer. That individuals may not possess documentation to trigger the detainer-mandate exception does not mean that the detainer mandate delegates arbitrary enforcement authority. *See* El Paso Mot. 29.

[19] Plaintiffs' suggestion that aliens with "deferred action" have authorized presence without lawful status is mistaken. *Compare* El Cenizo Mot. 27, *with Texas v. United States*, 809 F.3d 134, 184-86 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). The federal government has deemed "deferred action status" as "lawful status." *E.g.*, U.S. Br. as Amicus Curiae in Opp. to Reh'g En Banc 16, *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (No. 13-16248) (ECF No. 75).

2.251(b)); *id.* § 5.02 (§ 39.07(a)-(b)). Nothing in SB4 "forces [local officials] to make immigration status determinations." San Antonio Mot. 9. Moreover, the requirement of a "knowing[]" violation to trigger SB4's criminal sanctions, SB4 § 5.02 (§ 39.07(a)(2)) and that an entity "intentionally violate[d]" the detainer duty to trigger civil penalties, SB4 § 1.01 (§ 752.051(a)(3)), further guards against any potential unconstitutional vagueness. *Hoffman Estates*, 455 U.S. at 498-99.

IV. SB4's "Endorsement" Provision Does Not Violate the First Amendment.

Plaintiffs point to a single word in SB4—"endorse"—to argue that the statute constitutes unconstitutional viewpoint discrimination violating the First Amendment. El Cenizo Mot. 28-30; San Antonio Mot. 24-29, 51; Austin Mot. 10-11; El Paso Mot. 21. The *in pari materia* canon requires reading the undefined word "endorse" in its narrower sense, avoiding concerns about infringement upon elected officials' political speech. Moreover, even if that single word is held overbroad, the appropriate remedy is to strike only that word and uphold the rest of the statute.

A. SB4 provides that "[a] local entity or campus police department may not . . . adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws." SB4 § 1.01 (§ 752.053(a)(1)). None of these serial verbs—*adopt*, *enforce*, and *endorse*—are defined in the statute. Plaintiffs attack only *endorse*, implicitly recognizing that there is no First Amendment problem with prohibiting local entities from adopting and enforcing policies that limit the enforcement of immigration laws. *See* El Cenizo Mot. 28-29; San Antonio Mot. 24-29; Austin Mot. 10-12; El Paso Mot. 21.

Plaintiffs argue that *endorse* is so vague as to be unconstitutional, El Cenizo Mot. 30; San Antonio Mot. 47; El Paso Mot. 21, yet clear enough to constitute an unconstitutional "ban on speech," El Cenizo Mot. 28; San Antonio Mot. 24; Austin Mot. 10-12. As explained above regarding vagueness, the issue is whether the word provides no standard at all to determine whether conduct is covered. *See supra* Part III.B. *Endorse* is not a term of art, and it is readily susceptible to a common-sense definition—*i.e.*, a "straightforward, textually-based limit," San Antonio Mot. 27— that does not present constitutional concerns. *See infra* pp. 42-43. SB4 itself even provides

four concrete examples of policies that local officials are prohibited from endorsing. SB4 § 1.01 (§ 752.053(b)(1)-(4)); *see supra* pp. 4-5.

Plaintiffs wish to define *endorse* broadly, in a way that would sweep in the political speech of candidates for public office and lead to the plaintiffs' purported parade of horribles. El Cenizo Mot. 28-29; San Antonio Mot. 25-26; Austin Mot. 11-12; El Paso Mot. 21. But plaintiffs' constitutionally problematic definition is not compelled by the text of SB4. And particularly in facial challenges like this one, statutory provisions must be interpreted in a way that avoids constitutional concerns. *See, e.g.*, *United States v. Wallington*, 889 F.2d 573, 576 (1989) ("[A statute] should be construed narrowly to avoid overbreadth, if the statute is fairly subject to such a limiting construction."); *Virginia v. Am. Booksellers Ass'n Inc.*, 484 U.S. 383, 397 (1988) ("It has has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld."). This principle accords with the general practice that "[f]acial challenges to the constitutionality of statutes should be granted 'sparingly; and only as a last resort,' so as-applied challenges are preferred." *Hersh v. United States*, 553 F.3d 743, 762-63 (5th Cir. 2008) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).[20]

The term *endorse* in SB4 is readily susceptible to a narrower construction that would resolve any doubt as to its constitutional validity: the dictionary definition, "to sanction." Webster's New International Dictionary 845 (2d ed. 1945); *accord* Webster's New World College Dictionary 480 (5th ed. 2016); *cf. In re Hecht*, 213 S.W.3d 547, 571 (Tex. Spec. Ct. Rev. 2006) (appointed by Tex. Sup. Ct.) (rejecting a broad definition of "endorsement" in a judicial ethics canon, consulting leading dictionaries, and holding that "endorse" means "more than mere support"). To

[20] This is particularly true in the overbreadth context. *See* El Cenizo Mot. 29 n.9 (arguing that "[t]he endorsement ban" is overbroad); *accord* San Antonio Mot.26-29; Austin Mot. El Paso Mot. 21 & n.23. Because the "invalidation of a statute on overbreadth grounds brings about total judicial abrogation of even the legitimate regulation at the core of the overbroad statute . . . where there are a substantial number of situations to which a statute may validly be applied, [courts] eschew reliance on the overbreadth doctrine." *Wallington*, 889 F.2d at 576.

"sanction," in turn, means "to ratify or confirm," or "to authorize or permit; countenance." Webster's New World College Dict. 1286. And, of course, a use of official power is required to ratify or authorize.

So defined, it is not "difficult to imagine any legitimate applications" (El Cenizo Mot. 29 n.9) of the endorsement prohibition. SB4 is designed to stop local law enforcement agencies from having policies[21] that obstruct cooperation with federal immigration officials. The endorsement prohibition furthers that goal by providing that a local law-enforcement official may not ratify, confirm, authorize, or permit in their agency a policy contrary to § 752.053(b)(1)-(4).

In addition to properly avoiding any constitutional concerns, this common-sense definition satisfies the requirement that undefined statutory terms be given "fair meaning in accord with the manifest intent of the lawmakers." *United States v. Moore*, 423 U.S. 122, 145 (1975). The statute provides that local law-enforcement officials may not "adopt, enforce, or endorse" policies limiting immigration-law enforcement. SB4 § 1.01 (§ 752.053(a)(1)). When a statutory term is unclear, courts commonly look to surrounding statutory provisions "[o]n the same subject" for guidance. Black's Law Dictionary 911 (10th ed. 2014) (discussing the *in pari materia* statutory construction canon). Accordingly, the term "endorse" should be construed *in pari materia* with the other prohibited local-entity actions in the same clause, namely "adopt" and "enforce." *See Pervis v. La-Marque Ind. Sch. Dist.*, 466 F.2d 1054, 1057 (5th Cir. 1972). As plaintiffs tacitly recognize, neither of those actions implicates political speech or speech more generally. It would be odd for the Legislature to have intended a definition of "endorse" so broad as to implicate First Amendment concerns, when the prohibited actions right around it—to say nothing of the statute as a whole—say nothing at all about political speech or political campaigns.

Prohibiting officials from ratifying, confirming, authorizing, or permitting a prohibited policy in their agencies has nothing to do with the political process, political campaigns, or constitutionally protected speech generally. *Cf.* El Cenizo Mot. 29; San Antonio Mot. 25-26; Austin Mot.

[21] The statute defines "policy" as a "formal, written rule, order, ordinance, or policy and an informal, unwritten policy." SB4 § 1.01 (§ 752.051(6)).

11-12; El Paso Mot. 21. The State of Texas necessarily effectuates public policy and exercises its traditional police powers through its counties and their law-enforcement officials. *See generally* Tex. Const. arts. V, § 23; XI, § 1. The noncooperation policies that SB4 aims to prevent would be taken in those individuals' official capacities as government employees.[22]

B. In any event, even if the court were to hold that "endorse" constitutes unconstitutional viewpoint discrimination, the appropriate remedy would be to strike that word, and only that word, from the statute. *See, e.g.*, *Leavitt*, 518 U.S. at 139-40 (holding that a federal court must preserve the valid scope of a state statutory provision to the greatest extent possible in accordance with state law on severability). The Texas Legislature indicated that severability is to operate in this manner, both as a general principle, Tex. Gov't Code § 311.032(a), and in SB4 specifically, SB4 § 7.01 ("It is the intent of the legislature that every provision, section, subjection, sentence, clause, phrase, or *word* in this Act, and every application of the provisions in this Act to each person or entity, are severable from each other.") (emphasis added).

The term *endorse* appears just one time as one of three alternative verbs, in a single statutory provision in a statute filled with thousands of other words. Severing that one word would not present any problems that counsel against severing. Doing so would not require the Court "to write words into the statute." *Randall v. Sorrell*, 548 U.S. 230, 262 (2006). The word is not integral to the "functional coherence" of the statute. *Farmers Branch*, 726 F.3d at 537. Nor is that one word "so interwoven" in the statute, or even in the particular provision itself, that it "cannot be separated." *Hill v. Wallace*, 259 U.S. 44, 70 (1922). In this scenario, the only sensible remedy for a constitutional problem with "endorse" that could not be resolved through the preferred means of a limiting construction would be to strike that term alone. *See, e.g.*, *Phelps-Roper v. Koster*, 713 F.3d 942, 953 (8th Cir. 2013) (holding that one unconstitutional word in a statute should be

[22] As the Supreme Court has recognized, "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). This is necessarily so. "Official communications," after all, "have official consequences, creating a need for substantive consistency and clarity." *Id.* at 422. As a result, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421-22.

stricken, and the rest of the statute upheld, because the offending word "appears just once in each statute, and only as part of a serial list").

V. SB4 Does Not Violate the First Amendment By Chilling Protected Activity Through Official Retaliation.

El Paso plaintiffs TOPEF and MOVE also argue that SB4 chills protected association, assembly, and petition rights through the threat of retaliation against their members for education activities, protests, and other forms of civic engagement. El Paso Mot. 23-24 (citing, e.g., *Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997)). These plaintiffs cite *Texas v. Travis County*, No. 1:17-CV-00425-SS (W.D. Tex.), as proof that this purported retaliation is not merely "hypothetical," since that lawsuit named TOPEF as a defendant. El Paso Mot. 23. Those arguments fail because they both mischaracterize the *Travis County* litigation and fail to meet the requirements for a First Amendment retaliation claim under established law.

A. First, TOPEF is wrong that the State's *Travis County* action is evidence of retaliation. That suit merely seeks a declaration that SB4 is not facially invalid on specified grounds. *See* First Am. Compl., *Texas v. Travis County*, *supra* (W.D. Tex. May 31, 2017) (ECF No. 23). Texas filed that declaratory judgment action *before* the El Paso plaintiffs' lawsuit here, not "just days" after it. El Paso Mot. 23. Texas then amended its complaint to add as defendants entities that had challenged SB4 on grounds related to Texas's pending claims for declaratory relief. Plaintiffs' suggestion that Texas has no "explanation for why TOPEF should be a named defendant" other than "that TOPEF sought to vindicate the rights of itself and its members in federal court" (El Paso Mot. 23 n.27) mischaracterizes the declaratory action's posture: Texas sued to get a definitive resolution of the lawfulness of SB4, and parties were added to that *Travis County* litigation after they sued Texas in other courts on grounds related to the pending declaratory judgment action.

B. Plaintiffs' claim is also unsupported by First Amendment retaliation case law. Courts recognize that the First Amendment prohibits government officials from retaliating against individuals for speech or engaging in other constitutionally protected activity. *E.g.*, *Hartman v. Moore*, 547 U.S. 250, 256 (2006). But retaliation claims must fail unless the "protected activity

was the cause of the Government's retaliation." *Anderson*, 125 F.3d at 161; *accord Allen v. Cisneros*, 815 F.3d 239, 244 (5th Cir. 2016) (per curiam). The El Paso plaintiffs cannot make that showing here. Texas's lawsuit was for a declaration of SB4's facial validity regarding several constitutional claims, not retaliation for engaging in protected activity. *See Anderson*, 125 F.3d at 161 (listing elements of retaliation claim). Retaliation is actionable only when it is "the but-for cause of official action." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). "[A] retaliation claim is only applicable 'when non-retaliatory grounds are in fact insufficient to provoke the adverse consequences.'" *Allen*, 815 F.3d at 244. As shown above, Texas's related litigation involving TOPEF does not meet that standard.

Plaintiffs' claims based on the threat of future retaliatory action (El Paso Mot. 24) are similarly unavailing. In this pre-enforcement posture, plaintiffs cannot establish that retaliation caused hypothetical future action. For example, plaintiffs cannot demonstrate that a future enforcement actions would not be supported by a reasonable belief that the challengers have engaged in prohibited activity in violation of state law. *See Cripps v. La. Dep't of Agric. & Forestry*, 819 F.3d 221, 231 (5th Cir. 2016) (rejecting a retaliation claim because a governmental "decision was directly supported by the reasonable belief that Willie Cripps failed to use the proper amount of termiticide in the treatment of properties, a direct violation of state law."). The El Paso plaintiffs' contentions regarding the alleged chilling effect of conforming one's speech to avoid adverse consequences is really just a claim that SB4 imposes unconstitutional conditions on First Amendment activity. *See* El Paso Mot. 24. Indeed, the cases they cite did not involve official retaliation for engaging in protected speech. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 198 (1999) (name-badge requirement for canvassers in light of potential for harassment); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (striking down membership-disclosure requirement in light of risk of "economic reprisal" and "other manifestations of public hostility").

That theory fails because the unconstitutional condition that plaintiffs allege does not exist. SB4 does not "grant[] local officials unbridled discretion to target speakers of certain viewpoints, thereby 'sanction[ing] a device for the suppression of the communication of ideas and permit[ing]

the official to act as a censor.'" El Paso Mot. 24 (quoting *Cox v. Louisiana*, 379 U.S. 536, 557 (1965)). Plaintiffs also cite *Bourgeois v. Peters*, 387 F.3d 1303, 1317 (11th Cir. 2004)—which was not a retaliation case—in which a policy giving officers "unbridled discretion" to target unpopular speech violated the Fourth Amendment. El Paso Mot. 24. Yet SB4 confers no such authority. SB4 does not authorize local law enforcement officials "to determine which expressions of view will be permitted and which will not." *Cox*, 379 U.S. at 557 (discussing statute that on its face precluded all street assemblies and parades but in practice led local police to "permit or prohibit parades or street meetings in their completely uncontrolled discretion."). SB4 merely lists a number of immigration-related activities that may not be prohibited or materially limited at the local level, and provides obligations to comply with immigration detainer requests, but otherwise leaves law-enforcement responsibilities intact. *See supra* pp. 3-4. Plaintiffs cannot show at this stage that officials will exceed the bounds of their authority, let alone because of anything SB4 prohibits or requires. *See Cripps*, 819 F.3d at 231 (rejecting retaliation claim because the governmental body at issue "was within its regulatory bounds to take the action it did"). But in any event, those future claims lie against local officials abusing their existing law-enforcement authority as clarified by SB4, not against the State. *Cf.* El Paso Mot. 24.

VI. SB4's Detainer Mandate Does Not Violate the Fourth Amendment.

Various plaintiffs challenge SB4 as violating the Fourth Amendment based on its detainer provisions. *E.g.*, El Cenizo Mot. 30-34; San Antonio Mot. 29-32. But SB4 does not violate the Fourth Amendment by requiring Texas law enforcement officers to comply with validly promulgated immigration detainer requests from federal immigration officials. The Austin plaintiffs, who do not receive immigration detainer requests, also challenge SB4 on the grounds that it will lead police officers to conduct investigatory detentions into detainer-request status or to extend law-enforcement encounters in violation of the Fourth Amendment. Austin Mot. 14-15. This claim fails because SB4 requires no such actions. San Antonio's attempt to frame the Fourth Amendment

claim as a Fourteenth Amendment substantive and procedural due process challenge also fails because those claims merely duplicate plaintiffs' unsuccessful Fourth Amendment challenge.

A. SB4's detainer mandate does not violate the Fourth Amendment.

Plaintiffs' Fourth Amendment claim fails because SB4's detainer provisions do not "force law enforcement officers to violate their constituents' rights" or "prohibit[]" probable-cause determinations, El Cenizo Mot. 30, let alone in a way that lets law enforcement officials assert the hypothetical Fourth Amendment claims of others. In fact, compliance with SB4 comports with the Fourth Amendment's prohibitions against unreasonable seizures. And plaintiffs identify no basis for facial relief since SB4 undisputedly has at least *some* valid applications and the risk to plaintiffs in complying with SB4 is minimal.

1. At the outset, plaintiffs fundamentally ignore what SB4 does. This flaw masks the true nature of plaintiffs' claim—one that tries to assert the putative Fourth Amendment rights of others.

An immigration detainer request is "a federal government request to a local entity to maintain temporary custody of an alien, including a United States Department of Homeland Security Form I-247 document or a similar or successor form." SB4 § 1.02 (§ 772.0073(a)(2)). A detainer advises other law enforcement agencies that ICE seeks the custody of an alien who is in the custody of that agency, for the purpose of arresting and removing the alien. 8 C.F.R. § 287.7(a). A detainer requests that such agency advise ICE prior to releasing the alien, so that ICE may arrange to assume custody. *Id.* A detainer may also ask the local law enforcement agency to hold the person for up to 48 hours past an impending release date in order to assume custody. *Id.* § 287.7(d).[23]

[23] The affidavit of Travis County Sheriff Hernandez submitted in support of the Travis County plaintiffs' joinder in the El Cenizo plaintiffs' motion states incorrectly that an ICE detainer necessarily requests extension of custody "for a period of up to 48 hours (excluding Saturdays, Sundays, and holidays, 8 C.F.R. §287.7 (d)) beyond the time when the individual would otherwise be released from custody." ECF No. 58-1 (Hernandez Decl.) ¶ 21. In reality, an ICE detainer may simply request notification of an individual's upcoming release date, and in the event extended detention is requested, ICE no longer contains an exclusion of Saturdays, Sundays, and holidays when calculating a request. *See* ICE Policy 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers ¶ 2.7 (last visited June 16, 2017), https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf.

As of April 2, 2017, ICE's detainer policy requires that "immigration officers must establish *probable cause* to believe that the subject is an alien who is removable from the United States before issuing a detainer with a federal, state, local, or tribal [law enforcement agency]."[24] ICE requires that all detainers be accompanied by one of two types of federal immigration warrants, which is signed by an authorized ICE immigration officer.[25]

SB4 provides that officials in Texas have a duty, enforced by potential penalties or removal from office, to comply with immigration detainer requests from federal immigration officials. *See supra* pp. 6-9. There are exceptions to this duty and thus exceptions to punishment when an alien subject to an immigration detainer offers "proof that the person is a citizen of the United States or that the person has lawful immigration status in the United States, such as a Texas driver's license or similar government-issued identification." SB4 §§ 2.01, 5.02 (art. 2.251(b); § 39.07(c)).

Against this backdrop, plaintiffs' Fourth Amendment challenge is doomed. Plaintiffs do not even allege that SB4 itself somehow effects a Fourth Amendment seizure. As the Austin plaintiffs concede, it does not. Austin Mot. 13-14. Rather, plaintiffs argue that they do not wish to honor some or all immigration-detainer requests; that SB4 will make them do so; and that, in the course of doing so, officers will violate the Fourth Amendment rights of third parties.

This theory fails. "As a general rule, 'Fourth Amendment rights are personal[,]' and 'may not be vicariously asserted.'" *United States v. Escamilla*, 852 F.3d 474, 485 (5th Cir. 2017) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). Plaintiffs cite no case in which law-enforcement officers successfully asserted third-party Fourth Amendment rights as a basis to enjoin state law. *Cf. Chi. Park Dist. v. Chi. Bears Football Club, Inc.*, No. 06C3957, 2006 WL 2331099, at *2 (N.D. Ill. Aug. 8, 2006) (municipal stadium owner lacked standing for a "vicarious assertion of a Fourth Amendment claim raised on behalf of Bears' game attendees who potentially might be searched in the future" under a new NFL policy). Nor can plaintiffs suggest that they will be financially liable for the alleged Fourth Amendment violations. SB4 provides that the State will

[24] ICE Policy 10074.2, supra n.23 (emphasis added).

[25] *Id.*

defend local entities in suits based on good-faith compliance with immigration detainer requests, and will indemnify liability for such compliance. *See supra* p. 9.

2. In any event, plaintiffs' argument that SB4 requires searches that violate the Fourth Amendment fails on the merits. SB4 merely codifies what the Supreme Court noted in *Arizona v. United States*: Congress has authorized federal immigration officials to take an alien into custody based on that alien's status as a removable alien, and States may cooperate with that effort under the instruction and guidance of federal officials. 567 U.S. at 408-11. Several plaintiffs' own policies implicitly recognize this authority by honoring ICE detainers when doing so suits their perceived local-law-enforcement goals. *E.g.*, ECF No. 58-1 (Hernandez Decl.) ¶ 26 (complying with ICE detainers not backed by a "judicial warrant or court order" if the detainers "concern individuals alleged to have committed certain serious crimes or based on my own discretion and judgment that it is appropriate to hold an individual"). SB4's provisions are wholly consistent with existing immigration-detention authority. And plaintiffs' arguments that SB4 deviates from that authority are mistaken.

a. Under the Immigration and Nationality Act, federal immigration officials "can exercise discretion to issue a warrant for an alien's arrest and detention 'pending a decision on whether the alien is to be removed from the United States.'" *Arizona*, 567 U.S. at 407 (quoting 8 U.S.C. § 1226(a)). Those warrants are executive warrants, not judicial warrants. Officials may also arrest an alien without an executive warrant if the alien is "'in the United States in violation of any [immigration] law or regulation,' . . . but only where the alien 'is likely to escape before a warrant can be obtained.'" *Id.* at 408 (quoting 8 U.S.C. § 1357(a)(2)). ICE detainers issue based on a federal immigration officer's "reason to believe" that an alien is removable, which means "probable cause" of removability. *E.g.*, *Morales v. Chadbourne*, 793 F.3d 208, 216 (1st Cir. 2015).

Plaintiffs cite no case holding that federal officials' ability to arrest for immigration violations without judicial warrants violates the Fourth Amendment. *See, e.g.*, San Antonio Mot. 31 (recognizing federal immigration-arrest statutory authority and requirements). Indeed, federal immigration arrests under this process "have the sanction of time." *Abel v. United States*, 362 U.S.

217, 230 (1960); *see also Roy v. Cty. of L.A.*, No. 2:12-CV-09012, 2017 WL 2559616, at *5 (C.D. Cal. June 12, 2017) ("[F]ailure to submit ICE officers' probable cause determinations for review by an immigration, magistrate, or federal district court judge is not unconstitutional."). Even though immigration enforcement is often considered a "civil" matter, removal proceedings contemplate the necessity of detention. *See, e.g.*, *Kim*, 538 U.S. at 523 (no-bail detention; "Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process"); *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) (distinguishing "detention pending a determination of removability" from the question of authority to detain indefinitely). And, in the Court's Fifth Amendment alien-detention cases, the Court has explained that there is far more constitutional latitude with rules regarding pre-removal detention: "Congress regularly makes rules that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 521 (2003) (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)).[26]

Nothing in the INA limits the ability of "any officer or employee of a State or political subdivision of a State . . . to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B). Thus, in *United States v. Quintana*, 623 F.3d 1237 (8th Cir. 2010), an arrest was lawful because a border-patrol agent had "probable cause to believe" that an alien was removable based on evidence obtained after a traffic stop, and that a state trooper "was authorized to assist

[26] The Fifth Circuit has also noted that "neither [it] nor the Supreme Court has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally." *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011). More recently, the Fifth Circuit has explained that if Fourth Amendment claims are brought by "excludable aliens stopped before entry into the United States and their claims arise in the context of immigration, the entry fiction applies and there is no violation of the Fourth Amendment." *Castro v. Cabrera*, 742 F.3d 595, 600 (5th Cir. 2014). Under the entry fiction, mere physical presence on United States soil is insufficient to establish an alien's lawful admission to the country. "An alien present in the United States who has not been admitted or who arrives in the United States" is considered only an "applicant for admission." 8 U.S.C. § 1225(a)(1); *see Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (noting that an alien at a port of entry "is treated as if stopped at the border"). In light of this background, it is doubtful that the Fourth Amendment applies to many aliens who would be subject to ICE detainers enforced under SB4. For example, aliens who entered unlawfully and are removable on that basis because their unlawful presence makes them inadmissible upon detection by immigration authorities. *See* 8 U.S.C. § 1182(a)(6)(A)(i).

[the agent] in detaining [the defendant]" under § 1357(g)(10)(B). *Id.* at 1241-42. Local law-enforcement officials provide analogous support to federal-immigration authorities in complying with ICE detainers. *Cf. Arizona*, 567 U.S. at 410 (disapproving of *unilateral* state-immigration enforcement). And it is well-recognized that local law-enforcement officers may execute facially valid process. *Mays v. Sudderth*, 97 F.3d 107, 113 (5th Cir. 1996) (nonimmigration court order); *Duckett v. City of Cedar Park*, 950 F.2d 272, 280 (5th Cir. 1992) (nonimmigration warrant); *Chavez v. City of Petaluma*, 2015 WL 6152479, at *6, 11 (N.D. Cal. Oct. 20, 2015) (nonimmigration parole hold); *Puccini v. United States*, 1996 WL 556987, at *1 (N.D. Ill. Sept. 26, 1996) (nonimmigration federal-custody detainer).

ICE detainers, at most, ask local law enforcement to continue an alien's detention *up to* 48 hours past the point he would otherwise be released. Plaintiffs acknowledge that, under ICE policy at the time SB4 was enacted, a federal immigration detainer request comes in the form of a DHS "Form I-247 document or a similar or successor form," SB4 § 1.02 (§ 772.0073(a)(2)), that issues upon "reason to believe" that an alien is removable, and supported by an immigration warrant, which is a warrant issued by a federal immigration official indicating either the basis on which there is reason to believe the alien is removable or that the alien has been adjudged removable, *see supra* p. 49. That finding is the equivalent of "probable cause" of removability to conduct an immigration detention. *E.g.*, *Morales*, 793 F.3d at 217. Plaintiffs do not dispute that these steps comport with current immigration-arrest requirements.

A local law enforcement officer receiving such a detainer thus receives personal or collective knowledge that there is probable cause that an alien is removable. For example, the officer might learn that the alien is subject to a removal order. *See People v. Xirum*, 993 N.Y.S.2d 627, 630 (Sup. Ct. 2014) (probable cause on that basis).[27] "[I]t is not necessary for the arresting officer

[27] Under the Immigration and Nationality Act, local law-enforcement agencies can also contract with federal immigration officials to undertake specific immigration-enforcement duties. *See* 8 U.S.C. § 1357(g), and one of those duties is to execute immigration warrants, *see* 8 C.F.R. § 287.5(e)(3). According to ICE, currently three county sheriffs' departments and one city police department within Texas have such explicit agreements and thus authority to actually *execute* the warrants that accompany ICE detainers.

to know all of the facts amounting to probable cause, as long as there is some degree of communication between the arresting officer and an officer who has knowledge of all the necessary facts." *United States v. Ortiz*, 781 F.3d 221, 228 (5th Cir. 2015); *see also United States v. Ibarra*, 493 F.3d 526, 530 (5th Cir. 2007) ("collective knowledge" doctrine supported search of tractor trailer where requesting officer asked other police only "to monitor the vehicle" but also said that it was "carrying a load of narcotics").

In light of these steps, SB4 merely requires that local officials comply with federal immigration detainer requests that are backed by a finding of probable cause by a federal official and are consistent with the Fourth Amendment. Plaintiffs acknowledge this, but claim that it is "too early to know how many errors will occur." El Cenizo Mot. 32 n.10. That alone is reason to deny plaintiffs' motion, as it shows that SB4 is not *facially* invalid in all its applications.

b. Plaintiffs identify no "across-the-board" violation that would justify facially enjoining SB4's detainer provisions. Plaintiffs claim that detention will violate the Fourth Amendment when issued without probable cause. El Cenizo Mot. 31. But under current ICE policy, detainers will issue *only* upon a finding of probable cause. *See supra* pp. 48-49. Several cases that plaintiffs cite (El Cenizo Mot. 31), including *Morales v. Chadbourne*, No. 12-301-M-LDA, 2017 WL 354292, at *5-6 (D.R.I. Jan. 24, 2017), and *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014), dealt with prior ICE detainer forms that merely stated that DHS had "initiated an investigation" to determine whether she was removable. Under current ICE policy, that would not be enough for a detainer to issue, as probable cause is now required. And even if it were true that "ICE detainers do not always meet Fourth Amendment requirements of probable cause" (El Paso Mot. 31 n.33 (citing *Trujillo Santoyo v. United States*,

---

USICE, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, https://www.ice.gov/factsheets/287g (last visited June 16, 2017); *e.g.*, Jackson Cty. Sheriff's Office Memorandum of Agreement, App. D at 16, https://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/jacksoncounty.pdf (granting "[t]he power and authority to serve warrants of arrest for immigration violations pursuant to 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.5(e)(3)").

No. 5:16-cv-00855, slip op. 12 (W.D. Tex. June 5, 2017)), cases in which ICE detainers are backed by probable cause are fatal to plaintiffs' claim that SB4 is facially invalid.

Plaintiffs claim that "informal detention requests" may be improper if they are unwritten and "not expressly time-limited," but that bucks existing ICE policy and any defect is the result of the detainer, not SB4. El Cenizo Mot. 31.[28] Finally, as discussed above, ICE's past alleged "fail[ures] to comply with the INA's warrantless arrest provision" are irrelevant to plaintiffs' motion since ICE has changed its policy and no longer issues detainers without immigration warrants. *See supra* p. 49.

SB4's exception for citizens or individuals who provide proof of lawful status is irrelevant to plaintiffs' challenge. El Cenizo Mot. 32-33. Whether a person is able to "affirmatively prove their immigration status" (*id.* at 32) is also irrelevant since local officials can avoid SB4 liability by complying with the detainer, using *ICE*'s determination about removability. That the exception does not "prevent detentions from lasting longer than 48 hours" is irrelevant since ICE provides that detainer requests expire at 48 hours. *See* ICE Policy 10074.2, *supra* n.23, ¶2.7.

c. Disparities between *criminal* probable-cause requirements and *immigration-enforcement* probable-cause requirements do not require a different result. *See, e.g.*, San Antonio Mot. 31 (arguing that SB4 requires compliance with ICE detainers that are not based on probable cause of a *crime* (citing *Santoyo*, *supra*, slip op. 13)). Several courts have erroneously ruled that federal ICE detainers are backed by inadequate probable cause, reasoning that warrantless arrests cannot be premised on probable cause of a civil offense. *E.g.*, *Mercado v. Dallas Cty.*, 2017 WL 169102, at *6 (N.D. Tex. Jan. 17, 2017) (citing nonimmigration cases for the proposition that suspicion of

[28] Plaintiffs also fail to justify their assertion that SB4 requires compliance with "informal" detainer requests "such as a phone call." El Cenizo Mot. 31; *accord* San Antonio Mot. 31. The statutory text refers to "immigration detainer requests" as "including a United States Department of Homeland Security Form I-247 document or a similar or successor form." SB4 § 1.02 (§ 772.0073(a)(2)). In that context, "detainer requests" refers to immigration detainer requests through other types of forms. *See United States v. Golding*, 332 F.3d 838, 844 (5th Cir. 2003) (per curiam) (*noscitur a sociis* canon). For this reason, the El Paso's argument that "immigration detainer requests" is unconstitutionally vague (El Paso Mot. 26) also fails.

commission of civil offense insufficient to support Fourth Amendment criminal arrest); *see also Santoyo*, *supra*, slip op. 12, 15. That theory is wrong for at least three reasons.

