No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE ANGELICAVILLALOBOS, JUAN ESCALENTE, JANE DOE #4, and JANE DOE #5

Original Proceeding from the United States District Court for the Southern District of Texas, Brownsville Division
Case No. 14-cv-00254

DECLARATION OF KAREN C. TUMLIN IN SUPPORT OF PETITIONERS' MOTION TO PROCEED UNDER PSEUDONYM

KAREN C. TUMLIN
tumlin@nilc.org
NORA A. PRECIADO
preciado@nilc.org
National Immigration Law Center
3435 Wilshire Blvd., Suite 1600
Los Angeles, CA 90010
Telephone: (213) 639-3900

JUSTIN B. COX
cox@cox.legal
Law Office of Justin B. Cox
NILC Cooperating Attorney
1989 College Avenue NE
Atlanta, GA 30317
Telephone: (678) 404-9119

OMAR C. JADWAT
ojadwat@aclu.org
American Civil Liberties Union
Foundation Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2620

Counsel for Petitioners

CECILLIA D. WANG
cwang@aclu.org
CODY WOFSY
cwofsy@aclu.org
American Civil Liberties Union Foundation Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0770

EDGAR SALDIVAR
Texas State Bar No. 24038188
esaldivar@aclutx.org
REBECCA L. ROBERTSON
Texas State Bar No. 00794542
rrobertson@aclutx.org
American Civil Liberties Union of Texas
1500 McGowen Street, Suite 250
Houston, TX 77004
Telephone: (713) 942-8146

DECLARATION OF KAREN TUMLIN IN SUPPORT OF PETITIONERS' MOTION TO PROCEED UNDER PSEUDONYM

I, Karen Tumlin, hereby declare:

1 . I am a member of the bar of the State of California, the Legal Director at the National Immigration Law Center, and counsel of record for Petitioners in this case. I have personal knowledge of the facts stated herein and, if called as a witness, could and would competently testify thereto.

2. On June 3, 2016, I called and emailed Scott Keller, Solicitor General of Texas, and counsel of record for Plaintiffs in *Texas v. United States*, No. 14-00254 (S.D. Tex.) (filed December 3, 2014). I informed Mr. Keller that Petitioners would be filing this Motion to Proceed under a Pseudonym and for Protective Order ("Motion").

3. On June 3, 2016, J. Campbell Barker, Deputy Solicitor General of Texas, responded that Plaintiffs in *Texas v. United States* take no position on this Motion.

4. On June 3, 2016, I called and emailed Beth Brinkmann, Deputy Assistant Attorney General in the United States Department of Justice, and counsel of record for Defendants in *Texas v. United States*, No. 14-00254 (S.D. Tex.) (filed Dec. 3, 2014). I informed Ms. Brinkmann that Petitioners would be filing this Motion.

5. On June 3, 2016, Ms. Brinkmann responded that Defendants took

no position on this Motion at this time, and will inform the court of their position after they have had an opportunity to review the filed documents.

6. On June 3, 2016, I called and emailed Nina Perales, Director of Litigation at the Mexican American Legal Defense and Educational Fund and counsel of record for Intervenor-Defendants in *Texas v. United States*, No. 14-00254 (S.D. Tex.) (filed Dec. 3, 2014). I informed Ms. Perales that Petitioners would be filing this Motion.

7. On June 3, 2016, Ms. Perales responded that "the Jane Doe Defendant Intervenors are not opposed to a stay of that portion of the district court's May 19, 2016 order requiring filing under seal of the names and other personal information of certain recipients of deferred action."

8. Attached hereto as **EXHIBIT A** is a true and correct copy of the Declaration of Jane Doe #4.

9. Attached hereto as **EXHIBIT B** is a true and correct copy of the Declaration of Jane Doe #5.

10. Attached hereto as **EXHIBIT C** is a true and correct copy of the Department of Homeland Security Memorandum *Memorandum: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of*

U.S. Citizens or Permanent Residents, Dep't of Homeland Security (Nov. 20, 2014).

11. Attached hereto as **EXHIBIT D** is a true and correct copy of the district court's Memorandum Opinion and Order dated May 19, 2016, Dkt. No. 347.

12. Attached hereto as **EXHIBIT E** is a true and correct copy of the article *City Wins ID Battle*, Melissa Bailey, New Haven Indep. (June 25, 2008), http://www.newhavenindependent.org/index.php/archives/entry/city_wins_id_battle/.

13. Attached hereto as **EXHIBIT F** is a true and correct copy of the news article *Univision Highlights How Trump's Anti-Immigrant Rhetoric May Be Inspiring Violence Against Latinos*, Media Matters (May 20, 2016), http://mediamatters.org/video/2016/05/20/univision-highlights-how-trump-s-anti-immigrant-rhetoric-may-be-inspiring-violence-against-latinos/210511.

14. Attached hereto as **EXHIBIT G** is a true and correct copy of the op-ed *When Hateful Speech Leads to Hate Crimes: Taking Bigotry Out of the Immigration Debate*, Jonathan Greenblatt, Huffington Post (Aug. 24, 2015), http://www.huffingtonpost.com/jonathan-greenblatt/when-hateful-speech-leads_b_8022966.html.

15. Attached hereto as **EXHIBIT H** is a true and correct copy of the

transcript of the Aug. 19, 2015 hearing in the *Texas v. United States*, No. 14-00254 (S.D. Tex.) (filed Dec. 3, 2014)

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of June, 2016.

By: /s/ Karen C. Tumlin
Karen C. Tumlin

INDEX OF EXHIBITS TO KAREN TUMLIN'S DECLARATION IN SUPPORT OF PETITIONERS' MOTION TO PROCEED UNDER PSEUDONYM

Exhibit A Declaration of Jane Doe #4.

Exhibit B Declaration of Jane Doe #5.

Exhibit C *Memorandum: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, Dep't of Homeland Security (Nov. 20, 2014).

Exhibit D District Court's Memorandum Opinion and Order, Dkt. No. 347 (May 19, 2016).

Exhibit E *City Wins ID Battle*, Melissa Bailey, New Haven Indep. (June 25, 2008), http://www.newhavenindependent.org/index.php/archives/entry/city_wins_id_battle/.

Exhibit F *Univision Highlights How Trump's Anti-Immigrant Rhetoric May Be Inspiring Violence Against Latinos*, Media Matters (May 20, 2016), http://mediamatters.org/video/2016/05/20/univision-highlights-how-trump-s-anti-immigrant-rhetoric-may-be-inspiring-violence-against-latinos/210511.

Exhibit G *When Hateful Speech Leads to Hate Crimes: Taking Bigotry Out of the Immigration Debate*, Jonathan Greenblatt, Huffington Post (Aug. 24, 2015), http://www.huffingtonpost.com/jonathan-greenblatt/when-hateful-speech-leads_b_8022966.html.

Exhibit H Transcript of the Aug. 19, 2015 Hearing in *Texas v. United States*, No. 14-00254 (S.D. Tex.) (filed Dec. 3, 2014).

CERTIFICATE OF CONFERENCE

On June 3, 2016, I called counsel for all parties to the underlying litigation, *Texas v. United States*, No. 14-cv-00254 (S.D. Tex. filed Dec. 3, 2014), and informed them all of Petitioners' intent to file a petition for mandamus, a motion for a stay, and a motion for Jane Does #4-5 to proceed under pseudonyms. Counsel for the Plaintiff States stated that they oppose mandamus and a stay, and take no position on the motion to proceed under pseudonyms. Counsel for Defendant United States and the other federal government defendants stated that they take no position prior to the filing of these pleadings, and that they will inform the Court of their position after they have had an opportunity to review the filed documents. Counsel for Intervenor-Defendants Jane Does #1-3 stated that the Jane Doe Defendant Intervenors are not opposed to a stay of that portion of the district court's May 19, 2016 order requiring filing under seal of the names and other personal information of certain recipients of deferred action.

/s/ Karen C. Tumlin
Karen C. Tumlin

Counsel for Petitioners

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on June 3, 2016, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Karen C. Tumlin
Karen C. Tumlin

Counsel for Petitioners

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on June 3, 2016, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Karen C. Tumlin
Karen C. Tumlin
Counsel for Petitioners

CERTIFICATE OF SERVICE

I certify that this document has been filed with the clerk of the court and served by ECF or email on June 3, 2016, upon counsel of record in the underlying litigation, *Texas v. United States*, No. 14-cv-00254 (S.D. Tex. filed Dec. 3, 2014).

I further certify that some of the participants in the case are not registered CM/ECF users. I have emailed and/or mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Honorable Andrew S. Hanen
c/o Cristina Sustaeta, Case Manager
United States District Clerk's Office
United States Courthouse
600 East Harrison St., #101
Brownsville, TX 78520
Judge_hanen@txs.uscourts.gov

/s/ Karen C. Tumlin
KAREN C. TUMLIN
Counsel for Petitioner

Exhibits

EXHIBIT A

DECLARATION OF [redacted]

I, [redacted], hereby make the following declaration with respect to the above-captioned matter:

1. I make this declaration based on my own personal knowledge and if called to testify I could and would do so competently as follows.

2. I am a Petitioner for a Writ of Mandamus in this case, Texas v. United States, No. 14-00254 (S.D. Tex. filed December 3, 2014).

3. I am 26 years old and I live in Austin, Texas.

4. I was born in Mexico, but I was brought to the United States when I was a year old, and I have lived in this country ever since. I have not returned to Mexico since I was brought here.

5. I have lived in Texas for all but a few years of my life. I graduated from high school and a community college in Texas, and I am currently finishing the last of my coursework at the University of Texas in Austin in order to obtain my bachelor of science degree in nursing. I am a registered nurse.

6. I am married to a Lawful Permanent Resident who is in the process of becoming a U.S. citizen.

7. In November of 2012, I applied for deferred action through the Deferred Action for Childhood Arrivals ("DACA") program. At that point, I was undocumented, and had been the entire time I had been in this country.

8. I heard about DACA when it was announced, and I knew other people who applied right away, but I waited a few months to apply because I wanted to make sure that people who applied were actually getting work permits and other documents, and that it was not just a way to get people to admit to the government that they were undocumented. Once I saw that people who applied were getting approved for deferred action and work permits, and were not getting into trouble with the authorities, I felt comfortable appyling for DACA.

9. I received my approval for DACA in February of 2013. Soon thereafter, I received an Employment Authorization Document ("EAD") valid for two years.

10. I applied to renew my deferred action and EAD in early October of 2014.

11. On December 18, 2014, I received a notice that my deferred action and EAD had been renewed for three years. When I applied to renew them, my understanding was that the renewals would be for two years.

12. I currently have a Texas driver's license. Its expiration date is the same day in December 2017 that my current EAD expires.

13. I recently heard about the district court's May 19, 2016 order that requires the Federal Government to give the district court a list with the personal information of DACA recipients like me who received an EAD valid for three years and who live in certain states, including Texas.

14. I am very worried about the Federal Government giving my personal and private information—including my name, address, phone number, and A-file number—to anyone. When I applied for DACA, I submitted evidence in support of my application that included copies of my birth certificate, passport, confirmation certificate, community college identification, high school diploma, associate's degree, and school transcripts among other documents. My understanding when I applied for DACA was that U.S. Citizenship and Immigration Services would keep all of this information confidential.

15. The idea that the Federal Government would give this information to the district court, and that the court might give it to the State of Texas, makes me very anxious, both for myself and for my family.

16. The address that I used in my DACA application is my parents' house, where my three younger siblings also live. My parents are undocumented, and I am worried that they will be harassed or even arrested by Texas officials if my personal information is given out.

17. I am also worried that the State of Texas may try to treat me like I am here undocumented even though I have DACA and an EAD.

18. I am also worried that my family or I could be harassed by private individuals who might obtain my personal information. I am aware of a lot of anti-immigrant sentiment in Texas, and so I worry that if people know my personal information they will try to harm me or my family, either physically or in some other way.

19. I also worry about the possibility of people accessing my personal information because they could use it to harm me by stealing it and using it in ways that would damage my reputation, like stealing my identity.

20. For similar reasons, I am very worried that if my real name were used in this lawsuit, I or my family would be harmed physically or in some other way. I know there are a lot of people in Texas who disagree with the DACA program, and I worry that someone may try to retaliate against me or my family if they know that I have DACA and that I am trying to stop the State of Texas from getting my personal information. I am asking that my name not be made public in this lawsuit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of June, 2016

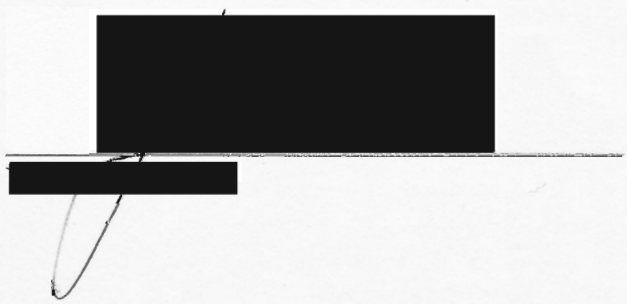


EXHIBIT B

DECLARATION OF [redacted]

I, [redacted], herby make the following declaration with respect to the above-captioned matter:

1. I make this declaration based on my own personal knowledge and if called to testify I could and would do so competently as follows.

2. I am a Petitioner for a Writ of Mandamus, Texas v. United States, No. 14-00254 (S.D. Tex. filed December 3, 2014).

3. I am 20 years old and I live in Houston, Texas.

4. I was born in Mexico, but I was brought to the United States in 2003, when I was in the third grade. It was difficult at first, especially learning English. I have always lived in Houston since that time and consider Texas to be my home.

5. This summer I am marrying a U.S. citizen and we will continue to live in Houston.

6. After I graduated from high school, I took a nine-month course at Lone Star College, a community college in the Houston area, and received a diploma as a medical assistant.

7. For the last 2 years, I have been working in patient care at an urgent care facility. I am excited to be starting a job in administration at a local hospital soon.

8. I have continued studying at Lone Star and am currently taking classes there toward an associate's degree. I hope to eventually work as a registered nurse.

9. I first applied for and received Deferred Action for Childhood Arrivals ("DACA") during my senior year in high school. In order to apply, I submitted a lot of documents including copies of my expired visa, school records, and pictures, paid the various fees, and completed the necessary background checks. I thought that the information I provided was going to be kept confidential.

10. In February 12, 2013, I was granted DACA and given an Employment Authorization Document ("EAD") that was valid for two years.

11. I obtained a social security number in April 2013.

12. I applied for a renewal of DACA around November 15, 2015, and was issued an extension of deferred action and a new EAD on December 18, 2014. When I applied to renew DACA and my EAD, I thought the renewal would be for two more years, but instead they are valid for three years. My current EAD expires on December 17, 2017.

13. When I applied for my DACA renewal, I provided again a lot of information and documents again, including my social security number.

14. I am aware of the lawsuit that has been filed by the state of Texas and other states challenging the expansion of the DACA program and the creation of the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program. I also understand that due to the date on which my EAD was issued and the fact that it is valid for three years, I am at risk of being included in the list of information required to be produced to the federal district court in Brownsville, Texas by the district court's order of May 19 in this case. Specifically, I understand that the district court has required the United States to turn over a list that would include "all personal identifiers and locators including names, addresses, 'A' file numbers and all available contact information, together with the date the three-year renewal or approval was granted" for individuals who received EADs for three-years around the time that I did if those people live in one of the 26 states that are suing to stop the expanded DACA and DAPA programs.

15. I do not want this personal information about me to be given to the district court. I am fearful of the consequences that the production of this information could have, especially if it is given to the states who are suing to stop the expansion of the DACA program and DAPA, including my home state of Texas. I am scared of the State of Texas or other people using this information against me or parents, or people using it against me at work. I am also concerned that if my personal information is released people could use it to harm by stealing my identity or getting more of my personal information.

16. One of my biggest fears is that when I applied for DACA I included the address of my parents in that application. My parents and my younger sister who lives with them are undocumented. My youngest sister is too young to apply for DACA. I am afraid that if this list is produced with all of my identifying information that the address could put my family at risk for deportation or harassment.

17. I also worry about the production of this information to the district court because I am currently living with my fiancé and the federal government has my current address. I don't know if this will affect him in any way.

18. I also worry about the possibility of people accessing my personal information because they could use it to harm me by stealing it and using it in ways that would damage my reputation, like stealing my identity.