First, warrantless arrests can be made for non-criminal conduct. It is well-established that "[l]awful warrantless arrest is not necessarily limited to those instances in which the arrest is made for criminal conduct." 3 Wayne LaFave et al., *Search and Seizure* § 5.1(b) (5th ed. 2012) (listing examples, including arrests for incapacitation due to intoxication, arrests of mentally ill individuals for medical evaluation, and returning runaway juveniles to their parents).

The Supreme Court's observation in *Arizona v. United States* that typically "it is not a crime for a removable alien to remain present in the United States" is not to the contrary. 567 U.S. at 407 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)). Unlike in *Arizona*, SB4 does not authorize freestanding authority to arrest for civil immigration violations, but merely ensure that officials cooperate with detentions under the express direction of federal immigration officials. That result comports with *Arizona*'s endorsement of cooperation under the guidance of federal officials, as well as Fifth Circuit precedent. *See, e.g.*, *Mays*, 97 F.3d at 113 (authority to comply with facially valid court order); *Duckett*, 950 F.2d at 280 (authority to comply with facially valid warrant).[29] Moreover, *Arizona* ruled on preemption grounds that did not strip state officials of their ability to constitutionally detain removable aliens consistent with the Fourth Amendment. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 328-32 (2001) (noting constables' common law inherent authority to arrest); *United States v. Phillips*, 834 F.3d 1176, 1181 (11th Cir. 2016); *accord Locke*

[29] *Arizona* also suggested that a detention for purposes of *investigating* an alien's immigration status would raise Fourth Amendment concerns. 567 U.S. at 413 ("Detaining individuals solely to verify their immigration status would raise constitutional concerns."); *see also Cervantez v. Whitfield*, 776 F.2d 556, 559-60 (5th Cir. 1985) (reciting federal immigration authority's stipulation that "local law enforcement agencies do not have authority to question, arrest, or detain persons solely on the grounds that they may be deportable aliens" but recognizing local law enforcement's ability "to detain a person for INS for possible future proceedings under the immigration laws" upon request). In contrast, under SB4, the ICE-detainer 48-hour hold is not an investigatory detention, but based on probable cause that the alien *is in fact* removable, and at the express direction of ICE to hold the alien. The San Antonio plaintiffs cite *Arizona* and *Cervantez* for the proposition that "detention pursuant to an ICE detainer requires either probable cause to believe that a criminal offense has been or is being committed or a warrant." San Antonio Mot. 30. But neither case stands for that proposition. *See Arizona*, 567 U.S. at 413; *Cervantez*, 776 F.2d at 560.

v. United States, 11 U.S. (7 Cranch) 339, 348 (1813) ("probable cause" meant a belief "made under circumstances which warrant suspicion," without distinguishing criminal and civil offenses). Detention by state officials for immigration offenses is not inherently invalid.

Indeed, the alternative to the uniformity provided by SB4 would leave in place the sort of selective ICE detainer compliance policies like that of Travis County Sheriff Hernandez. Those policies impermissibly allow a local entity to "achieve its own immigration policy" by deciding to decline certain ICE detainers on the theory that some immigration-enforcement guidance from federal officials should be ignored in favor of localities' other policy goals. *Arizona*, 567 U.S. at 408. Policies that do so are not "fully compliant with . . . federal law and [ICE] guidance." ECF No. 58-1 (Hernandez Decl.) ¶ 33. Instead, such local policies reflect the sorts of "unilateral decisions" regarding immigration enforcement that the *Arizona* Court rejected. 567 U.S. at 410.

Second, the criminal/civil distinction misperceives the contextual nature of the probable-cause analysis. Terms like "'reasonable suspicion' and 'probable cause' . . . are commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (citation and quotation marks omitted). "It is not consistent with this principle to determine the reasonableness of an arrest based solely upon the arresting officer's technical compliance with state or local law." *United States v. Laville*, 480 F.3d 187, 196 (3d Cir. 2007). If the Constitution allows Congress to authorize *federal* immigration officials to take aliens into custody based on civil removability grounds, then it makes no difference for Fourth Amendment purposes whether state officials carry out the first 48 hours of that detention at the behest of the federal government. A contrary result would allow arrests by federal officials but not if conducted by state law-enforcement officers at their behest under identical circumstances. The Fourth Amendment contains no such illogical requirement. *See id.* at 193.

Third, any number of scenarios could allow criminal probable cause determinations consistent with SB4 if federal immigration officials share with local officials information establishing that the detainee has committed a criminal immigration violation. *See, e.g.*, *Santoyo*, *supra*, slip

op. 12. Plaintiffs are thus wrong that SB4 necessarily requires seizures that lack probable cause, *e.g.*, El Paso Mot. 30-31, and that SB4 "ensures ongoing unconstitutional conduct," San Antonio Mot. 32.

3. Given these points, plaintiffs cannot show that SB4's detainer provision is facially invalid. Fourth Amendment facial challenges are among "the most difficult . . . to mount successfully," *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). SB4 does not "forbid[] officers from undertaking [a] particularized assessment" of probable cause. El Cenizo Mot. 33. That makes plaintiffs' reliance on *Patel* unpersuasive since, in that case, the statute at issue actually authorized a warrantless search of hotel owners' records. 135 S. Ct. at 2448, 2452-53. Rather, this is like the Fourth Amendment argument based on a constitutional "implication" in *Hoffman Estates*—in which certain recordkeeping requirements theoretically could have led to searches of individuals who had purchased legal drug paraphernalia—which was an inadequate basis for a pre-enforcement facial challenge. 455 U.S. at 504 n.22. But plaintiffs have not demonstrated that SB4 "is being employed in such an unconstitutional manner" to punish municipalities who decline to conduct unlawful seizures. *Id.*

That SB4 imposes certain penalties for noncompliance with detainer duties does not support plaintiffs' pre-enforcement facial challenge since plaintiffs can avoid SB4 liability by complying. Plaintiffs are not being forced to "bet the farm" on choosing the violative conduct before challenging SB4, El Cenizo Mot. 34. SB4's detainer penalties require scienter,[30] and SB4 provides for defense and indemnification from the Texas Attorney General for liability based on good-faith

[30] Plaintiffs are wrong that "a sheriff who instructed a deputy on a single occasion, based on a mistaken immigration status determination, not to honor a detainer would be subject to removal from office" because "sheriffs may not prohibit deputies from 'providing enforcement assistance.'" El Cenizo Mot. 33 (SB4 § 1.01 (§ 752.053(b)(3))). That argument treats new § 752.053(a)(3)'s separate prohibition on violating the detainer mandate as surplusage. The more-specific prohibition on "intentionally violating" the duty to honor ICE detainers should control over the less-specific prohibition on blocking employees from "providing enforcement assistance." *See, e.g., Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) ("[A] specific statute controls over a general one.").

compliance with an immigration detainer request. *See supra* p. 9; *cf.* San Antonio Mot. 9 (describing SB4's detainer-related penalties without mentioning SB4's scienter requirement or the Attorney General's duties to defend and indemnify).

B. The Austin plaintiffs' additional arguments are unavailing; SB4 does not require investigatory detentions or extended law-enforcement encounters.

Austin asserts that it does not receive ICE detainer requests, and therefore "has no method [to] determine whether people it detains may be the subject of such requests." Austin Mot. 9. Austin's chief of police states his officers "could detain a person (e.g., for a traffic infraction), release that person with a citation, and never know that the person was the subject of an ICE detainer request." ECF No. 57-04, ¶ 19. But SB4 does not require prolonged or investigatory detentions and thus the Austin plaintiffs' arguments fail. SB4 does not require such an affirmative investigation into whether an alien is subject to an ICE detainer. *See supra* p. 6. Current ICE policy also provides that detainer requests will not issue "for an alien who has been temporarily detained or stopped, but not arrested." *See* ICE Policy 10074.2, *supra* n.23, ¶2.5.

Austin also argues that giving officers "discretion on whether and when to inquire into a detainee's or arrestee's immigration status violates the Fourth Amendment's protection against unreasonable seizures." Austin Mot. 13. Being asked a question is not a "seizure" for Fourth Amendment purposes, since it does not result in an additional period of detention and thus cannot be a Fourth Amendment violation. *Muehler v. Mena*, 544 U.S. 93, 101 (2005) (citing *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)). The Austin plaintiffs argue that extending a traffic stop beyond the time needed to determine whether to write a citation or further investigate criminal activity violates the Fourth Amendment and that, under SB4, Austin "could not prohibit officers from prolonging a stop by inquiring into immigration status." Austin Mot. 15. But SB4 does not require immigration-status investigation—it merely provides that local law enforcement agencies cannot prohibit such inquiries where they are otherwise consonant with the Fourth Amendment. *See supra* pp. 38-39. In any event, the Austin plaintiffs are wrong that their pre-enforcement Fourth Amendment challenge is ripe for review now (Mot. 15 n.7), as Austin still ultimately seeks to

assert vicarious Fourth Amendment violations against third parties based on future police conduct. *See supra* p. 49.

C. The San Antonio plaintiffs' attempt to recast a Fourth Amendment claim as a Fourteenth Amendment due process claim also fails.

The San Antonio plaintiffs also argue (Mot. 43-46) that SB4's detainer mandate violates substantive and procedural due process rights under the Fourteenth Amendment. Specifically, they argue that SB4 subjects individual members of several plaintiff organizations "to the arbitrary deprivation of physical liberty without adequate cause" and denies a procedural due process right to be heard "'at a meaningful time and in a meaningful manner'" San Antonio Mot. 43 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)). Those arguments are foreclosed by plaintiffs' Fourth Amendment arguments. *See supra* Part VI.A.

Where there is a specific "source[ ] of constitutional protection against . . . governmental conduct," the "claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized . . . standard" judicially created from the Fourteenth Amendment. *Graham v. Connor*, 490 U.S. 386, 394 (1989); *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975). This applies to substantive due process claims. *Graham*, 490 U.S. at 394. "*Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). This principle also applies to procedural due process claims. In *Gerstein*, the Court rejected a procedural due process challenge to pretrial detention procedures because it was foreclosed by the Fourth Amendment, holding that "[t]he Fourth Amendment ...always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial." 420 U.S. at 125 n.27; *see also Reynolds v. New Orleans City*, 272 F. App'x 331, 338 (5th Cir. 2008) (per curiam); *Becker v. Kroll*, 494 F.3d 904, 919 (10th Cir. 2007); *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005). That the Fourth Amendment is incorporated against the states through the Fourteenth

Amendment does not mean that plaintiffs have independent Fourteenth Amendment claims here. *See* San Antonio Mot. 44 (citing *Santoyo*, *supra*, slip op. 18 (W.D. Tex. June 5, 2017)).

Furthermore, the San Antonio plaintiffs' procedural due process claim is duplicative of their Fourth Amendment claim. *See* San Antonio Mot. 44-46. This claim rest on the argument that "SB4 poses a significant risk of erroneously depriving Plaintiffs' members of [a] fundamental liberty interest" because "an individual who is ordered released by a judge at a hearing might nevertheless be detained pursuant to SB4 without probable cause simply because federal immigration authorities issue a detainer request." *Id.* at 45. Even in the criminal context, a new arrest does not violate the Fourth Amendment provided a neutral magistrate determines probable cause within 48 hours of an arrest. *See Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). As several plaintiffs argue, because the detainer is the equivalent of a new arrest, *e.g.*, El Cenizo Mot. 31, the 48-hour window would run from the time the detainee would have otherwise been released from local-law-enforcement custody. The violation, if any, would arise after that time, after the individual is already in federal custody or the detainer request has been allowed to expire. *See* ICE Policy 10074.2, *supra* n.23, ¶ 2.7 (providing that detainer requests that seek extended detention must be cancelled after 48 hours). SB4's protections, rather than being inadequate or "wholly preempted" (San Antonio Mot. 45) comport with federal immigration-arrest authority and require no more. Contrary to the assertion that the state lacks an interest in SB4's subject (San Antonio Mot. 45-46) the INA recognizes states' vital function in immigration enforcement, *see supra* pp. 12-13, 26-27.

VII. Equal Protection of the Law Is Promoted, Not Denied, by SB4.

SB4 does not "deny to any person within [the State's] jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *cf.* El Cenizo Mot. 34-38. To the contrary, by limiting local officials' refusal to cooperate with the enforcement of federal immigration law, SB4 *promotes* across the State of Texas the equal protection of the laws.

A. Two sets of plaintiffs do not raise a conventional equal-protection challenge but instead rely on inapposite political-process case law.

Two sets of plaintiffs—the El Cenizo plaintiffs and the Travis County plaintiffs—do not raise a conventional equal-protection challenge. They do not attempt to show that the facially race-neutral SB4 is pretext masking a purposeful classification of individuals based on race. *Compare Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (describing such a challenge), *with* El Cenizo Mot. 34-38 (not even attempting an *Arlington Heights* analysis), *and* Travis Cty. Mot. 1-2 (merely adopting the El Cenizo plaintiffs' equal-protection argument). That strategy is sound. SB4 applies evenly to all officials; it does not address race other than to prohibit unconstitutional racial discrimination. SB4 § 1.01 (§ 752.054).

Instead of pressing the baseless argument that SB4 is purposeful treatment of individuals according to race, these El Cenizo and Travis County plaintiffs rely on equal-protection cases about state laws that alter the political process. *See* El Cenizo Mot. 35-37 (citing *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), and *Reitman v. Mulkey*, 387 U.S. 369 (1967)); *cf.*, *e.g.*, *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1648 (2014) (Scalia, J., concurring) (noting that the plaintiffs resorted to this line of authority because the district court found their claim "doom[ed]" under "conventional equal protection" doctrine) (brackets in original; quoting district court opinion). The San Antonio plaintiffs join in this argument. San Antonio Mot. 41-42 & n.67.

But these political-process cases do not apply because their predicate is absent here—SB4 does not change the political process in a way specific to the issue of race discrimination

1. In *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1631-34 (2014), the Supreme Court reviewed its three prior "political process" cases and their limits. In the first such case, a state constitutional amendment was held invalid because it "expressly authorized and constitutionalized the private right to discriminate" racially in housing decisions. *Id.* at 1631 (quoting *Mulkey*, 387 U.S. at 376). In the second such case, a city charter was held invalid because it "singl[ed] out antidiscrimination ordinances" for a new requirement of approval by referendum,

thus "alter[ing] the procedures of government to target racial minorities." *Id.* at 1632 (discussing *Hunter v. Erickson*, 393 U.S. 385 (1969)). In the final such case, a state initiative was held invalid because it "explicitly used the racial nature of a decision" to require a different political process for deciding the issue. *Id.* at 1633 (quoting *Seattle*, 458 U.S. at 470) (brackets omitted). In *Schuette*, the Court then rejected "the broad reading" of these cases and explained how they govern only a narrow class of state actions "with a racial focus." *Id.* at 1634.

2. These "political process" cases are simply inapposite here because their predicate is absent—singling out the matter of *race discrimination*, as opposed to some other matter, for a change in the political process. *Cf. Seattle*, 458 U.S. at 474 (state initiative altered power to "address a racial problem—and only a racial problem"); *Hunter*, 393 U.S. at 391 (city-charter amendment applied only to antidiscrimination ordinances); *Mulkey*, 387 U.S. at 376 (constitutional amendment "expressly authorized and constitutionalized the private right to discriminate"). Unlike those cases, SB4 does not single out race discrimination for changes in the political process. SB4 concerns immigration-law enforcement.

Accordingly, plaintiffs' political-process claim necessarily argues that a state law curtailing local power on a matter other than race is unconstitutional whenever local officials themselves have enacted or may enact policies addressing perceived racial discrimination in that context. El Cenizo Mot. 34-36. That is a sweeping theory far beyond anything the Supreme Court has endorsed. *See Crawford v. Bd. of Educ. of Los Angeles*, 458 U.S. 527, 537, 540-41 (1982) (holding that *Hunter's* political-process theory is inapplicable where "Proposition I does not embody a racial classification" and "a discriminatory purpose" was not shown). Indeed, that untenable theory could invalidate state laws affecting the intra-state political process on any number of topics, such as laws seeking statewide uniformity in criminal-law enforcement methods. Unless a state law "singl[es] out" discrimination protections for a change in the political process, and thus "raises dangers of impermissible motivation," *Seattle*, 458 U.S. at 486 n.30, the political-process cases cited by plaintiffs are inapplicable.

3. Relying on these political-process cases would be particularly misguided here because local bans on racial profiling are not prohibited even *incidentally* by SB4 (much less singled out). Plaintiffs argue that, incident to its regulation of local cooperation in immigration-law enforcement, SB4 "wipes out" local authority to address racial profiling. El Cenizo Mot. 35. Not so.

Local bans on racial profiling are not prohibited by SB4. SB4 itself bans unconstitutional racial discrimination. SB4 § 1.01 (§ 752.054). And preexisting Texas law specifically bans police from racial profiling. Tex. Code Crim. Proc. art. 2.13 ("A peace officer may not engage in racial profiling."); *id.* art. 3.05 ("'racial profiling' means a law enforcement-initiated action based on an individual's race, ethnicity, or national origin").

Texas law then affirmatively *commands* local law-enforcement agencies to adopt policies that "strictly prohibit peace officers employed by the agency from engaging in racial profiling." *Id.* art. 2.131. And Texas law directs that law-enforcement officials submit agency-wide reports on racial-profiling complaints and specified statistics, *id.* arts. 2.133-.134, and undergo training on racial profiling, Tex. Educ. Code § 96.641(a)-(d), (k); Tex. Occ. Code § 1701.253(h).

SB4 does not address local policies and actions on racial profiling and cannot plausibly be read to prohibit them. A local policy that merely restates and reinforces preexisting limits on officer conduct is not a "material" limit, much less a limit that concerns immigration law as opposed to general police conduct. *See supra* p. 30. Plaintiffs' view would mean that SB4 prohibits local policies and actions that state law elsewhere *affirmatively commands* and that are *never mentioned* in SB4. Plaintiffs do not even try to square that peculiar view with the demanding standard for finding repeal by implication. *E.g.*, *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990) ("Such statutory repeals by implication are not favored. A legislative enactment covering a subject dealt with by an older law, but not repealing that law, should be harmonized whenever possible with its predecessor in such a manner as to give effect to both.").

Because local bans on racial profiling are not displaced even as an incident of SB4 (much less singled out for special unfavorable treatment), equal-protection cases about changing the political process solely for the issue of race discrimination are particularly unavailing here.

4. Finally, plaintiffs invoke *Romer v. Evans*, 517 U.S. 620 (1996). El Cenizo Mot. 37; San Antonio Mot. 41 n.67. *Romer* invalidated a state constitutional amendment that prohibited all state and local laws to protect homosexual persons against discrimination. 517 U.S. at 624. *Romer* held that amendment invalid upon finding no rational basis, but rather sheer animus, behind the amendment's singling out and prohibiting of discrimination protections for a disfavored class of persons. *Id.* at 633.

Romer is wholly inapplicable here. SB4 does not single out or prohibit bans on discrimination protecting any characteristic—race, color, national origin, alienage, or otherwise. Quite the opposite: SB4 *prohibits* unconstitutional discrimination on these bases. SB4 § 1.01 (§ 752.054). A law that does not single out discrimination bans for special treatment—and that affirmatively prohibits unconstitutional discrimination—does not run afoul of the Equal Protection Clause as applied in *Romer*. *See, e.g.*, *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) ("A law that prohibits the State from classifying individuals by race . . . a fortiori does not classify individuals by race."), *approved in Schuette*, 134 S. Ct. at 1636.

B. The claim that SB4 is purposeful discrimination based on race is meritless.

The Austin, El Paso, and San Antonio plaintiffs challenge SB4 as a pretext for purposeful discrimination among individuals on account of race. Austin Mot. 15-17; El Paso Mot. 3-20; San Antonio Mot. 37-42. That argument is meritless.

1. A facial challenge requires showing that a classification in the disputed law is pretext for intentional differential treatment according to race.

"The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). An equal-protection claim thus requires proof of a "racially discriminatory intent or purpose" for challenged state action. *Arlington Heights*, 429 U.S. at 265. In the case of a legislative enactment, that means an institutional decision "to discriminate on the basis of race."

Feeney, 442 U.S. at 260. A law that "neither says nor implies that persons are to be treated differently on account of their race" is not a racial classification. *Crawford*, 458 U.S. at 537.

Plaintiffs bring a facial challenge to SB4, asserting that the law itself denies equal protection and should be enjoined. *E.g.*, Austin Mot. 15; El Paso Mot. 1; San Antonio Mot. 38. It is essential to understand the proper focus of such a facial challenge. It is not enough to imagine some abstract legislative motive or ill will. A law can be facially invalidated as purposeful racial discrimination only if the law itself contains a "racial classification" or "a classification that is ostensibly neutral but is an obvious pretext for racial discrimination." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, at 272 (1979). As the Court held in *Feeney*: "In assessing an equal protection challenge, a court is called upon *only* to measure the basic validity of *the legislative classification*." *Id.* (emphases added). Or as the Court held in *Palmer v. Thompson*, 403 U.S. 217 (1971), without an invidious legislative classification of individuals, state action cannot be nullified "solely because of the motivations of the [legislators] who voted for it." *Id.* at 224.

In contrast, many of plaintiffs' complaints are not with any classification drawn by SB4. Plaintiffs devote attention to how federal officials might enforce immigration law, or how local officials might use their authority under SB4 to cooperate with those federal officials. *E.g.*, El Paso Mot. 6-8; San Antonio Mot. 41; Austin Mot. 16-17. Central is plaintiffs' speculation that "Latinos will be profiled and disparately affected" by federal or state law-enforcement officers, and that this was intended by SB4 (despite SB4's and preexisting Texas law's ban on unconstitutional profiling). El Paso Mot. 7.

Those complaints cannot invalidate SB4. If future enforcement activity by federal or local officers is alleged to discriminate based on race, that activity can itself be challenged and declared unlawful. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 83-84 (1986) (successful challenge to particular use of preemptory strikes); *Arlington Heights*, 429 U.S. at 269 (unsuccessful challenge to particular use of zoning authority). But SB4 does not direct any such unlawful enforcement practices. To the contrary, it prohibits them. SB4 § 1.01. Nothing in SB4 blocks local policies against "unlawful profiling," San Antonio Mot. 39—local policies that Texas law in fact *requires*. *See supra* pp. 7-

8. Plaintiffs' complaints about hypothetical race-based enforcement practices are not complaints about any classification drawn by the Legislature in SB4. And a facial challenge to a law must challenge the nature of "the legislative classification," *Feeney*, 442 U.S. at 272, a principle that plaintiffs' purpose argument repeatedly ignores.

Here, the only the legislative classification identified by plaintiffs is that SB4 addresses the topic of immigration-law enforcement, including against persons under lawful detention, arrest, or criminal sentence, SB4 §§ 1.01, 2.01, as opposed to some non-immigration topic. Austin Mot. 16; El Paso Mot. 2-3; San Antonio Mot. 40-41. That legislative classification, to the extent it concerns individuals at all, turns on whether an individual is the subject of federal immigration-law enforcement or has been lawfully detained or arrested on suspicion of crime. That legislative classification does not mention race. Nor is it "an obvious pretext," *Feeney*, 442 U.S. at 272, for a classification by race, as explained below. And that legislative classification is the only classification at issue in plaintiffs' facial challenge to SB4.

2. A disparate racial impact does not show that a law is a racial classification, but plaintiffs have not even shown a relevant disparate impact.

Plaintiffs argue that SB4 will have a disparate impact across racial groups. This assertion largely ignores the standard governing their facial challenge by drawing on speculation about hypothetical officials' future conduct, rather than focusing on the legislative classifications in SB4 itself. *See supra* Part VII.B.1. In any event, the "Fourteenth Amendment guarantees equal laws, not equal results." *Feeney*, 442 U.S. at 273. Yet plaintiffs have not shown a relevant disparate impact across racial groups of the undisputedly permissible distinctions drawn in SB4.

a. Plaintiffs argue that SB4's alleged "disparate impact violates the Equal Protection Clause." El Paso Mot. 1. But the Supreme Court has never "held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." *Davis*, 426 U.S. at 242. A law's disparate racial impact is not a constitutional violation.

The Equal Protection Clause does not prohibit "a statute or ordinance having neutral purposes but disproportionate racial consequences." *Id.* at 243. Indeed, this is the only sound rule, as the Court has explained: "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes." *Id.* at 248.

Hence, the Supreme Court has cautioned against transforming the foreseeability of disparate impact from mere "inference" into "proof" of a legislative intent to pass a "neutral rule" *because* of that impact as opposed to reasons that have "always been deemed to be legitimate." *Feeney*, 442 U.S. at 279 & n.25. Accordingly, *Davis* upheld an employment test that white applicants passed in proportionately greater numbers than did another racial group, where the plaintiffs failed to show that racial discrimination entered into the formulation of the test. 426 U.S. at 245-47. Similarly, *Arlington Heights* upheld a zoning decision denying permission to build low- and moderate-income housing projects because there was no evidence that the decision was pretext for discrimination based on race. 429 U.S. at 269-71. And *Feeney* upheld an employment preference for veterans, despite its substantial disparate impact on the basis of sex (as veterans are disproportionately men), because nothing showed that the preference was devised or reenacted to harm women's job prospects, even if the state legislature was aware that the veterans preference would disproportionately benefit men. 442 U.S. at 279. In short, rational classifications like those in *Davis*, *Arlington Heights*, and *Feeney* are upheld notwithstanding a disparate effect unless a challenger can show that the classification "can plausibly be explained only as a [race]-based classification," *id.* at 275, and is thus "obvious pretext," *id.* at 272.

b. Plaintiffs' disparate-impact argument is also flawed factually. First, the El Paso plaintiffs focus on (Mot. 6) SB4's requirement that law-enforcement officers may not be prohibited from inquiring about the immigration status of a person under "lawful detention or under arrest." SB4 § 1.01 (§ 752.053(b)(1)). The El Paso plaintiffs suggest that this prohibition (which is just a concrete example of the general prohibition in § 752.053(a)) disparately affects "Latinos in

Texas." El Paso Mot. 5. But plaintiffs have not shown that members of any racial group in Texas is "lawfully detained" or "arrested" out of proportion to their presence in the population. Indeed, suggesting the opposite, Senator Creighton pointed out in the Senate debate on SB4 that Hispanic motorists are *less* likely to be stopped relative to their population percentage, whereas Caucasian motorists are *more* likely to be stopped relative to their population percentage.[31] Likewise, although Senator Lucio expressed concerns about racial profiling during DPS stops, he clarified that he "[doesn't] have anything in [his] office to indicate that DPS has treated anyone in a disrespectful manner."[32] In short, plaintiffs have not shown that regulating about the conduct of "lawful detentions" and "arrests" somehow has a disparate racial impact.

Second, the El Paso plaintiffs argue that "Latino immigrants" would be "disproportionately affected" by SB4's provisions removing local bans on immigration-law enforcement. Mot. 7. Plaintiffs have not shown that. They have not offered evidence that Latino immigrants are subject to immigration-law enforcement in disproportion to their representation among immigrants.

And only that disparate impact could have any real probative force here. Plaintiffs fall back to the broader argument that immigration law disparately affects racial groups that are more prevalent in foreign countries than in this country, such as Hispanics. Austin Mot. 16; El Paso Mot. 7 (noting the assumption that most immigrants in Texas are Hispanic). The San Antonio plaintiffs go further and label as "disparate treatment" the inherently differential treatment of non-citizens and citizens under immigration law. San Antonio Mot. 40 (capitalization altered). Those points are entirely unprobative of an invidious purpose to deny equal protection of the law. It is undisputed that immigration law may "regulate the status of aliens," *Toll v. Moreno*, 458 U.S. 1, 10 (1982),

---

[31] Debate on Tex. S.B. 4 on the Floor of the Senate, 85th Leg., R.S., at 02:07:38-02:08:11 (Feb. 7, 2017, Part II) ("Hispanics make up 38.62% of the total Texas population yet only made up 26.2% of the DPS total vehicle searches, citations, and warnings . . . Caucasians, on the other hand, make up 43.5% of the total Texas population and were 47% of all DPS vehicle searches last year.") (available from http://www.senate.texas.gov/av-archive.php). Citation to legislative material is in Bluebook and Greenbook format, accounting for the fact that Texas legislative history is largely in video form.

[32] Enforcement by Certain Local Government Entities and Campus Police Departments of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the S. Comm. on State Affairs, 85th Leg., R.S., at 01:36:00-:08 (Feb. 2, 2017) (statement of Sen. Eddie Lucio, Jr.).

and thus distinguish between foreign citizens and U.S. citizens. The fact that racial groups more prevalent in foreign countries than in this country are subject to immigration law out of proportion to their representation in the U.S. is thus utterly unremarkable. Unless federal immigration law is deemed purposeful racial discrimination, this sort of "disproportionate impact" cannot plausibly "be traced to a purpose to discriminate on the basis of race," as required to carry persuasive weight in an equal-protection analysis. *Feeney*, 442 U.S. at 260.

3. The circumstantial evidence contemplated by *Arlington Heights* confirms that SB4 was not enacted to treat people differently based on race.

In *Arlington Heights*, after discussing the arguable disparate racial impact of a challenged zoning decision, the Supreme Court looked to circumstantial evidence to confirm that the decision was motivated by the proffered zoning policy and not a racial classification. 429 U.S. at 267-71. Likewise here. The legislative record, the background and sequence of events leading to SB4, and other circumstantial evidence all confirm that SB4 legitimately reflects the Legislature's race-neutral rational and is not pretext masking a purpose to treat individuals differently based on race.[33] Plaintiffs fall far short of showing that SB4 is "unexplainable on grounds other than race," *id.* at 266, and thus "obvious pretext," *Feeney*, 442 U.S. at 272.