///

///

///

///

///

19. I am also very worried that if my real name were used in this lawsuit, I or my family would be harmed physically or verbally or in some other way. There is a lot of anti-immigrant sentiment and people are very enraged about immigration so they attack people in the street randomly. I work in a very public place and I don't want people to know about me or recognize me for the same reasons. I worry that someone may try to hurt me or my family if they know that I have DACA and that I am trying to stop the State of Texas from getting my personal information. I am asking that my name not be made public in this lawsuit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3 day of June, 2016

[redacted]

EXHIBIT C

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 20, 2014

MEMORANDUM FOR: León Rodríguez
Director
U.S. Citizenship and Immigration Services

Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents**

This memorandum is intended to reflect new policies for the use of deferred action. By memorandum dated June 15, 2012, Secretary Napolitano issued guidance entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*. The following supplements and amends that guidance.

The Department of Homeland Security (DHS) and its immigration components are responsible for enforcing the Nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. Secretary Napolitano noted two years ago, when she issued her prosecutorial discretion guidance regarding children, that "[o]ur Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case."

Deferred action is a long-standing administrative mechanism dating back decades, by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time.[1] A form of administrative relief similar to deferred action, known then as "indefinite voluntary departure," was originally authorized by the Reagan and Bush Administrations to defer the deportations of an estimated 1.5 million undocumented spouses and minor children who did not qualify for legalization under the *Immigration Reform and Control Act* of 1986. Known as the "Family Fairness" program, the policy was specifically implemented to promote the humane enforcement of the law and ensure family unity.

Deferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual's case for humanitarian reasons, administrative convenience, or in the interest of the Department's overall enforcement mission. As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency's discretion. Deferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States. Nor can deferred action itself lead to a green card. Although deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes.[2]

Historically, deferred action has been used on behalf of particular individuals, and on a case-by-case basis, for classes of unlawfully present individuals, such as the spouses and minor children of certain legalized immigrants, widows of U.S. citizens, or victims of trafficking and domestic violence.[3] Most recently, beginning in 2012, Secretary Napolitano issued guidance for case-by-case deferred action with respect to those who came to the United States as children, commonly referred to as "DACA."

---

[1] Deferred action, in one form or another, dates back to at least the 1960s. "Deferred action" per se dates back at least as far as 1975. *See,* Immigration and Naturalization Service, Operation Instructions § 103.1(a)(1)(ii) (1975).

[2] INA § 204(a)(1)(D)(i)(II), (IV) *(Violence Against Women Act (VAWA) self-petitioners not in removal proceedings are "eligible for deferred action and employment authorization");* INA § 237(d)(2) *(DHS may grant stay of removal to applicants for T or U visas but that denial of a stay request "shall not preclude the alien from applying for . . . deferred action")*; REAL ID Act of 2005 § 202(c)(2)(B)(viii), Pub. L. 109-13 *(requiring states to examine documentary evidence of lawful status for driver's license eligibility purposes, including "approved deferred action status")*; National Defense Authorization Act for Fiscal Year 2004 § 1703(c) (d) Pub. L. 108-136 *(spouse, parent or child of certain U.S. citizen who died as a result of honorable service may self-petition for permanent residence and "shall be eligible for deferred action, advance parole, and work authorization").*

[3] In August 2001, the former-Immigration and Naturalization Service issued guidance providing deferred action to individuals who were eligible for the recently created U and T visas. Two years later, USCIS issued subsequent guidance, instructing its officers to use existing mechanisms like deferred action for certain U visa applicants facing potential removal. More recently, in June 2009, USCIS issued a memorandum providing deferred action to certain surviving spouses of deceased U.S. citizens and their children while Congress considered legislation to allow these individuals to qualify for permanent residence status.

By this memorandum, I am now expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum.

The reality is that most individuals in the categories set forth below are hard-working people who have become integrated members of American society. Provided they do not commit serious crimes or otherwise become enforcement priorities, these people are extremely unlikely to be deported given this Department's limited enforcement resources—which must continue to be focused on those who represent threats to national security, public safety, and border security. Case-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation's security and economic interests and make common sense, because they encourage these people to come out of the shadows, submit to background checks, pay fees, apply for work authorization (which by separate authority I may grant), and be counted.

A. Expanding DACA

DACA provides that those who were under the age of 31 on June 15, 2012, who entered the United States before June 15, 2007 (5 years prior) as children under the age of 16, and who meet specific educational and public safety criteria, are eligible for deferred action on a case-by-case basis. The initial DACA announcement of June 15, 2012 provided deferred action for a period of two years. On June 5, 2014, U.S. Citizenship and Immigration Services (USCIS) announced that DACA recipients could request to renew their deferred action for an additional two years.

In order to further effectuate this program, I hereby direct USCIS to expand DACA as follows:

Remove the age cap. DACA will apply to all otherwise eligible immigrants who entered the United States by the requisite adjusted entry date before the age of sixteen (16), regardless of how old they were in June 2012 or are today. The current age restriction excludes those who were older than 31 on the date of announcement (*i.e.*, those who were born before June 15, 1981). That restriction will no longer apply.

Extend DACA renewal and work authorization to three-years. The period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments. This change shall apply to all first-time applications as well as all applications for renewal effective November 24, 2014. Beginning on that date, USCIS should issue all work

authorization documents valid for three years, including to those individuals who have applied and are awaiting two-year work authorization documents based on the renewal of their DACA grants. USCIS should also consider means to extend those two-year renewals already issued to three years.

Adjust the date-of-entry requirement. In order to align the DACA program more closely with the other deferred action authorization outlined below, the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010.

USCIS should begin accepting applications under the new criteria from applicants no later than ninety (90) days from the date of this announcement.

B. Expanding Deferred Action

I hereby direct USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who:

- have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident;
- have continuously resided in the United States since before January 1, 2010;
- are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with USCIS;
- have no lawful status on the date of this memorandum;
- are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and
- present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

Applicants must file the requisite applications for deferred action pursuant to the new criteria described above. Applicants must also submit biometrics for USCIS to conduct background checks similar to the background check that is required for DACA applicants. Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of

the Immigration and Nationality Act.[4] Deferred action granted pursuant to the program shall be for a period of three years. Applicants will pay the work authorization and biometrics fees, which currently amount to $465. There will be no fee waivers and, like DACA, very limited fee exemptions.

USCIS should begin accepting applications from eligible applicants no later than one hundred and eighty (180) days after the date of this announcement. As with DACA, the above criteria are to be considered for all individuals encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or USCIS, whether or not the individual is already in removal proceedings or subject to a final order of removal. Specifically:

- ICE and CBP are instructed to immediately begin identifying persons in their custody, as well as newly encountered individuals, who meet the above criteria and may thus be eligible for deferred action to prevent the further expenditure of enforcement resources with regard to these individuals.

- ICE is further instructed to review pending removal cases, and seek administrative closure or termination of the cases of individuals identified who meet the above criteria, and to refer such individuals to USCIS for case-by-case determinations. ICE should also establish a process to allow individuals in removal proceedings to identify themselves as candidates for deferred action.

- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear. The USCIS process shall also be available to individuals subject to final orders of removal who otherwise meet the above criteria.

Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only an Act of Congress can confer these rights. It remains within the authority of the Executive Branch, however, to set forth policy for the exercise of prosecutorial discretion and deferred action within the framework of existing law. This memorandum is an exercise of that authority.

---

[4] INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) ("As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the[Secretary]."); 8 C.F.R. § 274a.12 (regulations establishing classes of aliens eligible for work authorization).

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, ET AL., Plaintiffs,	§ § §	
V.	§	CIVIL NO. B-14-254
	§	
UNITED STATES OF AMERICA, ET AL., Defendants.	§ §	

MEMORANDUM OPINION AND ORDER

An exchange between two characters from a recent popular film exemplifies what this case is, and has been, about:

> FBI Agent Hoffman: Don't go Boy Scout on me. We don't have a rulebook here.
>
> Attorney James Donovan: You're Agent Hoffman, yeah?
>
> FBI Agent Hoffman: Yeah.
>
> Attorney James Donovan: German extraction?
>
> FBI Agent Hoffman: Yeah, so?
>
> Attorney James Donovan: My name's Donovan, Irish, both sides, mother and father. I'm Irish, you're German, but what makes us both Americans? Just one thing . . . the rulebook.
>
> We call it the Constitution and we agree to the rules and that's what makes us Americans. It's all that makes us Americans, so don't tell me there's no rulebook . . . .[1]

Whether it be the Constitution or statutory law, this entire case, at least in this Court, has been about allegiance to the rulebook. In its prior orders concerning the actual subject matter of this case, the Court never reached the relative merits or lack thereof of the Defendants' 2014 Department of

[1] BRIDGE OF SPIES (DreamWorks 2015) (emphasis added). Screenplay by Matt Charman, Ethan Coen and Joel Coen.

Homeland Security ("DHS") Directive. The question addressed by this Court was whether the Government had to play by the rules. This Court held that it did. The Fifth Circuit has now also held that the Government must play by the rules, and, of course, that decision is now before the Supreme Court. It was no surprise to this Court, or quite frankly to any experienced legal observer, that this question would ultimately reach the Supreme Court. Consequently, the resolution of whether the Executive Branch can ignore and/or act contrary to existing law or whether it must play by the rulebook now rests entirely with that Court.

What remains before this Court is the question of whether the Government's lawyers must play by the rules. In other words, the propriety of the Defendants' actions now lies with the Supreme Court, but the question of how to deal with the conduct, or misconduct, of their counsel rests with this Court.

To that end, this Court neither takes joy nor finds satisfaction in the issuance of this Order. To the contrary, this Court is disappointed that it has to address the subject of lawyer behavior when it has many more pressing matters on its docket. It is, at best, a distraction, and there is nothing "best" about the conduct in this case. The United States Department of Justice ("DOJ" or "Justice Department") has now admitted making statements that clearly did not match the facts. It has admitted that the lawyers who made these statements had knowledge of the truth when they made these misstatements. The DOJ's only explanation has been that its lawyers either "lost focus" or that the "fact[s] receded in memory or awareness." [Doc. No. 242 at 18].[2] These misrepresentations were made on multiple occasions starting with the very first hearing this Court held. This Court would be remiss if it left such unseemly and unprofessional conduct unaddressed.[3]

---

[2] To explain its conduct, the Government has filed an unredacted brief and a redacted brief with only the latter being produced to the Plaintiff States. [Doc. Nos. 242 & 243]. This Court, by necessity, will cite the unredacted brief [Doc. No. 242] as that is the brief that contains the Government's explanations. It will not unseal the unredacted brief and will only quote here those segments pertinent to this opinion.

[3] Judges on the Ninth Circuit have described a court's duty to address misconduct:

> When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational

As the parties know, this Court has been deliberating for quite some time about the proper way to address the series of misrepresentations made by the attorneys from the Justice Department to the Plaintiff States and to this Court. This Court in at least one prior order has detailed the multiple times attorneys for the Government misrepresented the actions being taken (or, according to their representations, not being taken) by their clients. *See, e.g.*, Doc. No. 226. These misrepresentations will be discussed in more detail below; but suffice it to say the Government's attorneys effectively misled the Plaintiff States into foregoing a request for a temporary restraining order or an earlier injunction hearing. Further, these misrepresentations may have caused more damage in the intervening time period and may cause additional damage in the future. Counsel's misrepresentations also misdirected the Court as to the timeline involved in the implementation of the 2014 DHS Directive, which included the amendments to the Deferred Action for Childhood Arrivals ("DACA") program.

I. The Timing of this Order

Initially, this Court had decided to postpone ruling on this matter until after a final ruling on the merits since the injunction it entered was interlocutory, and the Court could not reasonably foresee a fact scenario in which the case would not ultimately be remanded for further proceedings. Subsequent events have changed the landscape in this regard. Usually, the legal issues in a case narrow on appeal until a case reaches the highest rung on the appellate ladder, at which point that court (be it a Court of Appeals or the Supreme Court) has one or two overriding issues that it must resolve. In addressing the request for a temporary injunction, this Court ruled, as is the custom and tradition in American jurisprudence, on the narrowest issue that would resolve the existing controversy: the procedural issue

---

> premises of the rule of law. When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition.

United States v. Olsen, 737 F.3d 625, 632 (9th Cir. 2013) (Kozinski, J., dissenting from denial of petition for rehearing en banc). Four judges joined this dissent.

concerning the Administrative Procedure Act ("APA"). This Court anticipated that the two issues on appeal would be this Court's ruling on standing and the procedural APA issue, with only the former possibly being case-determinative.

This case, however, has not followed the normal progression. Instead of the issues narrowing on appeal, they have expanded. The Fifth Circuit expanded the holding by not only affirming on the APA procedural violation, but also by ruling that the Plaintiff States have established a substantial likelihood of success on the merits of their claim that Defendants' actions violated substantive APA standards as well. *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015). The Supreme Court has apparently expanded the scope of review even further. It has not only granted review of the Fifth Circuit's judgment, but has also asked the parties to brief the constitutional issues.[4] *United States v. Texas*, 136 S. Ct. 906 (2016) (No. 15-674). Consequently, one now has reason to speculate that the Supreme Court could rule in a way that would negate the need for a remand to this Court. That being the case, the most efficacious path for this Court to follow is to proceed to rule upon what may be the only remaining issue.

II. The Misconduct Involving the Implementation of the 2014 DHS Directive

This Court has previously described the events that occurred in this case in its April 7, 2015, order. [Doc. No. 226]. In summary, this Court and opposing counsel were misled both in writing and in open court on multiple occasions as to when the Defendants would begin to implement the Secretary's 2014 DHS Directive establishing the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program and amending the DACA program. Opposing counsel and this Court were assured that no action would be taken implementing the 2014 DHS Directive until February 18,

[4] This Court has not been the only observer to note this expansion on appeal. "A rather unusual aspect of the case was that, although the lower courts had not decided a constitutional question the states had raised, the Justices added that question on their own." Lyle Denniston, *Immigration Policy: Review and Decision This Term*, SCOTUSBLOG (Jan. 19, 2016 9:50 AM), http://scotusblog.com/2016/01/immigration-policy-review-and-decision-this-term.

2015. Counsel for the Government made these assurances on the record on December 19, 2014, and in open court on January 15, 2015. Similar misrepresentations were made in pleadings filed on January 14, 2015, [Doc. No. 90 at 3] and even after the injunction issued, on February 23, 2015. [Doc. No. 150]. For example, on February 23, 2015, the Government lawyers wrote that: "DHS was to begin accepting requests for modified DACA on February 18, 2015."[5] [Doc. No. 150 at 7]. This representation was made despite the fact that in actuality the DHS had already granted or renewed over 100,000 modified DACA applications using the 2014 DHS Directive.

At the time of the Court's April 2015 order, the Government had not filed its brief explaining its conduct to the Court. Prior to reviewing that brief, the Court entertained a variety of possible explanations concerning the conduct of the Government lawyers. These included the more innocuous possibilities that the DOJ lawyers lacked knowledge or that they made an innocent mistake that led to the misrepresentations.

Now, however, having studied the Government's filings in this case, its admissions make one conclusion indisputably clear: the Justice Department lawyers knew the true facts and misrepresented those facts to the citizens of the 26 Plaintiff States, their lawyers and this Court on multiple occasions.[6]

A. The Government's Explanation

The Government claims that the reason its lawyers were not candid with the Court was that they either "lost focus on the fact" or that somehow "the fact receded in memory or awareness." [Doc. No. 242 at 18]. The Government's brief admits that its lawyers, including the lawyers who appeared in this Court, knew that the Defendants were granting three-year DACA renewals using the three-year period

[5] This date matches the Government's earlier representation that "U.S. Citizenship and Immigration Services (USCIS) does not intend to entertain requests for deferred action under the challenged policy until February 18, 2015 and even after it starts accepting requests, it will not be in a position to make any final decisions on those requests *at least* until March 4, 2015." [Doc. No. 90 at 3] (emphasis in the original). In reality, by March 3, 2015, over 100,000 requests had been granted.

[6] "As of early December 2014, the attorneys who appeared before this Court (and many other attorneys at both the DOJ and DHS) had been informed that DHS was providing three-year deferrals to new and renewal applicants. . . ." [Doc. No. 242 at 8]. Three-year deferrals could only have been granted using the 2014 DHS Directive. *See* the Government's brief quoted *infra* p. 7.

created by the 2014 DHS Directive at issue in this case. Yet the Government's lawyers chose not to tell the Plaintiff States or the Court. In fact, the Justice Department knew that DHS was implementing the three-year renewal portion of the 2014 DHS Directive weeks before its attorneys told this Court for the very first time that no such action was being taken. Apparently, lawyers, somewhere in the halls of the Justice Department whose identities are unknown to this Court, decided unilaterally that the conduct of the DHS in granting three-year DACA renewals using the 2014 DHS Directive was immaterial and irrelevant to this lawsuit and that the DOJ could therefore just ignore it. [Doc. No. 242 at 17]. Then, for whatever reason, the Justice Department trial lawyers appearing in this Court chose not to tell the truth about this DHS activity. The first decision was certainly unsupportable, but the subsequent decision to hide it from the Court was unethical.

Such conduct is certainly not worthy of any department whose name includes the word "Justice."[7] Suffice it to say, the citizens of all fifty states, their counsel, the affected aliens and the judiciary all deserve better.

B. The Misrepresentations by the Government's Attorneys

The Government has admitted to the Court in multiple places that both DHS and DOJ personnel knew since November of 2014 that three-year DACA renewals were being granted. It was impossible to grant a three-year deferral using the 2012 DACA criteria. The Government admits the only way these three-year deferrals could be granted was pursuant to the 2014 DHS Directive—the very subject of the States' injunction lawsuit:

---

[7] Just recently, the Sixth Circuit expressed a similar conclusion. It wrote:

> In closing, we echo the district court's observations about this case. The lawyers in the Department of Justice have a long and storied tradition of defending the nation's interests and enforcing its laws—all of them, not just selective ones—in a manner worthy of the Department's name. The conduct of the IRS's attorneys in the district court [like the attorneys representing the DHS in this Court] falls outside that tradition. We expect that the IRS will do better going forward. And we order that the IRS comply with the district court's discovery orders of April 1 and June 16, 2015—without redactions, and without further delay.

In re United States, No. 15-3793, 2016 WL 1105077, at *11 (6th Cir. Mar. 22, 2016) (emphasis added). The district court had earlier written that it questioned "whether or not the Department of Justice is doing justice." *Id.* at *5.

> The Government does not dispute, and indeed has never disputed, that the three-year deferrals were pursuant to the 2014 Deferred Action Guidance. Likewise, there is no dispute that the Government also understood the change from two- to three-year grants of deferred action to be a contested issue in the case.

[Doc. No. 242 at 15 n.2] (citation omitted).

1. The December 2014 Misrepresentation

From day one, the Plaintiffs sought to enjoin the entire 2014 DHS Directive. [Doc. Nos. 1 & 5]. The injunction proposed by the Plaintiff States sought to prevent the implementation of "the DHS Directive of November 20, 2014." [Doc. No. 5-1]. This by definition included the three-year DACA deferrals. It is important to remember that the Plaintiff States initially requested that a hearing on the merits of their motion be held before December 31, 2014. [Doc. No. 5 at 12]. The Plaintiff States agreed to a later hearing date as a result of the Government's representations made in a conference call with the Court on December 19, 2014. During that call, counsel for the Plaintiff States agreed to a January hearing date, but only did so after being assured by the Government that nothing would happen between the December 19th call and the hearing date. Out of an abundance of caution, counsel had the following exchange:

> **PLAINTIFF STATES' COUNSEL:** . . . [W]e have been operating under the assumption . . . that we absolutely protected our interests in this and that there won't be any curve balls or surprises about, you know, deferred action documents being issued, you know, tomorrow or on the first of the year . . . [W]e have filed in our pleadings and have pointed out, that, you know, the United States has hired a thousand employees in the initial large processing center and that there are, you know, there is a potential for I think for prejudice or at least changing the calculus on the preliminary injunction inquiry if the state of the playing field changes between now and the 9th of January.
>
> **THE COURT**: . . . [D]o you anticipate that happening?
>
> **COUNSEL FOR THE GOVERNMENT**: No, I do not, your Honor. The agency was directed to begin accepting requests for deferred action I believe beginning sometime in -- by mid-February but even after that we wouldn't anticipate any decisions on those for some time thereafter. So there -- I really would not expect anything between now and the date of the hearing.

[Doc. No. 184 at 10–11] (emphasis added). Clearly, counsel for the Plaintiff States was concerned about any intervening implementation of the 2014 DHS Directive that might occur before the injunction hearing. The Government has now conceded that, at the very time counsel told the Court and opposing counsel that no action was taking place, over 100,000 three-year deferred action renewals were being processed using the 2014 DHS Directive.

The response by a DOJ lawyer, who the Government concedes knew that the DHS was already issuing three-year extensions pursuant to the 2014 DHS directive, was:

"I really would not expect anything between now and the date of the hearing."

[Doc. No. 184 at 11] (emphasis added). How the Government can categorize the granting of over 100,000 applications as not being "anything" is beyond comprehension. Even if one did not think the increase in DACA time limits was at issue, a position completely unjustifiable under the circumstances, the duty of candor to the Court would certainly require that one mention the fact that the DHS was going forward with that part of the 2014 DHS Directive.

This was not a curve ball thrown by the Government; this was a spitball which neither the Plaintiff States nor the Court would learn of until March 3, 2015.

2. The January 2015 Misrepresentations

One misrepresentation could be understandably a mistake, but the exchange between Counsel and the Court in the January hearing puts to rest any doubt regarding misconduct. On this occasion, the Court was worried about what impact a delay in the briefing schedule requested by the Government might cause.

> **THE COURT**: I'm a little concerned about how much time you asked for. If I give you until the 28th [of January, 2015], can you work with that?
>
> **COUNSEL FOR THE GOVERNMENT:** Let me confer with my co-counsel, but I believe so.

Your Honor, in part we're just discussing about the need to respond to some of the voluminous factual material. If we could have until the 30th, that Friday, that would be preferable.

THE COURT: Okay. And . . . I guess to preempt Mr. Oldham [Counsel for the Plaintiff States] when I ask him does he have any problem with that, he's going to want to know what's happening when?

COUNSEL FOR THE GOVERNMENT: And we set this -- we did file yesterday afternoon, Your Honor.

THE COURT: I can't find it.

COUNSEL FOR THE GOVERNMENT: My apologies.

THE COURT: No, no. It's here. I just buried it with all my paper.

COUNSEL FOR THE GOVERNMENT: In that document [Motion for Extension of Time, Doc. No. 90] we reiterated that no applications for the revised DACA -- this is not even DAPA -- revised DACA would be accepted until the 18th of February, and that no action would be taken on any of those applications until March the 4th.

THE COURT: And nothing is happening on DAPA?

COUNSEL FOR THE GOVERNMENT: So the memorandum said that DAPA should be implemented no sooner than mid[-]May, so DACA is really the first -- the revised DACA is the first deadline.

THE COURT: Okay. Then you can have until the 30th.

COUNSEL FOR THE GOVERNMENT: Okay. Thank you.

THE COURT: Wait, wait. You're being flagged.

COUNSEL FOR THE GOVERNMENT: Oh, sorry. Just to be clear, I meant no later than. So the memorandum provides that by mid[-]May, DAPA will be stood up.

THE COURT: Okay.

COUNSEL FOR THE GOVERNMENT: But the main -- the driver here would be --

THE COURT: But as far as you know, nothing is going to happen in the next three weeks?

COUNSEL FOR THE GOVERNMENT: No, Your Honor.

THE COURT: Okay. On either.

COUNSEL FOR THE GOVERNMENT: In terms of accepting applications or granting any up or down applications.

THE COURT: Okay.

COUNSEL FOR THE GOVERNMENT: For revised DACA, just to be totally clear.

[Doc. No. 106 at 133–34] (emphasis added).

Twice counsel for the Government (who, according to the Government's brief, knew that the DHS was already granting renewals using revised DACA) told this Court that the Government would not begin to implement the revised DACA (which includes the three-year extensions) until mid-February. She, in fact, confirmed to this Court that nothing was going to happen.

Certainly no one can claim this even approaches candor to the Court. This was not a casual exchange between counsel. This exchange was prompted by the Government's own request for additional time. It was responsive to a direct inquiry by the Court, which was concerned that its order would, regardless of which side it ultimately favored, be issued in a timely and fair fashion.

The reason this Court is certain that there could have been no misinterpretation as to whether the increase to a three-year renewal period was at issue is that it raised that very topic just before the above-quoted exchange.

COUNSEL FOR THE GOVERNMENT: And just to be clear on that last point, . . . there's one directive that the plaintiffs are challenging in the complaint, and that both is directed toward the DAPA program, but also is a[n] expansion or revision of the DACA program. So to the extent that there's a revision or expansion of the group that would be eligible to apply for that, we do understand the plaintiffs to be challenging that.

THE COURT: The increase in years?

> **COUNSEL FOR THE STATES:** Your Honor --
>
> **COUNSEL FOR THE GOVERNMENT:** They ask to have you direct and enjoin, and that directive would allow the revisions to the DACA program that we described in our brief.

[*Id.* at 91] (emphasis added).

The brief referred to by counsel described the 2014 DHS Directive as "revis[ing] three aspects of DACA . . . . Second, it extended the period of DACA from two to three years." [Doc. No. 38 at 29] (emphasis added). Again, there is no doubt that counsel knew the increase in years for a DACA term was a matter of contention. This Court directly raised the issue. The Government admits that the lawyer making these statements knew at the time of this hearing that the DHS was already granting these three-year extensions (which it also admits are only authorized by the 2014 DHS Directive) instead of the two-year renewals authorized in 2012. Not only did counsel fail to tell the Court that the DHS was already granting relief using the 2014 DHS Directive, she told the Court that nothing would happen with regard to revised DACA until mid-February of 2015.

3. The Lack of Candor After the Injunction

If those two instances on the record were not enough, a later incident occurred when again there could be no doubt that the proposed revisions to DACA were at issue. This Court issued its injunction on February 16, 2015. That order enjoined the Government from implementing:

> . . . any and all aspects or phases of the expansions (including any and all changes) to the Deferred Action for Childhood Arrivals ("DACA") program as outlined in the DAPA Memorandum pending a trial on the merits or until a further order of this Court, the Fifth Circuit Court of Appeals or the United States Supreme Court.

[Doc. No. 144 at 2]. This clearly enjoined the three-year renewals created by the 2014 DHS Directive. Those are the same renewals that the Government's trial counsel, according to the Government's brief, knew had been occurring since early December of 2014. Despite this knowledge, counsel did not alert

the Court to this ongoing activity until March 3, 2015—some two weeks later. This should have been done immediately—especially given the bad faith representations counsel had already made.

To the contrary, what counsel did borders on the incredible. Instead of informing the Court that its clients had already been implementing the three-year renewals pursuant to the 2014 DHS Directive since late-November 2014, the Government filed a motion on February 23, 2015, to stay the Court's ruling and in that motion stated:

"DHS was to begin accepting requests for modified DACA on February 18, 2015."

[Doc. No. 150 at 7]. Again no mention was made that the DHS had already been granting three-year extensions under modified DACA for three months. Regardless of how one spins the facts prior to the injunction, no one after the injunction could conceivably think that the three-year extensions were not a matter of contention and were not now enjoined. Yet counsel, who knew of the DHS activity, were not only silent, but their motion was certainly calculated to give the impression that nothing was happening or had happened pursuant to the 2014 DHS Directive—when, in fact, by that time over 100,000 applications had already been granted. In the Motion to Stay, counsel also wrote:

> Moreover, the Court's assertion that its Order does not affect the status quo is at odds with the Court's recognition that DHS had already begun preparing to effectuate the Deferred Action Guidance. *See* Op. at 76. The Court issued its injunction one business day before USCIS [U.S. Citizenship and Immigration Services] was scheduled to begin accepting requests for deferred action under the modified DACA guidelines. USCIS had spent the prior 90 days—the time period established by the Guidance for implementation—preparing to receive such requests. The injunction sets back substantial preparatory work that has already been undertaken.

[Doc. No. 150 at 17] (emphasis added).[8]

[8] There is actually a fourth misrepresentation that the Government made. On January 14, 2015, when requesting an extension of time, the Government claimed that "Plaintiffs will not be prejudiced by [a] two-week extension . . . because U.S. Citizenship and Immigration Services (USCIS) does not intend to entertain requests for deferred action under the challenged policy until February 18, 2015, and even after it starts accepting requests, it will not be in a position to make any final decisions on those requests *at least* until March 4, 2015." [Doc. No. 90 at 3] (emphasis in the original). This Court finds that both of these misrepresentations in pleadings [Doc. Nos. 90 & 150] clearly breach Federal Rule of Civil Procedure 11(b). In sum, counsel twice in hearings and twice in pleadings knowingly made representations to the Court that they knew were not true.

"[P]reparing to" do something and actually doing it are obviously two different things. What counsel did not say was that, despite the fact that the Government was scheduled "to begin accepting requests for deferred action under the modified DACA guidelines," it had already granted relief using the modified DACA guidelines over 100,000 times. At this point, even the most calculating attorney would conclude that he or she would have to tell the Court the complete truth.

C. No *De Minimis* Rule Applies to the Truth

In its own defense, the Government has claimed it did not know before February 27, 2015, that the number of individuals that had been granted three-year deferrals between November 24, 2014, and the date of the injunction exceeded 100,000. It claims that it notified the Court very quickly after it realized that the number exceeded 100,000. [Doc. Nos. 242 & 243]. This may be true, but knowing the exact number is beside the point. The Government's attorneys knew since late-November of 2014 that the DHS was issuing three-year deferrals under the 2014 DHS Directive. Whether it was one person or one hundred thousand persons, the magnitude does not change a lawyer's ethical obligations. The duties of a Government lawyer, and in fact of any lawyer, are threefold: (1) tell the truth; (2) do not mislead the Court; and (3) do not allow the Court to be misled. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 cmts. 2 & 3 (AM. BAR ASS'N 2013). The Government's lawyers failed on all three fronts. The actions of the DHS should have been brought to the attention of the opposing counsel and the Court as early as December 19, 2014. The failure of counsel to do that constituted more than mere inadvertent omissions—it was intentionally deceptive. There is no *de minimis* rule that applies to a lawyer's ethical obligation to tell the truth.

III. The Rulebook

The rules that apply to this case are both succinct and clear. There is no gray area or even grounds for debate. Attorney conduct in the Southern District of Texas is controlled by Appendix A of its local rules. Appendix A is entitled "Rules of Discipline." Rule 1 is as follows:

> Rule 1. *Standards of Conduct.*
>
> A. Lawyers who practice before this court are required to act as mature and responsible professionals, and the minimum standard of practice shall be the Texas Disciplinary Rules of Professional Conduct.
>
> B. Violation of the Texas Disciplinary Rules of Professional Conduct shall be grounds for disciplinary action, but the court is not limited by that code.

S.D. Tex. Local Court Rules App. A.

Thus, this District has adopted the Texas Disciplinary Rules of Professional Conduct ("Texas Disciplinary Rules") as its minimum ethical standards. The Court also notes that courts in the Fifth Circuit are not limited to their respective state codes. Indeed, the Fifth Circuit, in an appeal emanating from a Southern District of Texas case, broadened the ethical standards applicable to all lawyers practicing in the Fifth Circuit. *In re Dresser Industries, Inc.*, 972 F.2d 540, 543–44 (5th Cir. 1992). In that case, which concerned disqualification of counsel, the Court held that for courts in the Fifth Circuit compliance with the local (Texas) disciplinary rules was not in and of itself sufficient. It stated that the conduct of lawyers practicing in this Circuit should certainly include compliance with the applicable state disciplinary rules, but courts should also look at ethical rules "announced by the national profession in the light of the public interest and the litigants' rights." *Id.* at 543. In short order, the Circuit reaffirmed that approach in *In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992). Regardless of whether state or national standards apply or how many authorities one consults, the result here would be the same. An attorney owes a duty of candor and honesty to the court, and at the very least a duty not to misrepresent the facts to a judge or opposing counsel. The pertinent Texas ethical rules are as follows:

Rule 3.03. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

(4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.[9]

Tex. Disciplinary Rules Prof'l Conduct R. 3.03 (emphasis added).

Candor is required by all rules of ethics that could possibly apply here. One definition of "candor" describes it as being "[t]he quality of being open, honest and sincere." *Candor*, BLACK'S LAW DICTIONARY (10th ed. 2014). The "duty of candor" under which lawyers operate is a bit broader. It is a "duty to disclose material facts; esp[ecially], a lawyer's duty not to allow a tribunal to be misled by false statements, either of law or of fact, that a lawyer knows to be false." *Duty*, BLACK'S LAW DICTIONARY (10th ed. 2014). Most authors would also include that it is a lawyer's duty not only to be honest but also not to mislead or allow a court to be misled by half-truths or statements which, while technically honest,

[9] Note the obligation placed on counsel to take remedial action.

are calculated to mislead. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmts. 2 & 3 (AM. BAR ASS'N 2013).

Of course, that was not the case here. Counsel in this case violated virtually every interpretation of candor. The failure of counsel to inform the counsel for the Plaintiff States and the Court of the DHS activity—activity the Justice Department admittedly knew about—was clearly unethical and clearly misled both counsel for the Plaintiff States and the Court.

> **Rule 4.01. Truthfulness in Statements to Others**
>
> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Tex. Disciplinary Rules Prof'l Conduct R. 4.01 (emphasis added).