Moreover, the Supreme Court has consistently recognized that government action is presumed valid, *e.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918); that government actors are presumed to act in good faith, *Miller v. Johnson*, 515 U.S. 900, 916 (1995); and that a "presumption of regularity" attaches to official action, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). In other words, there is a "heavy presumption of constitutionality" of

[33] Indeed, circumstantial evidence should not even be considered here because, not only have plaintiffs shown no relevant disparate impact, but SB4 facially *prohibits* unconstitutional racial discrimination. SB4 § 1.01; *see, e.g.*, *Crawford*, 458 U.S. at 544 n.31 ("Absent discriminatory effect, judicial inquiry into legislative motivation is unnecessary, as well as undesirable." (quoting *Brown v. Califano*, 627 F.2d 1221, 1234 (D.C. Cir. 1980))); *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 523 (9th Cir. 2011) ("failure to establish . . . discriminatory impact prevents any inference of intentional discrimination"); *see also Schuette*, 134 S. Ct. at 1648 (Scalia, J., concurring) ("any law expressly requiring state actors to afford all persons equal protection of the laws . . . does not—cannot—deny 'to any person ... equal protection of the laws,' U.S. Const. amend. XIV, § 1, regardless of whatever evidence of seemingly foul purposes plaintiffs may cook up in the trial court.").

facially neutral action serving a goal within a government's authority. *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990). The circumstantial evidence must be evaluated against these background presumptions.

a. The Legislature did not believe that SB4 discriminates based on race or allows local officials to do so.

In *Arlington Heights* and *Feeney*, the Supreme Court found that, despite a decisionmaker's awareness of disparate impact on a particular group, there was no showing of discriminatory intent in the formulation or adoption of the actions at issue. *Feeney*, 442 U.S. at 278-79; *Arlington Heights*, 429 U.S. 270-71. Here, not only is there no demonstrated disparity in the enforcement of immigration law or in the execution of lawful detentions or arrests, but the Legislature affirmatively believed and intended that SB4 would not allow racial discrimination.

The best evidence of this is SB4's text. SB4 explicitly prohibits unconstitutional discrimination on account of "race, color, religion, language, or national origin." SB4 § 1.01 (§752.054). Plaintiffs' rest their purpose argument on the notion that SB4 prohibits *local* policies against racial profiling. *See* San Antonio Mot. 40; El Paso Mot. 7-8. But that is wrong. As explained above, nothing in SB4 amends the preexisting Texas law that affirmatively *requires* local law-enforcement agencies to strictly prohibit racial profiling. *See supra* pp. 7-8 (citing Tex. Code Crim. Proc. art. 2.132).

Indeed, the Legislature relied on that preexisting law as a safeguard against racial profiling. Senator Perry, who was SB4's author, stated that he "[has] no intention whatsoever to pass any legislation that creates a situation that would increase . . . racial profiling."[34] Senator Creighton informed the Senate of the numerous prohibitions against and remedies for racial profiling in place at the state and federal level.[35] Senator Creighton also emphasized that incidents of racial profiling are rare, with only ten complaints against the Dallas Police Department reported in 2015, out of

[34] Sen. Floor Debate on S.B. 4, 85th Leg., R.S. (Feb. 7, 2017 Part II), at 02:00:58-02:01:11.

[35] *Id.* at 02:01:52-02:07:34 (citing, inter alia, Texas Code of Criminal Procedure arts. 2.131-.132).

713,048 "total documented [police] contacts."[36] Senator Perry accordingly noted, regarding potential racial profiling, that he "believe[s] in [law enforcement] officers better than that."[37]

No discriminatory purpose can be inferred from the Legislature's decision to rely on these conclusions rather than the unsupported speculation of political opponents seeking to thwart the law. The issue is not whether the Legislature was *correct* about the chance of hypothetical future racial profiling by police, when the Legislature did not *believe* that racial profiling was likely, *intended* that racial profiling be prohibited by existing laws on that subject, and *passed* an express prohibition on unconstitutional discrimination. Second-guessing the Legislature's belief that those protections are sufficient is antithetical to the "extraordinary caution" that courts must exercise in adjudicating claims that a State enacted a facially neutral classification on a permissible topic "on the basis of race." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (quoting *Miller*, 515 U.S. at 916).

Lastly, the El Paso plaintiffs misleadingly argue that racial profiling occurred on the House floor, after SB4's enactment, when Representative Rinaldi "call[ed] immigration enforcement agents to 'report' Latino protesters." El Paso Mot. 8. Plaintiffs omit a key detail: Representative Rinaldi acted after seeing protestors' signs proclaiming their unlawful presence. He did not "profile" protestors based on race; he took their statements about immigration status at face value.[38]

b. The events leading up to SB4 confirm that it was enacted for the law's stated purposes.

The Supreme Court has indicated that courts may look to "[t]he specific sequence of events leading up the challenged decision" to "shed some light on the decisionmaker's purposes." *Arlington Heights*, 429 U.S. at 267. The events leading up to SB4's adoption confirm that the Legislature genuinely stated its rationale: barring sanctuary-city policies to promote the rule of law and prevent crime by unlawfully present aliens.

---

[36] *Id.* at 02:08:13-02:08:35.

[37] *Id.* at 01:30:12-14.

[38] Matt Rinaldi (@MattRinaldiTX), Twitter, https://twitter.com/MattRinaldiTX/status/869269896365998080 (recounting signs stating: "I am illegal and here to stay.").

The Legislature did not shift from showing no interest in sanctuary cities to suddenly enacting SB4. Rather, SB4 is part of sustained nationwide attention to the issue of sanctuary cities. A bill to end sanctuary-city policies was introduced two years ago in the 84th legislative session, but did not come to a vote. Tex. S.B. 185, 84th Leg., R.S. (2015). The issue subsequently entered the national spotlight in 2015, when a convicted criminal was released by the sheriff's department in San Francisco, despite an immigration detainer request, and killed Kate Steinle as she walked on the waterfront with her father.[39] That national attention prompted a congressional hearing on the threat to public safety from sanctuary-city policies,[40] as well as a bill ("Kate's law") to increase penalties for illegal reentry.[41] In 2016, a Member of Congress wrote the Attorney General to urge the Department of Justice to "work with State and local jurisdictions to change their illegal sanctuary policies,"[42] resulting in the Justice Department later that year notifying cities that their Justice Assistance Grants would be jeopardized for non-compliance with the Department's "JAG Sanctuary Policy Guidelines."[43] And in January 2017, the President signed an executive order noting: "Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic."[44] In short, concerns with sanctuary-city policies have been raised officials in state and federal government for years.

As shown, the Legislature's focus on local cooperation with immigration-law enforcement did not materialize out of thin air, as if a pretext masking some other purpose. The Legislature was

---

[39] http://www.cnn.com/2015/07/03/us/san-francisco-killing-suspect-immigrant-deported/index.html

[40] Sanctuary Cities: A Threat to Public Safety, Hearing Before the H. Comm. on the Judiciary, Subcomm. on Immigration and Border Safety, 114th Cong., 1st Sess. (July 23, 2015), https://judiciary.house.gov/wp-content/uploads/2016/02/114-36_95632.pdf.

[41] H.R. 3011, 114th Cong. (2015).

[42] Letter from Hon. John A. Culberson to Attorney General Loretta E. Lynch (Feb. 1, 2016), https://culberson.house.gov/uploadedfiles/culberson_letter_to_attorney_general_lynch.pdf.

[43] U.S. Dep't of Justice, Office of Justice Programs Guidance Regarding Compliance with 8 U.S.C. § 1373, at 2 (July 7, 2016), https://culberson.house.gov/uploadedfiles/2016-7-7_section_1373_-_doj_letter_to_culberson.pdf.

[44] Executive Order 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017).

focused on an issue of sustained national attention. Indeed, the Legislature focused on the situation recently created by the Travis County Sheriff, who issued an officewide policy picking which crimes she concluded were serious enough to honor a federal request to temporarily detain an alien suspected or convicted of that crime for immigration authorities. Travis Cty. Sheriff's Office, Policy on Cooperation with U.S. Immigration and Customs Enforcement ¶ 2 (Feb. 1, 2017), https://www.tcsheriff.org/images/ICE_Policy.pdf. The Legislature was concerned with setting a uniform, statewide policy instead: "[Travis County Sherriff Hernandez] has labeled three offenses that she is willing to detain people for [at ICE's request]. Notably, what is not in those is rape, child pedophilia, and other offenses that are just as heinous and just as personal."[45]

Protecting the public against the possibility of such heinous crimes, committed by aliens who would otherwise be detained for immigration enforcement, is indeed a "credible legitimate policy rationale." El Paso Mot. 11. The issue before the Legislature was not the "crime rate among immigrants." El Paso Mot. 14. It was potential crime by individuals already confined on suspicion or conviction of crime. The Legislature could rationally and readily conclude that honoring detainer requests improves public safety, by keeping those individuals from committing more crime since they are transferred to federal officials for immigration law enforcement rather than returned to the street. To second guess the policy judgments of the Legislature would be antithetical to the "extraordinary caution" courts must "exercise . . . in adjudicating claims that a State has" enacted a facially neutral law "on the basis of race." *Easley*, 532 U.S. at 242.

Nevertheless, plaintiffs seek to minimize the Legislature's concern by noting that most ICE detainers have been complied with in Texas. El Paso Mot. 11-12. But the Travis County Sherriff had a written policy expressly contemplating compliance with detainers for aliens held on only certain charges. And the issue of sanctuary-city policies was a matter of national concern, as it only takes one crime to point out the stark consequences of releasing someone who would otherwise be detained. *See supra* p. 3.

[45] S. Cmm. Hrg. at 01:29:15-:30 (statement of Sen. Charles Perry).

Plaintiffs also seem to argue that the Legislature could not have truly been concerned with the rule of law since compliance with detainers is (in plaintiffs' view) unlawful. El Paso Mot. 12-13 (apparently referencing commandeering concerns). That argument is obtuse: plaintiffs are describing their own view, not the State's view. They cite no evidence that SB4's proponents believed that a State's voluntary decision that its officers will comply with ICE detainers is unlawful. That view was not held by the Legislature,[46] and it is incorrect on the merits. *See infra* Part IX.

Relatedly, SB4's legislative history does not show a "blatant disregard" for the rule of law by "requir[ing] a breach" of El Paso's settlement agreement purportedly requiring El Paso "not to enforce federal civil immigration laws." El Paso Mot. 13. Representative Ortega from El Paso originally sought an exemption for cities like El Paso "under settlement agreement not to enforce federal civil immigration laws" but ultimately *withdrew* that amendment after debate. ECF No. 56-4 (Rodriguez Decl.) ¶ 53. That was because El Paso's settlement agreement did not require complete abstention from immigration enforcement. As Representative Ortega explained, "El Paso County Sheriff Wiles, like the vast majority of sheriffs in the State of Texas, complies with federal detainer requests." H.J. of Tex., 85th Leg., R.S., S107 (2017).[47]

c. Historical background does not impugn SB4's purpose.

The Supreme Court in *Arlington Heights* suggested that "a series of official actions taken for invidious purposes" could evidence an invidious purpose for the action challenged. 429 U.S. at 267. This evidentiary source is limited, however. First, it is limited to actions taken by the decisionmaker whose action is under review. *See City of Mobile v. Bolden*, 446 U.S. 55 ,74 n.20 (1980)

[46] For instance, Representative Geren defended compliance with 48-hour immigration detainers as lawful. Enforcement by Campus Police Departments and Certain Local Governmental Entities of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the H. Comm. on State Affairs, 85th Leg., Reg. Sess., 01:11:23 (Tex. Mar. 15, 2017) (statement of Rep. Charlie Geren).

[47] Moreover, the Legislature was satisfied that, because SB4 does not require the El Paso County Sheriff to adopt a new policy *compelling* deputies to ask about immigration status, SB4 does not compel an activity that the settlement agreement precludes. Of course, deputies there may still be unable to ask about immigration status under the terms of the settlement, but that is not a policy adopted by the sheriff. *See* ECF No. 56-4 (Rodriguez Decl.) at Exh. 4 (settlement); H.J. of Tex., 85th Leg., R.S., S109 (2017) (reflecting Representative Geren's satisfaction that SB4 would not require violation of the settlement agreement).

(plurality op.); *Veasey v. Abbott*, 830 F.3d 216, 232 (5th Cir. 2016). Second, it is limited temporally: "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question." *Bolden*, 446 U.S. at 74 (plurality op.); *accord Veasey*, 830 F.3d at 232. Thus, discriminatory acts by local officials or by long-deceased legislators are irrelevant to this inquiry. *Contra, e.g.*, San Antonio Mot. 39 (citing decision issued over 60 years ago). Third, a relevant action must actually be discriminatory, not simply infirm on some other ground. *Contra, e.g.*, El Paso Mot. 10 (citing two cases not even about racial discrimination, but Fourth Amendment rights).

That leaves plaintiffs to rely on two rulings. El Paso Mot. 10 (citing rulings in *Perez v. Abbott* and *Veasey v. Abbott*); San Antonio Mot. 39 (same). Both of those cases involve election law (redistricting and voter ID, respectively), and not immigration law. Plus, both of those rulings are in cases with pending litigation, the State vigorously disputes those discriminatory-purpose findings, and the State will appeal those findings at the appropriate time (both cases remain pending before their respective district courts). Those rulings are not yet settled data points, and it would be wholly unfair to hold those non-final rulings against Texas where the State has not yet had full judicial process. Plaintiffs absolutely have not shown a history of racial discrimination "extend[ing] up until the present day." El Paso Mot. 10.

In contrast to the paucity of probative historical background evidence suggesting that a vast number of legislators drew SB4's neutral provisions about immigration-law enforcement as pretext for a racial classification, evidence affirmatively dispels any such notion. The Legislature has acted twice in recent years to prohibit racial profiling—requiring local law-enforcement agencies to adopt policies against it, mandating training for police chiefs and officers, and requiring reports the subject. *See* Act of May 31, 2009, 81st Leg., R.S., ch. 1172, § 26 (strengthening reporting

requirements); Act of May 24, 2001, 77th Leg., R.S., ch. 947, § 1 ("An Act relating to the prevention of racial profiling by certain peace officers."). This is not a history of racial discrimination. It is the opposite.

d. The legislative record does not undermine SB4's stated rationale.

The legislative record confirms that SB4 has the valid purpose apparent from its face: facilitating cooperation with federal immigration officials to promote the rule of law and reduce crime by illegal aliens. There are no "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports" stating that SB4's law-enforcement purpose is a sham. *Arlington Heights*, 429 U.S. at 268. To the contrary, the House and Senate committee reports reflect the law's manifest purpose to ban local prohibitions on cooperation with federal immigration officials.[48] Contemporaneous statements by SB4's proponents in the Legislature are in accord:

- In filing SB4, Senator Perry explained: "Banning sanctuary city policies will help prevent criminal aliens from being put back on our streets."[49]
- At the Senate State Affairs Committee hearing on SB4, Senator Perry explained that his purpose in proposing the bill was to end a "culture of contempt for the legal system" and restore "rule of law" values in Texas.[50]

[48] *See* H. Comm. on State Affairs, Bill Analysis, Tex. S.B. 4, 85th Leg., R.S., at 1 (2017) ("Concerns have been raised about the extent to which certain entities are cooperating with the federal government in the enforcement of immigration laws. C.S.S.B. 4 seeks to address these concerns and increase cooperation by, among other things, prohibiting the applicable entities from adopting or enforcing a measure under which those entities prohibit the enforcement of state or federal immigration laws or, as demonstrated by pattern or practice, the enforcement of those immigration laws."); S. Comm. on State Affairs, Bill Analysis, Tex. S.B. 4, 85th Leg., R.S., at 1 (2017) ("C.S.S.B. 4 looks to prohibit 'sanctuary city' policies, that prohibit local law enforcement from inquiring about a person's immigration status and complying with detainer requests. These policies often also prohibit the sharing of information regarding a person's immigration status with the federal government.").

[49] Press Release, Senator Charles Perry, Perry Files Legislation to Eliminate Sanctuary Cities in Texas (Nov. 15, 2016), http://www.senate.texas.gov/members/d28.press/en/p2016115.pdf.

[50] Enforcement by Certain Local Government Entities and Campus Police Departments of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the S. Comm. on State Affairs, 85th Leg., R.S., at 00:11:15-00:11:42 (Tex. Feb. 2, 2017) (statement of Sen. Charles Perry) (broadcast available online from the Senate Audio/Video Archive).

- Senator Perry further commented on the need a uniform detainer policy: "[Travis County Sherriff Hernandez] has labeled three offenses that she is willing to detain people for [at ICE's request]. Notably, what is not in those is rape, child pedophilia, and other offenses that are just as heinous and just as personal."[51]

- Senator Huffines declared that the purpose of SB4 is to target "criminal aliens," and that "Texas will not and should not ever tolerate racial profiling."[52]

- Representative Geren, the bill's sponsor in the House, introduced SB4 as about "the rule of law" and noted that local cooperation with federal officials is "not a new idea."[53]

- Representative Geren, introducing the bill at second reading on the House floor, stated that "[i]t's been [his] goal to make sure [that SB4 keeps the public safe] in a way that respects every person's rights and liberties."[54]

- Representative Villalba, explaining that his Mexican heritage did not preclude him from supporting SB4, called the bill "a common-sense bill" desired by "people in our communities who we care about who feel unsafe."[55]

- Representative Schaefer stated SB4's goal of allowing broader cooperation with immigration authorities: "the local sheriff might be arguing that [he] do[esn't] prohibit [his department from enforcing immigration laws], but in fact, [he] materially limit[s] . . . enforcement of detainers by picking some cases and not picking others. . . . [T]hat's why we're here."[56]

Lastly, plaintiffs imply that the term *illegal aliens* or *illegals* is "pejorative" or "hateful rhetoric." El Paso Mot. 19, 20. That is incorrect. As the Fifth Circuit has explained, the term "illegal alien" is properly used in law to describe individuals unlawfully present in this country. *Texas v. United States*, 809 F.3d 134, 148 n.14 (5th Cir. 2015) ("This opinion therefore refers to such persons as 'illegal aliens.'").

---

[51] *Id.* at 01:29:15-:30.

[52] *Id.* at 02:55:17-:22.

[53] Enforcement by Campus Police Departments and Certain Local Governmental Entities of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the H. Comm. on State Affairs, 85th Leg., R.S., at 00:13:10-00:14:06 (Tex. Mar. 15, 2017).

[54] H.J. of Tex., 85th Leg., R.S., at S1 (2017).

[55] *Id.* at S30-S31.

[56] *Id.* at S70.

e. Speculation by SB4's opponents cannot show that the law's proponents acted for the purpose of discriminating based on race.

Plaintiffs rely on statements by SB4 opponents to the effect that SB4 was "intended" as racial discrimination or "an attack on Latino" individuals. *E.g.*, ECF No. 56-5 (Sen. Rodriguez Decl.) ¶ 36. The Fifth Circuit has held that this type of speculative evidence is not probative. *See Veasey,* 830 F.3d at 234 ("the district court erred in relying on conjecture by the opponents of [a law] as to the motivations of those legislators supporting the law").

That makes good sense. "In their zeal to defeat a bill," opponents "understandably tend to overstate its reach." *Feiger v. U.S. Attorney Gen.*, 542 F.3d 1111, 1119 (6th Cir. 2008) marks omitted). Thus, "[t]he fears and doubts of the opposition are no authoritative guide." *Id.* (quotation marks omitted).

To hold otherwise only encourages gamesmanship and hyperbole by a bill's opponents. As another court has observed: "The incentive to couch partisan disputes in racial terms bleeds back into the legislative process," "as members of the 'out' party—believing they can win only in court, and only on a race-based claim—may be tempted to spice the legislative record with all manner of racialized arguments, to lay the foundation for an eventual court challenge." *Session v. Perry*, 298 F. Supp. 2d 451, 473 n.69 (E.D. Tex. 2004) (quotation marks omitted). For instance, it was known during SB4's debate that the bill's opponents were preparing for a legal challenge; hence, in response to a question about court challenges, SB4's House sponsor responded: "I would expect that a lot of what you're doing right now is trying to set one up."[57]

On the other hand, some opponents of SB4 did candidly acknowledge the bill's good-faith aims. For instance:

[57] *Id.* at S10 (statement of Rep. Charlie Geren).

- Senator Menéndez opposed SB4 but acknowledged that SB4 was "well intentioned"[58] and aimed to "creat[e] a standard approach to the law and how it is applied in the State of Texas."[59]

- Sheriff Gonzalez of Harris County opposed SB4 but testified that "[he] understand[s] [SB4] it is well intention[ed]; wanting to protect all Texans [is] admirable, [and he] appreciate[s] the work of [Representative] Geren" on SB4.[60]

- Representative Dutton spoke against SB4 on policy grounds but added that "[he doesn't] believe that [Representative Geren] is a bad person."[61]

Those concessions, notwithstanding the incentive towards loaded rhetoric, speak volumes.

f. SB4 received robust testimony and debate, and its opponents' complaints about aspects of the legislative process are not probative of anything but a desire to vote on an important bill.

Plaintiffs invoke *Arlington Heights*' statement that "[d]epartures from the normal procedural sequence also might afford evidence" that a law's stated rationale is pretext. 429 U.S. at 267. If a law is rammed through without any deliberation on its stated rationale, that might signal that another rationale is at play. But SB4 received ample process and deliberation.

For context, the Texas Legislature meets in regular sessions once every two years, and its session lasts only from January through May. SB4 was pre-filed in November 2016, before the legislative session started.[62] SB4 did not leave the Senate until February 8, 2017 and was under consideration in the House until April 27, 2017,[63] near the end of the session. Plaintiffs admit that hundreds of interested parties testified in open proceedings about SB4. El Paso Mot. 17. SB4 was

---

[58] Enforcement by Certain Local Government Entities and Campus Police Departments of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the S. Comm. on State Affairs, 85th Leg., R.S., at 02:56-:57 (Feb. 2, 2017) (broadcast available online from the Senate Audio/Video Archive).

[59] Sen. Floor Debate, 85th Leg., R.S., at 02:37:43-02:38:22 (Feb. 7, 2017).

[60] Enforcement by Campus Police Departments and Certain Local Governmental Entities of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the H. Comm. on State Affairs, 85th Leg., R.S., at 01:47:30-:36 (Mar. 15, 2017) (available online from the House Committee Broadcast Archive).

[61] H.J. of Tex., 85th Leg., R.S., at S29 (57th Leg. Day) (2017).

[62] Texas Legislature Online - 85(R), Actions for SB4, http://www.legis.state.tx.us/billlookup/Actions.aspx?LegSess=85R&Bill=SB4

[63] *Id.*

debated for over 16 hours in Senate committee,[64] approximately 6 hours on the Senate floor,[65] over 10 hours in House committee,[66] and over 17 hours on the House floor.[67] That is over 49 hours of recorded debate. And that does not include the countless hours that Representative Geren spent individually meeting with stakeholders and hearing their concerns and amendments during the approximately one month that the bill was in the House committee.[68] The notion that SB4 was hurried through the Legislature to avoid consideration is simply unsupportable.

Plaintiffs focus on irrelevant parliamentary procedures that show nothing more than reasonable steps to ensure a vote on an important law. Complaints like those have little weight: "Reasonable choices are to be made by the legislature not the courts." *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 409 (5th Cir. 1991). For instance, *Operation Push* held that a complaint about a change in the votes required to pass a law merely concerned "typical aspects of the legislative process" and thus did not prove discriminatory intent. *Id.*

1. Plaintiffs point out that SB4 was declared an emergency item for legislative purposes. *E.g.*, El Paso Mot. 16. That designation concerns structuring the legislative calendar, and laws are routinely deemed emergency matters for legislative purposes in Texas (for instance, reform of the State's Child Protective Services agency was another emergency matter this session).[69] In fact, *dozens* of matters have been given the emergency designation in the Texas Legislature over the

---

[64] Enforcement by Certain Local Government Entities and Campus Police Departments of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the S. Comm. on State Affairs, 85th Leg., R.S. (Feb. 2, 2017).

[65] Sen. Floor Debate, 85th Leg., R.S. (Feb. 7, 2017).

[66] Enforcement by Campus Police Departments and Certain Local Governmental Entities of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the H. Comm. on State Affairs, 85th Leg., R.S. (Mar. 15, 2017).

[67] Debate on Tex. S.B. 4 on the Floor of the Senate, 85th Leg., R.S. (Apr. 26, 2017).

[68] H.J. of Tex., 85th Leg., R.S., at S1 (statement of Rep. Charlie Geren upon initiation of House floor debate: "I have met with virtually all stakeholders impacted by this legislation, and [I am] fully aware of the many differences of opinions [on the bill].").

[69] Legislative Reference Library of Texas, *Governor's Emergency Items*, http://www.lrl.state.tx.us/whatsNew/client/index.cfm/2017/1/30/Governors-Emergency-Items..

past decade.[70] The effect of that designation is to allow the Legislature to act on the bill in the first 60 days of session,[71] meaning *more* time for legislative debate and thus hardly suggesting desire to conceal a pretextual law. SB4 went through the same process as other bills and did not pass the second chamber until April 27, on the 107th day of session.

2. The fact that SB4 spent 48 minutes in the House Calendars Committee (El Paso Mot. 17) is likewise probative of nothing. The House Calendars Committee is not a substantive committee that hears subject-matter debate over bills; rather, the Calendars Committee simply orders how bills reach the House floor. Here, a different House Committee—the State Affairs Committee—heard over 10 hours of testimony on SB4 and voted it out of Committee. The calendar is the list of bills eligible for consideration on a specified date, and the House Calendars Committee sets those calendars.[72] That a bill was considered quickly in that committee merely indicates that it was an important matter warranting attention on the House floor. It does not mean that the time for deliberating on the bill was compressed. As noted, SB4 was not rushed through the House but rather spent five weeks in the House committee.

3. Plaintiffs next raise a red herring by stating that the Senate "had . . . changed" its rule which previously required a two-thirds vote to bring a bill to the floor for debate. El Paso Mot. 17. Plaintiffs use the past tense because that rule was changed on January 21, 2015—in the *previous* legislative session, almost two years before SB4 was filed.[73] That change was not remotely related to SB4 or any specific piece of legislation. And the change was minimal: from two-thirds (66%) to three-fifths (60%) of Senators present and voting, to advance a bill to debate.[74]

---

[70] Legislative Reference Library of Texas, *Governor Documents Search*, http://www.lrl.state.tx.us/legeLeaders/governors/searchProc.cfm (document type = "message"; keyword = "emergency").

[71] Legislative Reference Library of Texas, *Governor's Emergency Items*, *supra*; *see* Tex. Const. art. III, § 5(b)-(c).

[72] Texas Legislative Council, *Texas Legislative Glossary* 2 (Jan. 2017); Texas House of Representatives, Calendars Committee, http://www.house.state.tx.us/committees/committee/?committee=C050.

[73] S. Journal, 84th Leg. R.S., Jan. 21, 2015, p. 7-8 (amending Senate Rule 5.13).

[74] *Id.*

4. Plaintiffs assert that the House departed from its usual legislative process in attempting to enact a "calendar rule" for the consideration of amendments, and in subsequently reconsidering the vote for that rule when the original vote failed. El Paso Mot. 17-18. That is false.

The House routinely enacts calendar rules to require that proposed amendments for major pieces of legislation (e.g., budget, emergency items, school finance, sunset legislation) be pre-filed by a certain time.[75] The purpose is to enable a more thorough debate by allowing members to review proposed amendments in advance. Here, those opposed to SB4 voted against the calendar rule that they are now complaining was not adopted.[76] It is also false to suggest that the reconsideration of the original vote to adopt the calendar rule was a departure from the norm because "the outcome was not in doubt." El Paso Mot. 18. To the contrary, because the House has a two-thirds rule for adopting a calendar rule,[77] the original 90-52 vote for the calendar rule was just five votes short of the needed two-third vote (i.e., 95 ayes).[78] That close margin gave sufficient doubt to reconsider the vote, and indeed the margin shrank on reconsideration to just two votes below the threshold.[79]

5. Plaintiffs complain about the House process for considering amendments. El Paso Mot. 18-19. But the parliamentary step they complain about was actually a courtesy to opponents of SB4. The routine course when opponents continue offering amendments to delay an up-or-down vote on a bill is for proponents to simply move the previous question, which forecloses any vote on the pending amendments themselves.[80] Here, the House gave SB4 opponents the courtesy of an alternative parliamentary procedure that allowed them to say that their amendment was at least voted down (using the margin of the vote the last debated amendment, Record Vote 456), rather

---

[75] Rules of the Texas House of Representatives, 85th Legislature; e.g., Rules of the Texas House of Representatives, 85th Legislature, Rule 11, § 6(g) and (h).

[76] See, e.g., H. Journal, 85th Leg., R.S., April 24, 2017, p. 5 (record vote 363).

[77] Rules of the Texas House of Representatives, 85th Leg., Rule 6, § 16(f).

[78] H. Journal, 85th Leg., R.S., April 24, 2017, p. 5 (record vote 363).

[79] H. Journal, 85th Leg., R.S., April 24, 2017, p. 10 (record vote 365).

[80] Rules of the Texas House of Representatives, 85th Leg., Rule 7, § 21.

than not considered at all (the perfectly acceptable routine course). Either way, the House was going to move to a *vote* on the long-debated bill without those amendments, so this picayune choice of procedure cannot possibly prove intent to cover up some suppressed rationale for SB4.

6. Plaintiffs rely on the fact that some amendments proposed by SB4's opponents were not accepted. *See id.* at 18-19. At the outset, this portion of plaintiffs' theory is infirm because a "failure to enact suggested amendments . . . are not the most reliable indications of [legislative] intention." *Bryant v. Yellen*, 447 U.S. 352, 376 (1980). In any event, focusing on the fate of opponents' amendments only highlights that several were adopted: Amendment No. 21, offered by Senator Garcia on behalf of Senator Rodríguez, was adopted with no objections and added an exemption for public health departments of a local entity.[81] Amendment No. 25, offered by Senator Uresti, was adopted with no objection and added "religion" to the anti-discrimination provision.[82] And the House passed eight ameliorative amendments proposed by Democrat lawmakers.[83] Adopting some of opponents' amendments while declining to adopt others incompatible with the majority's policy choices is a routine part of the legislative give-and-take.

7. Finally, plaintiffs argue that the amendment proposed during the House debate by Representative Schaeffer "should have been considered a substantial substitute and, thus, should have been pre-filed." El Paso Mot. 20. But the Schaefer amendment was filed in the same manner and form as all other amendments proposed in the House. And the Schaeffer amendment was not "a complete substitute" for the pending bill.[84] It merely restored language from the Senate passed version to one part of the bill.[85] That happens all the time and is arguably more transparent than doing the same thing during the conference committee process, where it can also occur.

---

[81] S.J., 85th Leg., R.S. 219, at 224.

[82] *Id.* at 224.

[83] *Id.* at 1859, 1876, 1879, 1882, 1884, 1896, 1914, 1918, 1921 (Amends. 7, 20, 23, 26, 28, 40, 60, 64).

[84] Rules of the Texas House of Representatives, 85th Leg., Rule 11, § 6.

[85] *See* pages 6 and 9, http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=85R&Bill=SB4.