> **RULE 8.04. Misconduct**
>
> (a) A lawyer shall not:
>
> (1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;
>
> (2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> * * *

Id. R. 8.04 (emphasis added). These are the applicable rules that are incorporated by reference as the controlling rules of the Southern District of Texas.

Further, compliance with these rules has been mandated by federal law since 1998 when Congress enacted the so-called "McDade Amendment." That law reads in pertinent part:

> § 530B. Ethical standards for attorneys for the Government
>
> (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.
>
> (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.[10]
>
> * * *

28 U.S.C. § 530B (emphasis added). Counsel's conduct in this case was not only unethical, but a failure to comply with federal law.

National standards, to the extent those are represented by the Model Rules of Professional Conduct promulgated by the American Bar Association ("ABA"), do not suggest any contrary result in this case. The applicable ABA rules track those found in the Texas Disciplinary Rules of Professional Conduct.

> **Rule 3.3 Candor Toward The Tribunal**
>
> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> * * *

MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2013) (emphasis added).

[10] While this amendment has received criticism from various commentators, virtually none of the criticism has been directed at a lawyer's duty to be honest with the Court and opposing counsel. *See, e.g.*, Bradley T. Tennis, *Uniform Ethical Regulation of Federal Prosecutors*, 120 YALE L.J. 144 (2010); Paula J. Casey, *Regulating Federal Prosecutors: Why McDade Should Be Repealed*, 19 GA. ST. U. L. REV. 395 (2002).

> **Rule 4.1 Truthfulness In Statements To Others**
>
> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; . . .
>
> * * *

Id. r. 4.1 (emphasis added).

> **Rule 8.4 Misconduct**
>
> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> * * *

Id. r. 8.4 (emphasis added).

IV. The Government's Conduct Violates the Rulebook

This Court has found no authority to support the concept that it is ever ethical and appropriate conduct to mislead a court and opposing counsel; nor has the Government provided any authority to that effect. That being the case, the Court finds no need for a comprehensive dissertation on the duty of candor and honesty because counsel in this case failed miserably at both. The Government's lawyers in this case clearly violated their ethical duties.

To say that the Government acted contrary to its multiple assurances to this Court is, at best, an understatement. The Government knowingly acted contrary to its representations to this Court on over 100,000 occasions.[11] This Court finds that the misrepresentations detailed above: (1) were false; (2) were made in bad faith; and (3) misled both the Court and the Plaintiff States.

Both the Court and the attorneys representing the Plaintiff States relied upon February 18, 2015, (the implementation day for the 2014 DHS Directive specified by the Government attorneys) as the controlling date. The Court issued the temporary injunction on February 16, 2015. The timing of this ruling was clearly made based upon the representations that no action would be taken by Defendants until February 18, 2015. If Plaintiffs' counsel had known that the Government was surreptitiously acting, the Plaintiff States could have, and would have according to their representations, sought a temporary restraining order pursuant to Federal Rule of Civil Procedure 65(b) much earlier in the process. Their clear intent until the Government misrepresented the facts during the December 19, 2014, conference call was to obtain a hearing before year's end. Due to the Government's wrongful misstatements, the Plaintiff States never got that opportunity. The misrepresentations of the Government's attorneys were material and directly caused the Plaintiff States to forgo a valuable legal right to seek more immediate relief.

V. The Appropriate Remedy for the Inappropriate Conduct

A. <u>What This Court Will Not Do</u>

Since there is no doubt that misconduct has occurred and since there is for the first time a possibility that this case will not be remanded, the Court will take this opportunity to dispose of the only impediment to the Supreme Court issuing a complete and final judgment in this matter. The misconduct

[11] The figure quoted at the March 19, 2015, hearing was 108,081. [Doc. No. 203 at 25]. This figure does not include the approximately 2,000 times the Government admitted it actually violated this Court's injunction. [Doc. No. 247 at 1].

in this case was intentional, serious and material. In fact, it is hard to imagine a more serious, more calculated plan of unethical conduct. There were over 100,000 instances of conduct contrary to counsel's representations; such a sizable omission cannot be classified as immaterial.

The most immediate remedy that must be considered for misconduct so blatant and with adverse consequences of such magnitude is the striking of the party's pleadings. While perhaps an appropriate sanction, as this Court has expressed in prior proceedings and opinions (and despite the overwhelming grounds to do so), it will not strike the Government's pleadings. In a different situation, this Court might very well have taken that action. This egregious conduct merits it. While this Court has that power (both pursuant to the Rules and under its inherent power), the fact that a federal court might have a power does not mean that court should necessarily exercise it. The national importance of the outcome of this litigation outweighs the benefits to be gained by implementing the ultimate sanction. The citizens of this country and those non-citizens who may be affected by the 2014 DHS Directive deserve an answer and should not be deprived of that answer due to the misconduct of counsel. Further, the Supreme Court has decided to weigh in on these matters. Striking the Government's pleadings would not only be unfair to the litigants, but also unfair, and perhaps even disrespectful, to the Supreme Court as it would deprive that Court of the ability to thrash out the legal issues in this case. Regardless of how unprofessional the DOJ's conduct may have been, this Court will not strike the Government's pleadings.

The second remedy that is most frequently implemented in cases of attorney misconduct is to award the aggrieved parties the attorneys' fees and costs that may have resulted due to the misconduct. The Supreme Court and Fifth Circuit have consistently recognized the applicability of this form of sanction.

> Courts have inherent power to sanction a party that has engaged in bad-faith conduct and can invoke that power to award attorney's fees. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45 (1991). "In *Chambers*, the Supreme Court held that a district court may sanction

> parties for conduct that occurs in portions of the court proceeding that are not part of the trial itself." *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 590–91 (5th Cir. 2008).

In re Skyport Global Communication, Inc., No. 15-20246, 2016 WL 1042526, at *1 (5th Cir. Mar. 14, 2016).

This Court finds, however, that this remedy is also inappropriate in this case. The taxpayers of the 26 Plaintiff States are already paying the attorneys' fees, expenses and costs for the Plaintiff States. The taxpayers of all 50 states (including the 26 Plaintiff States) are paying the attorneys' fees, expenses and costs of the Government. Thus, the taxpayers of a majority of the states are already paying for the fees and expenses of the plaintiffs and a large portion of those of the defendants, while those of the remaining 24 states are only paying their share of the costs of the defense.

The Government's counsel told this Court that if it sanctions the misconduct of the Government's attorneys in a monetary fashion, those sanctions would be paid by the taxpayers of the United States. Thus, the taxpayers of the 26 Plaintiff States, who have been wronged by the misconduct, would have to pay for: (1) the original fees, expenses and costs of their own attorneys; (2) a large percentage of the original fees, expenses and costs of opposing counsel; (3) the fees, expenses and costs of their own counsel caused by the misconduct; (4) a large percentage of the fees, expenses and costs of the opposing side caused by the misconduct; plus (5) a substantial portion of whatever sanction amount this Court would levy. Stated another way, the Court would be imposing more costs on the aggrieved parties, and the Justice Department, which is actually responsible for this mess, would go unscathed. There would be no corrective effect and no motivation for the Government's lawyers to act more appropriately in the future. Since the taxpayers would foot the bill for any fines, fining counsel would not make the Plaintiff States whole, serve as a deterrent to any future misconduct, or act as a punishment

for any past transgressions. Therefore, this Court will not impose monetary sanctions on the defense counsel.[12]

B. The Appropriate Remedy

There is no doubt, however, that because the Government's counsel breached the most basic ethical tenets, the Plaintiff States have been damaged and have given up a valuable legal right. Moreover, counsel for the Government should not be rewarded for their past misconduct. There is certainly no indication that counsel will not repeat this conduct.[13] They knowingly continued to hide this conduct for months and only admitted it once they realized the number of violations exceeded 100,000. Clearly, there seems to be a lack of knowledge about or adherence to the duties of professional responsibility in the halls of the Justice Department. In addition to the loss of their opportunity to seek a temporary restraining order or an earlier injunction hearing date, there remains a distinct possibility that the Plaintiff States are being damaged and/or will suffer future damages due to these misrepresentations. All of these factors demand that this Court take some level of action.

This Court hereby orders the Government to file a list of each of the individuals in each of the Plaintiff States given benefits (and whose benefits have not been withdrawn) under the 2014 DHS

[12] One could argue that the Court should order the sanction only be paid by the taxpayers of the 24 non-plaintiff states. This would not be warranted either as those taxpayers committed no wrong. Furthermore, this solution would no doubt create an accounting nightmare for the Treasury Department.

[13] Indeed, the conduct of the Justice Department in other aspects of this case has been anything but laudable. For example, counsel did not act appropriately when it later came to light that their clients were actually violating the injunction. The regrettable conduct of the prior counsel involved in the misrepresentations at issue here was exacerbated by the dilatory manner in which their replacements from the Justice Department and their clients tried to evade their duty to correct the actions the Defendants took in violation of this Court's injunction. The Government admitted it violated this Court's injunction in over 2,000 instances. [Doc. No. 247 at 1]. Six weeks later, the Government admitted it had not fixed the violations. [Doc. No. 275]. Rather than acting responsibly, professionally and promptly, counsel did not implement effective corrective measures until this Court ordered their clients to actually appear in Court to explain their inaction. [Doc. No. 281]. While this latter conduct is related to the Government's violations of this Court's injunction (violations to which the Government has admitted), it was not directly related to the misrepresentations referred to in this Order. Nevertheless, it is not without importance, as this misconduct and the failure of the Justice Department to insist that its clients immediately seek to remedy their violations of this Court's injunction are indicative of the unprofessional manner in which the attorneys for the Government have approached this case. Ultimately, it took action by this Court to finally force counsel to act as responsible members of the Bar. It goes without saying, or at least it should go without saying, that it is the duty of all attorneys to act professionally whether ordered to by a court or not.

Directive contrary to its lawyers' multiple representations. These are the individuals granted benefits during the period (November 20, 2014–March 3, 2015) in which the attorneys for the Justice Department promised that no benefits were being conferred. This list should include all personal identifiers and locators including names, addresses, "A" file numbers and all available contact information, together with the date the three-year renewal or approval was granted. This list shall be separated by individual Plaintiff State. It should be filed in a sealed fashion. The Court, on a showing of good cause (such as a showing by a state of actual or imminent damage that could be minimized or prevented by release of the information to one of the Plaintiff States), may release the list or a portion thereof to the proper authorities in that particular state. Obviously, this list, once filed, will remain sealed until a further order of this Court.

Notwithstanding the foregoing, the Court will not entertain any requests concerning the release of this sealed information to any state until the Supreme Court has issued its decision on the issues currently before it. The Justice Department has until June 10, 2016, to make this filing.

The Court next turns to the topic of candor. Candor in court is such a self-evident concept that it is almost too mundane to discuss in an opinion. Indeed, when one addresses the need for honesty in court, it is hard not to speak in platitudes. It is such a truism that all Americans, if not individuals worldwide, are familiar with the requirement. This concept is so pervasive that it can be seen in almost any aspect of society. One example that easily comes to mind is that drawn from the beloved movie *Miracle on 34th Street* when the young child of the assistant district attorney is called to the witness stand:

> Mr. Gailey: (Attorney for Mr. Kringle) — Will Thomas Mara please take the stand?
>
> Thomas Mara Sr.: (Assistant District Attorney) — Who, me?

Mr. Gailey:	Thomas Mara Jr.
	(Spectators Murmuring)
Tommy Mara Jr.:	Hello, Daddy.
Mr. Gailey:	Here you are, Tommy.
The Judge:	Tommy, you know the difference between telling the truth and telling a lie, don't you?
Tommy Mara Jr.:	Gosh, everybody knows you shouldn't tell a lie, especially in court.
	(Spectators Chuckling)
The Judge:	Proceed, Mr. Gailey.[14]

The need to tell the truth, especially in court, was obvious to a fictional young Tommy Mara Jr. in 1947, yet there are certain attorneys in the Justice Department who apparently have not received that message, or more likely have just decided they are above such trivial concepts. Regardless of the motivation behind the conduct, multiple misrepresentations over a period of months both in pleadings and in open court cannot be ignored—especially when, as here, they were made knowingly and had the effect of depriving the millions of individuals represented by the Plaintiff States of a valuable remedy.

While this Court does not hold the Department of Justice attorneys to a higher standard than it would attorneys practicing elsewhere, it would hope that the Justice Department, itself, would seek to maintain the highest ethical standards. The Justice Department purports to represent all Americans—not just those who are in favor of whatever actions the Department is seeking to prosecute or defend. The end result never justifies misconduct. That is the stance the Justice Department takes daily in thousands of its other cases, and it is no less applicable here.

Therefore, this Court, in an effort to ensure that all Justice Department attorneys who appear in the courts of the Plaintiff States that have been harmed by this misconduct are aware of and comply with

[14] MIRACLE ON 34TH STREET (20th Century Fox 1947) (emphasis added). Screenplay by George Seaton.

their ethical duties, hereby orders that any attorney employed at the Justice Department in Washington, D.C. who appears, or seeks to appear, in a court (state or federal) in any of the 26 Plaintiff States annually attend a legal ethics course.[15] It shall be taught by at least one recognized ethics expert who is unaffiliated with the Justice Department. At a minimum, this course (or courses) shall total at least three hours of ethics training per year. The subject matter shall include a discussion of the ethical codes of conduct (which will include candor to the court and truthfulness to third parties) applicable in that jurisdiction. The format of this continuing education shall be left to the independent expert lecturer. Self-study or online study will not comply with this Order, but attendance at a recognized, independently sponsored program shall suffice.

Despite the fact that 26 different jurisdictions are involved, this ethics requirement should not be a task that places too great of a burden on the Department. First of all, the vast majority, if not all, of the 26 states in question have adopted a version of the ABA Model Rules of Professional Conduct ("ABA Model Rules"). Consequently, compliance with the Order should not be too cumbersome.[16] Further, this Court's Order is requiring no more than what the Justice Department should have been, but obviously is not effectively, doing already. This Order will merely ensure compliance with the legal standards already placed upon Justice Department attorneys by 28 U.S.C. § 530B(a). For example, the ethical standards of Texas and the Southern District of Texas were clearly violated in this proceeding. Education as to ethical standards should be a crucial part of the Justice Department's continuing legal education, even if it were not included as part of this Order.

---

[15] The Plaintiff States include: the State of Alabama, the State of Arizona, the State of Arkansas, the State of Florida, the State of Georgia, the State of Idaho, the State of Indiana, the State of Kansas, the State of Louisiana, the State of Maine, the State of Michigan, the State of Mississippi, the State of Montana, the State of Nebraska, the State of Nevada, the State of North Carolina, the State of North Dakota, the State of Ohio, the State of Oklahoma, the State of South Carolina, the State of South Dakota, the State of Tennessee, the State of Texas, the State of Utah, the State of West Virginia and the State of Wisconsin.

[16] For example, as quoted above, the Texas Disciplinary Rules and the ABA Model Rules are almost identical. With regard to the duty of candor, this will no doubt be true for most states as this Court has not found any code of conduct that specifically allows counsel to misrepresent the facts to a court.

The Attorney General of the United States shall appoint a person within the Department to ensure compliance with this Order. That person shall annually file one report with this Court including a list of the Justice Department attorneys stationed in Washington, D.C. who have appeared in any court in the Plaintiff States with a certification (including the name of the lawyer, the court in which the individual appeared, the date of the appearance and the time and location of the ethics program attended) that each has attended the above-ordered ethical training course. That certification shall be filed in this cause during the last two weeks of each calendar year it covers. The initial report shall be filed no later than December 31, 2016. This Order shall remain in force for a period of five years (the last report being due December 31, 2021).

The decision of the lawyers who apparently determined that these three-year renewals under the 2014 DHS Directive were not covered by the Plaintiff States' pleadings was clearly unreasonable. The conduct of the lawyers who then covered up this decision was even worse. Therefore, the Attorney General is hereby ordered to report to this Court in sixty (60) days with a comprehensive plan to prevent this unethical conduct from ever occurring again. Specifically, this report should include what steps the Attorney General is taking to ensure that the lawyers of the Justice Department will not, despite what court documents may portend or what a court may order, unilaterally decide what is "material" and "relevant" in a lawsuit and then misrepresent that decision to a Court. Stated differently, the Attorney General is also hereby ordered to report what steps she is taking to ensure that, if Justice Department lawyers make such an internal decision without approval from the applicable court, the Justice Department trial lawyers tell the truth—the entire truth—about those decisions to the court and opposing counsel.[17]

[17] While denying misconduct, the Government concedes that "[k]nowing misrepresentations to a court would strike at the heart of the Judiciary's confidence in DOJ and its mission, not just in this litigation but in other matters. . . ." [Doc. No. 242 at 27]. Obviously, this Court agrees that unethical conduct undermines the DOJ's mission.