8. In sum, plaintiffs' arguments about parliamentary procedure miss the forest for the trees. The inquiry into procedural deviations is trying to analyze whether there was an eagerness to rush legislation through for the purpose of limiting the opportunity for debate and review. The exact opposite happened here. SB4 went through the ordinary committee process in both chambers. No provisions were added to the bill outside the normal legislative process. SB4 was heard over the course of 10-plus hours in House committee on March 15, 2017. Not one amendment was offered by those opposing the bill in the House committee, despite the lengthy testimony. For the next 42 days, committee chair Representative Geren listened to concerns and comments from law-makers, law-enforcement officials, and other stakeholders.[86] As a result of that process, the bill was modified into a committee substitute that was voted out of committee.[87] This is not an aberrational departure from conventional process. This is how the legislative process functions. Nothing about the way in which SB4 was considered and passed suggests an ulterior, invidious motive in its adoption.

The principle of parsimony supports the conclusion that the Texas Legislature was not operating with a discriminatory purpose: "In the law, as in life, the simplest explanation is sometimes the best one." *Loan Syndications & Trading Ass'n v. S.E.C.*, 818 F.3d 716, 718 (D.C. Cir. 2016); *Brown v. Vance*, 637 F.2d 272, 281 (5th Cir. 1981) (applying Occam's Razor to pick between competing theories). So it is here. SB4's purpose is what the Legislature stated and what the law does: to promote cooperation with federal immigration officials in the interest of public safety and the rule of law. The circumstantial evidence confirms that SB4's neutral classifications are not pretext for a classification according to race.

---

[86] *See* House Comm. Recording, at 00:01:44-00:01:48, 00:12:55-00:18:00 (showing that Representative Geren worked with a number of parties after the bill was heard in committee to make changes to the bill that resulted in the committee substitute).

[87] The Senate engrossed version and House Committee substitute are compared side-by-side at pages 4-18 of the House Committee Bill Analysis on SB4, 85th Leg., R.S. (2017).

C. The San Antonio plaintiffs' claim of purposeful discrimination on account of alien status is unsustainable.

The El Cenizo and San Antonio plaintiffs also argue that SB4 violates equal-protection rights by singling out and regulating with respect to the alleged "suspect class" of non-citizens. El Cenizo Mot. 38; San Antonio Mot. 40. That is mistaken. State laws are not categorically suspect for regulating on the topic of immigration law. The Supreme Court has repeatedly upheld state laws on this subject and emphasized their usefulness. *Arizona*, 567 U.S. at 411; *Whiting*, 563 U.S. at 600-01. Plaintiffs cite no case suggesting that aliens are a suspect class with respect to federal immigration laws, subjecting those laws to strict scrutiny. Indeed, a defining characteristic of immigration law is distinguishing between citizens and aliens. And SB4 simply turns on the federal government's permissible classifications.

Moreover, if plaintiffs mean to argue that SB4 regulates a narrower class—unlawfully present aliens, who would be subject to immigration law enforcement—the equal-protection argument still fails. Unlawfully present aliens subject to federal immigration consequences are not a suspect class, even outside the immigration context. *See, e.g.*, *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005) ("To begin, nonimmigrant aliens are not a suspect class under *Griffiths*."); *id.* at 416 ("The Court has never applied strict scrutiny review to a state law affecting any other alienage classifications, *e.g.*, illegal aliens, the children of illegal aliens, or nonimmigrant aliens."); *id.* at 419-20 ("there is no precedential basis for the proposition that nonimmigrant aliens are a quasi-suspect class or that state laws affecting them are subject to intermediate scrutiny").

VIII. Plaintiffs' Voting-Rights Arguments Are Unfounded.

Plaintiffs argue that SB4 violates the Fourteenth Amendment right to vote (El Cenizo Mot. 38-39) or § 2 of the Voting Rights Act (San Antonio Mot. 43-44). That argument is baseless.

SB4 has nothing to do with voting. The El Cenizo plaintiffs invoke (Mot. 38) the Supreme Court's recognition of "a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Similarly, the San Antonio plaintiffs rely (Mot. 42) on the limits in Voting Rights Act § 2 on a "voting

qualification or prerequisite to voting or standard, practice, or procedure." 52 U.S.C. § 10301. But plaintiffs cite nothing in SB4 stating a "voting qualification" or prerequisite, *id.*, or "regulat[ing] access to the franchise," *Dunn*, 405 U.S. at 336. Because SB4 is not a voting regulation, neither the Fourteenth Amendment right to vote nor § 2 of the Voting Rights Act applies.

Plaintiffs reason that removing an official for specified misconduct—as SB4 provides for—somehow "revokes" (El Cenizo Mot. 39) or "dilutes" (San Antonio Mot. 42) citizens' right to vote on an equal basis. Plaintiffs fail to cite a single case for this non sequitur. State laws provide for removing officials for any number of reasons, from corruption to neglect of duties to failing to take state-required training on racial profiling. *E.g.*, Tex. Const. art. V, § 24; *id.* art XV, § 7; Tex. Loc. Gov't Code §§ 22.009, 87.013; Tex. Gov't Code § 406.018; Tex. Spec. Dist. Code § 5004.058; Tex. Educ. Code § 96.641(i), (k). Removing an official for a violation of state law does not dilute the *voting* strength of any group of voters. If plaintiffs have a dispute with the procedures for how removed officials are replaced, the appropriate object of such an as-applied challenge is the particular replacement process. The San Antonio plaintiffs seem to recognize this, citing the city charter provisions governing replacement of removed officials. San Antonio Mot. 43. But those replacement provisions are not what plaintiffs challenge or seek to enjoin here.

IX. Plaintiffs' Tenth Amendment Argument Is Meritless.

Plaintiffs argue that SB4 violates the Tenth Amendment anti-commandeering doctrine. El Cenizo Mot. 39-40. That claim is baseless. The anti-commandeering doctrine protects state officials from *federal* control, not local officials from state control.

The Tenth Amendment anti-commandeering doctrine respects the division of powers between "the State and Federal Governments" by imposing limits on "federal control" of state officers. *Printz*, 521 U.S. at 922; *accord New York*, 505 U.S. at 188.

That doctrine does not apply here for a basic reason: SB4 is a *state law*, not a federal law. The Tenth Amendment addresses "the proper division of authority between the Federal Government and the States." *New York*, 505 U.S. at 149. It has nothing to say about how a State controls

its state and local officials. *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

Unsurprisingly, then, plaintiffs cannot cite a single case invalidating a *state* law under the Tenth Amendment. *See* El Cenizo Mot. 39-40 (citing *Printz* and *New York*, which were both challenges to federal laws, and *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), which was not an anti-commandeering case at all). If the States in *Printz* and *New York* had directed statewide compliance with the federal regulatory programs at issue, there would be no anti-commandeering problem.

Plaintiffs note (El Cenizo Mot. 39) that local entities can be proper Tenth Amendment *claimants* if they are "agents of the State" whose state-issued power is being *federally* commandeered. *Printz*, 521 U.S. at 930, 931 n.15. But the identity of a proper state-government *claimant* does not change the proper *object* of an anti-commandeering challenge: a "federal regulatory program." *Id.* at 930.

In any event, plaintiffs would not even be proper state-government claimants. Through SB4, the State has withdrawn local entities' state-law authority to categorically refuse cooperation with immigration law enforcement and has directed compliance with the State's duly enacted policy. Plaintiffs raise no state-law challenge to the withdrawal of their authority in this regard. And the Supreme Court has long recognized that "[t]he number, nature, and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." *Hunter*, 207 U.S. at 178; *see supra* pp. 16-17.

X. Plaintiffs' Contract Clause Claim Is Meritless.

The City of San Antonio claims that SB4 impairs "contracts" between public institutions of higher education and their students and employees. San Antonio Mot. 48-51. But SB4 does not

violate the Contract Clause. U.S. Const. art. I, § 10, cl. 1.[88] SB4 does not in any way impair constitutionally protected contractual obligations. San Antonio's argument borders on frivolous.

As an initial matter, the City of San Antonio and its officials lack standing to raise this claim. "Being but creatures of the State, municipal corporations have no standing to invoke the contract clause . . . of the Constitution in opposition to the will of their creator." *Coleman v. Miller*, 307 U.S. 433, 441 (1939); *Donelon v. La. Div. of Admin. Law ex rel Wise*, 522 F.3d 564, 567 n.6 (5th Cir. 2008) (noting, separate and apart from other possible constitutional claims, the "general rule that political subdivisions have no standing to invoke the Contract Clause or the Fourteenth Amendment in opposition to the will of their creator").[89]

In any event, and in spite of the City's "heavy burden" to show a Contract Clause violation "in the context of a facial challenge," *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 992 (2d Cir. 1997), the City points to no authority for its argument that there exists an implied contract between colleges and students that is capable of being impaired by State law. *See* San Antonio Mot. 49-50. The City also makes no effort to explain just how the various features it identifies as part of this implied contract—"admission," "tuition," a "pertinent curriculum," "standards and guidelines for academic achievement, community citizenship, and general behavior," students "earn[ing] degrees" (*id.* at 49-50)—would be impaired by SB4. It cannot be merely that "students will be deterred from attending school and completing their degrees." *Id.* at 49. By that logic, if the Texas legislature were to pass a revenue-raising law that increased tuition fees, or were to raise the drinking age, and as a result Texas public universities and junior colleges became

[88] The City's Contract Clause claim regarding implied obligations between public institutions and their employees is premised entirely on its overbroad definition of "endorsement." San Antonio Mot. 51. That should be rejected for the reasons discussed in Section IV, *supra*.

[89] Furthermore, the City's assertion of its Contracts Clause relies upon affidavits from municipal officials (San Antonio Police Chief McManus and Alamo Colleges District Board Member Alderete). San Antonio Mot. 49-50. Junior colleges are governmental units organized under Tex. Educ. Code § 130 through a "Junior College District," and are political subdivisions of the State, *id.* at §§ 130.001-.211; *see also* Tex. Civ. Prac. & Rem. Code § 101.001(3)(A)-(B) (defining "[g]overnmental unit" as "this state and all the several agencies of government that collectively constitute the government of this state" and as "a political subdivision of this state, including any . . . junior college district.").

less attractive to students, there could be a viable Contract Clause claim. The City's broad conception of this impairable implied student-college contract, untethered to the case law, "would expand the definition of contract so far that the Contract Clause would lose its purpose." *General Motors Corp. v. Romein*, 503 U.S. 181, 182 (1992). In effect, it "would cause the Clause to protect against all changes in legislation." *Id.* The Contract Clause was never intended "to obliterate the police power of the States." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).

But even assuming that a constitutionally protected contract could be fashioned from these amorphous standards, SB4 does not effect a "substantial impairment." *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 504 (5th Cir. 2001). The City's claimed impairment rests entirely on its assumption that SB4 will "inevitably lead to racial profiling" with resulting burdens for Latino students. San Antonio Mot. 50. Any claim that SB4 will result in racial profiling or discriminatory treatment is entirely speculative at this facial-challenge stage. *See supra* p. 63. SB4 itself bans unconstitutional racial discrimination. *See* SB4 § 1.01 (§ 752.054). And that complements already existing State law, which requires law-enforcement agencies to adopt policies that "strictly prohibit[s] peace officers employed by the agency from engaging in racial profiling," Tex. Code Crim. Proc. art. 2.132, and, among other things, undergo training on racial profiling, Tex. Educ. Code § 96.641(a)-(d), (k). If any future enforcement activity by federal, local, or campus police officers is alleged to discriminate against Latino students based on race, that can be challenged and declared unlawful. *E.g.*, *Batson*, 476 U.S. at 83-84; *Arlington Heights*, 429 U.S. at 269. *See supra* pp. 65-66.

Moreover, when analyzing the extent of impairment, courts frequently take into account the degree to which "the industry the complaining party has entered has been regulated in the past." *Energy Reserves Grp, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983). It should come as no surprise that public institutions of higher education are "heavily regulated" by the State. *Id.* at 413. Education is, after all, an important component of the State's police power. *See, e.g.*, *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1518 n.7 (5th Cir. 1993) (discussing Texas law, and refer-

ring to the "valid exercise of the state's police power in regulating education"). The Texas Education Code alone is replete with provisions regulating every aspect of public universities. *See, e.g.*, Tex. Educ. Code chs. 53-135. Just for public junior colleges, there are 254 sections, many of which have dozens of subsections. *Id.* ch. 130. And this significant regulation extends to campus peace officers. The Code is what authorizes their employment. *See id.* at § 51.203. It vests those officers with "powers, privileges, and immunities," including the power to make arrests. *Id.* § 51.203(b)(1)-(2). And it subjects them to State certification requirements. *Id* § 51.203(e).

All this it to say that the students, colleges, and university employees involved in San Antonio's alleged "implied contract" were on notice that the rights and responsibilities under that "contract" were subject to changes by the State. *Cf. Energy Reserves*, 459 U.S. at 411 ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic."); *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the [S]tate by making a contract about them."). "A state cannot 'bargain away' its police power." *United Healthcare Ins. Co. v. Davis*, 602 F.3d 618, 627 n.7 (5th Cir. 2010). Any "contract" now existing between colleges and their students—or between colleges and their employees, for that matter—could not have "surrender[ed] an essential attribute of the State's sovereignty." *Lipscomb*, 269 F.3d at 505 (internal quotations and brackets omitted).

Finally, even if San Antonio could show substantial impairment, SB4 serves a "significant and legitimate public purpose," and any incidental effect on implied contracts is "reasonable." *Energy Reserves*, 459 U.S. at 411. The City's argument to the contrary is merely a rehash of its federal preemption argument. *See* San Antonio Mot. 50. SB4 is not preempted legislation. *See supra* Part II. As evidenced in the bill's text and in its legislative history, SB4 is designed to facilitate cooperation with federal immigration officials to promote the rule of law and reduce crime committed by aliens. *See* SB4; *supra* pp. 76-77. That is a legitimate exercise of the State's police power. It has long been recognized that States possess the sovereign power to pass "[l]egislation to protect the public safety" *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 436 (1934); *see*

also id. ("[T]he reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."). This power is not merely significant and legitimate; it is "paramount." *Allied Structural Steel Co.*, 438 U.S. at 241.

XI. The Texas Constitution Home Rule Amendment Does Not Bar SB4's Enforcement.

A. The City of Austin claims that, as a home-rule city endowed with certain powers of self-government under State law, *see* Tex. Const. art. XI, § 5, it has "police power authority" upon which SB4 cannot infringe. Austin Mot. 18.[90] But the very same constitutional provision the city cites makes clear that these local self-government powers are necessarily limited by, and subordinate to, laws enacted by the State. *See* Tex. Const. art. XI, § 5 ("The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State."). The power of self-government is not absolute. The Texas Constitution did not establish various independent fiefdoms, unaccountable to the Legislature and the laws it passes. As the Texas Supreme Court has made clear, any city "that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute." *Dallas Merchant's*, 852 S.W.2d at 491.

Texas had ample power under state law to pass SB4. *Contra* Austin Mot. 19. The Texas Legislature has the general power to pass legislation "reasonably related to public health and welfare" as a "valid exercise of the police power." *Gibson Distrib, Inc. v. Downtown Develop. Ass'n of El Paso, Inc.*, 572 S.W.2d 334, 335 (Tex. 1978). The State's police power is "broad and comprehensive." *Tex. State Teachers Ass'n v. Texas*, 711 S.W.2d 421, 425 (Tex. App. 1986). And the

[90] Cities with populations over 5,000 may elect to become home-rule cities. Tex. Const. art. XI, § 5. Unlike other cities, "[a] home rule city derives its power not from the Legislature but from [the] Texas Constitution." *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex. 1975). Although a home-rule city "has all the powers of the state not inconsistent with the Constitution, the general laws, or the city's charter[,] these broad powers may be limited by statute." *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998).

"promotion of safety" has long been understood to be "unquestionably at the core" of that power. *Kelly*, 425 U.S. at 247; *accord Lombardo v. City of Dallas*, 73 S.W.2d 475, 479 (Tex. 1934) (holding that the State's police power "embraces regulations designed to promote . . . public safety").

Whatever disagreements the City of Austin might have with Texas's chosen methods, it cannot seriously be contested that SB4 is reasonably related to safeguarding the public. *See supra* pp.76-77.[91] In the lead-up to SB4, between June 1, 2011 and November 30, 2015, "over 176,000 criminal aliens (those that are unlawfully present in the United States and have committed an additional crime for which they were arrested) [were] booked into local Texas jails." Senate Veterans Affairs and Military Installations Subcommittee on Border Security, Interim Report to the 85th Legislature, at 1, http://www.senate.state.tx.us/cmtes/84/c652/c652.InterimReport2016.pdf. And that figure has only continued to expand. "[O]ver 222,000 criminal aliens have been booked into local Texas jails between June 1, 2011 and May 31, 2017." Tex. Dep't of Pub. Safety, Texas Criminal Alien Arrest Data, https://www.dps.texas.gov/administration/crime_records/pages/txCriminalAlienStatistics.htm. In those six years, criminal aliens were responsible for over 593,000 criminal offenses—including 1,211 homicide charges, 70,500 assault charges, 17,132 burglary charges, 8,906 weapons charges, and 6,361 sexual assault charges. *Id.* And "[o]f the convictions associated with criminal alien arrests, over 177,000 or 66% are associated with aliens who were identified by [Department of Homeland Security] status as being in the US illegally at the time of their last arrest." *Id.* SB4 was intended to combat this significant criminal problem by stopping localities like the city from impeding cooperation with federal immigration officials.

B. El Paso County similarly argues, in passing, that SB4 unconstitutionally interferes with the "El Paso County Sheriff's constitutional duty as the county's final policymaker in the area of

[91] *See also, e.g.*, Press Release, Sen. Charles Perry, Perry to Address Sanctuary Campuses in Senate Bill 4 (Dec. 5, 2015), http://www.perry.senate.state.tx.us/pr16/p120516a.htm ("[T]his bill is about keeping our schools and communities safe); Gov. Greg Abbott, State of the State Address (Jan. 31, 2017), https://gov.texas.gov/news/post/governor_abbott_delivers_state_of_the_state_address (recounting the serially violent criminal exploits of an alien in and out of Texas jails).

law enforcement" and the "El Paso County Attorney's prosecutorial function." El Paso Mot. 4 n.2. The County makes no effort to identify what powers have been conferred on these local officials to give them final authority over what laws to enforce or prosecute, the source of such sweeping powers, or just how it is that SB4 would interfere with the exercise of those powers should they exist. *See* El Paso Mot. 4 n.2.[92]

In actuality, the Texas Constitution makes it clear that county sheriffs are subordinate to the State. Tex. Const. art. V, § 23 ("There shall be elected by the qualified voters of each county a Sheriff, who shall hold his office for the term of four years, whose duties, qualifications, perquisites, and fees of office, shall be prescribed by the Legislature."); *see also Neff v. Elgin*, 270 S.W. 873, 877 (Tex. Civ. App. 1925) ("the sheriff's duties are defined by the Legislature"). And county attorneys have a constitutional duty to represent the State. Tex. Const. art. V, § 21 ("The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties."); *accord Upton v. City of San Angelo*, 94 S.W. 436, 437 (Tex. Civ. App. 1906). Nothing in the Texas Constitution gives these local officials veto-power over laws enacted by the Legislature.

XII. Plaintiffs Do Not Make the Equitable Showing for a Preliminary Injunction.

To obtain the extraordinary relief of a preliminary injunction, a plaintiff must show not only a likelihood of success on the merits but "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. 7, 20 (2008). Plaintiffs do not make those showings.

Plaintiffs must first show that irreparable injury is likely absent an injunction: "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a

[92] The county's reliance on *Hill County. v. Sheppard*, 178 S.W.2d 261, 264 (Tex. 1944)—the only case it cites in support of its argument—is perplexing. That case concerned the Legislature's attempt effectively to abolish the office of county attorney, which the court held that the Legislature was without authority to do because that office was provided for in the Constitution. *Id.* at 262-64 (discussing Tex. Const. art. V, § 21). Surely, El Paso County cannot be arguing that SB4 does anything remotely similar.

clear showing that the plaintiff is entitled to such relief." *Id.* at 22. Here, plaintiffs are seeking to enjoin a law that does not order a new type of activity with unknown effects. Rather, state and local law-enforcement officials have been cooperating with federal immigration authorities across the nation for years, without irreparable harm to those officials. *E.g.*, Waybourn Decl. ¶¶ 6-10; Decl. of Steven McCraw (Exh. 3) ¶ 6-10. This counsels against the extraordinary remedy of injunctive relief. *Winter*, 555 U.S. at 23. Also, SB4 requires defense and indemnification of any liability of covered law-enforcement officials for complying with detainer requests, further undermining claims that plaintiffs will be irreparably harmed once SB4 takes effect. SB4 § 3.01.

In any event, any alleged harm to plaintiffs is outweighed by the ongoing irreparable harm to the State from an injunction and by the public interest. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (brackets omitted) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). It is for the State to judge the public-safety interests coloring a decision on cooperation with federal officials, and preventing the State from implementing a statute addressing "law enforcement and public safety interests . . . constitutes irreparable harm." *Id.*

An injunction would also be contrary to the public interest. SB4 furthers the same public interest enshrined federally in 8 U.S.C. §§ 1373 and 1644: facilitating cooperation between law enforcement and federal immigration officials. *See generally* 8 U.S.C. §§ 1373, 1644 (encouraging local communication with federal immigration authorities regarding unauthorized immigrants). Promoting the rule of federal and state law—not refusing to cooperate in it, as plaintiffs wish—is a compelling public interest. *See Heckler v. Cmty Health Servs. of Crawford Cty, Inc.*, 467 U.S. 51, 60 (1984) ("noting the interest of the citizenry as a whole in obedience to the rule of law"). Moreover, the public has an interest in allowing SB4 to proceed to take effect September 1, 2017, rather than whenever so that, in advance of the law's effective date, local officials can begin community outreach envisioned by SB4, educating the public of local policies on immigration-status inquiries. *See* SB4 § 1.01 (§752.057).

STATEMENT REGARDING EVIDENCE

Defendants do not believe evidence is necessary or relevant to the facial, pre-enforcement challenges that plaintiffs have mounted. To the extent the court allows evidence anyway, defendants attach and incorporate the following exhibits in support of its response:

Exhibit 1: Declaration of Steven C. McCraw

Exhibit 2: Declaration of Bill E. Waybourn

Exhibit 3: Declaration of Rand Henderson

Exhibit 4: Declaration of Laura Stowe

CONCLUSION

For the foregoing reasons, the Court should deny the motions for a preliminary injunction.

Respectfully submitted this the 23d day of June, 2017.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY D. STARR
Deputy First Assistant Attorney General

MICHAEL C. TOTH
Special Counsel to the First Assistant Attorney General

ANDREW D. LEONIE
Associate Deputy Attorney General

AUSTIN R. NIMOCKS
Associate Deputy Attorney General

/s/Darren McCarty
DARREN MCCARTY
Special Counsel for Civil Litigation
Texas Bar No. 24007631
darren.mccarty@oag.texas.gov

DAVID J. HACKER
Senior Counsel

JOEL STONEDALE
Counsel

Office of Special Litigation
ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Mail Code 009
Austin, Texas 78711-2548
(512) 936-1414
(512) 936-0545 Fax

ATTORNEYS FOR TEXAS

CERTIFICATE OF SERVICE

I, Darren McCarty, hereby certify that on this the 23rd day of June, 2017, a true and correct copy of the foregoing document was transmitted using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/Darren McCarty
Darren McCarty

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

TEXAS, *Plaintiff*, v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; VICTORIA A. LIPNIC, in her official capacity as Acting Chair of the Equal Employment Opportunity Commission; and JEFFERSON B. SESSIONS, III, in his official capacity as Attorney General of the United States, *Defendants*.	Case No. 5:13-CV-00255-C

PLAINTIFF'S RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION, AND REQUESTS FOR PRODUCTION TO PLAINTIFF

Texas, by and through the Attorney General, and pursuant to the Federal Rules of Civil Procedure, serves its responses to Defendants' First Set of Interrogatories, Requests for Admission, and Requests for Production to Plaintiff (the "Request") as follows:

Preliminary Statement

Texas's responses are made without prejudice to, and are not a waiver of, its right to rely on other facts, documents, or legal theories. Texas does not waive, and hereby expressly reserves, its right to assert any and all objections as to the admissibility of such responses into evidence in this action, or in any other proceedings, on any and all grounds including, but not limited to, competency, relevancy, materiality, and privilege. Texas responds herein without, in any way, implying that they consider the responses to be relevant or material to the subject matter of this action.

DOJCIV00323

Texas will produce documents only to the extent that such documents are in the possession, custody, or control of the Attorney General. Texas expressly reserves the right to supplement, clarify, revise, or correct any or all of the responses herein, and assert additional objections or privileges, in one or more subsequent supplemental response(s). Publicly available documents including, but not limited to, newspaper clippings, court papers, and documents available on the Internet, will not be produced.

RESPONSES AND OBJECTIONS TO DEFENDANTS' INTERROGATORIES

1. Describe each and every instance in which the EEOC investigated Plaintiff related to Plaintiff's laws, policies, regulations, or practices regarding the employment of individuals with criminal convictions as a potential violation of Title VII, as referenced in Paragraph 34 of Plaintiff's Amended Complaint.

RESPONSE:

Texas objects to this interrogatory as it is not reasonably calculated to lead to the discovery of admissible evidence. Moreover, the subject of the interrogatory is not relevant. Texas maintains that it is an object of the challenged rule, which causes Texas an increased regulatory burden. Moreover, Defendants' new rule threatens Plaintiff's interest in establishing statewide policies regarding felons and managing their own workplaces. ECF No. 24 at 23–37. "By forcing state officials . . . to choose between a federal rule or complying with State law, the Rule causes an irreparable injury." *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *44 (N.D. Tex. June 27, 2016) (Cummings, J.) (citations omitted). Sovereigns suffer injury when their duly enacted laws or policies are enjoined or impeded. *Texas v. United States*, 201 F. Supp. 3d 810, 834–35 (N.D. Tex. 2016), *order clarified,* No. 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016), and *appeal dismissed sub nom. Texas, et al. v. United States et al.* (Oct. 21, 2016) (citations omitted); *Nevada, Texas et al. v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 532 (E.D. Tex. 2016) (finding

harm to states where "compliance costs" were expended to comply with new federal regulation). *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.")); *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws"); *Texas v. United States*, 95 F. Supp. 3d 965, 981 (N.D. Tex. 2015) ("[W]henever an enactment of a state's people is enjoined, the state suffers irreparable injury."); *Coalition for Econ. Equity v. Wilson,* 122 F.3d 718, 719 (9th Cir. 1997). Here, Defendants' rule removes from non-federal officials discretion and authority to create and enforce their own rules and regulations for their workplaces. This unlawful interference is harm to Plaintiff's sovereign interest. *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (holding that erroneous tribal gaming commission decision amounts to an irreparable injury to the state's sovereign interest); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015) (states suffer irreparable harm where defective federal regulation would divest them of their sovereignty over intrastate waters).

Texas also objects to this interrogatory as it seeks information in possession of Defendants, thus making it unnecessary to burden Texas with searching for and/or otherwise providing information within Defendants' custody and control.

Texas also objects that this interrogatory is propounded for the purposes of harassment or delay as it seeks information in possession of Defendants, thus making it unnecessary to burden Texas with searching for and/or otherwise providing information within Defendants' custody and control.

Texas also objects to the extent that is seeks information in the possession or control of third parties, or which is otherwise publicly available. Rule 26 "applies only

with respect to documents that are within the custody or control of the disclosing party within the meaning of Rule 34." 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE § 2053, p. 370 (2010). Moreover, discovery is not required regarding public records which are equally accessible to all parties. *See Ayyad v. Holder*, No. 05-CV-02342-WYD-MJW, 2014 WL 4084165, at *1 (D. Colo. Aug. 19, 2014); *Baum v. Vill. of Chittenango*, 218 F.R.D. 36, 40 (N.D.N.Y. 2003) (court would not compel production of a public transcript, as such, was "equally accessible to all."); *Snowden ex rel. Victor v. Connaught Labs., Inc.*, 137 F.R.D. 325, 333 (D. Kan. 1991) (citation omitted) ("It is well-established that discovery need not be required of documents of public record which are equally accessible to all parties."); *Tequila Centinela, S.A. de C.V. v. Bacardi & Co., Ltd.*, 242 F.R.D. 1, 11 (D.D.C. 2007) ("Typically, courts do not order discovery of public records which are equally accessible to all parties."); *Krause v. Buffalo & Erie Cty. Workforce Dev. Consortium, Inc.*, 426 F. Supp. 2d 68, 90 (W.D.N.Y. 2005) (refusing to strike undisclosed voter registration cards submitted as evidence as they were "equally accessible to all parties."). Nonetheless, Plaintiff has already identified both Texas and local laws and/or policies that conflict with the EEOC rule at issue in this case. Plaintiff is not required to demonstrate or cite every single legal conflict, state or local, that may exist within Texas's borders. *See, e.g.*, ECF No. 52 at 7–8. "It further is settled law that 'a party [upon whom a discovery demand is served] . . . need not seek such documents from third parties if compulsory process against the third parties is available to the party seeking the documents.'" *Nosal v. Granite Park LLC*, 269 F.R.D. 284, 290 (S.D.N.Y. 2010) (quoting *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007)). *See CGC Holding Co., LLC v. Hutchens*, No. 11-CV-01012-RBJ-KLM, 2016 WL 1238149, at *10 (D. Colo. Mar. 30, 2016).

Texas also objects to this interrogatory in that it seeks law, not facts. "[T]he coercive power of discovery can be invoked to uncover facts, but the task of researching the law is left to the parties themselves." *Ind. Coal Council v. Hodel*, 118 F.R.D. 264, 266 (D.D.C. 1988). "[D]iscovery does not serve the function of providing Plaintiff with legal research." *Taylor v. Greene*, No. 08-81054-CIV, 2010 WL 5248502, at *3 (S.D. Fla. Dec. 16, 2010). "The defendant is not required to provide legal research to the plaintiff." *Maale v. Caicos Beach Club Charter, Ltd.*, No. 08-80131-CIV, 2010 WL 297808, at *4 (S.D. Fla. Jan. 19, 2010). This request asks Plaintiff to do Defendants' legal research and is, thus, improper. Plaintiff already identified both Texas and local laws and/or policies that conflict with the EEOC rule at issue in this case. Plaintiff is not required to demonstrate or cite every single legal conflict, state or local, that may exist within Texas's borders. Indeed, "if the theoretical possibility that there are more documents sufficed to justify additional discovery, discovery would never end." *Id.* at *1. "The discovery rules are not a ticket to an unlimited, never-ending exploration of every conceivable matter that captures an attorney's interest." *Vakharia v. Swedish Covenant Hosp.*, No. 90 C 6548, 1994 WL 75055, at *2 (N.D. Ill. Mar. 9, 1994). "'[D]iscovery' is not a synonym for investigation." *Am. Bank v. City of Menasha*, 627 F.3d 261, 265 (7th Cir. 2010), *as amended* (Dec. 8, 2010). If the Defendants seek that information, they are capable of performing legal research to obtain it.