Finally, whatever it is that the Department of Justice Office of Professional Responsibility has been doing, it has not been effective. The Office of Professional Responsibility purports to have as its mission, according to the Department of Justice's website, the duty to ensure that Department of Justice attorneys "perform their duties in accordance with the high professional standards expected of the Nation's principal law enforcement agency." *Office of Professional Responsibility*, DEP'T OF JUSTICE, https://www.justice.gov/opr (last visited May 17, 2016). Its lawyers in this case did not meet the most basic expectations.[18] The Attorney General is hereby ordered to inform this Court within sixty (60) days of what steps she is taking to ensure that the Office of Professional Responsibility effectively polices the conduct of the Justice Department lawyers and appropriately disciplines those whose actions fall below the standards that the American people rightfully expect from their Department of Justice.

VI. Conclusion

This Order is tailored to give the 26 Plaintiff States some avenue for relief from the possibility of any damage that may result from the misconduct of the Defendants' lawyers and to prevent future harm to any Plaintiff State due to the Government's misrepresentations. The Court also enters this Order to deter and prevent future misconduct by Justice Department lawyers by ordering an appropriately tailored continuing legal education program, which will not only serve to educate the uninitiated, but more importantly will remind all trial lawyers that their honest and ethical participation is a necessity for the proper administration of justice. It also compels the Attorney General, or her designee, to take the necessary steps to ensure that DOJ attorneys act honestly in the future.

[18] Other courts have noticed these problems as well. Just in the last six months, both the Fifth Circuit and the Sixth Circuit have questioned the conduct of those employed by the Department of Justice. *United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015); *In re United States*, No. 15-3793, 2016 WL 1105077 (6th Cir. Mar. 22, 2016). The Fifth Circuit went further and suggested that not only was there misleading conduct, but the conduct was followed by an inadequate investigation and a cover-up. These are just two of an ever-growing number of opinions that demonstrate the lack of ethical awareness and/or compliance by some at the Department of Justice.

The Court does not have the power to disbar the counsel in this case, but it does have the power to revoke the *pro hac vice* status of out-of-state lawyers who act unethically in court. By a separate sealed order that it is simultaneously issuing, that is being done.

The Court notes that to its knowledge none of the acts cited in this or prior orders were committed by attorneys from the United States Attorney's Office in the Southern District of Texas. To date, without exception, these attorneys have acted and continue to act, in this Court's experience, with honor, professionalism and forthrightness. Further, while the misconduct involved at least two or more attorneys from the Justice Department, to this Court's knowledge, no acts occurred during the tenure of the current Attorney General. The Court cannot help but hope that the new Attorney General, being a former United States Attorney, would also believe strongly that it is the duty of DOJ attorneys to act honestly in all of their dealings with a court, with opposing counsel and with the American people.

All motions for discovery, motions for different sanctions, or requests for further relief (including those made in Doc. Nos. 183 and 188) relating to the misrepresentations of counsel in this case, other than those instituted by this Order, are hereby denied. Further, all remaining motions filed by any party are denied.

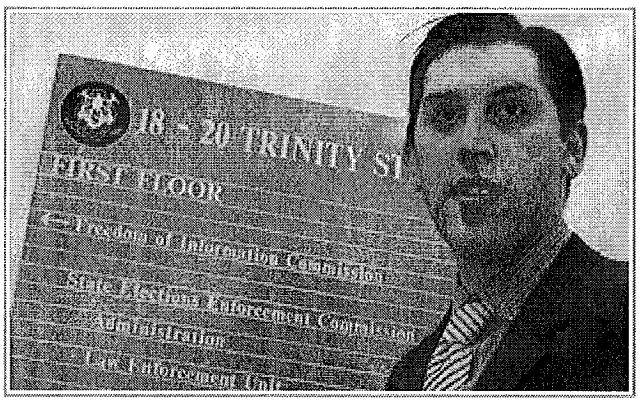
Signed this 19th day of May, 2016.

Andrew S. Hanen
United States District Judge

EXHIBIT E

City Wins ID Battle

by **MELISSA BAILEY** | Jun 25, 2008 5:38 pm
(39) Comments | Commenting has been closed | E-mail the Author
Posted to: **City Hall, Immigrants**



(Updated) New Haven does not have to give up the names and addresses of immigrants who signed up for the city's immigrant-friendly ID, according to a proposed decision issued Wednesday.

The ruling, by a hearing officer of the state Freedom of Information Commission, came in response to a request to reveal the names and addresses of the 5,000-plus people who have signed up for New Haven's immigrant-friendly municipal ID card since its launch last July.

Journalist Chris Powell and the Community Watchdog Project, a group opposed to illegal immigration led by Dustin Gold (pictured above), originally requested the city to release the names and addresses.

In a decision issued Wednesday, FOIC hearing officer Sherman D. London wrote that the city was right to refuse Gold and Powell's request, because releasing the names would have created a safety risk. His decision is a proposed ruling; it will be voted on at a hearing on July 9 before the Freedom of Information Commission.

Click here to read the decision. Click here and here to read articles about the FOI battle.

"I'd like to thank the FOI Commission for recognizing the safety threat that would be posed by releasing the information of individuals involved," wrote Mayor John DeStefano, Jr. in a press statement Wednesday.

London found that "the ID Card program unleashed a level of vitriol and venom aimed at City officials and illegal immigrants that was far beyond mere political disagreement or healthy civic engagement, according to testimony."

The city "has met its burden of proof that the records are permissively exempt from mandatory disclosure," London concluded. He ruled that neither the city nor the state Department of Emergency Management and Homeland Security violated freedom of information laws by refusing to disclose the records.

That means immigrants who trusted the city with their names and addresses would not be exposed.

"We met the burden of proof and look forward to moving past this so that we can continue to grow this successful program," said Kica Matos, the city's Community Service Administrator, in the city press statement.

"New Haven residents should feel comfortable coming down to City Hall to apply for their Elm City Resident Card with the confidence that their information will be kept safe and secure," Matos said.

The city did get chided on one point: It should have been more prompt in contacting the Department of Public Works regarding its decision not to disclose the records, London concluded.

Gold, of the immigrant watchdog group, said he plans to object to the decision at the July 9 hearing.

"It doesn't seem like a full ruling to me," Gold argued, saying London ruled on the safety-risk exemption, but did not address two other exemptions the city had claimed.

Gold claimed that London "misconstrued the statute" that allows for an exemption due to safety risk. He also took issue with the way London cited excerpts from hateful emails and radio clips to show that officials and immigrants' lives were in danger — quotes such as "I have my Automatic Rifle ready to go an[d] won't hesitate to use it to kill these Rodents."

"Most of the quotes were taken out of context," Gold argued. He argued the comments should be protected under freedom of speech and did not constitute a credible and imminent threat to individuals' safety.

Commenting has closed for this entry

EXHIBIT F

Published on *Media Matters for America* (http://mediamatters.org)
Home > Univision Highlights How Trump's Anti-Immigrant Rhetoric May Be Inspiring Violence Against Latinos

Univision Highlights How Trump's Anti-Immigrant Rhetoric May Be Inspiring Violence Against Latinos

From the May 20 edition of Univisión's *Noticiero Univisión*:

Translated transcript:

MARÍA ELENA SALINAS: Something is happening in the country that we haven't seen in many years -- an anti-immigrant sentiment that is turning violent. For many, this is a result of the negative rhetoric from the presidential campaign. What is certain is that the examples of hate against immigrants are increasing from coast to coast. And this attitude has a name: xenophobia.

Xenophobia. Origin, Greek. "Xeno," foreigner. "Phobia," fear. The fear, hate, or rejection of a person or group of people from a different country. It manifests itself as disdain, threats, aggression, or murder. This is what we've been seeing recently. Denigrating comments, racist declarations, and violent acts directed primarily at minorities. José Antonio Machado lived this during a campaign event for magnate Donald Trump in Doral, Florida.

JOSÉ ANTONIO MACHADO: They tore down my banner, they pushed me, they stepped on me, they kicked me.

SALINAS: Why do you think this was the reaction from the people who support Trump?

MACHADO: Hate. I think Trump, his words, raises an anti-immigrant sentiment.

SALINAS: Since Trump started his presidential campaign, reports of xenophobia have been increasing. The organization America's Voice has documented some 30 cases of attacks against Latinos.

[START CLIP]

DONALD TRUMP: When Mexico sends its people, they're not sending their best. They're bringing drugs, they're bringing crime. They're rapists. Some, I assume, are good people.

[END CLIP]

SALINAS: In 2013 you met with Trump along with a group of DREAMers. Is this Donald Trump that you see today the same one that you met that day?

MACHADO: He invited us, and I told him my story. And at the time he said that we convinced him, but now he is singing a different song.

SALINAS: Many Trump followers seem to be singing to the same rhythm as the businessman.

ROAN GARCIA-QUINTANA: I haven't heard of any evidence of what you've cited. Some people have come, and they support him.

SALINAS: Roan Garcia-Quintana is the executive director of America Has Had Enough, which is considered a hate group by the Southern Poverty Law Center.

GARCIA-QUINTANA: I don't hate anyone. The only thing I'm saying is that illegals don't belong in any country.

SALINAS: You are an immigrant, you came from Cuba. Why are you against immigrants?

GARCIA-QUINTANA: I'm not against immigrants, I'm against illegals.

SALINAS: There are 5 months left until the presidential election, and while many immigrants are worried for what will come, millions of Latino voters are preparing themselves to combat racism that is considered to be proliferating. If Trump were to win the presidency in November, what do you think will be the destiny of the country? Of immigrants?

MACHADO: We are ready to vote and we are going to prevent that from happening. But if that is the wish of the American people, then we'll have to start protecting ourselves.

***Previously*:**

Despite Saturating The Airwaves, Trump Has Yet To Sit Down With Hispanic Media [1]

To Understand Trump's Latino Problem, Just Look At Hispanic Media [2]

On Univision, Trump Supporter Doubles Down On Claim That Latinos Oppose Trump Because They Are "Highly Emotional" [3]

Posted In

Diversity & Discrimination [4], Elections [5], Inclusion Matters [6], Race & Ethnicity [7], Immigration Myths [8]

Network/Outlet

Univision [9]

Person

Donald Trump [10], Maria Elena Salinas [11]

Show/Publication

Noticiero Univision [12]

Stories/Interests

2016 Elections [13], Immigration [14]

Source URL: http://mediamatters.org/video/2016/05/20/univision-highlights-how-trump-s-anti-immigrant-rhetoric-may-be-inspiring-violence-against-latinos/210511

Links

[1] http://mediamatters.org/blog/2016/03/31/despite-saturating-the-airwaves-trump-has-yet-t/209635
[2] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwj8qKGlg-nMAhXJNz4KHVhUDTAQFggjMAE&url=http%3A%2F%2Fmediamatters.org%2Fresearch%2F2016%2F05%2F04%2Funderstand-trump-s-latino-problem-just-look-hispanic-media%2F210227&usg=AFQjCNFRjdyzxvSVv3orprgbgrJIQVIWHA&bvm=bv.122448493,d.cWw
[3] http://mediamatters.org/video/2016/05/16/univision-trump-supporter-doubles-down-claim-latinos-oppose-trump-because-they-are-highly-emotional/210440
[4] http://mediamatters.org/issues/diversity-discrimination
[5] http://mediamatters.org/issues/elections
[6] http://mediamatters.org/issues/inclusion-matters
[7] http://mediamatters.org/issues/race-ethnicity
[8] http://mediamatters.org/issues/immigration-myths
[9] http://mediamatters.org/networks-and-outlets/univision
[10] http://mediamatters.org/people/donald-trump
[11] http://mediamatters.org/tags/maria-elena-salinas
[12] http://mediamatters.org/shows-and-publications/noticiero-univision
[13] http://mediamatters.org/stories-and-interests/2016-elections
[14] http://mediamatters.org/stories-and-interests/immigration

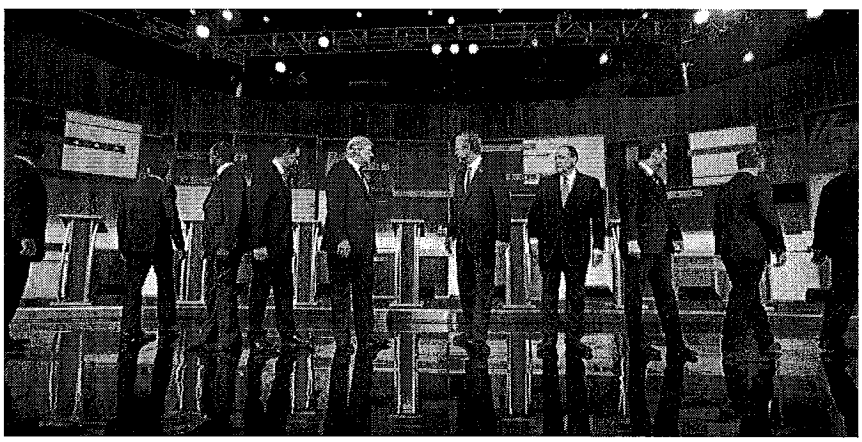
EXHIBIT G

THE BLOG

When Hateful Speech Leads to Hate Crimes: Taking Bigotry Out of the Immigration Debate

08/21/2015 05:18 pm ET | Updated Aug 24, 2015

Jonathan Greenblatt
National Director and CEO of the Anti-Defamation League



ASSOCIATED PRESS

When police arrived at the scene in Boston, they found a Latino man shaking on the ground, his face apparently soaked in urine, with a broken nose. His arms and chest had been beaten. One of the two brothers arrested and charged with the hate crime reportedly told police, "Donald Trump was right — all these illegals need to be deported."

The victim, a homeless man, was apparently sleeping outside of a subway station in Dorchester when the perpetrators attacked. His only offense was being in the wrong place at the wrong time. The brothers reportedly attacked him for who he was — simply because he was Latino.

FOLLOW HUFFPOST

In recent weeks anti-immigrant — and by extension anti-Latino — rhetoric has reached a fever pitch. Immigrants have been smeared as "killers" and "rapists." They have been accused of bringing drugs and crime.

A radio talk show host in Iowa has called for enslavement of undocumented immigrants if they do not leave within 60 days. There have been calls to repeal the 14th Amendment's guarantee of citizenship to people born in the United States, with allegations that people come here to have so-called "anchor babies." And the terms "illegal aliens" and "illegals" — which many mainstream news sources wisely rejected years ago because they dehumanize and stigmatize people — have resurged.

The words used on the campaign trail, on the floors of Congress, in the news, and in all our living rooms have consequences. They directly impact our ability to sustain a society that ensures dignity and equality for all. Bigoted rhetoric and words laced with prejudice are building blocks for the pyramid of hate.

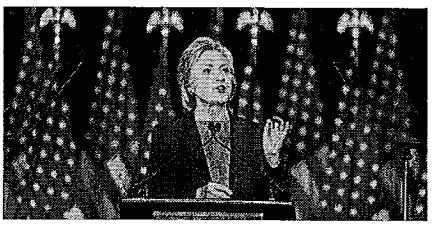
Biased behaviors build on one another, becoming ever more threatening and dangerous towards the top. At the base is bias, which includes stereotyping and insensitive remarks. It sets the foundation for a second, more complex and more damaging layer: individual acts of prejudice, including bullying, slurs and dehumanization.

Next is discrimination, which in turn supports bias-motivated violence, including apparent hate crimes like the tragic one in Boston. And in the most extreme cases if left unchecked, the top of the pyramid of hate is genocide.

Just like a pyramid, the lower levels support the upper levels. Bias, prejudice and discrimination — particularly touted by those with a loud megaphone and cheering crowd — all contribute to an atmosphere that enables hate crimes and other hate-fueled violence. The most recent hate crime in Boston is just one of too many. In fact, there is a hate crime roughly every 90 minutes in the United States today. That is why last week ADL announced a new initiative, #50StatesAgainstHate, to strengthen hate crimes laws around the country and safeguard communities vulnerable to hate-fueled attacks. We are working with a broad coalition of partners to get the ball rolling.

Laws alone, however, cannot cure the disease of hate. To do that, we need to change the conversation. We would not suggest that any one person's words caused this tragedy — the perpetrators did that — but the rhetorical excesses by so many over the past few weeks give rise to a climate in which prejudice, discrimination and hate-fueled violence can take root. Reasonable people can differ about how we should fix our broken immigration system, but stereotypes, slurs, smears and insults have no place in the debate.