Notwithstanding these objections, and without waiving these or any other objections, and in a good faith effort to provide information, Texas is aware of the investigation documented in ECF No. 32-5, which ultimately produced litigation, *Waldon et al. v. Cincinnati Pub. Schs.*, Case No. 1:12-cv-677 (S.D. Ohio), as well as that involving the Texas Department of Public Safety. *See* Decl. of Kathleen Murphy, provided herewith. *See*, additionally, all Declarations and information submitted herwith. The challenged guidance has also formed the basis of several other legal challenges against employers covered by Title VII. *See, e.g., McCain v. United States*, No.

2:14-CV-92, 2015 WL 1221257 (D. Vt. Mar. 17, 2015); *Williams v. Compassionate Care Hospice*, No. CV162095JLLJAD, 2016 WL 4149987 (D.N.J. Aug. 3, 2016).

2. Describe each and every instance in which the United States Department of Justice initiated any kind of legal proceeding against Plaintiff, including filing a complaint in federal court or enforcement action, alleging that Plaintiff's laws, policies, regulations, or practices regarding the employment of individuals with criminal convictions were discriminatory or in violation of Title VII, as referenced in Paragraph 34 of Plaintiff's Amended Complaint.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses.

3. Describe each and every instance in which Plaintiff was sued by a private party in any state or federal court related to its laws, policies, regulations, or practices regarding the employment of individuals with criminal convictions based on an alleged violation of Title VII, as referenced in Paragraph 34 of Plaintiff's Amended Complaint.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses.

4. Describe each and every instance in which Plaintiff has modified a law, policy, regulation, or practice related to the employment of individuals with criminal convictions as a result of the EEOC's Enforcement Guidance.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses.

5. Describe each and every state law that disqualifies convicted felons from holding certain jobs that Plaintiff has ignored as a result of the EEOC Enforcement Guidance, as alleged in Paragraph 12 of Plaintiff's Amended Complaint.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. Additionally, Texas refers Defendants to Restrictions on Convicted Felons in Texas, as chronicled by the Texas Law Library, available online at https://www.sll.texas.gov/library-resources/collections/restrictions-on-convicted-felons/.

6. Describe each and every local law that disqualifies convicted felons from holding certain jobs that Plaintiff has ignored as a result of the EEOC Enforcement Guidance, as alleged in Paragraph 12 of Plaintiff's Amended Complaint.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses.

7. Describe all efforts Plaintiff has undertaken to analyze its laws, policies, regulations, or practices related to the employment of individuals with criminal convictions in response to the EEOC's Enforcement Guidance.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. In addition, this request seeks information protected by the attorney/client privilege, deliberative process privilege, attorney work-product privilege, other applicable privileges, and any information it could be calculated to lead to would also be covered by those privileges.

8. Identify each and every "state law and longstanding hiring policy" of Plaintiff that imposes an "absolute ban on hiring convicted felons," as alleged in paragraph 23 of Plaintiff's Amended Complaint.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. Notwithstanding these objections, and without waiving these or any other objections, and in a good faith effort to provide information, Texas directs Defendants to the Declarations and information provided herewith as non-exhaustive examples of the same.

9. Identify each and every "state law and longstanding hiring policy" of Plaintiff that bars "persons convicted of certain categories of felonies," from holding Texas state jobs, as alleged in paragraph 23 of Plaintiff's Amended Complaint.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses.

10. Identify all jobs as to which Plaintiff seeks "a declaration of its right to maintain and enforce its laws and policies that absolutely bar convicted felons (or certain categories of convicted felons) from serving," as alleged in paragraph 43 of Plaintiff's Amended Complaint.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses.

11. Identify all hiring policies that Plaintiff has rewritten at taxpayer expense as a result of the EEOC Enforcement Guidance, as referenced in paragraph 33 of Plaintiff's Amended Complaint.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. Notwithstanding these objections, and without waiving these or any other objections, and in a good faith effort to provide information, the Attorney General does not know how many agencies, local governments, or other instrumentalities of Texas government have changed policies since the EEOC Rule

at issue was released, or how many agencies, local governments, or other instrumentalities of Texas government have not changed policies since the EEOC Rule at issue was released because of the institution and maintenance of this legal action.

12. Identify with specificity each and every injury you contend has been caused by Defendants as alleged in Plaintiff's Amended Complaint.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. Notwithstanding these objections, and without waiving these or any other objections, and in a good faith effort to provide information, Texas avers that, beyond the direct conflicts between the EEOC Rule at issue and Texas law and hiring policies, the EEOC Rule at issue also impermissibly invades the discretion of Texas, its agencies, local governments, or other instrumentalities of Texas government to make certain hiring decisions and/or otherwise maintain absolute bars to employment as determined to be in the best interests of Texas, as generally informed by Texas law and policy regarding felons (*see, e.g.*, https://www.sll.texas.gov/library-resources/collections/restrictions-on-convicted-felons/), or in the best interests of the agency or government making the decision, or what those entities believe to be in the best interests of the citizens that they serve and who provide the tax money for their existence and operation, any number of circumstances or considerations which are beyond the scope of what the EEOC believes to be relevant or appropriate, as articulated by the EEOC Rule at issue.

13. Identify each and every state law and longstanding hiring policy that you contend disparately impacts a group protected by Title VII.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses.

RESPONSES AND OBJECTIONS TO DEFENDANTS' REQUESTS FOR PRODUCTION

1. Provide each and every document upon which you based your responses to Defendants' First Set of Interrogatories, or that you considered in responding to Defendants' First Set of Interrogatories.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. Notwithstanding those objections and responses, and without waiving any objections, and in a good faith effort to respond, please see Declarations and documents provided herewith.

2. Provide each and every document upon which you based your responses to Defendants' First Requests for Admission, or that you considered in responding to Defendants' First Requests for Admission.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. Notwithstanding those objections and responses, and without waiving any objections, and in a good faith effort to respond, please see Declarations and documents provided herewith.

RESPONSES AND OBJECTIONS TO DEFENDANTS' REQUESTS FOR ADMISSION

1. Admit that the United States Department of Justice has never filed an enforcement action or lawsuit against Plaintiff alleging that Plaintiff's laws, policies, regulations, or practices regarding the employment of individuals with criminal convictions are discriminatory or in violation of Title VII.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. Notwithstanding those objections and responses, and with-

out waiving any objections, and in a good faith effort to respond, the Attorney General does not possess sufficient information to admit or deny this request and, thus, out of an abundance of caution, denies this request. The Attorney General is unaware of (a) any enforcement action or lawsuit brought by the Department of Justice against Plaintiff, or Plaintiff's instrumentalities of government or agencies, alleging that Plaintiff's laws, policies, regulations, or practices regarding the employment of individuals with criminal convictions are unlawful, and (b) how many like enforcement actions or lawsuits were not pursued by Defendants or the Department of Justice because of the institution and maintenance of this legal action.

2. Admit that Plaintiff is unaware of any investigation of Plaintiff conducted by the EEOC related to the Plaintiff's laws, policies, regulations, or practices regarding the employment of individuals with criminal convictions in connection with a potential violation of Title VII.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. Notwithstanding those objections and responses, and without waiving any objections, and in a good faith effort to respond, Texas denies this request. *See* Decl. of Kathleen Murphy, provided herewith.

3. Admit that Plaintiff has not altered its laws, policies, regulations, or practices with respect to the employment of individuals with criminal convictions to make them conform to the EEOC Enforcement Guidance.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. Notwithstanding those objections and responses, and without waiving any objections, and in a good faith effort to respond, the Attorney General does not possess sufficient information to admit or deny this request and, thus, out of an abundance of caution, denies this request. On information and belief, the

Attorney General does not believe that the Texas agencies or local governments referenced in the First Amended Complaint (ECF No. 24), or which have provided evidence herein, have altered their laws, policies, regulations, or practices with respect to the employment of individuals with criminal convictions since the EEOC Rule at issue was promulgated. The Attorney General is unaware of (a) the number of instrumentalities or agencies of Plaintiff that specifically altered laws, policies, regulations, or practices with respect to the employment of individuals with criminal convictions since the EEOC Rule at issue ("EEOC Enforcement Guidance") was promulgated, and (b) how many agencies, local governments, or other instrumentalities of Texas government have not changed policies since the EEOC Rule at issue ("EEOC Enforcement Guidance") was released because of the institution and maintenance of this legal action.

4. Admit that Plaintiff contends that it has the right to enact laws that prohibit a felon from being employed in any job with the State regardless of the nature of the felony, the nature of the job, the amount of time since the felony was committed, or any other fact or circumstance.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. Notwithstanding those objections and responses, and without waiving any objections, and in a good faith effort to respond, denies this request. Texas admits that its larger comprehensive legal scheme regarding criminal convictions (*see, e.g.*, https://www.sll.texas.gov/library-resources/collections/restrictions-on-convicted-felons/), and myriad factors beyond "the nature of the felony, the nature of the job, the amount of time since the felony was committed, or any other fact or circumstance" considered important by Defendants, or others, known and unknown, may inform any number of employment decisions of Texas, its agencies, local governments, or other instrumentalities of Texas government.

5. Admit that Plaintiff has never violated state and local laws that prohibit the "'individualized assessment' that EEOC requires," as referenced in paragraph 32 of Plaintiff's Amended Complaint.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. Notwithstanding those objections and responses, and without waiving any objections, and in a good faith effort to respond, the Attorney General does not possess sufficient information to admit or deny this request and, thus, out of an abundance of caution, denies this request.

6. Admit that Plaintiff cannot identify a state or local law concerning the hiring of convicted felons that disparately impacts a group protected under Title VII.

RESPONSE:

Texas fully incorporates by reference and reasserts all prior and subsequent objections and responses. Texas also objects that the request seeks a conclusion of law, not a question of fact. Notwithstanding those objections and responses, and without waiving any objections, and in a good faith effort to respond, the Attorney General does not possess sufficient information to admit or deny this request and, thus, out of an abundance of caution, denies this request. The Attorney General is also unaware of statistical evidence that may be used to support a claim that a state or local law concerning the hiring of convicted felons disparately impacts a group protected under Title VII.

Respectfully submitted this the 28th day of July, 2017.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY D. STARR
Deputy First Assistant Attorney General

MICHAEL C. TOTH
Special Counsel to the First Assistant Attorney General

ANDREW D. LEONIE
Associate Deputy Attorney General

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS
Associate Deputy Attorney General
Texas Bar No. 24002695
austin.nimocks@oag.texas.gov

DAVID J. HACKER
Senior Counsel

JOEL STONEDALE
Counsel

Office of Special Litigation
ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Mail Code 009
Austin, Texas 78711-2548
(512) 936-1414
(512) 936-0545 Fax

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2017, a true and correct copy of the foregoing document was transmitted to Justin M. Sandberg, Trial Attorney, Federal Programs Branch, Department of Justice, via e-mail at Justin.Sandberg@usdoj.gov.

/s/Austin R. Nimocks
AUSTIN R. NIMOCKS
Associate Deputy Attorney General

DOJCIV00336

No. 16-1180

In the Supreme Court of the United States

JANICE K. BREWER, ET AL., PETITIONERS
v.
ARIZONA DREAM ACT COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

J. CAMPBELL BARKER
Deputy Solicitor General

ARI CUENIN
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

Counsel for Amici Curiae

DOJCIV00337

TABLE OF CONTENTS

DOJCIV00338

TABLE OF AUTHORITIES

Cases:

Miscellaneous:

In the Supreme Court of the United States

No. 16-1180

JANICE K. BREWER, ET AL., PETITIONERS

v.

ARIZONA DREAM ACT COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Amici are the States of Texas, Alabama, Arkansas, Georgia, Kansas, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Tennessee, and West Virginia, and Mississippi Governor Phil Bryant.[1] States may restrict benefits available to aliens who are unlawfully present in the country, provided States do

[1] No counsel for any party authored this brief in whole or in part. No person or entity other than amici made a monetary contribution to the preparation or submission of the brief. Counsel of record for the parties received timely notice and consented to the filing of this brief. *See* Sup. Ct. R. 37.2(a), 37.6.

DOJCIV00345

not override Congress's statutory framework defining when aliens are lawfully present. *See* Pet. App. 36 (C.A. amended op.) (citing *Plyler v. Doe*, 457 U.S. 202, 225-26 (1982)). The Executive Branch, however, purports to possess the unilateral power to authorize the presence in this country of any alien it chooses not to deport. A coalition of 26 States and elected state officials previously challenged a separate use of this purported executive power to grant lawful presence and work authorization to millions of unlawfully present aliens. The Fifth Circuit affirmed a preliminary injunction of that program as unlawful, both procedurally (as promulgated without notice and comment) and substantively (as foreclosed by immigration statutes). *Texas v. United States*, 809 F.3d 134, 146-88 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). This lawsuit presents essentially the same issue and same state interest: If the Executive can unilaterally make aliens lawfully present, and thus eligible for driver's licenses, that "would have a major effect on the states' fiscs, causing millions of dollars of losses." *Id.* at 152-53.

SUMMARY OF ARGUMENT

The federal Executive Branch unilaterally created a sweeping program, known as DACA, that has granted "deferred action" status to hundreds of thousands of foreign nationals present in this country unlawfully. Deferred action under DACA is much more than just a decision not to pursue removal of the alien. The Executive deems deferred action under DACA to confer lawful presence and a host of attendant benefits.

Arizona law requires that applicants for driver's licenses show that their presence in this country is "authorized under federal law." Ariz. Rev. Stat. § 28-3153(D). Arizona correctly recognizes that aliens covered by DACA are not authorized under federal *statutes* to be present in the country. But the Ninth Circuit treated DACA as part of the supreme federal law capable of preempting Arizona's law. To the contrary, DACA's unlawful attempt to confer lawful presence violates immigration statutes.

Because DACA is unlawful, it cannot preempt Arizona law. Yet even if DACA were simply a lawful memorialization of enforcement discretion—and it is not—it could not preempt state law under *Arizona v. United States*, 132 S. Ct. 2492 (2012). Either way, therefore, DACA cannot preempt Arizona's law.

I. DACA, or "Deferred Action for Childhood Arrivals," is unlawful. It thus cannot be part of the "supreme Law of the Land" preempting state laws. U.S. Const. art. VI, cl. 2. DACA is unlawful executive action for essentially the same reasons that a materially identical executive action expanding DACA has been held unlawful—it affirmatively grants lawful presence and

work authorization in violation of Congress's intricate statutory framework for determining when an alien may lawfully be present and work in the country. *Texas*, 809 F.3d at 146. The Ninth Circuit erred by effectively giving preemptive force to this unlawful executive action.

The chief defense of DACA has been that it is allegedly mere enforcement discretion—forbearing from deporting certain aliens. *See* Pet. App. 44, 46 (C.A. amended op.); Pet. App. 190-91 (Office of Legal Counsel (OLC) memo); Pet. App. 197 (DACA memo); *see also Texas*, 809 F.3d at 174-78. That is wrong. "Lawful presence" is an immigration classification created by Congress with significant consequences. Likewise, Congress authorized only certain classes of aliens for work authorization. Yet DACA deems hundreds of thousands of unlawfully present aliens as lawfully present and eligible for work authorization. *See* Pet. App. 199 (DACA memo); *infra* Part I.A-I.B. This affirmative change in classification far exceeds enforcement discretion.

II. Even assuming for the sake of argument that DACA was merely a lawful program reflecting whom the Executive would forbear from removing, that would mean that DACA could not possibly preempt state law. This Court held in *Arizona v. United States* that mere "enforcement priorities" of the Executive Branch could not preempt state law. 132 S. Ct. at 2508. As *Arizona* explained, what matters for a preemption analysis is what "Congress has done" or delegated through statutes. *Id.*; *see also* Pet. App. 8-9 & n.4 (Kozinski, J., dissenting from the denial of reh'g en banc).

* * *

Just like the States' challenge to the executive action granting lawful presence in *Texas v. United States*, this case is about an unprecedented assertion of executive power. Legislators have disagreed on whether immigration statutes should be amended. And the class of individuals covered by DACA may compel particularly sensitive enforcement decisions because it comprises individuals who entered the country as minors. Holding DACA unlawful would not require the Executive to remove any alien or disrupt the Executive's power to prioritize categories of aliens for removal. But when Congress has defined certain conduct as unlawful, the separation of powers does not permit the Executive to unilaterally declare that conduct lawful.

ARGUMENT

I. Because DACA's Executive Authorization of Aliens' Presence and Work in this Country Violates Federal Statutes, DACA Cannot Have Preemptive Force.

A. DACA contravenes Congress's extensive statutory framework for lawful presence.

DACA's conferral of lawful presence violates Congress's extensive statutory framework defining when aliens are authorized to be present in the country.

The Executive deems the "deferred action" granted by DACA, Pet. App. 196-99 (DACA memo), to confer lawful presence on otherwise unlawfully present aliens, Pet. App. 18 (C.A. amended op.).[2] The Executive has made this clear: "Deferred action ... means that, for a specified period of time, an individual is permitted to be lawfully present in the United States." *Texas*, 809 F.3d at 148 (quoting executive memo extending DACA deferred-action period from two to three years).[3] The Ex-

---

[2] The Executive currently explains to prospective DACA recipients that "while your deferred action is in effect ... you are considered to be lawfully present in the United States." USCIS, Frequently Asked Questions, https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (last visited May 1, 2017).

[3] *Accord* Pet. App. 18 (C.A. amended op.) (Executive does not consider DACA recipients unlawfully present); *see* Resp. to Mot. for Preliminary Injunction Ex. 6 (DACA Toolkit) at 11, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-254), ECF No. 38-6 (Executive considers DACA recipients lawfully present); Surreply to Mot. for Preliminary

ecutive even told the Ninth Circuit in this lawsuit that DACA "deferred action status" is "lawful status." U.S. Br. as Amicus Curiae in Opp. to Reh'g En Banc 16, *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (No. 13-16248).

DACA's purported grant of lawful presence violates the Immigration and Nationality Act (INA). "The INA flatly does not permit the [Executive to deem] aliens as 'lawfully present' and thereby make them newly eligible for a host of federal and state benefits." *Texas*, 809 F.3d at 184. The Executive has no power to unilaterally "create immigration classifications" that authorize aliens' presence in this country, Pet. App. 34 (C.A. amended op.), because "the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present," *Texas*, 809 F.3d at 179. DACA violates the INA just like the materially identical DAPA program. *See id.*[4]

1. "Policies pertaining to the entry of aliens and their right to remain here are ... entrusted exclusively to Congress"—not the Executive. *Arizona*, 132 S. Ct. at 2507 (citing *Galvan v. Press*, 347 U.S. 522, 531 (1954)); *see* U.S. Const. art. I, § 8, cl. 4. Congress has accordingly enacted "extensive and complex" statutory provisions

---

Injunction Ex. 44 (Neufeld Decl.) at Ex. B, *Texas*, *supra*, ECF No. 130-11 (same in 2013 version of DACA FAQs).

[4] DACA also violates federal law because, like DAPA, it was issued without notice-and-comment rulemaking procedure. *See Texas*, 809 F.3d at 188. This brief focuses on the unlawfulness of DACA's substance under federal law.

governing when aliens may be lawfully present in the country. *Arizona*, 132 S. Ct. at 2499.

Congress has not given the Executive *carte blanche* to permit aliens to be lawfully present in the country. When Congress allows aliens to be lawfully present, it identifies these "specified categories of aliens" in statutes. *Id.*; *accord Texas*, 809 F.3d at 179.

Congress has delineated over 40 classes of lawfully present aliens: lawful permanent residents, nonimmigrants, asylees, refugees, and many others. *See* Br. of State Respondents 2-4, 45, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (*Texas* Resp. Br.); *accord Texas*, 809 F.3d at 179. The INA creates two primary categories of aliens permitted to be present in the country:

- Aliens admitted as "nonimmigrant" aliens, who receive temporary permission to be lawfully present in the country according to one of several visa categories. 8 U.S.C. § 1101(a)(15)(A)-(V).
- Aliens admitted for lawful permanent residence, that is, LPRs, who lawfully entered the country with an "immigrant" visa. *Id.* §§ 1101(a)(20), 1151, 1153, 1181.

Congress also created other avenues to lawful presence, such as admission as a refugee, *id.* §§ 1157, 1159, asylum, *id.* § 1158, and humanitarian "parole" into the country, available only "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Id.* § 1182(d)(5)(A).

When Congress has seen fit to grant lawful presence to a significant portion of the aliens present unlawfully

in the country, it has enacted legislation to do so. *E.g.*, *id.* §§ 1160, 1254a (1986 legislation). But no such legislation covers aliens unlawfully present who entered the country as minors. *See* Pet. App. 192 (OLC memo). The Executive's belief that immigration statutes have "turn[ed] out not to work in practice" to achieve a certain policy outcome does not grant the Executive "a power to revise clear statutory terms."[5] *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (*UARG*).

2. DACA directly flouts several statutory mechanisms that Congress enacted to discourage aliens from being unlawfully present in the country.

a. First, the lawful presence purportedly granted by DACA appears to negate the charge that an alien is removable as "present in the United States in violation of [federal law]," 8 U.S.C. § 1227(a)(1)(B). *Texas* Resp. Br. 5. And lawful presence under DACA may also negate the charge that an alien is removable as present "without being admitted or paroled," 8 U.S.C. § 1182(a)(6)(A)(i), because the Executive maintains that an alien granted lawful presence is *not* considered "present in the United States without being admitted or paroled," *Texas* Resp. Br. 5 (quoting Pet. Br. 9 n.3, *Texas*, 136 S. Ct. 2271). *Contra* Pet. App. 42 (amended opinion stating that because aliens with deferred action are "provisionally present without being admitted or paroled, their stay must be considered "'authorized by the [Executive]'" (quoting 8 U.S.C. § 1182(a)(9)(B)(ii))).

---

[5] DACA also violates the Take Care Clause, U.S. Const. art. II, § 3, as it purports to render conduct that Congress established as unlawful to be lawful. *See Texas* Resp. Br. 71-77.

Of course, an alien's unlawful presence does not automatically mean that he must be removed. For example, in four narrow contexts, Congress provided statutory authority to grant class-based deferred action and attendant legal consequences. *See Texas v. United States*, 787 F.3d 733, 759 & n.78 (5th Cir. 2015) (collecting statutes); *infra* p. 14-16. Congress has also imposed several statutory limitations on removal. *E.g.*, 8 U.S.C. §§ 1229b (cancellation of removal), 1231(b)(3) (withholding of removal). And due to limited enforcement resources, the Executive generally has "discretion to abandon" removal proceedings on a "case-by-case basis"—forbearance rooted in prosecutorial discretion and traditionally called "deferred action." *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483-84 & n.8 (1999) (*AADC*). But *AADC*'s conception of deferred action is far removed from deferred-action status as the Executive now confers it—as granting lawful presence and a host of attendant benefits.

b. DACA also vitiates another statutory mechanism for discouraging unlawful presence: the INA's reentry bar. Congress directed that the total time in which an alien is "unlawfully present" in the country triggers a 3- or 10-year bar on that alien's reentry into the country after departure. 8 U.S.C. § 1182(a)(9)(B)(i). But the lawful presence that DACA purports to assign would stop the reentry-bar clock. *Texas*, 809 F.3d at 166 n.99.

That is contrary to law. "Unlawful presence" is defined as an alien's presence in the United States "after the expiration of the period of stay authorized by the [Executive] *or* presen[ce] in the United States *without being admitted or paroled.*" 8 U.S.C. § 1182(a)(9)(B)(ii)

(emphases added). The disjunctive second clause triggers the reentry-bar clock for aliens who have not been admitted or paroled. *Texas* Resp. Br. 50. The INA does not authorize the Executive to stop this clock for any alien of its choosing or to admit or parole aliens into the country merely because they are not priorities for removal proceedings. *See* 8 U.S.C. § 1182(d)(5)(A) (humanitarian "parole" "shall not be regarded as an admission of the alien" into the country and is available only "on a case-by-case basis for urgent humanitarian reasons or significant public benefit").

c. For certain DACA recipients, the Executive has ignored the INA reentry bar in another way. Unlawfully present aliens who depart the country are generally inadmissible upon return. *See* 8 U.S.C. § 1182(a)(9)(B). But the Executive has given unlawfully present aliens with DACA status access to "advance parole," which allows them to leave and reenter the country.[6] *Cf. id.* § 1182(d)(5)(A). Furthermore, a number of DACA recipients who received "advance parole" subsequently obtained adjustment to LPR status[7]—and thus a path-

[6] *See* Letter from León Rodríguez, Dir., USCIS, to Sen. Grassley 1 (June 29, 2016), available at https://www.judiciary.senate.gov/imo/media/doc/2016-06-29 USCIS to CEG - DACA Advance Parole Program.pdf. Even the Executive admits that it "has been permissive in authorizing travel by DACA recipients via advance parole." Pet. Reply Br. 18 n.2, *Texas*, 136 S. Ct. 2271.

[7] Letter from Rodríguez to Grassley, *supra*, at 1-2. The Executive's electronic records did not track which of the 2,994 DACA recipients who were approved for advance parole and who were subsequently granted adjustment of status "may have been otherwise eligible for adjustment of status regardless of the grant of advance parole." *Id.* at 1.

way to citizenship, *id.* § 1427(a). *See Texas* Resp. Br. 12-13.

d. Finally, DACA violates Congress's 1996 decision to eliminate most federal benefits for unlawfully present aliens whom the Executive has not yet removed. Contrary to that condition for benefits, DACA status makes otherwise unlawfully present aliens eligible for Social Security, Medicare, and the Earned Income Tax Credit. *See Texas* Resp. Br. 7, 11-12, 16.[8]

Congress introduced "lawful presence" as a requirement for benefits eligibility in 1996. *See Texas* Resp. Br. 47. Before then, certain statutes permitted benefits for aliens "permanently residing in the United States under color of law" (PRUCOL)[9]—interpreted to include unlawfully present aliens whom the Executive was forbearing from removing. *See, e.g., Lewis v. Thompson*, 252 F.3d 567, 571-72 (2d Cir. 2001) (citing *Berger v. Heckler*, 771 F.2d 1556, 1575-76 (2d Cir. 1985)).

In 1996, Congress eliminated most benefits for these aliens. It did so in part by enacting welfare-reform legislation replacing PRUCOL status with "lawful presence" as the immigration classification triggering eligi-

---

[8] In addition to these federal benefits, DACA also makes aliens eligible under some state laws for benefits, such as driver's licenses, *e.g.*, Tex. Transp. Code § 521.142(a), and unemployment insurance, *e.g.*, Tex. Lab. Code § 207.043(a)(3).

[9] *E.g.*, Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9406(a), 100 Stat. 1874, 2057 (amending 42 U.S.C. § 1396b(v)(1)) (prohibiting nonemergency Medicaid payments for aliens "not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law").

bility for specified benefits. The legislative history confirmed that "[p]ersons residing under color of law shall be considered to be aliens *unlawfully present* in the United States." H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2771 (emphasis added).

As relevant here, Congress required aliens to be "lawfully present in the United States as determined by the [Executive]" to obtain Social Security, Medicare, and another retirement benefit. 8 U.S.C. § 1611(b)(2)-(4). DACA purports to enable access to those benefits. *See* 8 C.F.R. § 1.3(a)(4)(vi); 45 C.F.R. § 152.2(4)(vi). Yet extensive statutory criteria define when an alien's presence is lawful, and these provisions do not mention discretion to deem any alien in the country lawfully present. *See supra* pp. 7-9. Nor does anything in the legislative history suggest such discretion. *See Texas* Resp. Br. 49 & n.36. DACA thus does what Congress prohibited in 1996: it authorizes benefits for aliens, not because their presence is authorized by law, but simply because the Executive is forbearing from removing them.

B. DACA contravenes statutes defining which aliens are authorized to work in this country.

The ability of DACA recipients to present employment-authorization documents (EADs) as proof of lawful presence is central to the Ninth Circuit's holding. *See* Pet. App. 18-20, 23, 28-32, 38-40, 50 (C.A. amended op.). But DACA's unilateral grant of work authorization, Pet. App. 199 (DACA memo), violates immigration statutes and is unlawful.

1. Congress has not given the Executive free rein to grant work authorization. Instead, Congress intri-

cately defined which aliens are authorized for employment in the country.

About 20 nonimmigrant-visa categories directly authorize employment. *E.g.*, 8 U.S.C. § 1101(a)(15)(H) (temporary employment of certain nonimmigrants), (P) (entertainment work).[10] Congress also requires the Executive to authorize employment of other categories of aliens, such as:

- Asylum holders, *id.* § 1158(c)(1)(B);
- Temporary protected status, *id.* § 1254a(a)(1)(B);
- Aliens granted and applying for relief under the Immigration Reform and Control Act of 1986 (IRCA), *id.* § 1255a(b)(3), (e)(1)-(2);
- Aliens granted "Family Unity" under the Immigration Act of 1990, Pub. L. No. 101-649, tit. III, § 301, 104 Stat. 4978, 5029 (codified as amended at 8 U.S.C. § 1255a note).

Congress then provided that aliens in certain categories are "eligible" for or "may" receive work authorization from the Executive; those categories include:

- Asylum applicants, 8 U.S.C. § 1158(d)(2);
- Certain battered spouses of nonimmigrants, *id.* § 1105a(a);
- Certain agricultural worker preliminary applicants, *id.* § 1160(d)(3)(A);

---

[10] *See also* USCIS, *How Do I Change to Another Nonimmigrant Status?* 2 (Jan. 2016), https://www.uscis.gov/sites/default/files/USCIS/Resources/C2en.pdf.

- Certain nationals applying for status adjustment;[11]
- Deferred-action U-visa applicants;[12]
- Deferred-action family members of LPRs killed on September 11, 2001;[13]
- Deferred-action family members of U.S. citizens killed in combat;[14] and
- Deferred-action Violence Against Women Act self-petitioners and family members.[15]

Against the backdrop of that "comprehensive framework," *Arizona*, 132 S. Ct. at 2504, there is no power to unilaterally grant work authorization to any unlawfully present alien whom the Executive chooses not to remove. A view of work authorization that would make Congress's detailed work-authorization provisions surplusage must be rejected. *Bd. of Trustees of Leland Stanford Jr. Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 788 (2011). Importantly, when Congress wanted to provide work-authorization eligibility to four nar-

---

[11] Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, div. A, § 101(h), tit. IX, § 902(c)(3), 112 Stat. 2681-538, 2681-539; Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit. II, § 202(c)(3), 111 Stat. 2160, 2193 (1997).

[12] 8 U.S.C. § 1184(p)(6); *see id.* § 1227(d)(1)-(2).

[13] USA PATRIOT Act of 2001, Pub. L. No. 107-56, tit. IV, § 423(b)(1)-(2), 115 Stat. 272, 361.