Immigrants have been a frequent target of hate, and unfortunately, prejudice and violence are not new. Many of our ancestors faced similar prejudice when they came to the United States. In the 1800s, the attacks were against Irish and German immigrants. Next was a wave of anti-Chinese sentiment culminating with the Chinese Exclusion Act in 1882. Then the hatred turned on the Jews, highlighted by the lynching of Leo Frank in 1915. Then came bigotry against Japanese immigrants



and people of Japanese dissent, which led to the shameful internment of more than 110,000 people during World War II. Today, anti-immigrant bigotry largely focuses on Latinos. The targets have changed, but the messages of hate remain largely the same. It is long past time for that to end.

ADL, as a 501(c)(3), does not support or oppose candidates for elective office, but we have a simple message for all policymakers and candidates: There is no place for hate in the immigration debate.

There is nothing patriotic or admirable about hatred and hate-fueled violence. The only acceptable response to hate crimes is unequivocal, strong condemnation. And the same is true for the bias, prejudice and bigoted speech that have recently permeated the immigration conversation.

Follow Jonathan Greenblatt on Twitter: www.twitter.com/JGreenblattADL

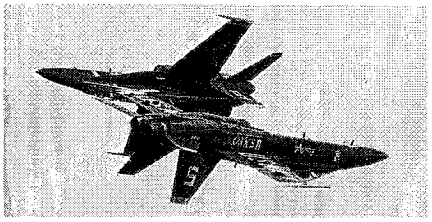
More: Latino Politics Hate Crimes Hate Crime Laws

FOLLOW POLITICS

GET THE NEWSLETTER *address@email.com* Subscribe!



Blue Angels Pilot Killed After Jet Crashes In Tennessee

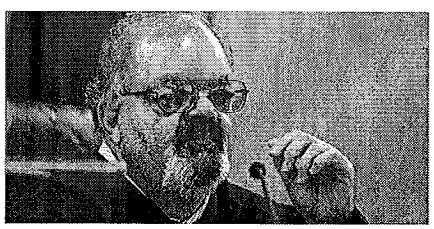


Here Are All The People Still Vowing Never To Support Donald Trump

Third Veteran Dumped By Trump Because Of Military Service

Dan Rather Responds To Trump's 'Vicious' Rant Against The Press

Lawyers Want Judge Punished For Having Public Defender Handcuffed



Anderson Cooper Shuts Down Donald Trump

Theories Spread: Trump Deliberately Sabotaging His Own Campaign

7 Big Scandals Hillary Clinton Will Never Escape

CONVERSATIONS

0 Comments Sort by Oldest

Add a comment...

Facebook Comments Plugin

St. Paul's Turned Blind Eye To Teen Harassed For Reporting Her Sexual Assault, Suit Alleges

Misogynistic Philippines Leader Duterte Continues To Disrespect Women

EXHIBIT H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STATE OF TEXAS, ET AL	*	1:14-CV-00254
VS.	*	10:12 a.m.
UNITED STATES OF AMERICA, ET AL	*	AUGUST 19, 2015

HEARING ON MOTIONS
BEFORE THE HONORABLE ANDREW S. HANEN
Volume 1 of 1, Pages 1 - 50

APPEARANCES:

FOR THE PLAINTIFFS:
Ms. Angela V. Colmenero
Texas Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 474-2697

Mr. Nicholas Bitter
Texas Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 474-2697

FOR THE DEFENDANTS:
Ms. Jennifer D. Ricketts
United States Department of Justice
20 Massachusetts Avenue
Washington, D.C. 20001
(202) 514-3671

Mr. James J. Gilligan
United States Department of Justice
20 Massachusetts Avenue
Washington, D.C. 20001
(202) 514-3358

Mr. Daniel David Hu
Office of the United States Attorney
1000 Louisiana, Suite 2300
Houston, Texas 77002
(713) 567-9518

APPEARANCES (continued)

Mr. Evan Franke
Litigation Coordination Counsel
Office of the Chief Counsel
United States Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW; Suite 4025
Washington, D.C. 20529

Ms. Jessica Schau-Nelson
United States Department of Homeland Security
3801 Nebraska Avenue, NW
Nac01-01-001
Washington, D.C. 20538

Court Reporter:
Laura Wells, RPR, RMR, CRR
515 Rusk, Suite 8004
Houston, Texas 77002

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

VOLUME 1
(Hearing on Motions)

August 19, 2015

PROCEEDINGS

THE COURT: All right. Be seated. We're here in B-14-CV-254. Ms. Colmenero, who is with you representing the states?

10:12:54 MS. COLMENERO: Your Honor, I'm joined by Adam Bitter from the Texas Attorney General's office. We're here on behalf of the plaintiff states.

THE COURT: Ms. Ricketts, who is here with you?

MS. RICKETTS: Good morning, Your Honor. I have

10:13:05 Jim Gilligan from my office, Department of Justice.

I also have Jonathan Meyer, Deputy General Counsel at DHS and Jessica Schau-Nelson and Evan Franke from CIS and then Mr. Hu, whom you know.

THE COURT: Okay. Let me start with the easy

10:13:21 part, maybe. I have what appears to be an agreed amended motion for entry of protective order. I hate to ask this. Is it agreed?

MS. RICKETTS: It is, Your Honor.

MS. COLMENERO: It is, Your Honor.

10:13:38 THE COURT: All right. Then I'm signing it.

Now we have got two different topics I want to cover. As you know from the last time we met, my goal was and still is to try to resolve all the ancillary issues that might otherwise detract from a decision on the merits or

10:14:19 from starting to even consider the merits before we get

the case back because if I'm affirmed, we have got a long road ahead of us; and if I'm reversed, depending on how I'm reversed, I've still got to deal with this matter. So my goal is to get rid of this one way or the other.

10:14:46 Okay. The first issue that I want to talk about are the actual violations of the injunctions and the remedy; and I have looked at the Government's filings, including the one from last night or yesterday evening. And while I'm not clear on everything, it looks like we're making

10:15:15 substantial progress in resolving all this.

Ms. Ricketts, who is going to address that?

MS. RICKETTS: Your Honor, with your permission, Mr. Gilligan will address the compliance issues; and then, I will address the joint advisory issues.

10:15:29 THE COURT: Great. That's basically how I have that divided in my mind as well. All right.

All right. Mr. Gilligan, let me ask you: I have used the figures that you guys have provided; and it looked like -- at least by my math, and it's always bad when

10:15:55 lawyers start to do math -- that we had of the original 2,128 we got -- and the real "we", you guys, got most everything resolved with the exception of 11 individuals. Am I in the ballpark on that?

MR. GILLIGAN: You are in the ballpark, Your

10:16:26 Honor. Actually, the story is that of the -- both the

2,128 post-injunction issuances plus the 484 re-mailed EADs a total of about 2,612 or so. We have over 2,600 of those back or accounted for, and the 11 reflects the outstanding number for both groups in total.

10:16:53 THE COURT: Okay. For some reason I had 11 from one group and 11 from the other. So I had in my mind 22 that were outstanding.

MR. GILLIGAN: That was indeed, Your Honor, you are correct, the status on July 31st, when we made our

10:17:07 July 31st filing. As of yesterday, when we made our supplemental filing, we were down to 11 total between the two groups.

THE COURT: All right. And as I understand from yesterday's filings with regard to these -- and we'll talk

10:17:23 about the other 50 in a minute, but that the Government is still trying to take measures to fix that with regard to these outstanding 11 people?

MR. GILLIGAN: Yes, Your Honor. That is correct. In fact, we have already begun. We have already sent

10:17:41 letters out where we have contact information, and we are attempting to continue to reach people by telephone and e-mail where we have the necessary contact information.

I can give Your Honor a little bit of detail about the breakdown of the 11.

10:17:56 THE COURT: Okay. If you will, go ahead.

MR. GILLIGAN: Five of them are cases where as far as we can tell it appears that they had moved and are now at new addresses without having informed the agency as they should have. So it may be that these five
10:18:14 individuals never received any of the notices and did not reside at the addresses where we made home visits. And so we're trying to reach out to them at the new addresses to see if we can get the cards retrieved.

And if that does not prevail, we will send USCIS
10:18:33 personnel out to knock on the doors and see if we can obtain the cards that way.

Of course, we are using whatever contact information we have in those cases as well.

There are four other cases where we had succeeded in
10:18:45 making contact of one form or another either with the individual cardholder or a relative or an associate and were told that they would comply. They would send the card back or provide us with a certification of good cause for not doing so.

10:19:01 But that did not happen by the July 30th deadline that we had established. But given that these individuals had at least or their associates had at least expressed a willingness to do what was required, we have determined that we will continue to reach out to them with the
10:19:17 contact information we have as necessary, pay further home

visits, if other means don't prove successful, and do what we can to retrieve those four.

That leaves two final cases out of the 11 where we have not been successful in making contact with anyone. It appears, at least in one of those cases, that the individual may have moved. So we were told by his landlord. And we have no additional contact information, no new address of that nature.

We do have some telephone information. We have a new number for one of them. We have a new number for the other's representative. And so we're going to try to continue to reach out to these two individuals by those means. But it may be that we have reached a dead end at least in these two cases.

THE COURT: All right. But with respect to any records that the DHS is keeping or the immigration service or however you want to describe it, has the Government changed their records to reflect what should accurately be the situation?

MR. GILLIGAN: Well, in all 11 cases, Your Honor, all of these individuals have been terminated and notices have been issued to them telling them that their deferred action and employment authorization has been revoked and they are told that use of their cards is not authorized and updates have been made in the appropriate databases.

THE COURT: Then we have the 53 that apparently got released by accident in Nebraska.

MR. GILLIGAN: Yes, Your Honor. That's correct. Nebraska Services.

10:20:56 THE COURT: Where are we there?

MR. GILLIGAN: We have all 53 of them either retrieved or accounted for, Your Honor. I believe that is reported in the declaration we filed yesterday as well. We have made the appropriate updates in the agency's

10:21:10 databases and in the databases that support the E-Verify and SAVE systems.

THE COURT: All right. And then, just for my edification, this failure to stop the printing queue or however it were, Mr. Gilligan, that actually happened

10:21:34 quite a while ago?

MR. GILLIGAN: Yes.

THE COURT: You didn't discover it happened until just recently. Am I right about that?

MR. GILLIGAN: That's right. The reason we

10:21:42 didn't discover it, Your Honor, is that what happened was that the Nebraska Service Center in an aggressive effort to try to come into compliance with the Court's injunction back in February, they electronically converted the authorized terms in a number of cases from three years to

10:21:59 two years shortly after the injunction.

And this was successful in a number of those cases in preventing the cards from being issued because the data had not been forwarded from the official records system CLAIMS 3 to the card production system. And so those
10:22:17 cards were held.

But then in these other approximately 50 cases, unfortunately, by the time the electronic conversion was made in CLAIMS 3, the data authorizing the production of those approximately 50 cards had already gone forward; and
10:22:30 so, they were not stopped.

THE COURT: But the folks in charge of that facility they understand what their obligation is now, and that whole problem is not going to reoccur?

MR. GILLIGAN: That problem should not reoccur,
10:22:43 Your Honor. We --

THE COURT: Please don't say it like that because it implies that some other problem will.

MR. GILLIGAN: Your Honor, as much as I would love to, I hesitate when we're dealing with electronic
10:22:57 systems as complicated as these to provide the Court a 110 percent guarantee. But we have -- we have taken a number of preventive measures such as in the system now it is the system will not allow anybody to put in an authorization for deferred action or employment
10:23:15 authorization greater than two years. It simply cannot be

done.

And at the direction of Director Rodriguez, the agency has scoured its databases over and over again to see if there are any other pockets of cards like the 53 that we don't know about. At this point in time, we have no reason to believe that there are any further.

10:23:34

THE COURT: What I understood from the last advisory is it's the agency's goal to try to have this wrapped up by September 18th?

10:23:48

MR. GILLIGAN: Yes, Your Honor. That's our objective.

THE COURT: Okay. All right. Then let's shift gears. Let's talk about the problem that we started with that we're back on track on now which is the ones that happened that got approved before the injunction.

10:24:04

MR. GILLIGAN: Okay. May I make a quick clarification before we make that shift in gears, Your Honor?

THE COURT: Go ahead.

10:24:16

MR. GILLIGAN: Concerning the E-Verify system, we stated in our July 31st papers that a result of the updates that are made to our systems, state agencies and employers can accurately verify individuals' two-year terms of deferred action and work authorization in the state and E-Verify systems. In particular, that appears

10:24:33

in Paragraph 5 of the Director's July 31st declaration.

In preparing our filing yesterday we determined that the statement is somewhat imprecise so far as E-Verify is concerned. It's on the money with SAVE; but we provided a clarification in Footnote 2 of the supplemental declaration we submitted yesterday, which explains that when employers submit a query to the E-Verify system it informs the employer whether or not the individual is authorized to work.

10:24:54

10:25:14

And then, 90 days prior to the expiration of the individual's authorized term the system then sends a reminder to the employer that the individual's work authorization must be reverified.

So in the case of individuals whose terms have been converted from three years to two, the employers, if they obtain work, will receive a reverification notice 90 days before the two-year term expires.

10:25:30

THE COURT: Okay.

MR. GILLIGAN: So Your Honor wished to switch gears and talk about the 108,000 approvals prior to the injunction?

10:25:47

THE COURT: Right. And I want to talk about the efforts that have been made to reach some resolution on what to do about those, if anything.

MR. GILLIGAN: Well, Your Honor, in terms of the

10:26:03

details of the parties' meet-and-confer on that, I would defer to Ms. Ricketts.

Our bottom line on that issue is, in light of the statements that plaintiffs have made in the parties' joint
10:26:19 status report, that if we are to seriously entertain the notion of converting 100,000 cases from three years to two and further then attempting to retrieve 108,000 employment authorization cards, that that's a matter that needs to be briefed given the magnitude of the undertaking that's
10:26:39 being contemplated.

But in terms of discussions in the meet-and-confer process, as I said, I would defer to Ms. Ricketts.

THE COURT: Let me ask one other thing; and, Mr. Gilligan, I don't know if you or Ms. Ricketts is the
10:26:53 person.

I understood from what was filed, the joint filing, that there seems to be -- and again, I'm talking about the post-injunction folks, the 2,500 --

MR. GILLIGAN: Uh-huh.

10:27:07 THE COURT: -- or so individuals, that there is some argument between the parties about whether if the states take any kind of corrective action there has to be some kind of notification or the Federal Government would like notification of any corrective action.

10:27:27 Is that your bailiwick or is that Ms. Ricketts'?

MR. GILLIGAN: Again, I defer to Ms. Ricketts on that question.

THE COURT: All right.

MR. GILLIGAN: If you wish to address that issue now, Your Honor, I will allow her to do that.

10:27:35

THE COURT: Thank you, Mr. Gilligan.

MS. RICKETTS: Thank you, Your Honor.

From our perspective the issue is -- was part of the negotiation over the protective order; and we had asked, given the sensitive nature of the information that we were providing to the plaintiff states and the fact that the plaintiff states did not want to use the SAVE system to undertake any corrections that they determined they wanted to undertake, SAVE system being the most up-to-date information, that all we wanted was an e-mail that indicated if a state agency was going to undertake a corrective action so that we could try to make sure that the information was as up-to-date as possible and, also, because if it is not or if the individual against whom they took that action believed the DHS information which we had provided to the plaintiff states was inaccurate, they have the right to approach DHS and go through a process to request a corrected record.

10:27:48

10:28:04

10:28:20

So we wanted a heads-up, if you will, that that might happen in a particular state. It was not because we

10:28:38

suggested it was a legal requirement as Texas suggests. It was simply a courtesy that we were asking. We did not insist on it in the protective order because we were trying to complete those negotiations and get the
10:28:53 protective order signed as quickly as possible so that we could get the PII information to the plaintiff states. That's why we didn't include it.

THE COURT: What have the states been provided?

MS. RICKETTS: We have provided them for the
10:29:05 2,600 post-injunction EADs a state-by-state breakdown for the plaintiff states in all instances and for the re-mailings for all states.

THE COURT: I mean, do they know, like, name and address of the 2,600?

10:29:18 MS. RICKETTS: That's actually the PII information that we will provide to them. We have agreed to provide the date of birth, the name, address, Social Security number, the EAD number and some specific SAVE information, the static SAVE information, for all of those
10:29:32 individuals.

THE COURT: What about for the 108,000?

MS. RICKETTS: We have provided for the 108,000 a state-by-state breakdown for all of them and approximate SAVE queries for driver's licenses from November 2014
10:29:44 through July 2017.

And, of course, throughout the meet-and-confer process we have provided them with confirmation of where we were in the corrective actions. So they have everything except for the PII.

10:29:54 I believe we have also agreed to provide the same information as for the 2,600 for the most recent 50 or so. We have not yet provided that, but we have agreed to provide that.