[14] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, tit. XVII, § 1703(c)(2), 117 Stat. 1392, 1694-95.

[15] 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV), (a)(1)(K).

row classes of deferred-action recipients, it did so by statute.[16] Otherwise, the 1986 IRCA "prohibit[s] the employment of aliens who are unauthorized to work in the United States because they either *entered the country illegally*, or are in an immigration status which does not permit employment." H.R. Rep. No. 99-682(I), at 46, 51-52 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650, 5655-56 (emphasis added).

Contrary to Judge Berzon's suggestion, Pet. App. 52-53 (Berzon, J., concurring in the denial of reh'g en banc), 8 U.S.C. § 1324a(h)(3) does not convey the broad power to authorize employment. *Texas* Resp. Br. 52-53. Section 1324a(h)(3) is simply a definitional section in an IRCA provision regulating employer liability for hiring an "unauthorized alien." 8 U.S.C. § 1324a(a). Section 1324a(h)(3) defines "unauthorized alien" to mean aliens who are not either LPRs or "authorized to be so employed by [the INA] or by the [Executive]."[17] This section merely tells employers that they can rely on work authorization conferred by statute or by the Executive

---

[16] 8 C.F.R. § 274a.12(c)(14) makes work authorization available to certain aliens granted "deferred action." This provision would cover the four categories of deferred-action recipients that Congress made eligible for work authorization. *See Texas*, 787 F.3d at 762 n.95.

[17] The phrase "authorized to be so employed by [the INA]" refers to all the alien categories directly authorized to work by the INA itself, like many recipients of nonimmigrant visas. *See supra* p. 14. The phrase "authorized to be so employed ... by the [Executive]" refers to the alien categories for which the Executive either must or may separately grant work authorization. *See supra* pp. 14-15.

without fear of liability. As the Fifth Circuit rightly concluded, *Texas*, 809 F.3d at 183, this section does not address the scope of the Executive's delegated work-authorization power, let alone covertly grant the Executive power to undo Congress's comprehensive 1986 IRCA reforms with the stroke of a pen. *See Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes").

2. DACA's work-authorization component thus flouts numerous restrictions that Congress imposed on the employment of unauthorized aliens. In 1986, IRCA created "a comprehensive framework for 'combating the employment of illegal aliens.'" *Arizona*, 132 S. Ct. at 2504 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)). Breaking with previous law, Congress created penalties for employers who hire "unauthorized aliens"—another mechanism for discouraging unlawful immigration. 8 U.S.C. § 1324a(a), (f); *see Texas*, 809 F.3d at 181 & n.174 (citing *Hoffman Plastic Compounds*, 535 U.S. at 147). Unauthorized employment also has legal consequences for the alien. It generally makes aliens ineligible to adjust to LPR status, 8 U.S.C. § 1255(c)(2), and forecloses any available tolling of the unlawful-presence clock under the INA's reentry bar, *id.* § 1182(a)(9)(B)(iv).

Furthermore, work authorization allows aliens to obtain a Social Security number, and therefore eligibility for the valuable Earned Income Tax Credit, *Texas*, 809 F.3d at 149 & n.18 (referencing district court citation of IRS Commissioner testimony); *see* 26 U.S.C. § 32(c)(1)(E), (m). The Executive's position on this matter reflects the view that aliens' receipt of work authori-

zation connotes that their "*status* is so changed as to make it lawful for them to engage in such employment," thus allowing a Social Security number to issue. 42 U.S.C. § 405(c)(2)(B)(i)(I) (emphasis added); *accord* 20 C.F.R. § 422.104(a)(2).

C. DACA is unsupported by historical practice.

"[P]ast practice does not, by itself, create power." *Medellín v. Texas*, 552 U.S. 491, 532 (2008) (citation and quotation marks omitted). Regardless, the historical practice here confirms that DACA is unlawful. *See Texas* Resp. Br. 53-59.

Many of the historical programs preceding DACA—where the Executive was forbearing from removing classes of aliens—were supported by statutory authorization that Congress has since curtailed. Several programs were forms of "parole," which previously had been left to the "discretion" of the Executive "under such conditions as he may prescribe." 8 U.S.C. § 1182(d)(5)(A) (1952). But Congress clamped down on the Executive's statutory parole authority in 1996. *See* 8 U.S.C. § 1182(d)(5)(A).

Other programs, including the 1990 Family Fairness program,[18] Pet. App. 27 n.2 (C.A. amended op.), offered "extended voluntary departure" that Congress permitted at the time. *See* 8 U.S.C. §§ 1252(b), 1254(e) (1988). But Congress took that power away in 1996, capping voluntary departure at 120 days. 8 U.S.C. § 1229c(a)(2)(A).

---

[18] Family Fairness granted relief to only about 1% of the country's unlawfully present aliens (about 47,000 people), David Hancock, *Few Immigrants Use Family Aid Program*, Miami Herald, Oct. 1, 1990, at 1B.

Historical practice does not support DACA's work-authorization component either. No Executive practice preceding IRCA's comprehensive regulation of alien employment offers relevant support because, before IRCA in 1986, there was no general federal ban on hiring unauthorized aliens.

Post-1986 historical practice is equally unsupportive of unilateral work-authorization power. Congress has never amended IRCA's definition of "unauthorized alien" in 8 U.S.C. § 1324a(h)(3). Congress has thus consistently maintained its intent to generally "prohibit the employment of aliens" who "entered the country illegally." H.R. Rep. No. 99-682(I), at 46, 1986 U.S.C.C.A.N. at 5650. Congress reinforced that position in 1996, capping the period of voluntary departure and thus eliminating the basis for work authorization provided under programs like the 1990 Family Fairness program.

The Executive did promulgate a post-IRCA work-authorization regulation that covered a few categories of aliens either with a pending application for status or whom the Executive was forbearing from removing. *E.g.*, 8 C.F.R. § 274a.12(c)(9)-(10), (c)(14), (c)(16).[19] The regulation's grant of work-authorization eligibility to deferred-action recipients is valid in the four narrow contexts in which Congress, by statute, deemed deferred-action recipients eligible for work authorization. *See supra* p. 14-16.

---

[19] For many alien classes covered by this regulation, work authorization is ancillary to an existing legal status. *E.g.*, 8 C.F.R. § 274a.12(a). Numerous classes consist of aliens lawfully admitted with a nonimmigrant visa. *Id.* § 274a.12(a)(6), (a)(9), (c)(3), (c)(5)-(7), (c)(17), (c)(21), (c)(25).

But this regulation cannot show congressional acquiescence to a massive new program like DACA, when the Executive itself justified its deferred-action regulation based on the minuscule number of work authorizations it would allow. 52 Fed. Reg. 46,092, 46,092-93 (Dec. 4, 1987) (number of aliens covered was so small as "to be not worth recording statistically" and "the impact on the labor market is minimal"); *see also Texas*, 86 F. Supp. 3d at 639 n.46 (only 500-1,000 aliens received deferred action annually from 2005-2010, before DACA). And only a handful of class-based deferred-action programs operated in the past 50 years, essentially as "bridges from one legal status to another." *Texas*, 809 F.3d at 184; *see* Josh Blackman, *The Constitutionality of DAPA Part I*, 103 Geo. L.J. Online 96, 119-25 (2015) (historical overview); *Texas* Resp. Br. 59 n.47 (noting the four examples). Historical practice provides no basis to argue congressional acquiescence to a program like DACA, much less a basis that could overcome the numerous statutes this program contravenes.

D. The Ninth Circuit's preemption ruling was incorrect.

Because DACA lacks congressional authorization, the Ninth Circuit erred in holding that DACA preempts state law.

1. The Ninth Circuit erred because the INA does not "delegate[] to the [E]xecutive" power to unilaterally authorize aliens' presence. Pet. App. 36 (C.A. amended op.).

"The INA evinces a 'clear and manifest' intention *not* to cede this field to the executive." Pet. App. 8 (Kozinski, J., dissenting from the denial of reh'g en

banc). Insofar as this purported delegation relates to preemption analysis, "the INA has spoken directly to the issue and 'flatly does not permit' executive supplementation like the DACA program." *Id.* (quoting *Texas*, 809 F.3d at 184). And implied authority to deem hundreds of thousands of aliens lawfully present cannot exist. That is "a question of deep 'economic and political significance' that is central to [the INA's] statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *UARG*, 134 S. Ct. at 2444); *see* Pet. App. 8 (Kozinski, J., dissenting from the denial of reh'g en banc).

The definition of "unlawful presence" in the INA's reentry bar does not give the Executive unilateral power to confer lawful presence on any alien it chooses. *Cf.* Pet. App. 42 (C.A. amended op.). This statute's definition of unlawful presence refers to a "period of stay authorized by the [Executive]." 8 U.S.C. § 1182(a)(9)(B)(ii). But that is just one of two alternative clauses. An alien is also unlawfully present if in the country "without being admitted or paroled." *Id.*; *see supra* pp. 10-11. As Judge Kozinski noted: "Even if it were true that an immigrant was 'unlawfully present' if he stayed beyond a period approved by the [Executive], this doesn't mean he would be 'lawfully present' if he didn't stay beyond such a period." Pet. App. 7 n.3 (Kozinski, J., dissenting from the denial of reh'g en banc). Contrary to the Ninth Circuit's opinion, Pet. App. 42 (C.A. amended op.), no regulation provides reentry-bar tolling for DACA recipients or requires "deference"; the cited regulations are

limited to certain crime and human trafficking victims, *see* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2).

Nor does the REAL ID Act suggest congressional approval of DACA. Simply because the REAL ID Act contemplates that States may issue driver's licenses to deferred-action recipients does not mean that States must do so. "The provision actually says that a state 'may only issue a temporary driver's license or temporary identification card' to deferred-action immigrants—a limit, not a requirement." Pet. App. 8 (Kozinski, J., dissenting from the denial of reh'g en banc) (quoting REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 202(c)(2)(C)(i), 119 Stat. 302, 313).

2. The Ninth Circuit purported to decline to rule on DACA's lawfulness, while holding that Arizona's decision to deny driver's licenses to DACA recipients was preempted by federal law. Pet. App. 44, 47 (C.A. amended op.). That purported restraint is illusory. As Judge Kozinski noted, one is "at a loss to explain how . . . [t]he President's policies may or may not be 'lawful' and may or may not be 'law,' but are nonetheless part of the body of 'federal law' that imposes burdens and obligations on the sovereign states." Pet. App. 4 (Kozinski, J., dissenting from the denial of reh'g en banc).

The Ninth Circuit asserted that what preempted Arizona's driver's-license policy was not DACA but the INA's definition of "authorized presence." Pet. App. 16; *see* Pet. App. 34, 38, 39-40 & n.8 (C.A. amended op.). But asking whether Arizona's decision to recognize DACA recipients as unlawfully present is preempted by the INA's lawful-presence definition is just another way of asking whether the INA authorizes DACA's granting

of lawful presence. The Ninth Circuit's decision necessarily requires concluding that DACA is lawful—even if the Ninth Circuit "ben[t] over backward" to purportedly avoid reaching that issue. Pet. App. 4 (Kozinski, J., dissenting from the denial of reh'g en banc). No ambiguity in the Ninth Circuit's reasoning precludes this Court from reaching the questions presented.

3. To recap, Congress did not, "through the INA, delegate[] to the executive branch" the power to make "immigration classification[s]," Pet. App. 36 (C.A. amended op.), which render unlawful presence lawful, *see supra* Part I.A. And, as the Fifth Circuit held with respect to DACA's expansion, programs like DACA are more than mere prosecutorial discretion. *Cf.* Pet. App. 46 (C.A. amended op.). DACA, like DAPA, relies on a massive bureaucracy to grant applicants lawful presence, related benefits eligibility, and work authorization. *See* C.A. E.R. 31, 33-34 (DAPA memo).

DACA is thus affirmative governmental action, *see Texas*, 809 F.3d at 165-68, not just a decision to forbear from enforcement, *cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985). DACA goes far beyond this Court's understanding of deferred action as only the "discretion to abandon" removal proceedings. *AADC*, 525 U.S. at 483-84 & n.8. Instead, DACA reflects a "general policy" that contravenes the Executive's "statutory responsibilities." *Heckler*, 470 U.S. at 833 n.4. Comparing DACA to past Executive practice, *see supra* Part I.C, shows that DACA is far from the "'general policy' non-enforcement" described by the Ninth Circuit, Pet. App. 46 (C.A. amended op.).

The history of DACA and DAPA further confirm that they are unlawful executive actions. President Obama repeatedly urged Congress to pass the DREAM Act, *see* Pet. 6-7, which would generally allow unlawfully present aliens to apply for conditional-permanent-resident status if, among other things, they had been in the country continuously for five years and entered before age 16. *See Texas* Resp. Br. 9. After Congress repeatedly refused, the Executive created DACA. *See Texas* Resp. Br. 9. The Executive described DACA as an "exercise of prosecutorial discretion" "on an individual basis." Pet. App. 197 (DACA memo). But Executive officials mechanically approve applications that meet DACA's eligibility criteria. *See Texas* Resp. Br. 9. Unlike prosecutorial discretion, DACA confers a meaningful immigration classification established by Congress. *See supra* pp. 7-9, 12-13. And when the 113th Congress did not pass the DREAM Act and President Obama responded with DAPA, *Texas* Resp. Br. 10-11, the President then admitted, "I just took an action to change the law." *Texas*, 86 F. Supp. 3d at 668 & n.94 (citation and quotation marks omitted).

The Executive has admitted that DACA and DAPA recipients receive a "lawful" status. *See supra* pp. 6-7; U.S. Br. as Amicus Curiae in Opp. to Reh'g En Banc 16; *Ariz. Dream Act Coal.*, 757 F.3d 1053. Even the Executive's own benefits regulations have established a "deferred action status." 8 C.F.R. § 1.3(a)(4)(vi); 45 C.F.R. § 152.2(4)(vi). The Executive similarly conceded in *Texas v. United States* that DAPA "works in a way that's different than ... prosecutorial discretion" because it grants inducements "for people to come out and identify

themselves." J.A. 716, *Texas*, 136 S. Ct. 2271. In short, DACA "purports to *alter* [statutory] requirements" and thus is not "an exercise of [the Executive's] enforcement discretion." *UARG*, 134 S. Ct. at 2445.

II. Even If DACA Were Merely Enforcement Discretion, It Could Not Preempt State Law Under *Arizona v. United States*.

As explained above in Part I, DACA is much more than mere enforcement discretion because it affirmatively grants lawful presence and work authorization. But, even if DACA were just enforcement discretion, it could not preempt state law under *Arizona v. United States*. As *Arizona* held, mere Executive Branch "federal enforcement priorities" cannot preempt state law. 132 S. Ct. at 2508. Instead, preemption analysis must examine what "Congress has done" or delegated through statutes. *Id.*; *see also id.* at 2524 (Alito, J., concurring in part and dissenting in part) ("The United States' argument that [Arizona law] is pre-empted, not by any federal statute or regulation, but simply by the Executive's current enforcement policy is an astounding assertion of federal executive power that the Court rightly rejects.").

The Ninth Circuit's understanding of DACA contradicts settled law that Executive enforcement policy lacks preemptive effect. "It is Congress—not the [Executive]—that has the power to pre-empt otherwise valid state laws." *North Dakota v. United States*, 495 U.S. 423, 442 (1990). "Executive Branch actions [like] press releases, letters, and *amicus* briefs" are not law. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298,

329-30 (1994). "Executive Branch communications" may thus "express federal policy" but they "lack the force of law." *Id.*; *see Arizona*, 132 S. Ct. at 2508.

The Ninth Circuit, however, now "holds that the enforcement decisions of the President are federal law." Pet. App. 4 (Kozinski, J., dissenting from the denial of reh'g en banc). This directly conflicts with *Arizona*'s admonishment that federal enforcement priorities cannot preempt state law. Furthermore, Arizona's law follows Congress's immigration classifications "to the letter." Pet. App. 4. The Ninth Circuit's preemption ruling is thus particularly damaging because it strips the States of their role in the legislative process and allows the Executive an unchecked ability to supplant state law. *See, e.g.*, Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869, 878 (2008) ("The political and procedural safeguards of federalism are thus readily circumvented through executive action.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEVEN T. MARSHALL
Attorney General of
Alabama

LESLIE RUTLEDGE
Attorney General of
Arkansas

CHRISTOPHER M. CARR
Attorney General of
Georgia

DEREK SCHMIDT
Attorney General of
Kansas

JEFF LANDRY
Attorney General of
Louisiana

JOSHUA D. HAWLEY
Attorney General of
Missouri

TIM FOX
Attorney General of
Montana

DOUGLAS J. PETERSON
Attorney General of
Nebraska

KEN PAXTON
Attorney General of
Texas

JEFFREY C. MATEER
First Assistant Attorney
General

SCOTT A. KELLER
Solicitor General
Counsel of Record

J. CAMPBELL BARKER
Deputy Solicitor General

ARI CUENIN
Assistant Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

MIKE HUNTER
Attorney General of
Oklahoma

ALAN WILSON
Attorney General of
South Carolina

HERBERT H. SLATERY III
Attorney General and
Reporter of Tennessee

PATRICK MORRISEY
Attorney General of
West Virginia

PHIL BRYANT
Governor of Mississippi

MAY 2017

No. 17-15589

In the United States Court of Appeals for the Ninth Circuit

STATE OF HAWAI'I AND ISMAIL ELSHIKH,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawai'i

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MONTANA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND A STAY PENDING APPEAL

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
scott.keller@oag.texas.gov

SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
Deputy Solicitor General

ARI CUENIN
Assistant Solicitor General

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF

Amici curiae the States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and Governor Phil Bryant of the State of Mississippi respectfully move for leave to file a brief as amici curiae in support of appellants and a stay pending appeal. The parties consent to the proposed amicus brief, which accompanies this motion and Form 8 certification.

1. On March 6, 2017, the President issued Executive Order 13,780, determining that "the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States." 82 Fed. Reg. 13,209, 13,213 (Mar. 9, 2017). "In light of the conditions in these six countries, until the assessment of current screening and vetting procedures" required by the Order are completed, the Order states that "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* at 13,211. "Accordingly, while that assessment is ongoing," the Order imposes a "temporary pause on the entry of nationals" from these six countries, "subject to categorical exceptions and case-by-case waivers," as described in the Order. *Id.* The Order also imposes a temporary restriction on aliens seeking entry under the U.S. Refugee Admissions Program. *Id.* at 13,215-16. On March 15, 2017, the district court enjoined the Executive Order in part on the basis that plaintiffs were likely to prevail on their Establishment Clause claim.

2. Federal Rule of Appellate Procedure 29 permits a State to file an amicus brief without the parties' consent or leave of court "during a court's initial consideration of a case on the merits." Fed. R. App. P. 29(a)(1), (2). Although the parties consent to the proposed amicus brief, that rule appears not to govern here both because the case is before the Court in a stay posture simultaneously with the "case on the merits," and because the attached brief is submitted on behalf of fourteen States as well as the Governor of Mississippi. *See id.* 29(a)(2) (no leave of Court required for amicus brief of a "state").

3. Amici respectfully move for any necessary leave to file an amicus brief at this stage, in support of appellants and in support of their motion to stay pending appeal being considered simultaneously by the Court. The attached proposed brief includes material that is "desirable" and "relevant to the disposition of the case." *Id.* 29(a)(3). The amicus brief provides an overview of the federal immigration laws against which plaintiffs' statutory and constitutional claims should be evaluated; explains that the Executive Order reflects a policy decision delegated to the Executive Branch expressly by Congress, and was issued after multiple federal officials drew public attention to serious flaws in the preexisting vetting scheme for aliens residing abroad who wish to enter this country; and draws the Court's attention to authorities relevant to the extension of constitutional rights that plaintiffs advocate here.

4. This is a case of national interest with important and far-reaching foreign-affairs and national-security implications. Amici have a substantial interest in the health and welfare of their citizens, but the States and their elected officials must

rely on the federal Executive to determine when the entry of aliens should be suspended for public-safety reasons under a regime crafted by the States' elected representatives in Congress. *See generally Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012). Amici thus share a substantial interest in the federal government having the latitude to make policy judgments reserved to it by statute, and inherent in this country's nature as a sovereign, regarding the terms and conditions for whether aliens may enter the country.

5. Amici have also endeavored to assist the Court in resolving the weighty issues in this case in as few words as possible. The attached brief complies with the type-volume limitation for an amicus brief on the merits because it uses fewer than half of the 14,000 words that are allotted for appellants' opening brief during the Court's initial consideration of the case on the merits. *See* Fed. R. App. P. 29(a)(1), (5), 32(a)(7)(B)(i); 9th Cir. R. 32-1(a).

6. The parties consent to the relief requested in this motion.

CONCLUSION

Amici respectfully request leave to file the attached brief as amici curiae supporting appellants and a stay pending appeal.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

s/ Scott A. Keller
SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
Deputy Solicitor General

ARI CUENIN
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
scott.keller@oag.texas.gov

CERTIFICATE OF CONFERENCE

This motion has been conferenced with counsel for the parties, and the parties consent to the filing of the proposed amicus brief for which leave to file is requested herein.

s/ Scott A. Keller
SCOTT A. KELLER

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Scott A. Keller
SCOTT A. KELLER

No. 17-15589

In the United States Court of Appeals for the Ninth Circuit

STATE OF HAWAI'I AND ISMAIL ELSHIKH,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; AND THE UNITED STATES OF AMERICA,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawai'i

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MONTANA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND A STAY PENDING APPEAL

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
scott.keller@oag.texas.gov

SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
Deputy Solicitor General

ARI CUENIN
Assistant Solicitor General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes and Rules

Miscellaneous

INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and Governor Phil Bryant of the State of Mississippi.[1] Amici have a significant interest in protecting their residents' safety. But the States possess no authority to restrict or set the terms of aliens' entry into the United States for public-safety and national-security reasons. Instead, the States and their elected officials rely on the federal Executive Branch to carry out that function pursuant to the laws of Congress. *See Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012). Congress delegated to the Executive Branch significant authority to prohibit aliens' entry into the country, and the challenged Executive Order is a lawful exercise of that authority. Plaintiffs' lawsuit presents no basis to enjoin the Order.

[1] By separate motion, amici request leave to file this brief, to which the parties consent.

SUMMARY OF THE ARGUMENT

After multiple federal officials drew public attention to serious flaws in the preexisting vetting scheme for aliens residing abroad who wish to enter this country with visas or as refugees, the Executive Branch made a policy decision entrusted to it expressly by Congress: the Executive temporarily suspended the admission of specified classes of aliens pursuant to its broad authority under 8 U.S.C. § 1182(f). This Executive Order expressly identified a heightened national-security risk attendant to six countries that Congress and the Obama Administration had previously identified as "countries of concern" under national-security-risk criteria.

The district court's injunction of the Executive Order is remarkable. The Order falls within the Executive Branch's strongest area of authority—*Youngstown*'s first zone of executive action—because it draws support not only from the President's own foreign-affairs and national-security powers, but also from Congress's delegated authorization pursuant to its Article I powers over the admission of aliens into the country. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring). The Executive Order, especially given its national-security context, thus enjoys "the strongest of presumptions and the widest latitude of judicial interpretation." *Id.* at 637. After all, "[u]nlike the President and some designated Members of Congress, neither the Members of [the Supreme] Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008). Furthermore, there is a "heavy presumption of constitutionality to which a carefully considered decision of a coequal and representative branch of

our Government is entitled." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (citation and quotation marks omitted).

Plaintiffs cannot satisfy the heavy burden necessary to overcome that strongest presumption of validity. Their argument would extend the Constitution's application to policies regarding *nonresident aliens* who are *outside this country* and attempting to enter the country. The Constitution does not apply extraterritorially to nonresident aliens who are in foreign territory clearly not under the sovereign control of the United States and who are attempting to enter this country. Indeed, the Supreme Court has recognized that there is no "judicial remedy" to override the Executive's use of the delegated § 1182(f) power to deny classes of nonresident aliens entry into the country. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993).

Yet even if plaintiffs were correct that constitutional protections apply extraterritorially to nonresident aliens abroad, no constitutional violation exists here. A discriminatory-purpose pretext analysis of governmental action is exceedingly limited under the Supreme Court's precedents. Under those precedents, the Executive Order is nothing close to a pretext for religious discrimination: it is grounded in national-security concerns and classifies aliens according to nationality—not religion. The six countries covered by the Order were previously identified by Congress and the Obama Administration, under the visa-waiver program, as national-security "countries of concern." In fact, before the current presidential Administration took office, multiple federal officials—including the FBI Director, the former Assistant Director of the FBI's Counterterrorism Division, and the former

Director of National Intelligence—expressed concerns with deficiencies in the country's ability to vet the entry of aliens. *See infra* pp. 17-18.

The court below relied (D.E.270 at 15) on the three-judge panel's suggestion in *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), that the Executive was unlikely to prevail against an Establishment Clause challenge to the prior Executive Order. *See id.* at 1167-68. That reliance was mistaken; the panel's suggestion is dicta and is unpersuasive. The *Washington* panel opinion's due-process reasoning is also incorrect and should be overruled in an appropriate case. *See* Amended Order, *Washington v. Trump*, No. 17-35105, slip op. 7 (9th Cir. Mar. 17, 2017) (Kozinski, J., dissenting from denial of rehearing en banc); *id.*, slip op. 24-26 (Bybee, J., dissenting from denial of rehearing en banc).

The district court's ruling is an intrusion into the national-security, foreign-affairs, and immigration powers possessed by the Executive and delegated by Congress in the Immigration and Nationality Act (INA). The injunction is contrary to law, and it threatens amici's interests by denying the federal government—under a statutory regime crafted by the States' elected representatives in Congress—the latitude necessary to make policy judgments inherent in this country's nature as a sovereign. This Court should grant defendants' motion to stay and ultimately reverse.

ARGUMENT

I. The Strongest Presumption of Validity Applies to the Executive Order Because It Falls Within *Youngstown*'s First Category of Executive Action Pursuant to Power Expressly Delegated by Congress.

This lawsuit seeks a remarkable use of the judicial power to interfere with the President's national-security decisions in an area of strongest executive authority. Because the Executive Order implements power expressly delegated by Congress, the President's authority is at its maximum and "includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), *quoted in Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000), *and Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015). Executive action in this first *Youngstown* zone is "supported by the strongest of presumptions" of validity. *Id.* at 637, *quoted in Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981).

A. The Order's suspension of entry is an exercise of authority expressly delegated by Congress in the INA.

The President has temporarily suspended the entry into the United States of two classes of aliens:

- nationals of six listed countries, if they are not lawful permanent residents (LPRs) of the United States, were outside this country ten days after the Executive Order issued, and do not qualify for other exceptions (such as holding a valid visa ten days after the Executive Order issued); and
- aliens seeking entry under the U.S. Refugee Admissions Program.

Executive Order 13,780 §§ 2, 3, 6, 82 Fed. Reg. 13,209, 13,212-16 (Mar. 9, 2017) (EO). That suspension is an exercise of broad, discretionary authority delegated to the President by Congress to suspend the entry of aliens. 8 U.S.C. § 1182(f).

1. "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Congress has recognized this too, as it gave the President broad discretion to suspend the entry of any class of aliens:

> *Whenever* the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, *he may by proclamation*, and *for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens* as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f) (emphases added). It is unlawful for an alien to enter the country in violation of "such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

In addition to the President's § 1182(f) power to suspend the entry of aliens, Congress also provided that the Executive Branch "may at any time, in [its] discretion," revoke a visa. *Id.* § 1201(i). Such a discretionary visa revocation is judicially unreviewable except in one narrow circumstance: in a removal proceeding, if the "revocation provides the sole ground for removal." *Id.*

The President's power to limit refugee admission is authorized not only by § 1182(f) but also by the INA's separate delegation to the President of the power to

control the number of refugee admissions. *Id.* § 1157(a)(2) (refugee admissions capped at "such number *as the President determines*," after certain congressional consultation, "is justified by humanitarian concerns *or is otherwise in the national interest*" (emphases added)).

2. As an initial matter, any challenge to an exercise of the President's § 1182(f) power founders on *Sale*, 509 U.S. at 187-88. At issue there was a challenge on behalf of Haitian migrants to an executive order requiring that certain aliens interdicted at sea be immediately returned to their home country without an opportunity to present asylum claims. *Id.* at 164-66. *Sale* held it "perfectly clear that 8 U.S.C. § 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Id.* at 187. The Court rejected the argument that a later-enacted statutory provision limits the President's power under § 1182(f) to suspend aliens' entry into the United States, reasoning that it "would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect." *Id.* at 176.

ty intereste Court in *Sale* ultimately concluded that there is no "judicial remedy" remedy" to override the Executive's use of the § 1182(f) power to deny classes of nonresident aliens entry. The Court found itself "in agreement with the conclusion expressed in Judge Edwards' concurring opinion in" *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987): "'*there is no solution to be found in a judicial*

remedy'" that overrides the Executive's exercise of § 1182(f) authority.[2] *Sale*, 509 U.S. at 188 (quoting *Gracey*, 809 F.2d at 841 (Edwards, J., concurring)) (emphasis added). *Sale* is thus fatal to plaintiffs' claims.

3. The sweeping delegation of authority in § 1182(f) is not undermined by 8 U.S.C. § 1152(a)(1)(A). Section 1152(a)(1)(A) does not address the *entry* of aliens into the country. Instead, it is part of a set of restrictions on the *issuance* of *immigrant visas*: visas for aliens to seek admission for permanent residence.[3] *See* 8 U.S.C. §§ 1101(a)(15)-(16), 1151(a)-(b), 1181(a). Added in the Immigration and Nationality Act of 1965, which abolished an earlier national-origins-formula quota system, § 1152(a)(1)(A) states:

> Except as specifically provided [elsewhere in the INA], no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Section 1152(a)(1)(A) does not conflict with § 1182(f) or impliedly restrict nationality-based denials of entry under § 1182(f). *See Sale*, 509 U.S. at 176; *see also Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) (describing conflict re-

---

[2] Notably, Judge Edwards' persuasive conclusion in *Gracey* addressed both statutory and constitutional challenges. *See* 809 F.2d at 837-38.

[3] Section 1152(a)(1)(A) addresses only the issuance of an "immigrant visa." Because § 1152(a)(1)(A) does not apply to nonimmigrant visas, it could not possibly show that § 2 of the Order is unauthorized by the INA as applied to aliens seeking entry as nonimmigrants. Similarly, refugee admission does not require an immigrant visa. *See* 8 U.S.C. § 1181(c). So § 1152(a)(1)(A) cannot show that the INA somehow withholds any authority for § 6 of the Order.

quirement for repeal by implication). An alien's *entry* into this country is a different and much more consequential event than the preliminary step of receiving a *visa*, which merely entitles the alien to apply for admission.[4] Visa possession does not control or guarantee entry into the country; the INA provides several ways in which visa-holding aliens can be denied entry. *See, e.g.*, 8 U.S.C. §§ 1101(a)(13)(A), 1182(a), (f), 1201(h), (i); 22 C.F.R. §§ 41.122, 42.82. One of them is the President's express authority under § 1182(f) to suspend the entry of classes of aliens.

This design of the INA has been repeatedly recognized in past practice. For example, over 30 years ago, the Executive suspended the entry of Cuban nationals into the United States as immigrants, subject to certain exceptions. Presidential Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986). Plaintiffs point to no instance in which the Executive has treated § 1152(a)(1)(A) as prohibiting nationality-based suspensions of entry under § 1182(f). It does not.

4. Nor does 8 U.S.C. § 1182(a) limit the President's § 1182(f) authority to suspend aliens' entry. In § 1182(a), Congress enumerated no fewer than seventy grounds that make an alien automatically inadmissible to the United States, unless an exception applies. And Congress did not provide that these are the only grounds

---

[4] A visa does not entitle an alien to enter the country. Entry can be denied, for example, if the alien is found inadmissible upon arrival at a port of entry. *Id.* § 1201(h). "Admission" of an alien means "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A). Mere presence on U.S. soil is not enough: "an alien present in the United States who has not been admitted or who arrives in the United States" is only an "applicant for admission." *Id.* § 1225(a)(1).

on which the Executive can deny aliens entry. Instead, Congress in § 1182(f) separately enabled the President to impose additional entry restrictions, including the power to "suspend the entry" of "any class of aliens" for "such period as he shall deem necessary." As the D.C. Circuit correctly recognized in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), § 1182(f) permits the Executive to deny aliens entry even if the aliens are not covered by one of the enumerated § 1182(a) categories that automatically render an alien inadmissible: "The President's sweeping proclamation power [in § 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a)." *Id.* at 1049 n.2. The *Abourezk* court even noted an example of this understanding in a nationality-based § 1182(f) proclamation issued by President Reagan, which suspended entry for "officers or employees of the Cuban government or the Cuban Communist Party." *Id.* (citing Presidential Proclamation No. 5377, 50 Fed. Reg. 41,329 (Oct. 10, 1985)).

B. Because the Order's directives are in *Youngstown*'s first zone, they receive the strongest presumption of validity.

Executive action in the first *Youngstown* zone—exercising power assigned by Congress—is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in Dames & Moore*, 453 U.S. at 674.

That respect attaches here because of not only the explicit congressional grant of authority to deny entry, 8 U.S.C. § 1182(f), but also the INA's complementary approach to allowing entry. Specifically, Congress enacted "extensive and com-

plex" provisions detailing how over forty different classes of nonimmigrants, refugees, and other aliens can attain lawful presence in the country. *Arizona*, 132 S. Ct. at 2499; *see Texas v. United States*, 809 F.3d 134, 179 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). But while Congress provided these detailed criteria to significantly restrict the Executive's ability to unilaterally *allow* aliens to be lawfully present in the country, Congress simultaneously delegated the Executive broad discretionary authority to *exclude* aliens from the country, under § 1182(f).

The exclusion of aliens is also a core federal prerogative: a power "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (quotation marks omitted); *accord United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). The burden of persuasion must "rest heavily upon" any party who might attack the Executive's congressionally authorized action on such a fundamental aspect of sovereignty. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

II. Plaintiffs' Arguments that the Executive Order Violates the Constitution Are Meritless.

Plaintiffs' constitutional challenges rest on the flawed premise that the United States Constitution applies to policies regarding nonresident foreign citizens, located abroad, who seek admission into this country. That premise is incorrect and represents a remarkable expansion of constitutional rights. It is "clear" that "an unadmitted and nonresident alien" "ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Mandel*, 408 U.S. at 762. The "power to admit or exclude aliens is a sovereign prerogative," and aliens seeking admission to the United States request a "privilege." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Moreover, even on plaintiffs' incorrect view of these constitutional rights' territorial scope, a discriminatory-purpose pretext analysis of governmental action is exceedingly limited under the Supreme Court's precedents—and is far from being satisfied here.

A. Neither the Establishment Clause nor the Fifth Amendment apply extraterritorially to policies regarding nonresident aliens abroad seeking entry into the United States.

The Establishment Clause does not apply to nonresident aliens abroad, for the same reasons that due-process and equal-protection rights do not apply to such aliens. *See, e.g.*, *Sale*, 509 U.S. at 188 (observing that no "judicial remedy" exists to challenge the Executive's exercise of § 1182(f) authority to deny nonresident aliens entry). The Supreme Court has long "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."

United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)). And it has held that the Due Process Clause applies only "within the territorial jurisdiction." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The Supreme Court thus recognizes a key distinction between aliens inside versus outside the United States. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Rodriguez-Silva v. INS*, 242 F.3d 243, 248 (5th Cir. 2001) (determining that Congress was not required to establish a rational basis for nationality-based classifications because its power to regulate immigration is plenary); *cf. Boumediene*, 553 U.S. at 754 (involving (1) lengthy detention, rather than entry denial, at (2) Guantanamo Bay, where the United States had "plenary control, or practical sovereignty"). The Constitution does not override immigration policies regarding foreign citizens not residing or present in United States territory.

Plaintiffs cannot make an end-run around that principle by resorting to the alleged "stigmatizing" effect on individuals within the United States of a challenged decision regarding whether nonresident aliens outside this country are admitted. To hold otherwise would allow bootstrapping an Establishment Clause claim based on a government action regulating only aliens beyond any application of the Clause. Amici are aware of no instance, outside the present context, in which a U.S. citizen or alien resident in this country prevailed on an Establishment Clause claim based on the stigma allegedly perceived by how the government treated other nonresident aliens abroad. *Cf. Lamont v. Woods*, 948 F.2d 825, 827, 843 (2d Cir. 1991) (allowing an Establishment Clause claim to proceed based on the unique taxpayer-standing

doctrine in a challenge to the expenditure of government funds in foreign countries). And, consistent with the Establishment Clause's inapplicability in this context, Congress has long designated members of certain religious groups, such as Soviet Jews, Evangelical Christians, and Ukrainian Orthodox Church members, as presenting "special humanitarian concern to the United States" for immigration purposes. 8 U.S.C. § 1157(a)(3) & note; *see* Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, div. K, § 7034(k)(8)(A), 129 Stat. 2705, 2765 (2015) (reauthorizing this designation).

B. The Executive Order, which reflects national-security concerns and classifies aliens by nationality, cannot be deemed a pretext for religious discrimination.

Even assuming for the sake of analysis that the Order implicates some form of Establishment Clause or equal-protection guarantee, the Order would still be constitutional. The Order is a valid use of the Executive's foreign-affairs and national-security powers. It is not mere pretext for religious discrimination, and the district court's analysis reaching that conclusion contravenes Supreme Court precedent significantly limiting efforts to discern a hidden discriminatory purpose behind facially neutral governmental action.

1. The Supreme Court "has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-31[] (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). The Court has therefore permitted a discriminatory-purpose analysis "only

in the 'very limited and well-defined class of cases where the very nature of the constitutional question requires [this] inquiry.'" *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968)).

In the "very limited and well-defined class of cases" where the Supreme Court has engaged in a discriminatory-purpose analysis of governmental actions, *id.*, the Court has concomitantly stated that any such analysis is exceedingly limited, such that only clear and obvious proof of pretext can allow courts to override governmental actions, which are presumed valid:

- Judicial scrutiny of governmental purpose is inappropriate unless "an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005).
- When there are "legitimate reasons" for governmental action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim).
- Governmental discriminatory purpose can be shown for a neutral classification only if it "is an obvious pretext for . . . discrimination"—that is, the law "can plausibly be explained only as a [suspect class]-based classification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 275 (1979) (rejecting equal-protection claim).
- Governmental pretextual purpose can only be established where there is the "'clearest proof'" to override legitimate governmental objectives. *Smith v. Doe*, 538 U.S. 84, 92 (2003) (rejecting ex-post-facto claim).

All of this follows from the Court's longstanding admonition that government officials' actions are presumed valid. *E.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918).

2. The Executive Order classifies aliens by nationality—not religion.[5] The Order's temporary pause in entry by nationals from six countries and in the refugee program neither mentions any religion nor depends on whether affected aliens are Muslim. *See* EO §§ 2, 3, 6. These provisions distinguish among aliens only by nationality. *Id.* Thus, the Executive Order is emphatically not a "Muslim ban." Numerous Muslim-majority countries in the world were not covered by the seven-country list used in the prior Executive Order and cabined even further here,[6] and

---

[5] Because the Executive Order classifies aliens by nationality, and not religion, any equal-protection analysis applicable under the Constitution, *but see supra* Part II.A, subjects the Order to no more than rational-basis review. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 83 (1976). In fact, decades-old nationality-based classifications are found throughout the INA. For example, Congress has authorized Temporary Protected Status for an "alien who is a national of a foreign state" specified by the Executive. 8 U.S.C. § 1254a(a)(1). Congress has also conferred certain benefits on aliens from particular countries who are applying for LPR status. *See, e.g.*, *id.* § 1255 note (listing immigration provisions under the Haitian Refugee Immigration Fairness Act of 1998 and the Nicaraguan Adjustment and Central American Relief Act, among others). And Congress created a "diversity immigrant" program to issue immigrant visas to aliens from countries with historically low rates of immigration to the United States. *See id.* § 1153(c).

[6] Jack Moore & Conor Gaffey, *What's Behind Donald Trump's Decision to Include Some Muslim-Majority Countries in the Travel Ban—and Not Others?*, Newsweek, Jan. 31, 2017, http://www.newsweek.com/muslim-majority-countries-not-included-trump-travel-ban-550141 (listing Muslim-majority countries not covered by the prior Order's entry restrictions).

the Pew Research Center estimates that even the country list from the prior Executive Order "would affect only about 12% of the world's Muslims."[7]

The Executive Order's nationality-based restrictions have a manifest legitimate basis: to "ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, [and] to ensure that adequate standards are established to prevent infiltration by foreign terrorists." EO § 2(c). The Order finds detriment to national interests from permitting "unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen," *id.*—similar to the prior Executive Order's restriction on entry of aliens from seven "countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. [§] 1187(a)(12)," EO § 1(b)(i), (f). That set of seven countries under § 1187(a)(12) was created by Congress and the Obama Administration, in administering the visa-waiver program, upon finding each to be a national-security "country or area of concern." 8 U.S.C. § 1187(a)(12)(A)(i)(III).

The Executive Order itself explains at length the President's rationale for the entry restrictions. *See* EO §§ 1-2. And before the current Administration took office, numerous federal government officials—including the FBI director,[8] the for-

---

[7] Pew Research Ctr., *World's Muslim Population More Widespread than You Might Think* (Jan. 31, 2017), http://www.pewresearch.org/fact-tank/2017/01/31/worlds-muslim-population-more-widespread-than-you-might-think/.

[8] H. Comm. on Homeland Sec., 114th Cong., *Nation's Top Security Officials' Concerns on Refugee Vetting* (Nov. 19, 2015), https://homeland.house.gov/press/nations-top-security-officials-concerns-on-refugee-vetting/.

mer Director of National Intelligence,[9] and the former Assistant Director of the FBI's Counterterrorism Division[10]—expressed concerns about the country's current capacity for vetting alien entry. According to the House Homeland Security Committee, ISIS and other terrorists "*are determined*" to abuse refugee programs,[11] and "groups like ISIS may seek to exploit the current refugee flows."[12] The national-security interests implicated by the ongoing War on Terror against radical Islamic terrorists were further recognized in the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note). *See, e.g.*, *Boumediene*, 553 U.S. at 733; *see also, e.g.*, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1035(a), 129 Stat. 726, 971 (2015) (codified at 10 U.S.C. § 801 note); The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 4-7 (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

---

[9] *Id.*

[10] Letter of Bob Goodlatte, Chairman, H. Comm. on the Judiciary, to Barack Obama, President of the United States of America (Oct. 27, 2015), http://judiciary.house.gov/_cache/files/20315137-5e84-4948-9f90-344db69d318d/102715-letter-to-president-obama.pdf.

[11] H. Comm. on Homeland Sec., 114th Cong., *Syrian Refugee Flows: Security Risks and Counterterrorism Challenges* 2-3 (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/HomelandSecurityCommittee_Syrian_Refugee_Report.pdf.

[12] H. Comm. on Homeland Sec., 114th Cong., *Terror Threat Snapshot: The Islamist Terrorist Threat* (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/November-Terror-Threat-Snapshot.pdf.

Given this national-security grounding, a challenge to the Executive Order as a pretext for religious discrimination must fail. Ample reason exists for courts to leave undisturbed the "delicate policy judgments" inherent in the Executive Order about when a factor indicating a heightened national-security risk warrants a particular course of action regarding the Nation's borders. *Plyler v. Doe*, 457 U.S. 202, 225 (1982). Courts are not well situated to evaluate competing experts' views about particular national-security-risk-management measures. *See Boumediene*, 553 U.S. at 797. When it comes to deciding the best way to use a sovereign's power over its borders to manage risk, courts have long recognized that the political branches are uniquely well situated. *E.g.*, *Mathews*, 426 U.S. at 81; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 591 (1952).

Comments the President made during his campaign for office cannot overcome the combination of (1) the Order's detailed explanation of its national-security rationale, (2) the legitimate basis for that reasoning in conclusions of numerous federal officials, *see supra* pp. 17-18, (3) the presumption of validity of government conduct, and (4) the concomitantly cabined nature of discriminatory-purpose pretext review of facially neutral governmental action, *see supra* pp. 14-16. The Supreme Court has recognized the limited significance of campaign statements before candidates assume the responsibilities of office. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also* Amended Order, *Washington v. Trump*, slip. op. 4-7 (Kozinski, J., dissenting from denial of rehearing en banc). And comments made by nongovernmental officials are irrelevant for determining whether

the Executive Branch took action only as a pretext for a prohibited, discriminatory purpose. *See Feeney*, 442 U.S. at 279.

Plaintiffs' claim that the Order is pretext for religious discrimination thus fails. The Order is religion-neutral, enjoying the strongest presumption of validity not only as *Youngstown* zone-one action, *see supra* Part I, but also because of the Executive's "facially legitimate and bona fide reason" for exercising national-security and foreign-affairs powers to restrict entry, *see infra* pp. 24-25. Courts must "neither look behind the exercise of that discretion, nor test it by balancing its justification against" plaintiffs' asserted constitutional rights. *Mandel*, 408 U.S. at 770.

3. In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), a panel of this Court concluded that the Executive was unlikely to succeed in appealing a district court order enjoining the prior Executive Order on the basis that it violated the Due Process Clause. *Id.* at 1164-65. The panel also stated in unresolved dicta that an Establishment Clause claim raised "serious allegations" and presented "significant constitutional questions," but the panel did not deny a stay pending appeal on that basis. *Id.* at 1168.

The panel's Establishment Clause dicta did not resolve the issue and does not control here. *See Miller v. Gammie*, 335 F.3d 889, 892-93, 899-900 (9th Cir. 2003) (en banc); *id.* at 901 (Kozinski, J., concurring) (question must be "expressly resolved" by a three-judge panel to constitute binding "law of the circuit"). That dicta is not persuasive for the reasons just explained. *See supra* pp. 15-19. Nor does the panel's due-process holding present a sound alternative basis for upholding or

refusing to stay the district court's injunction. That holding was wrong and should be vacated in an appropriate case.

As the Supreme Court has recognized, no process is due if one is not deprived of a constitutionally protected interest in life, liberty, or property. *E.g.*, *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). Nonresident aliens abroad have no constitutionally protected interest in entering the United States.[13] Even apart from the issue of entry into the United States, "[t]here is no constitutionally protected interest in either obtaining or continuing to possess a visa." *Louhghalam v. Trump*, No. 1:17-cv-10154, 2017 WL 479779, at *5 (D. Mass. Feb. 3, 2017) (slip op. 13). Similarly, multiple courts of appeals have rejected due-process claims regarding visa issuance or processing. *See, e.g.*, *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990); *De Avilia v. Civiletti*, 643 F.2d 471, 477 (7th Cir. 1981).

Regardless, whatever process could possibly be due was satisfied here by the Executive Order's public proclamation prospectively announcing an exercise of the

---

[13] The analysis could be different for certain lawful permanent residents who are returning to the country from abroad, *see Landon*, 459 U.S. at 33-34, but the Executive Order's suspension of entry for certain foreign nationals does not apply to those who are lawful permanent residents of the United States. EO § 3(b)(i).

The analysis could also be different where *removal proceedings*—which involve the distinct situation of potential detention and forcible removal—were instituted against an alien who is in this country and whose visa was revoked, as that alien would have certain due-process protections under the Fifth Amendment. *See Demore v. Kim*, 538 U.S. 510, 523 (2003); *Zadvydas*, 533 U.S. at 693; *see also* 8 U.S.C. § 1201(i) (judicial review of visa revocations only regarding certain deportation proceedings).

Executive's § 1182(f) authority. In fact, the Executive Order goes beyond the INA's requirements for process by giving ten days' advance notice to potentially affected aliens. And § 1182(f) cannot be subverted by arguing that a class-wide proclamation under that authority is constitutionally insufficient procedure. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

The *Washington v. Trump* panel incorrectly posited that four categories of aliens, other than LPRs, may have "potential" claims to due-process protections. 847 F.3d at 1166 (listing the following categories: (1) "persons who are in the United States, even if unlawfully"; (2) "non-immigrant visaholders who have been in the United States but temporarily departed or wish to temporarily depart"; (3) "refugees"; and (4) "applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert"). That theory, however, leads to absurd consequences: it could effectively extend constitutional rights to every person on the planet. Regardless, none of those potential claims has merit.

First, there are no viable claims as to aliens in the United States unlawfully. Even if unlawfully present aliens have due-process rights in *removal proceedings*, *see id.* (citing *Zadvydas*, 533 U.S. at 693), that does not mean that an unlawfully present alien who leaves the country somehow has a right to process for admission to the country upon return. Moreover, such aliens would generally be inadmissible based on their prior unlawful presence. *See* 8 U.S.C. § 1182(a)(9)(B), (f).

The second category—nonimmigrant visaholders—is expressly exempted from the current Executive Order. EO § 3(a)(i)-(iii). In all events, *Landon* does not establish that nonimmigrant visa-holders have due-process rights when seeking

to enter this country from abroad. *Cf. Washington*, 847 F.3d at 1166 (raising this suggestion). *Landon* involved a *resident* alien, and suggested that any process due must account for the circumstances of an alien's ties to this country. *See* 459 U.S. at 32-34 ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional [due-process] status changes accordingly.... The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances."). Those ties are significantly less in the case of a *nonresident* alien who was temporarily admitted on a nonimmigrant visa. In any event, *Landon* was decided before Congress changed the nature of an alien's interest in visa possession by amending the INA, in 2004, to provide that "[t]here shall be no means of judicial review ... of a revocation" of a visa, "except in the context of a removal proceeding if such revocation provides the sole ground for removal under" the INA. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5304(a), 118 Stat. 3638, 3736 (codified at 8 U.S.C. § 1201(i)).

Third, any due-process argument based on the purported denial of refugees' rights to apply for relief also fails. *Cf. Washington*, 847 F.3d at 1166. Aliens seeking "refugee" status are nonresident aliens located abroad, so they have no constitutionally protected liberty interest in admission into the United States. *See supra* p. 21. Any claim regarding the refugee program cannot rest on provisions regarding asylum. *See* 8 U.S.C. § 1158. Asylum and refugee admission are not the same thing. The INA's asylum protection can be sought by individuals who are already "physically present in the United States or who arrive[] in the United States." *Id.*

§ 1158(a)(1). Only an alien *outside* the United States may apply to be admitted as a refugee. *See id.* §§ 1101(a)(42), 1157(a), 1158(a), (c)(1), 1181(c). And, again, there is no baseline norm that constitutional rights—including the right to petition the United States government—apply to citizens of other countries neither residing nor present in the United States. *See supra* Part II.A.

Fourth, there are no viable due-process arguments based on visa "applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert." *Washington*, 847 F.3d at 1166 (citing *Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in judgment); *id.* at 2142 (Breyer, J., dissenting); *Mandel*, 408 U.S. at 762-65)). As an initial matter, *Din* involved only a visa application, and it did not address the President's separate § 1182(f) power to deny classes of aliens entry. *Sale*, though, did just that and held there was no "judicial remedy" to challenge an exercise of § 1182(f) authority as applied to nonresident aliens. 509 U.S. at 188.

In any event, the narrowest opinion concurring in the judgment in *Din* expressly did not decide whether a U.S. citizen has a protected liberty interest in the visa application of her alien spouse, such that she was entitled to notice of the reason for the application's denial. *See* 135 S. Ct. at 2139-41 (Kennedy, J., concurring in the judgment). In fact, the concurrence reasoned that, even if due process applied in this context, the only process possibly required was that the Executive give a "facially legitimate and bona fide reason" for denying a visa to an alien abroad—a standard met here as to the suspension of entry by the explanation given in the Executive Order. *Id.* at 2141; *see also id.* at 2131 (plurality op.) ("[A]n unadmitted and

nonresident alien . . . has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission."). Regardless, the existence of occasional scenarios like that in *Din* could not support a facial injunction.

CONCLUSION

The Court should grant defendants' motion for a stay pending appeal and ultimately reverse the district court's order enjoining the Executive Order.

Respectfully submitted.

STEVEN T. MARSHALL
Attorney General of Alabama

MARK BRNOVICH
Attorney General of Arizona

LESLIE RUTLEDGE
Attorney General of Arkansas

PAMELA JO BONDI
Attorney General of Florida

DEREK SCHMIDT
Attorney General of Kansas

JEFF LANDRY
Attorney General of Louisiana

TIM FOX
Attorney General of Montana

WAYNE STENEHJEM
Attorney General of North Dakota

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

s/ Scott A. Keller
SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
Deputy Solicitor General

ARI CUENIN
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
scott.keller@oag.texas.gov

MIKE HUNTER
Attorney General of Oklahoma

ALAN WILSON
Attorney General of South Carolina

MARTY J. JACKLEY
Attorney General of South Dakota

HERBERT H. SLATERY III
Attorney General and Reporter
of Tennessee

PATRICK MORRISEY
Attorney General of West Virginia

PHIL BRYANT
Governor of Mississippi

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Scott A. Keller
SCOTT A. KELLER

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it is prepared in a proportionally spaced typeface in Microsoft Word using 14-point Equity typeface, and with the type-volume limitation because it contains under 7,000 words.

s/ Scott A. Keller
SCOTT A. KELLER

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-15589

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [6264] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ Scott A. Keller

Date: 4/10/2017

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)

No. 17-1351

In the United States Court of Appeals for the Fourth Circuit

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF; HIAS, INC., ON BEHALF OF ITSELF AND ITS CLIENTS; MIDDLE EAST STUDIES ASS'N OF NORTH AMERICA, INC., ON BEHALF OF ITSELF AND ITS MEMBERS; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; DANIEL R. COATS, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF NATIONAL INTELLIGENCE,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MONTANA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND A STAY PENDING APPEAL

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
scott.keller@oag.texas.gov

SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
Deputy Solicitor General

ARI CUENIN
Assistant Solicitor General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes and Rules

Miscellaneous

DOJCIV00423

INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, Oklahoma, South Carolina, South Dakota, and West Virginia, and Governor Phil Bryant of the State of Mississippi.[1] Like every State, amici have a significant interest in protecting their residents' safety. But the States possess no authority to restrict or set the terms of aliens' entry into the United States for public-safety and national-security reasons. Instead, the States and their elected officials rely on the federal Executive Branch to carry out that function, pursuant to the laws of Congress. *See Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012). Congress delegated to the Executive Branch significant authority to prohibit aliens' entry into the country, and the challenged Executive Order is a lawful exercise of that authority. Plaintiffs' lawsuit presents no basis to enjoin the Order.

[1] By separate motion, amici request leave to file this brief, to which the parties consent.

SUMMARY OF THE ARGUMENT

After multiple federal officials drew public attention to serious flaws in the preexisting vetting scheme for aliens residing abroad who wish to enter this country under visas or as refugees, the Executive Branch made a policy decision entrusted to it expressly by Congress: the Executive temporarily suspended the admission of specified classes of aliens pursuant to its broad authority under 8 U.S.C. § 1182(f). This Executive Order also expressly identified a heightened national-security risk attendant to six countries that Congress and the Obama Administration had previously identified under national-security-risk criteria.

The district court's injunction of the Executive's power to deny classes of aliens entry is remarkable. The Order falls within the Executive Branch's strongest area of authority—*Youngstown*'s first zone of executive action—because it draws support from not only the President's own foreign-affairs and national-security powers, but also from Congress's delegated authorization pursuant to its Article I powers over the admission of aliens into the country. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring). The Executive Order, especially given its national-security context, thus enjoys "the strongest of presumptions and the widest latitude of judicial interpretation." *Id.* at 637. After all, "[u]nlike the President and some designated Members of Congress, neither the Members of [the Supreme] Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008). Furthermore, there is a "heavy presumption of constitutionality to which a carefully considered decision of a coequal

and representative branch of our Government is entitled." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (citation and quotation marks omitted).

Plaintiffs cannot satisfy the heavy burden necessary to overcome that strongest presumption of validity. Their theory calls for an extraordinary extension of constitutional rights to *nonresident aliens* who are *outside this country* and attempting to enter the country. Nonresident aliens who are in foreign territory clearly not under the sovereign control of the United States do not possess rights under the United States Constitution regarding entry into this country.

Yet even if plaintiffs were correct that the Constitution extended to nonresident aliens abroad, no constitutional violation exists here. Indeed, the Supreme Court has recognized that there is no "judicial remedy" to override the Executive's use of the delegated § 1182(f) power to deny classes of nonresident aliens entry into the country. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993).

The Executive Order is not a pretext for religious discrimination, as the Order is grounded in national-security concerns and classifies aliens according to nationality—not religion. The six countries covered by the Order were previously identified by Congress and the Obama Administration, under the visa-waiver program, as among national-security "countries of concern." In fact, before the current presidential Administration took office, multiple federal officials—including the FBI Director, the former Assistant Director of the FBI's Counterterrorism Division, and the former Director of National Intelligence—expressed concerns with deficiencies in the country's ability to vet the entry of aliens. *See infra* p. 18. And it is well-

known that terror attacks tied to radical Islam have recently occurred around the world and within the United States.

Nor should this Court rely on *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), which was wrongly decided. The Executive Order does not violate due process because nonresident aliens abroad have no liberty interest in seeking admission into the country; therefore, no constitutional claims accrue from a suspension of those aliens' ability to enter. Regardless, the text of the Order itself, which describes legitimate reasons for entry denial, provides whatever process could possibly be due.

The district court's ruling is thus an intrusion into the national-security, foreign-affairs, and immigration powers possessed by the Executive and delegated by Congress. The injunction is contrary to law, and it threatens amici's interests by denying the federal government—under a statutory regime crafted by the States' elected representatives in Congress—the latitude necessary to make policy judgments inherent in this country's nature as a sovereign. This Court should grant defendants' motion to stay and ultimately reverse.

ARGUMENT

I. The Executive Order Does Not Violate the INA Because the Order Implements Power that Congress Expressly Delegated to the Executive.

The President has temporarily suspended the entry into the United States of two classes of aliens:

- nationals of six listed countries, if they are not lawful permanent residents of the United States, were outside this country ten days after the executive order here issued, and do not qualify for other exceptions (such as holding a valid visa ten days after the executive order issued); and
- aliens seeking entry under the U.S. Refugee Admissions Program.

Executive Order 13,780 §§ 2, 3, 6, 82 Fed. Reg. 13,209, 13,212-16 (Mar. 9, 2017) ("EO"). This suspension of entry does not violate the INA. To the contrary, Congress delegated the President broad, discretionary authority under 8 U.S.C. § 1182(f) to suspend the entry of aliens. And the suspension of entry here is an exercise of that expressly delegated authority.

A. The Order's country-specific suspension of entry does not violate the INA.

1. "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Congress has recognized this too, as it gave the President broad discretion to suspend the entry of any class of aliens:

> *Whenever* the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, *he may by proclamation*, and *for such period as he shall deem necessary*, *suspend the entry of all aliens or any class of aliens* as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f) (emphases added). And it is unlawful for an alien to enter the country in violation of "such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

In addition to the President's § 1182(f) power to suspend the entry of aliens, Congress also provided that the Executive Branch "may at any time, in [its] discretion," revoke a visa. *Id.* § 1201(i). Such a discretionary visa revocation is judicially unreviewable except in one narrow circumstance: in a removal proceeding, if the "revocation provides the sole ground for removal." *Id.*

2. As an initial matter, any challenge to the President's § 1182(f) power fails under *Sale*, 509 U.S. at 187-88. At issue there was a challenge on behalf of Haitian refugees to an executive order requiring that certain aliens interdicted at sea be immediately returned to their home country without an opportunity to present asylum claims. *Id.* at 164-66. *Sale* held it "perfectly clear that 8 U.S.C. § 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Id.* at 187. The Court rejected the argument that a later-enacted statutory provision limits the President's power under § 1182(f) to suspend aliens' entry into the United States, reasoning that it "would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect." *Id.* at 176.

The Supreme Court in *Sale* ultimately found itself "in agreement with the conclusion expressed in Judge Edwards' concurring opinion in" *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987): "'*there is no solution to be found in a judicial remedy*'" that overrides the Executive's exercise of § 1182(f) authority.[2] *Sale*, 509 U.S. at 188 (quoting *Gracey*, 809 F.2d at 841 (Edwards, J., concurring)) (emphasis added).

3. Plaintiffs cannot overcome the unmistakably sweeping delegation of authority in § 1182(f) by relying on 8 U.S.C. § 1152(a)(1)(A). Section 1152(a)(1)(A) does not address the *entry* of aliens into the country. Instead, it is part of a set of restrictions on the issuance of *immigrant visas*—visas for aliens to seek admission for permanent residence.[3] *See* 8 U.S.C. §§ 1101(a)(15)-(16), 1151(a)-(b), 1181(a). Section 1152(a)(1)(A), which was added in the Immigration and Nationality Act of 1965, states:

> Except as specifically provided [in a paragraph imposing country-specific caps on immigrant visas], no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Section 1152(a)(1)(A) does not conflict with § 1182(f), let alone impliedly restrict it. *See, e.g.*, *Sale*, 509 U.S. at 176; *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S.

---

[2] Like the claims in the instant case, Judge Edwards' persuasive conclusion in *Gracey* addressed both statutory and constitutional challenges. *See* 809 F.2d at 838.

[3] Section 1152(a)(1)(A), therefore, could not possibly support a *facial* injunction of § 2(c) of the Order, because it addresses only "immigrant visa" issuance. It does not apply to nonimmigrant visas and thus could not possibly show that the Order violates the INA as applied to aliens seeking entry as nonimmigrants.

497, 503 (1936) (describing conflict requirement for repeal by implication). An alien's entry into this country is a different and more consequential event than the preliminary step of receiving a visa, which only entitles the alien to apply for admission.[4] Visa possession does not control or guarantee entry into the country; the INA provides several ways in which visa-holding aliens can be denied entry. *See, e.g.*, 8 U.S.C. §§ 1101(a)(13)(A), 1182(a), (f), 1201(h), (i); 22 C.F.R. §§ 41.122, 42.82. One of them is the President's express authority under § 1182(f) to suspend the entry of classes of aliens.