THE COURT: Okay. And is there a problem with

10:30:07 providing that same information for the 108,000? I know it's a lot of work but I mean --

MS. RICKETTS: It would be a significant amount of work, Your Honor, to do that for the 108,000.

So to where we left it, as I understand it -- and

10:30:23 Ms. Colmenero can speak to this more directly -- is that they had asked for this information which we agreed to provide so they could determine whether they wanted the additional information for the 108. I don't want to speak for her.

10:30:35 THE COURT: Ms. Colmenero, let's start with the 2,500 group. It looks to me, I mean, like the Government has done its best to try to fix the problem here, which is my term, from the last hearing.

Do the states have any problem with that, what they

10:30:56 have done with the 2,500?

MS. COLMENERO: With the approximately 2,600 corrections or remediation efforts that have taken place and the exchange of the PII, you know, the states appreciate the efforts that the Federal Government has
10:31:11 gone through.

I think where the states end up with respect to these post-injunction violations -- and we alerted the Court to this in our last response to the defendants' motion to cancel the hearing -- is that we expect full compliance
10:31:26 with the injunction. We don't necessarily expect substantial compliance, which is what we understand that they are endeavoring to take.

And so, our concern is with ongoing and future compliance with the Court's injunction. Because even in
10:31:40 the last declarations that have been filed, the way we read them is that there are still ongoing efforts to determine whether or not there are additional post-injunction violations. And we are now here six months after the Court's February 16th injunction, and
10:31:55 we're still talking about complying with the Court's injunction. And we see that as problematic.

So from our -- from our standpoint, we have the concern of compliance with the Court's injunction, which has been a concern for us ever since the initial
10:32:13 disclosure of the 108,000 pre-injunction EAD grants that

happened in March.

THE COURT: Let me stop you with -- I mean, if I understood what Mr. Gilligan just said, they basically have accounted for or brought into compliance all but 11 individuals; and they are working on those 11.

10:32:37

And so, while I'm not satisfied with substantial compliance either, they have done a substantial amount of work to bring everybody back into compliance and have given us assurances that the outstanding 11 individuals will be brought back into compliance.

10:32:59

I mean, I guess in a way I'm asking you what else can they do?

MS. COLMENERO: With respect to the 2,600 and the remediation efforts as well as the disclosure of the PII to the plaintiff states we believe the issues have been resolved pretty much with the 2,600 post-injunction violations.

10:33:14

And I think that our concern is just ongoing compliance going forward and this potential that there may be additional problems that are discovered in the future, which we just feel at this point that there should be -- we should be assured of compliance with the injunction and we shouldn't have to -- there shouldn't be these issues coming up where we find 53 additional individuals out of the Nebraska Service Center.

10:33:32

10:33:46

And we have reiterated our concerns with compliance many times before, Your Honor; and so we have requested, you know, many options, some of which include a reporting requirement or an external compliance monitor to at least
10:34:03 ensure that they are, in fact, complying with the Court's injunction.

THE COURT: Okay. Here is -- well, shift over and talk to me about the notification issue that you have with Ms. Ricketts as far as corrective action by the
10:34:25 states.

MS. COLMENERO: Yes, Your Honor. Ms. Ricketts is correct. This issue came up in the negotiations with the agreed protective order regarding the disclosure of the personally identifiable information related to the 2,600
10:34:35 individuals.

There was the request that a reporting requirement be included in the order. The plaintiff states objected to that, and we felt that that was an unnecessary oversight due to the fact that the plaintiff states really did
10:34:50 nothing wrong here and we're merely trying to determine whether or not we need to undertake any corrective action and whether or not it's worth the cost and effort that, obviously, we will never recover for those efforts.

THE COURT: Does this current proposed order have
10:35:07 notification requirements?

MS. COLMENERO: It does not. And so then the request shifted to could you just send us an e-mail.

We feel that any type of notification requirement to the Federal Government is unnecessary here because the 10:35:21 protective order itself requires the plaintiff states to use the most up-to-date information to conduct remediations.

So if the concern is accuracy, that is accounted for in the order. And there should also be no issues 10:35:36 regarding accuracy given that the personally identifiable information originated from the defendants' own records. And the plaintiff states intend to conduct these accuracy checks using the SAVE databases for those agencies that do, in fact, use them.

10:35:54 But in a state as large as Texas, I'm sure Your Honor can imagine, we have numerous state agencies that are here; and the burden placed on the plaintiff states to notify the Federal Government any time it decides to take any action related to the PII is onerous given the state 10:36:11 of circumstances as they exist right now because this is really a process the plaintiff states did not anticipate taking in this case.

THE COURT: All right. Let me resolve this, both of these issues.

10:36:24 One, I am not going to -- I don't think the states

need to give any kind of notice to the Federal Government of corrective action.

And secondly, Mr. Gilligan, I would like a status report on September 25th as to the status of that. That's a week after your hopeful deadline of the 18th.

10:36:59

And then, I would like another status report, which I'm hoping will be very short, on May 25th, 2016. And by status I'm talking about are we in compliance with the injunction.

10:37:27

So I would think by the next six months that would be "We're in compliance. Nothing has happened that would put us out of compliance." I mean, it could be a paragraph, I hope.

All right. Now let's shift gears. As far as I'm concerned, that puts to bed anything post injunction. I mean --

10:37:54

MS. COLMENERO: We agree, Your Honor.

THE COURT: Ms. Ricketts, is there anything you would --

10:38:01

MS. RICKETTS: (Shaking head side to side.)

THE COURT: Okay. Let's talk about pre-injunction. All right. I understand there were various issues where -- let me ask you, Ms. Colmenero, since you have the podium right now.

10:38:27

What do you think the issues are outstanding, setting

aside the fact -- well, maybe I should ask this: Is it the states' position that they should recall all 108,000 and replace them, the three-year with a two-year?

MS. COLMENERO: It is, Your Honor. And I think 10:38:49 the way the states see it is that we grouped the 108 pre-injunction grants together with the discovery disputes stemming from this Court's April 7th order because those in many ways relate to the misrepresentations that occurred during the preliminary injunction proceeding.

10:39:08 And so, the way we look at these 108,000 pre-injunction grants is we do view them as a violation of the Court's February 16th injunction. And we believe that the defendants should go back and unwind these benefits and provide that personally identifiable information to 10:39:27 the plaintiff states for the plaintiff states to determine whether or not any corrective action measures are necessary on their end.

THE COURT: Short of redoing all 108,000, what other issues do the states have with the Federal 10:39:42 Government that need to be resolved?

MS. COLMENERO: There are the discovery disputes from -- stemming from the Court's April 7th order which related to the assertions of privilege on the information that Your Honor had requested in its order.

10:39:58 And so, if I can kind of propose a solution to the

Court from the plaintiffs' perspective that could kind of wrap this issue up. The plaintiff states would -- if the defendants would agree to take similar remediation efforts as they did for the 2,600 individuals and these
10:40:17 remediation efforts would apply to the 108,000 individuals who got the pre-injunction EADs, the plaintiff states would be content for this Court to not rule on the privilege ascertain disputes and the additional discovery that the plaintiff states have sought in response to the
10:40:36 Court's April 7th order.

And the reason being is that in our mind a remediation of these 108,000 individuals would serve as a remedy for the misrepresentations that were the subject of the Court's order.

10:40:49 THE COURT: And by remediation, I mean, what steps do you -- are you -- do you think they ought to take?

MS. COLMENERO: We understand that they took some swift action with respect to the 2,600 post-injunction
10:41:04 individuals but we now know that there is a process in place that can happen and there is a remediation effort that can occur and we think that there should be a similar remediation effort that occurs with the 108 but we wouldn't -- I mean, obviously, we can work on the timeline
10:41:21 issue with them.

We understand they were responding quickly to Your Honor's July 7th order. So they took extraordinary steps in order to fix those issues. But every day that those three-year EADs remain on their databases there are
10:41:38 individuals who are seeking benefits from the plaintiff states. There is an outward representation that three-year terms are, in fact, authorized on what is now an enjoined directive.

THE COURT: Okay. Let me play devil's advocate
10:41:54 with you and I say, okay, Ms. Colmenero, setting aside the fact that we may have mislead the states as to what was going on between November 20th and February 16th -- and, you know, I'm not making an argument you haven't heard before, I'm sure -- we didn't violate the injunction
10:42:21 because there was no injunction. How can we violate an injunction that doesn't exist?

MS. COLMENERO: And our response is -- and we have identified this in the joint status report filed by both parties. But the way we read the Court's February
10:42:36 16th injunction is it has enjoined the defendants from implementing any and all aspects of the expanded DACA program.

And so, in the six months since the injunction was issued the defendants have continued to maintain databases
10:42:49 and records reflecting the granting of three-year terms of

deferred action under a now enjoined directive.

And while these three-year terms were issued prior to the Court's February 16th injunction, the continued maintenance of these three-year authorizations and the
10:43:05 databases and records which are used by state agencies to query the Federal Government for information related to an individual's immigration status is, in fact, contrary to the February 16th injunction provision barring implementation in any and all aspects.

10:43:21 And so, we do believe the defendants lack the authority to continue to represent on an ongoing basis that three-year terms are authorized.

THE COURT: You don't think that perhaps runs afoul of some kind of retroactivity, retroactive
10:43:36 application of an injunction?

MS. COLMENERO: We don't believe so, Your Honor, because just as they are taking these extraordinary efforts to call back these 11 EAD cards that exist with these individuals there is still an outward representation
10:43:50 that exists by the 108,000 also having these EAD cards and using them for future benefits for -- which would allow them to get benefits on a three-year term if we were talking about driver's licenses in the plaintiff states.

THE COURT: Well, I understand that. But, I
10:44:05 mean, I guess it's no secret what I'm asking you. I'm

troubled by the fact that you don't -- help me with the legal distinction. I think there is a legal distinction of violating an order that is in effect with perhaps violating the spirit of what was represented to somebody but the order wasn't in effect.

I mean, doesn't the fact that the order was signed change a lot of things?

MS. COLMENERO: I see your point, Your Honor; and I think those are kind of two distinct arguments in our mind. You know, I think you can look at the 108 and really tie those to the -- what the parties understood what is happening during the pendency of the preliminary injunction and tie those to the misrepresentations that occurred.

I do think that the proposal that we propose to the Court would, in fact, address that harm because I think the whole reason we got to these discovery disputes, we got to the Court's April 7th order, was because of the misrepresentation.

And if they had corrected to what we believe was a status quo at the time that the preliminary injunction was ongoing and those proceedings were happening, I don't think we ever would have reached to the point of the misrepresentations as well as these discovery disputes that arose from the Court's April 7th order.

THE COURT: So what you are suggesting is I could do that not as a violation -- I mean, the power of the Court is not to protect its own injunction order. It's almost as a sanction for misrepresenting the facts to the
10:45:45 Court.

MS. COLMENERO: I don't want to call it a sanction. I think what we proposed in our initial filings with the Court back in March was we wanted to seek early discovery to determine what potential remedies that we may
10:45:58 want to propose to the Court. We have kind of reached this point where there are these discovery disputes, but I think the reason we have these disputes between us related to the 108 is all based on this idea that there is a status quo that was being maintained that wasn't being
10:46:14 maintained.

But if we could -- if we reverted back to the status quo, which is the 108 are remediated, plaintiff states provided with the PII related to those 108, then I do believe that that resolves the plaintiff states disputes
10:46:30 that were part of our initial motion for early discovery that we filed with the Court back in March.

THE COURT: Ms. Ricketts, do you want to weigh in to this?

MS. RICKETTS: Your Honor, this is an area that
10:46:43 actually is both Mr. Gilligan's and mine. So I'll take a

first crack at it.

My understanding of the point of the meet and confer was that the Government -- we could provide to the states information so that they could determine what harm they
10:46:59 suffered and whether they wanted to request remediation. I do appreciate they have now requested remediation.

But if that is the case, if they are asking as either a violation of the injunction or in any other way to undo the 108, we certainly would ask for the opportunity to
10:47:16 brief that so that they could demonstrate the harm that they have suffered and we could have an opportunity to brief what, if any, remedy might be appropriate in this instance.

That was our understanding of the point of the meet
10:47:29 and confer. So I do not understand that we have any dispute regarding requested information. The only dispute remaining seems to be what action, further action then we should be taking. We have provided them all the information that they have requested to date.

10:47:49 THE COURT: Ms. Colmenero, will you -- both of you all just stay there.

MS. COLMENERO: Thank you. We had understood -- and maybe this was just a misunderstanding during our very hurried meet and confers -- that with respect to the 108,
10:48:06 yes, they did provide us with some information in terms of

potential impact on the states, which was the state-by-state breakdown, as well as a driver's license SAVE query number. But in our mind that was not --

THE COURT: Tell me what you mean by a driver's license SAVE query number.

MS. COLMENERO: These would have been the number of queries done through the Federal Government SAVE databases from Texas driver's licenses facilities.

THE COURT: Okay. But how does that -- how is that helpful?

MS. COLMENERO: It doesn't really tell us a whole lot other than there were individuals who came to Texas driver's license facilities who fell within the 108,000 category of individuals who potentially got driver's licenses from the state for three-year terms.

So it does give us some indication in terms of the impact on the plaintiff states but doesn't necessarily provide a road map in terms of the processes the states would put in place to undergo any kind of corrective action because we don't have personally identifiable information for any particular individual within the class of the 108,000.

MS. RICKETTS: And if I might, Your Honor, our understanding was that we provided all of that specific information for the 2,600 so the states could, in fact,

make that determination on a smaller scale. They have the numbers on a larger scale for the 108.

And the value, from our perspective of the SAVE queries for the driver's licenses, is presumably states would only be taking corrective action for licenses or benefits that had a validity period for more than two years. And it is tough to find a license or a benefit that has a validity period for longer than two years other than driver's licenses and, perhaps, bar licenses.

10:49:38

10:49:56

And so the driver's license SAVE query information seemed the most relevant for the states to make that determination.

THE COURT: Well, how does that help them? I mean, what do they do with that?

10:50:02

MS. RICKETTS: What they would do is determine whether they think they have suffered harm. They would have the number -- not necessarily the number of driver's licenses that have been provided, it's true; but it would be a ballpark number of the queries that were made by the state agency for the purposes of determining whether to provide a driver's license number.

10:50:17

THE COURT: And so they would use the cost of the inquiry as a damage figure?

MS. RICKETTS: I don't know, Your Honor, honestly.

10:50:32

THE COURT: That's why I'm trying to figure out why that helps them.

MS. COLMENERO: We don't find it particularly helpful. Having the personal identifiable information which they are going to provide to us as part of the 2,600 is, in fact, the most accurate kind of information for us to develop processes and protocols.

Because I'll tell Your Honor this has never happened before in Texas where we have to go back and unfix these types of licenses and undergo this type of remediation effort. So we actually need to ensure that we have the most accurate information possible in order to ensure that we have the appropriate individual who is being queried within our own system.

MS. RICKETTS: And again, we're at the beginning stage of that because we have not yet provided to Texas the personally identifiable information for the 2,600. Some of this might be then speculative.

I have no sense of what is most valuable from Texas' perspective, I will readily admit. We have been trying to provide the information they have requested, and I believe we have provided the information they have requested.

But we had understood this would be a staged process that they would receive the significant and very sensitive information for the 2,600 to make a determination as to

what next steps they would propose. We had anticipated that would be through briefing, but they would have all of the information then to make an argument to Your Honor as to what next steps should be taken and why, what harm they
10:51:56 have suffered and how it would be remedied -- how it would be appropriately remedied from their perspective and we would have that opportunity to respond.

MS. COLMENERO: And, Your Honor, if I may, I think from our perspective we're proposing a solution such
10:52:12 that we can end this dispute not only related to the discovery issues that are still outstanding but also the -- any type of remedy that might be available for the 108,000.

THE COURT: Ms. Colmenero, let me ask you this:
10:52:27 Let's assume I order the Federal Government to do that. They are going to provide you with the names, addresses or whatever; and they send them to you. I mean, what is the next step? What happens then?

MS. COLMENERO: We need to look at the personally
10:52:40 identifiable information, talk to the appropriate state agencies, develop protocols, processes to determine what type of remediation we need to undertake; and I think similar to the remediation efforts that the Federal Government has undergone in terms of exchanging cards for
10:52:58 driver's licenses, for example, we would probably have to

go through similar efforts ourselves.

THE COURT: So, hypothetically, the State of Texas would -- when it issued -- well, maybe I need to understand the process better when, let's say, one of the
10:53:20 DACA folks with a two-year work authorization comes in and wants a driver's license and Texas gives them a driver's license with a two-year expiration date.

MS. COLMENERO: Uh-huh.

THE COURT: Is that a yes?

10:53:36 MS. COLMENERO: Well, it would depend upon whether or not that individual fell within the 2,600 post injunction.

THE COURT: No. No. No. I'm talking about not any. Not the 108,000. Not the --

10:53:47 MS. COLMENERO: Okay.

THE COURT: I'm talking about, let's say, in 2013, before this ever came up.

MS. COLMENERO: Okay. That individual comes to a Texas driver's license facility. They present a form of
10:53:58 identification that shows that they are lawfully present in the U.S. We take that form of identification. We query the Federal Government's SAVE database to ensure that they are, in fact, here lawfully present for the amount of time that sets forth on that document.

10:54:15 THE COURT: And then you give them a license for

how long?

MS. COLMENERO: For two years.

THE COURT: Okay.

MS. COLMENERO: The amount of time they are here lawfully present.

THE COURT: All right. Now, if they have a three-year authorization do they get a license for three years?

MS. COLMENERO: If they are queried through the SAVE database and confirmed that they are, in fact, here for three years, we would issue a temporary license for three years.

THE COURT: All right. And so what you are saying is if, say, out of this 108,000, 15,000 are in Texas, Texas would then go through all 15,000 people and say, okay, instead of a two-year license -- I mean, a three-year license, here is a two-year license, send us back your three-year license?

MS. COLMENERO: We would correct our records internally and determine how best to go about exchanging the actual cards that have been issued to those individuals.

MS. RICKETTS: One thing I would note, Your Honor, if I might. For the SAVE queries I would just note that the query information we provided for the 108 is

likely an overestimate of those who might have received a driver's license; and certainly not all of those who received the three-year EADs had SAVE queries in Texas or, frankly, in any state. So it is a smaller number than
10:55:35 those who received the three-year EADs, and it is a smaller number still from the SAVE query numbers because some of those queries were multiple queries.

If I could channel Mr. Schwei who couldn't be here today because of a family emergency, I could perhaps
10:55:51 explain to you why that is. I can't right at this moment. But it is an overestimate.

THE COURT: Don't channel Mr. Schwei. Please don't do that.

All right. Here is where I am. I am soliciting help
10:56:05 from both sides. I know, Ms. Colmenero, you have basically said here is one solution.

The way I look at it is I can open this up to discovery, which is how this first came up, which was a request to do discovery.

10:56:26 And what I'm trying to figure out is why I would do that. And I don't mean justification why. I mean what does it eventually accomplish? I mean, it's either -- I have tried to play out the scenario in my head.

We're either going to go through the discovery
10:57:00 process, the states are going to -- and, really, the

discovery process that I anticipated may be different, Ms. Colmenero, than what you are talking about because I was concerned, quite frankly, about the misrepresentations made to the Court. And it sounds like the states are more concerned, and maybe rightfully so, with the 108,000 and who they are and where they are. And I can see that, but I am not sure where that gets us. I mean, that's one scenario though.

The second scenario is I just do nothing.

And the third scenario is, you know, I say all right I'm just going to decide this as a sanctions motion and decide whether or not sanctions are appropriate given the representations that were made before the Court that were not accurate.

And if so, then I have got to come up with an appropriate remedy. And, I mean, I hear you say your remedy is for me to order the Government to redo all 108,000 of them. I'm not sure I necessarily buy into that but I mean -- Ms. Ricketts, I mean, assuming hypothetically the Court was inclined to issue some kind of sanctions, what would be an appropriate sanction?

MS. RICKETTS: I was actually voting for Door No. 2, Your Honor.

THE COURT: The do nothing door?

MS. RICKETTS: The do nothing door.

THE COURT: The door where Carol Merrill is standing.

MS. RICKETTS: I would be happy to be there. That would be my generation, as well.

10:59:14 Your Honor, obviously, we don't believe that a sanction like that is appropriate; but we would want the opportunity to brief that. Again, our understanding is that the states would need to demonstrate the harm that they have suffered. It was why we provided voluntarily so 10:59:28 much sensitive information to them. We believe that is the information they asked for, and we assumed it was -- at least I had understood it was for that very purpose to determine what harm they had suffered and what remedy they thought was appropriate. We would like the opportunity to 10:59:43 brief that before the Court would order any particular sanction or remedy.

Also, if you don't mind, Your Honor -- I am stepping on Mr. Gilligan's toes in this topic. If you don't mind if I check with him if there is anything else he has to 10:59:59 add?

THE COURT: Well, if he has got a fifth solution or a fourth solution, I am willing to listen.

MS. RICKETTS: I think he will vote for Door No. 2, as well.

11:00:06 MR. GILLIGAN: Your Honor, I think I have been

given a hint to select Door No. 2, as well; but I would just say, Your Honor, regarding the question of a sanction for miscommunications that we had earlier with the Court regarding the implementation of the three-year grants of
11:00:23 deferred action under the 2012 guidelines, again, we apologize for those miscommunications. We regret them. They were inadvertent and unintended for all the reasons we have explained in our prior filings.

THE COURT: I know, but they were repeated on at
11:00:42 least three different occasions.

MR. GILLIGAN: Yes, Your Honor. But consider what happened when we first learned of the 108,000 cases as is reflected in the public documents, the privilege log and the metadata chart. We responded immediately to
11:01:09 provide the Court that information.

The filing, the March 3rd advisory, was drafted, reviewed and filed in just about 24 hours. There was no delay in bringing that to the Court's attention. And I think the urgency with which we got that document on file
11:01:23 also reflects the fact that we weren't trying to hide anything from the Court in the first place.

There are, of course, other circumstances which we have discussed in our prior filings which go to show that the issue of the ongoing grants was simply something that
11:01:39 didn't cross our minds when people were focused on the

harm that the states had asserted during the preliminary injunction proceedings, which was the harm from additional categories of individuals becoming eligible for deferred action and, therefore, state benefits, not people who were already eligible under the 2012 guidelines.

11:01:58

But ultimately I think -- while I can respond to a number of the points the state has made, our position is that any question of remediation as some sort of a sanction, particularly retrieving 108,000 cards, is something that needs to be briefed; and it would need to be predicated, Your Honor, with some sort of demonstration of harm by the plaintiff states.

11:02:22

Equity is proportional, Your Honor. It's not punitive. It does not require that a party make tremendous efforts that -- be required to make tremendous expenditures of time and effort and public resources because of an innocent mistake, at least where there has been no showing of appreciable harm to another party or that there would be any benefit that would accrue from the effort that's being made.

11:02:39

11:02:59

We also -- we, of course, agree with the view that there is a difference between something that occurred after the injunction and something that occurred and was completed beforehand. We are talking here about cases where the adjudication was made and all the databases were

11:03:19

updated and the cards were issued prior to the Court's injunction.

And there is a difference here, and we would want to elaborate upon this in further briefing. There is a
11:03:34 difference between a continuing violation of an injunction and the continuing effects of past acts that occurred beforehand.

THE COURT: How do we know there is 108,000?

MR. GILLIGAN: I believe that that -- that is an
11:03:50 issue I haven't looked at closely in a while, Your Honor, because we have moved on to other things. It is based on queries of the agency's principle database of these kinds of records, the CLAIMS 3 system.

MS. COLMENERO: And if I may, Your Honor, just
11:04:07 interject here. I think from the plaintiff states perspective the Inspector General's report that was filed with this Court earlier this week at least in our opinion suggests that it's hard to know whether or not there is actually 108,000 that occurred before the injunction
11:04:26 happened.

The Inspector General's report states that the data was unreliable that USCIS used; and based on the information it reviewed, even the Inspector General cannot say with confidence the exact number of three-year EADs
11:04:40 issued after the injunction.

So, you know, we talk about the 108,000 pre-injunction grants; but I think there is even a question as to if that's truly an accurate number.

MR. GILLIGAN: Your Honor, I have just been advised that as part of the agency's own ongoing, self-monitoring, self-evaluation that the Office of Performance and Quality has verified that the 108,000 number is correct.

Regarding the Inspector General's report, which the principle conclusion of which was that the initial 2,100 that we were talking about earlier, post-injunction three-year EADs, were issued inadvertently and not intentionally, what the Inspector General had to say about the reliability of the data we don't want to -- you know, we don't want to take issue with the Inspector General. But they stated that the data was unreliable because they couldn't confirm the numbers they had been provided by the agency, but they didn't explain what the basis was of that.

So we're uncertain why they considered the data unreliable. They refer to the fact that we were finding additional groups of cards that had been re-mailed or issued after the injunction. But that's not, in our minds, an indication of unreliability. That's simply a reflection of the fact that when you ask the system

different questions it gives you different answers.

The 2,100 were the result of a query about EADs that had been produced after the injunction; and when the Office of Performance and Quality was at the Director's
11:06:26 instruction conducting an audit of that number to make sure we had found them all, they asked a different query were there any re-mailed after the injunction. And that different question then revealed a different answer.

So to us it's not a data quality issue. It's a
11:06:43 question of understanding the complexities of the systems that the agency has.

But to bring it back to the question of remediation, what the plaintiffs are asking here is that DHS be required to take what we did in order to get the 2,500 or
11:07:07 2,600 cases taken care of and those cards returned and to scale that effort up by a factor of 40 times, from 2,600 to 108,000. That's a tremendous undertaking.

And yet to date there has been no demonstration of harm by the states. Perhaps, you know, the PII will have
11:07:30 something to do with that. But as it stands it seems to us that if we're going to do an equitable balancing here of what burden is on one party or the other there is no basis, no showing at this time that could justify the kind of remedial efforts the states are suggesting.

11:07:52 And if it's going to be entertained, it's something

that we feel that the legal issues should be briefed and the factual issues there should be a record made on those.

THE COURT: Do you have a response, Ms. Colmenero?

11:08:09 MS. COLMENERO: Very briefly, Your Honor. I think we would not opt for Door No. 2 but opt for a combination of perhaps Door No. 1 or Door No. 3, which is -- you are correct, Your Honor.

We were -- we are concerned about the

11:08:21 misrepresentations that were made during the pendency of the preliminary injunction proceeding. We understood that the status quo was going to remain the same; and it did, in fact, change.

And we have previously argued to this Court that the

11:08:34 states have been irreparably harmed by the change in the status quo; and I think that's evident by these post-injunction violations given the fact that now the state has, you know, its own remediation efforts that they need to consider taking that are going to require time and

11:08:52 expense that are unrecoverable.

So there is direct harm to the plaintiff states by the issuance of the three-year EADs, especially with a directive that is now enjoined.

And so, we propose a solution which is, essentially, a

11:09:06 return of the status quo, which is what we anticipated had

always been occurring during the pendency of the preliminary injunction. And I think if there was a return to such a status quo through a remediation by the defendants I think that would resolve these outstanding
11:09:21 discovery disputes that were related to the misrepresentations.

THE COURT: Say that last sentence again.

MS. COLMENERO: I said I think if there was -- if the defendants undertook similar remediation efforts as to
11:09:32 the 108 it would essentially be a return to the status quo, which means no more three-year EADs exist out there, which would resolve the discovery disputes at least from the plaintiff states perspective that relate to the misrepresentations that occurred.

11:09:47 THE COURT: Let me ask you this -- and I know we have states on one side and we have the Federal Government on this side. But in the middle of all this is 108,000 individuals. I mean, should I take their well-being into account?

11:10:11 MS. COLMENERO: You could --

THE COURT: I mean, they didn't do anything wrong.

MS. COLMENERO: I agree.

THE COURT: Other than perhaps being in the
11:10:20 country illegally. But, I mean, as far as they are

concerned they applied just like they were told to apply; and they got a three-year extension. And, oh, boy, I don't have to reapply for three years instead of two years.

11:10:35 MS. COLMENERO: I agree, Your Honor, that they are kind of the victim of kind of what's happened with respect to this change in the status quo that happened during the pendency of the preliminary injunction proceedings.

11:10:48 However, from the plaintiff states perspective we want to ensure that our records are, in fact, correct and that we issue licenses for individuals who are, you know, here to be -- who are lawfully here in the United States.

And we do believe that by maintaining these three-year 11:11:07 terms on a now enjoined directive that when those individuals come to the plaintiff states and seek a term driver's license, for example, that we're now issuing licenses on a now enjoined directive for that period of time.

11:11:20 And so, we believe that if those records were corrected, which is what we would want, that that from our perspective is the best-case scenario.

MR. GILLIGAN: Your Honor, I do believe your question hits on the question of the public interests in 11:11:37 all this. And certainly we would agree that the 108,000

individuals who at least in respect to these matters have done nothing wrong should be taken into account as well as the public interests. We are talking about public resources on both sides of the equation here and I --

11:11:56 THE COURT: Well, I think that would -- I mean, we have taxpayers of 26 states over here; and we have taxpayers of all 50 states over here. And that's one of the reasons I'm trying to resolve this and bring this portion of this litigation to an end.

11:12:14 MR. GILLIGAN: Indeed, Your Honor. You know, the states -- you know, we hear the states speak in abstract terms about the efforts required to convert driver's licenses from three years to two years and so forth and there are remedial efforts but we -- there is no record as

11:12:33 yet on the extent to which any such efforts are necessary among this group of 108,000 and whether any benefits to the states that would accrue from the Federal Government going to the time and effort and expense of retrieving these cards would justify the tremendous effort that would

11:12:54 be required to do that, again, on a scale of 40 times what we have already done with respect to the 2,600.

THE COURT: Is there some record somewhere located in some computer that has a list of all 108,000 or can be programmed to provide a list of all 108,000?

11:13:25 (Sotto voce discussion between defense counsel.)

MR. GILLIGAN: I'm advised by knowledgeable co-counsel that we have information, yes, to that effect, Your Honor.

THE COURT: All right. Anything either side wants to add?

11:13:42

MS. COLMENERO: Not right now, Your Honor.

THE COURT: All right. Here is what I want, and I'm not ordering you to do this. I'm -- if you want to do this.

11:14:13

Assuming, hypothetically, the Court finds that facts were misrepresented to it, I want to know what sanctions you think I can order.

And secondarily, again, hypothetically, if the Court were to conclude that sanctions were appropriate of some

11:14:47

kind for the misrepresentations made to the Court, what should those sanctions be?

And if you will have those on file by the 4th of September.

Let me say right off the bat so that there is no need

11:15:13

for flowery, assuming arguendo language that I understand that the defendants opt for Door No. 2 and that it's their position that there should be no sanctions. And I understand that. So I am -- nothing you say is going to be an admission in any way that sanctions are appropriate.

11:15:42

I'm assuming -- I'm trying to make things easy for

you. If you choose to file something, you don't have to put a bunch of flowery language saying we don't think there ought to be sanctions because I know that's your position.

11:15:57 And this doesn't have to be an encyclopedia. I mean, it can be short and sweet and to the point.

And after that, I will decide what to do. But I have made it clear, I think, it's my intention to resolve this matter so that one way or the other, however the appellate

11:16:28 courts rule, that it's not lingering.

I will sign the protective order today. Regardless of the -- how I rule on this other issue, Mr. Gilligan, I still am -- the issue of a certification of where we are as of September 18th and as of next May 18th, that's

11:16:59 remaining in place. All right?

MR. GILLIGAN: Understood, Your Honor. We're happy to do that.

THE COURT: Okay. Let me just say one other thing with regard to any kind of future motions. I

11:17:17 understand the time pressures that everybody is under sometimes. I don't find it good advocacy to arbitrarily put deadlines on a Court. In fact, I have never heard of it. I have never seen it before this case. It's now happened twice in this case.

11:17:47 I don't think there is a Court -- there may be, but I

know there isn't in Texas -- that has as heavy a docket as mine. And so I rule on things as promptly as I can. And I don't think I have left any stones unturned in this case.

11:18:05 I mean, even the opinion I wrote on the injunction, you know, I was given a February 18th deadline; and I had it out by February 16th.

Now, fortunately for me and for this community, Judge Olvera is riding to my rescue. His investiture will be

11:18:31 next week. And so I'll get some help. But I promise both sides that I will try to rule on things as promptly as possible.

I will readily admit this issue I find troubling both in terms of -- well, I have already stated my concerns on

11:18:53 this; and I stated at the last hearing how I don't necessarily take any joy in considering any kind of sanctions against attorneys who are in the heat of battle representing their clients.

But get whatever you want to on file by September 4th,

11:19:26 and I plan to dispose of this issue so that once the Fifth Circuit rules we either can proceed on the merits or everything will be over one way or the other and whichever side wins or loses can go talk to the Supreme Court.

All right. Thank you all.

(Proceedings concluded at 11:19.)

Date: August 21, 2015

COURT REPORTER'S CERTIFICATE

I, Laura Wells, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Laura Wells

Laura Wells, CRR, RMR