To compare entry and visa-possession under the INA is to compare apples and oranges. A statutory provision about the preliminary step of receiving an immigrant visa, § 1152(a), does not somehow limit the President's § 1182(f) authority concerning the entry of aliens. Section 1152(a) is silent as to the President's separately delegated authority to suspend alien entry. And the Executive Branch has not his-

---

[4] Visa-possession and admission are distinct concepts. A visa is a determination that an alien is eligible to seek admission; it requires clearing specified bases for ineligibility. 8 U.S.C. §§ 1101(a)(4), 1181, 1182(a), 1184. But a visa does not entitle an alien to enter the country. Entry can be denied, for example, if the alien is found inadmissible upon arrival at a port of entry. *Id.* § 1201(h).

"Admission" of an alien means "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A). Mere presence on U.S. soil is not enough: "an alien present in the United States who has not been admitted or who arrives in the United States" is only an "applicant for admission." *Id.* § 1225(a)(1). If an alien "is not clearly and beyond a doubt entitled to be admitted," he must generally be placed in removal proceedings. *Id.* § 1225(b)(2)(A).

torically treated § 1152(a)(1)(A) as prohibiting nationality-based suspensions of entry under § 1182(f). For example, President Reagan suspended the entry of Cuban nationals into the United States as immigrants, subject to certain exceptions. Presidential Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986).

4. Nor does 8 U.S.C. § 1182(a) somehow limit the President's § 1182(f) authority to deny aliens entry. In § 1182(a), Congress enumerated no fewer than seventy grounds that make an alien automatically inadmissible to the United States, unless an exception applies. But Congress did not provide that these are the only grounds on which the Executive can deny aliens entry. Instead, Congress in § 1182(f) separately enabled the President to impose additional entry restrictions, including the power to "suspend the entry" of "any class of aliens" for "such period as he shall deem necessary." As the D.C. Circuit correctly recognized in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), § 1182(f) permits the Executive to deny aliens entry even if the aliens are not covered by one of the enumerated § 1182(a) categories that automatically render an alien inadmissible: "The President's sweeping proclamation power [in § 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a)." *Id.* at 1049 n.2. The *Abourezk* court even noted an example of this understanding in a nationality-based § 1182(f) proclamation issued by President Reagan, which suspended entry for "officers or employees of the Cuban government or of the Cuban Communist Party." *Id.* (citing Presidential Proclamation No. 5377, 50 Fed. Reg. 41,329 (Oct. 10, 1985)).

B. The Order's directives on refugee admission do not violate the INA.

The President's ability to direct the extent of refugee admission is also well-grounded in the INA. Not only does the President have authority under 8 U.S.C. § 1182(f) to temporarily restrict the entry of any class of aliens—including aliens claiming refugee status—but the INA also places the number of refugee admissions in the President's control. 8 U.S.C. § 1157(a)(2) (refugee admissions capped at "such number *as the President determines*," after certain congressional consultation, "is justified by humanitarian concerns *or is otherwise in the national interest*" (emphases added)). And, as explained above, the § 1152(a)(1)(A) restriction on issuance of immigrant visas is irrelevant to the President's authority to suspend alien entry. Section 1152(a)(1)(A) does not address the entry of refugees, or of aliens in general. Moreover, admission into the country as a refugee does not require an immigrant visa. *See* 8 U.S.C. § 1181(c). So refugee admission as a category is not even within § 1152(a)(1)(A)'s "immigrant visa" sweep.

II. Plaintiffs' Arguments that the Executive Order Violates the Constitution Are Meritless.

A. The Order receives the strongest presumption of validity because it falls within in an area of maximum executive authority: *Youngstown*'s first category of executive action pursuant to congressionally delegated power.

This lawsuit seeks a remarkable use of the judicial power to interfere with the President's national-security decisions in an area of strongest executive authority. Because the Executive Order implements power expressly delegated by Congress, *see supra* Part I, the President's authority is at its maximum and "includes all that he possesses in his own right plus all that Congress can delegate," *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), *quoted in Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000). Plaintiffs' constitutional claims thus implicitly argue that "the Federal Government as an undivided whole" lacks the authority to proceed as the Executive Order here directs. *Id.* at 636-37.

Executive action in this first *Youngstown* zone is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Id.* at 637, *quoted in Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981). That respect attaches here because of not only the explicit congressional grant of authority to deny entry, *see* 8 U.S.C. § 1182(f), but also the INA's complementary approach to allowing entry. Specifically, Congress enacted "extensive and complex" provisions detailing how over forty different classes of nonimmigrants, refugees, and other aliens can attain lawful presence in the country. *Arizona*, 132 S. Ct. at 2499; *see Texas v. United States*, 809 F.3d 134, 179 (5th Cir. 2015), *aff'd by an equally divided court*, 136

S. Ct. 2271 (2016) (per curiam). But while Congress provided these detailed criteria to significantly restrict the Executive's ability to unilaterally *allow* aliens to be lawfully present in the country, Congress simultaneously delegated the Executive broad discretionary authority to *exclude* aliens from the country, under § 1182(f). Congress knows how to limit executive power in this area, yet the broad delegation of executive power in § 1182(f) underscores the Executive's unique role in protecting the Nation.

The exclusion of aliens is also a core federal prerogative: a power "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (quotation marks omitted); *accord Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). The burden of persuasion should thus "rest heavily upon" any party who might attack the Executive's congressionally authorized action on such a fundamental aspect of sovereignty. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

Extending constitutional rights as envisioned by plaintiffs would have grave implications, such as imposing delay, cost, and risk while courts scrutinize federal officials' concerns with existing procedures for vetting aliens seeking entry into the country. When it comes to deciding the best way to use a sovereign's power over its borders to manage risk, courts have long recognized that the political branches are uniquely well situated. *E.g.*, *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

B. Plaintiffs' constitutional claims fail because the Constitution does not accord rights extraterritorially to nonresident aliens abroad seeking entry into the United States.

Plaintiffs' constitutional challenges rest on the flawed premise that the United States Constitution confers on nonresident foreign citizens, located abroad, rights regarding admission into this country. But it is "clear" that "an unadmitted and nonresident alien" "ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Mandel*, 408 U.S. at 762. The "power to admit or exclude aliens is a sovereign prerogative," and aliens seeking admission to the United States request a "privilege." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

The Fifth Amendment does not apply to nonresident aliens outside United States territory. The Supreme Court has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)). This conforms to the Court's observation in *Sale* that no "judicial remedy" exists to challenge the Executive's exercise of § 1182(f) authority to deny nonresident aliens entry. 509 U.S. at 188. Likewise, the Court's precedents establish that the Fifth Amendment's Due Process Clause applies to "person[s]," U.S. Const. amend. V, only "within the territorial jurisdiction," *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). The Court has thus recognized a key distinction between aliens inside versus outside the United States. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Rodriguez-Silva v. INS*, 242 F.3d 243, 248 (5th Cir. 2001) (determining that Congress was not required to establish a rational basis for nationality-based classifications because its power to reg-

ulate immigration is plenary). *Cf. Boumediene*, 553 U.S. at 754 (involving (1) lengthy detention, rather than entry denial, at (2) Guantanamo Bay, where the United States had "plenary control, or practical sovereignty").

Analogously, the Establishment Clause does not vest rights extraterritorially in nonresident aliens abroad—for essentially the same reasons that due-process and equal-protection rights do not apply to such aliens. *See, e.g.*, *Zadvydas*, 533 U.S. at 693; *Verdugo-Urquidez*, 494 U.S. at 269. Congress itself has long designated members of certain religious groups, such as Soviet Jews, Evangelical Christians, and Ukrainian Orthodox Church members, as presenting "special humanitarian concern to the United States" for immigration purposes. 8 U.S.C. § 1157(a)(3) & note.

C. Even assuming arguendo that constitutional rights extend extraterritorially to nonresident aliens abroad, plaintiffs' claims are meritless.

1. The Executive Order is grounded in national-security concerns and classifies aliens by nationality, so the Order is not an unconstitutional pretext for religious discrimination.

Even assuming for the sake of argument that some form of equal-protection or Establishment-Clause rights applied to the aliens covered by the Executive Order, the Order is a valid use of the Executive's foreign-affairs and national-security powers. The Court should reject any suggestion that the Order is motivated by a pretextual discriminatory purpose based on religion.

a. The Supreme Court "has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-31[] (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of govern-

ment." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). The Court has therefore permitted a discriminatory-purpose analysis "only in the 'very limited and well-defined class of cases where the very nature of the constitutional question requires [this] inquiry.'" *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968)). And amici are aware of no case in which a court has applied a religion-based discriminatory-purpose analysis in the foreign-affairs context—even though the federal government has been making immigration-based religious classifications for decades. *See supra* p. 14.

Regardless, in the "very limited and well-defined class of cases" where the Supreme Court has engaged in a discriminatory-purpose analysis of governmental actions, *City of Columbia*, 499 U.S. at 377 n.6, the Court has concomitantly stated that only obvious, clear proof of pretext can allow courts to override governmental actions, which are presumed valid:

- When there are "legitimate reasons" for governmental action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim).
- Governmental discriminatory purpose can be shown for a neutral classification only if it "is an obvious pretext for . . . discrimination"—that is, the law "can plausibly be explained only as a [suspect class]-based classification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 275 (1979) (rejecting equal-protection claim).
- Governmental pretextual purpose can only be established where there is the "'clearest proof'" to override legitimate governmental objectives. *Smith v. Doe*, 538 U.S. 84, 92 (2003) (rejecting ex-post-facto claim).

All of this follows from the Court's admonition that government officials' actions have long been presumed valid. *E.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918). And a claim of pretext is particularly unavailing in this context, as the Executive Order is in *Youngstown*'s first zone and thus "supported by the strongest of presumptions and the widest latitude of judicial interpretation." 343 U.S. at 637 (Jackson, J., concurring).

b. The Executive Order classifies aliens by nationality—not religion.[5] The Executive Order's temporary pause in entry by nationals from six countries and in the refugee program neither mentions any religion nor depends on whether affected aliens are Muslim. *See* EO §§ 2, 3, 6. These provisions distinguish among aliens only by nationality. *Id.* Thus, the Executive Order is emphatically not a "Muslim ban." Indeed, numerous Muslim-majority countries in the world were not covered

[5] Because the Executive Order classifies aliens by nationality, and not religion, any applicable equal-protection analysis subjects the Order to no more than rational-basis review. *See, e.g.*, *Mathews*, 426 U.S. at 83; *Nademi v. INS*, 679 F.2d 811, 814 (10th Cir. 1982). "Th[e] discrimination among subclassifications of aliens is not based on a suspect classification," *Soskin v. Reinertson*, 353 F.3d 1242, 1256 (10th Cir. 2004), and "may be drawn in the immigration field by the Congress or the Executive," *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979). In fact, decades-old nationality-based classifications are found throughout the INA. For example, Congress has authorized Temporary Protected Status for an "alien who is a national of a foreign state" specified by the Executive. 8 U.S.C. § 1254a(a)(1). Congress has also conferred certain benefits on aliens from particular countries who are applying for LPR status. *See, e.g.*, *id.* § 1255 note (listing immigration provisions under the Haitian Refugee Immigration Fairness Act of 1998 and the Nicaraguan Adjustment and Central American Relief Act, among others). And Congress created a "diversity immigrant" program to issue immigrant visas to aliens from countries with historically low rates of immigration to the United States. *See id.* § 1153(c).

by the seven-country list used in the prior Executive Order,[6] and the Pew Research Center estimates that this list from the prior Executive Order "would affect only about 12% of the world's Muslims."[7]

The Executive Order's nationality-based restrictions have a manifest legitimate basis: to "ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, [and] to ensure that adequate standards are established to prevent infiltration by foreign terrorists." EO § 2(c). The Order then finds detriment to national interests from permitting "unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen," *id.*—similar to the prior Executive Order's restriction on entry of aliens from "countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. [§] 1187(a)(12)," EO § 1(b)(i), (f). Those six countries are among those previously identified by Congress and the Obama Administration, in administering the visa-waiver program, as a national-security "country or area of concern." 8 U.S.C. § 1187(a)(12)(A)(i)(III).

---

[6] Jack Moore & Conor Gaffey, *What's Behind Donald Trump's Decision to Include Some Muslim-Majority Countries in the Travel Ban—and Not Others?*, Newsweek, Jan. 31, 2017, http://www.newsweek.com/muslim-majority-countries-not-included-trump-travel-ban-550141 (listing Muslim-majority countries not covered by the prior Order's travel restrictions).

[7] Pew Research Ctr., *World's Muslim Population More Widespread Than You Might Think* (Jan. 31, 2017), http://www.pewresearch.org/fact-tank/2017/01/31/worlds-muslim-population-more-widespread-than-you-might-think/.

The Executive Order itself explains the President's rationale for the travel restrictions at length. *See* EO §§ 1-2. And before the current Administration took office, numerous federal government officials—including the FBI director,[8] the former Director of National Intelligence,[9] and the former Assistant Director of the FBI's Counterterrorism Division[10]—expressed concerns about the country's current capacity for vetting alien entry. According to the House Homeland Security Committee, ISIS and other terrorists "*are determined*" to abuse refugee programs,[11] and "groups like ISIS may seek to exploit the current refugee flows."[12] The national-security interests implicated by the ongoing War on Terror against radical Islamic terrorists were further recognized in the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note). *See, e.g.*, *Boumediene*, 553 U.S. at 733; *see also, e.g.*, National Defense Authorization Act

---

[8] H. Comm. on Homeland Sec., 114th Cong., *Nation's Top Security Officials' Concerns on Refugee Vetting* (Nov. 19, 2015), https://homeland.house.gov/press/nations-top-security-officials-concerns-on-refugee-vetting/.

[9] *Id.*

[10] Letter of Bob Goodlatte, Chairman, H. Comm. on the Judiciary, to Barack Obama, President of the United States of America (Oct. 27, 2015), http://judiciary.house.gov/_cache/files/20315137-5e84-4948-9f90-344db69d318d/102715-letter-to-president-obama.pdf.

[11] H. Comm. on Homeland Sec., 114th Cong., *Syrian Refugee Flows: Security Risks and Counterterrorism Challenges* 2-3 (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/HomelandSecurityCommittee_Syrian_Refugee_Report.pdf.

[12] H. Comm. on Homeland Sec., 114th Cong., *Terror Threat Snapshot: The Islamist Terrorist Threat* (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/November-Terror-Threat-Snapshot.pdf.

for Fiscal Year 2016, Pub. L. No. 114-92, § 1035(a), 129 Stat. 726, 971 (2015) (codified at 10 U.S.C. § 801 note); The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 4-7 (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf. In light of this reality, a challenge to the Executive Order as a pretext for religious discrimination must fail.

Ample reason thus exists for courts to leave undisturbed the "delicate policy judgments" inherent in the Executive Order about when a factor indicating a heightened national-security risk warrants a particular course of action regarding the Nation's borders. *Plyler v. Doe*, 457 U.S. 202, 225 (1982). Courts are not well situated to evaluate competing experts' views about particular national-security-risk-management measures. *See Boumediene*, 553 U.S. at 797. Comments the President made during his campaign for office cannot overcome the Executive Order's detailed explanation of its national-security basis, the legitimate basis for that reasoning in conclusions of numerous federal officials, *see supra* pp. 17-18, and the presumption of validity of official government conduct. The Supreme Court has recognized the limited significance of campaign statements before candidates assume the responsibilities of office. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002). And comments made by nongovernmental officials are irrelevant for determining whether the Executive Branch decision-makers for the Order held a discriminatory, pretextual purpose. *See Feeney*, 442 U.S. at 279.

Any claim of religious pretext thus fails: the Executive Order is religion-neutral, and this exercise of *Youngstown* zone-one authority is "supported by the

strongest of presumptions and the widest latitude of judicial interpretation." 343 U.S. at 637 (Jackson, J., concurring); *see supra* Part II.A. Because the Executive Order states a "facially legitimate and bona fide reason" for exercising the Executive's national-security and foreign-affairs powers to restrict entry, courts must "neither look behind the exercise of that discretion, nor test it by balancing its justification against" plaintiffs' asserted constitutional rights. *Mandel*, 408 U.S. at 770.

2. This Court should not rely on the Ninth Circuit's decision in *Washington v. Trump* because it was wrongly decided.

In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), a Ninth Circuit panel concluded that the Executive was unlikely to succeed in appealing a district court order enjoining the prior Executive Order on the basis that it violated the Due Process Clause. *Id.* at 1164-65. While a procedural due-process claim is not currently before this Court, the Court nevertheless should not rely on *Washington v. Trump* because it was wrongly decided.

a. As the Supreme Court has recognized, no process is due if one is not deprived of a constitutionally protected interest in life, liberty, or property. *E.g.*, *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). Nonresident aliens abroad[13] have no constitu-

[13] The analysis could be different for certain lawful permanent residents who are returning to the country from abroad, *see Landon*, 459 U.S. at 33-34, but the Executive Order's suspension of entry for certain foreign nationals does not apply to those who are lawful permanent residents of the United States. EO § 3(b)(i).

tionally protected interest in entering the United States.[14] Even apart from the issue of entry into the United States, "[t]here is no constitutionally protected interest in either obtaining or continuing to possess a visa." *Louhghalam v. Trump*, No. 1:17-cv-10154, 2017 WL 479779, at *5 (D. Mass. Feb. 3, 2017) (slip op. 13). Similarly, multiple courts of appeals have rejected due-process claims regarding visa issuance or processing. *See, e.g.*, *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990); *De Avilia v. Civiletti*, 643 F.2d 471, 477 (7th Cir. 1981).

b. Regardless, whatever process could possibly be due was satisfied here by the Executive Order's public proclamation prospectively announcing an exercise of the Executive's § 1182(f) authority. In fact, the Executive Order goes beyond the INA's requirements for process by giving ten days' advance notice to potentially affected aliens. And § 1182(f) cannot be subverted by arguing that a class-wide proclamation under that authority is constitutionally insufficient procedure. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

---

[14] The analysis could be different where *removal proceedings*—which involve the distinct situation of potential detention and forcible removal—were instituted against an alien who is in this country and whose visa was revoked, as that alien would have certain due-process protections under the Fifth Amendment. *See Demore v. Kim*, 538 U.S. 510, 523 (2003) (noting that it is "well established" that aliens have due-process rights in deportation hearings (citation and quotation marks omitted)); *see also Zadvydas*, 533 U.S. at 693 (alien entitled to Fifth Amendment protections once alien is within the country). Hence, the INA provides for judicial review of visa revocations only in the limited context of deportation proceedings. 8 U.S.C. § 1201(i). But the Order here concerns the denial of entry in the first place—not deportation—and the Supreme Court has not extended the Fifth Amendment to nonresident aliens abroad seeking to enter the country. *Cf. Landon*, 459 U.S. at 32.

c. In *Washington v. Trump*, the Ninth Circuit panel incorrectly posited that four categories of aliens, other than LPRs, may have "potential" claims to due-process protections. 847 F.3d at 1166 (listing the following categories: (1) "persons who are in the United States, even if unlawfully"; (2) "non-immigrant visaholders who have been in the United States but temporarily departed or wish to temporarily depart"; (3) "refugees"; and (4) "applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert"). That theory, however, leads to absurd consequences: it could effectively extend constitutional rights to every person on the planet. Regardless, none of those potential claims has merit.

First, there are no viable claims as to aliens in the United States unlawfully. Even if unlawfully present aliens have due-process rights in *removal proceedings*, *see id.* (citing *Zadvydas*, 533 U.S. at 693), that does not mean that an unlawfully present alien who leaves the country somehow has a right to process for admission to the country upon return. To the contrary, such aliens would generally be inadmissible based on their prior unlawful presence. *See* 8 U.S.C. § 1182(a)(9)(B), (f).

The second category—nonimmigrant visaholders—is expressly exempted from the current Executive Order. EO § 3(a)(i)-(iii). In all events, *Landon* does not establish that nonimmigrant visa-holders have due-process rights when seeking to enter this country from abroad. *Cf. Washington*, 847 F.3d at 1166 (raising this suggestion). *Landon* involved a *resident* alien, and suggested that any process due must account for the circumstances of an alien's ties to this country. *See* 459 U.S. at 32-34 ("[O]nce an alien gains admission to our country and begins to develop the

ties that go with permanent residence his constitutional [due-process] status changes accordingly.... The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances."). Those ties are significantly less in the case of a *nonresident* alien who was temporarily admitted on a nonimmigrant visa. In any event, *Landon* was decided before Congress changed the nature of an alien's interest in visa possession by amending the INA, in 2004, to provide that "[t]here shall be no means of judicial review ... of a revocation" of a visa, "except in the context of a removal proceeding if such revocation provides the sole ground for removal under" the INA. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5304(a), 118 Stat. 3638, 3736 (codified at 8 U.S.C. § 1201(i)).

Third, any due-process argument based on the purported denial of refugees' rights to apply for relief also fails. *Cf. Washington*, 847 F.3d at 1166. Aliens seeking "refugee" status are nonresident aliens located abroad, so they have no constitutionally protected liberty interest in admission into the United States. *See supra* pp. 20-21. Any claim regarding the refugee program cannot rest on provisions regarding asylum. *See* 8 U.S.C. § 1158. Asylum and refugee admission are not the same thing. The INA's asylum protection can be sought by individuals who are already "physically present in the United States or who arrive[] in the United States." *Id.* § 1158(a)(1). Only an alien *outside* the United States may apply to be admitted as a refugee. *See id.* §§ 1101(a)(42), 1157(a), 1158(a), (c)(1), 1181(c). And, again, there is no baseline norm that constitutional rights—including the right to petition the

United States government—apply to citizens of other countries neither residing nor present in the United States. *See supra* Part II.B.

Fourth, there are no viable due-process arguments based on visa "applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert." *Washington*, 847 F.3d at 1166 (citing *Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in judgment); *id.* at 2142 (Breyer, J., dissenting); *Mandel*, 408 U.S. at 762-65)). As an initial matter, *Din* involved only a visa application, and it did not address the President's separate § 1182(f) power to deny classes of aliens entry. *Sale*, though, did just that and held there was no "judicial remedy" to challenge an exercise of § 1182(f) authority as applied to nonresident aliens. 509 U.S. at 188.

In any event, the narrowest opinion concurring in the judgment in *Din* expressly did not decide whether a U.S. citizen has a protected liberty interest in the visa application of her alien spouse, such that she was entitled to notice of the reason for the application's denial. *See* 135 S. Ct. at 2139-41 (Kennedy, J., concurring in the judgment). In fact, the concurrence reasoned that, even if due process applied in this context, the only process possibly required was that the Executive give a "facially legitimate and bona fide reason" for denying a visa to an alien abroad—a standard met here, as to the suspension of entry, by the explanation given in the Executive Order. *Id.* at 2141; *see also id.* at 2131 (plurality op.) ("[A]n unadmitted and nonresident alien . . . has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission."). Regardless, the existence of occasional scenarios like that in *Din* could not support a facial injunction.

CONCLUSION

The Court should grant defendants' motion for a stay pending appeal and ultimately reverse the district court's order enjoining the Executive Order.

Respectfully submitted.

STEVEN T. MARSHALL
Attorney General of Alabama

MARK BRNOVICH
Attorney General of Arizona

LESLIE RUTLEDGE
Attorney General of Arkansas

PAMELA JO BONDI
Attorney General of Florida

DEREK SCHMIDT
Attorney General of Kansas

JEFF LANDRY
Attorney General of Louisiana

TIM FOX
Attorney General of Montana

MIKE HUNTER
Attorney General of Oklahoma

ALAN WILSON
Attorney General of South Carolina

MARTY J. JACKLEY
Attorney General of South Dakota

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

s/ Scott A. Keller
SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
Deputy Solicitor General

ARI CUENIN
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
scott.keller@oag.texas.gov

PATRICK MORRISEY
Attorney General of West Virginia

PHIL BRYANT
Governor of Mississippi

DOJCIV00449

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Scott A. Keller
SCOTT A. KELLER

DOJCIV00450

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it is prepared in a proportionally spaced typeface in Microsoft Word using 14-point Equity typeface and with the type-volume limitation because it contains under 6,500 words.

s/ Scott A. Keller
SCOTT A. KELLER

DOJCIV00451

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 17-1351 as

☐ Retained ☐ Court-appointed(CJA) ☐ Court-assigned(non-CJA) ☐ Federal Defender ☐ Pro Bono ☑ Government

COUNSEL FOR: States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, Oklahoma, South Carolina, South Dakota, and West Virginia, and Governor Phil Bryant of the State of Mississippi as the (party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

s/ Scott A. Keller
(signature)

Scott A. Keller
Name (printed or typed)

(512) 936-1700
Voice Phone

Office of the Attorney General
Firm Name (if applicable)

(512) 474-2697
Fax Number

P.O. Box 12548 (MC 059)

Austin, Texas 78711-2548
Address

scott.keller@oag.texas.gov
E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on March 27, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Scott A. Keller
Signature

March 27, 2017
Date

01/19/2016 SCC

No. 17-1351

In the United States Court of Appeals for the Fourth Circuit

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF; HIAS, INC., ON BEHALF OF ITSELF AND ITS CLIENTS; MIDDLE EAST STUDIES ASS'N OF NORTH AMERICA, INC., ON BEHALF OF ITSELF AND ITS MEMBERS; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, JOHN F. KELLY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; REX W. TILLERSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; DANIEL R. COATS, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF NATIONAL INTELLIGENCE,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MONTANA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND A STAY PENDING APPEAL

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
scott.keller@oag.texas.gov

SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
Deputy Solicitor General

ARI CUENIN
Assistant Solicitor General

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF

Amici curiae the States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, Oklahoma, South Carolina, South Dakota, and West Virginia, and Governor Phil Bryant of the State of Mississippi respectfully move for leave to file a brief as amici curiae in support of appellants. The parties consent to the proposed amicus brief, which accompanies this motion and a Certificate of Compliance with Type-Volume Limit.

1. On March 6, 2017, the President issued Executive Order 13,780, determining that "the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States." 82 Fed. Reg. 13,209, 13,213 (Mar. 9, 2017). "In light of the conditions in these six countries, until the assessment of current screening and vetting procedures" required by the Order are completed, the Order states that "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* at 13,211. "Accordingly, while that assessment is ongoing," the Order imposes a "temporary pause on the entry of nationals" from these six countries, "subject to categorical exceptions and case-by-case waivers," as described in the Order. *Id.* The Order also imposes a temporary restriction on aliens seeking entry under the U.S. Refugee Admissions Program. *Id.* at 13,215-16. On March 15, 2017, the district court enjoined the Executive Order in part on the basis that plaintiffs were likely to prevail on their Establishment Clause claim.

2. Federal Rule of Appellate Procedure 29 permits a State to file an amicus brief without the parties' consent or leave of court "during a court's initial consideration of a case on the merits." Fed. R. App. P. 29(a)(1), (2). Although the parties consent to the proposed amicus brief, that rule appears not to govern here both because the case is before the Court in a stay posture simultaneously with the "case on the merits," and because the attached brief is submitted on behalf of twelve States as well as the Governor of Mississippi. *See id.* 29(a)(2) (no leave of Court required for amicus brief of a "state").

3. Amici respectfully move for any necessary leave to file an amicus brief at this stage, in support of appellants and in support of their motion to stay pending appeal being considered simultaneously by the Court. The attached proposed brief includes material that is "desirable" and "relevant to the disposition of the case." *Id.* 29(a)(3). The amicus brief provides an overview of the federal immigration laws against which plaintiffs' statutory and constitutional claims should be evaluated; explains that the Executive Order reflects a policy decision delegated to the Executive Branch expressly by Congress, and was issued after multiple federal officials drew public attention to serious flaws in the preexisting vetting scheme for aliens residing abroad who wish to enter this country; and draws the Court's attention to authorities relevant to the extension of constitutional rights that plaintiffs advocate here.

4. This is a case of national interest with important and far-reaching foreign-affairs and national-security implications. Every State has a substantial interest in the health and welfare of their citizens, but the States and their elected officials

must rely on the federal Executive to determine when the entry of aliens should be suspended for public-safety reasons under a regime crafted by the States' elected representatives in Congress. *See generally Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012). Amici thus share a substantial interest in the federal government having the latitude to make policy judgments reserved to it by statute, and inherent in this country's nature as a sovereign, regarding the terms and conditions for whether aliens may enter the country.

5. Amici have also endeavored to assist the Court in resolving the weighty issues in this case in as few words as possible. The attached brief complies with the type-volume limitation for an amicus brief on the merits because it uses fewer than half of the 13,000 words that are allotted for appellants' opening brief during the Court's initial consideration of the case on the merits. *See* Fed. R. App. P. 29(a)(1), (5), 32(a)(7)(B)(i).

6. The parties consent to the relief requested in this motion.

CONCLUSION

Amici respectfully request leave to file the attached brief as amici curiae supporting appellants and a stay pending appeal.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

s/ Scott A. Keller
SCOTT A. KELLER
Solicitor General

J. CAMPBELL BARKER
Deputy Solicitor General

ARI CUENIN
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
scott.keller@oag.texas.gov

CERTIFICATE OF CONFERENCE

This motion has been conferenced with counsel for the parties, and the parties consent to the filing of the proposed amicus brief for which leave to file is requested herein.

s/ Scott A. Keller
SCOTT A. KELLER

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Scott A. Keller
SCOTT A. KELLER

DOJCIV00458

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-1351 **Caption:** Int'l Refugee Assistance Project et al. v. Trump et al.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Type-Volume Limit for Briefs: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

Type-Volume Limit for Other Documents if Produced Using a Computer: Petition for permission to appeal and a motion or response thereto may not exceed 5,200 words. Reply to a motion may not exceed 2,600 words. Petition for writ of mandamus or prohibition or other extraordinary writ may not exceed 7,800 words. Petition for rehearing or rehearing en banc may not exceed 3,900 words. Fed. R. App. P. 5(c)(1), 21(d), 27(d)(2), 35(b)(2) & 40(b)(1).

Typeface and Type Style Requirements: A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch). Fed. R. App. P. 32(a)(5), 32(a)(6).

This brief or other document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

☑ this brief or other document contains 6277 [*state number of*] words

☐ this brief uses monospaced type and contains _____ [*state number of*] lines

This brief or other document complies with the typeface and type style requirements because:

☑ this brief or other document has been prepared in a proportionally spaced typeface using
Microsoft Word [*identify word processing program*] in
Equity 14-point [*identify font size and type style*]; **or**

☐ this brief or other document has been prepared in a monospaced typeface using
_____ [*identify word processing program*] in
_____ [*identify font size and type style*].

(s) Scott A. Keller

Party Name State of Texas et al.

Dated: Mar. 27, 2017

11/14/2016 SCC