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

STATE OF TEXAS, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:14-cv-254-ASH
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants.	)	

DEFENDANTS' MOTION TO STAY MAY 19, 2016 ORDER PENDING FURTHER REVIEW

Defendants respectfully move for a stay of the Court's May 19, 2016, Memorandum Opinion and Order [ECF No. 347] pending further review, whether by appeal, mandamus, or both. The grounds for this motion are set forth in the accompanying memorandum, the declaration of Lee J. Lofthus, and the declaration of León Rodríguez.

Pursuant to Local Rule 7.1(D), Defendants aver that their counsel conferred with counsel for Plaintiffs, and the parties cannot agree about the disposition of the motion. Defendants' counsel conferred with counsel for the Intervenors, who do not oppose this motion.

A proposed order is attached in accordance with Local Rule 7.2.

Date: May 31, 2016

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Defendants' Motion to Stay May 19, 2016 Order Pending Further Review, with attachments, has been delivered electronically on May 31, 2016, to all counsel of record through the Court's ECF system.

/s/ James J. Gilligan
Counsel for Defendants

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FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:14-cv-254-ASH
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION
TO STAY MAY 19, 2016, ORDER PENDING FURTHER REVIEW

Dated: May 31, 2016

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

Page(s)

FEDERAL STATUTES

FEDERAL RULES OF CIVIL PROCEDURE

INTRODUCTION AND SUMMARY OF ARGUMENT

The sanctions ordered by the Court far exceed the bounds of appropriate remedies for what this Court concluded were intentional misrepresentations, a conclusion that was reached without proper procedural protections and that lacks sufficient evidentiary support. Compounding matters, the sanctions imposed by this Court exceed the scope of its authority and unjustifiably impose irreparable injury on the Department of Justice, the Department of Homeland Security (DHS), and thousands of innocent third parties.

The Department of Justice takes with utmost seriousness the public trust committed to it to represent the interests of the American people in the courts of the United States, and insists that its attorneys adhere to the high standards of ethical conduct and professionalism required to carry out that critical mission. The Court found that certain representations made to it in this case were made in bad faith or with intent to deceive. We respectfully but emphatically disagree with that conclusion. It is wrong, and made worse by (and perhaps explained by) the absence of the required fair process for the Department and its attorneys. The Government accordingly will seek immediate review, whether by appeal, mandamus, or both, and moves for a stay of the Court's public order pending that review.[1]

All factors that a court must consider when ruling on a request for a stay support the Government's motion. First, the Government is likely to prevail on appeal, because (1) the Court's finding of bad-faith misrepresentations is not supported by the evidence, and certainly not by clear and convincing evidence, as required; (2) the Court imposed sanctions without observing required procedural protections; and (3) the sanctions imposed place onerous

[1] The Court issued a public Memorandum Opinion and Order on May 19, 2016 (ECF No. 347) ("May 19 Order") accompanied by a Sealed Order also entered on May 19, 2016 (ECF No. 348), received by the Government on May 27, 2016.

administrative obligations on DHS that are unjustified by any demonstrated remedial purpose; impermissibly encroach on the Attorney General's authority to supervise the conduct of litigation involving the United States; and improperly seek to regulate the conduct of and standards for appearance by Department of Justice attorneys before other state and federal courts in twenty-six States. Second, the Government will suffer irreparable injury if the Court's May 19 Order is not stayed, resulting from impaired enforcement of immigration law, including through the unchallenged 2012 Deferred Action for Childhood Arrivals (DACA) policy; judicial intrusion into the internal administration of the Department of Justice; regulation of Department of Justice attorneys appearing before other courts; and the unrecoverable expenditure of significant financial and personnel resources required to comply with the Order. Finally, the balance of equities and the public interest, including the interests of tens of thousands of innocent third parties whose personally identifying information DHS has been ordered to produce, also weigh in favor of a stay. For all of these reasons, the Government's motion to stay should be granted.

NATURE AND STATE OF THE PROCEEDING

The Court's February 16, 2015, preliminary injunction is currently under review by the United States Supreme Court. Pending that review, further proceedings on the merits of this case have been stayed. The Court issued the May 19 Order and the accompanying Sealed Order imposing sanctions against the Department of Justice, certain of its attorneys, and DHS based on findings of intentional misrepresentations by the Government and its attorneys concerning the timeline for implementing provisions of the November 2014 Deferred Action Policy Memorandum. The Government intends immediately to seek further review, and moves in this Court for a stay of the May 19 Order pending review.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Defendants request a stay pending further review of the Court's May 19 Order. The Court has the inherent power to stay matters within the control of its docket. *See* Fed. R. Civ. P. 62(c) (authorizing stays of interlocutory injunctions pending appeal).

Courts typically consider four factors in evaluating a request for a stay pending further review: (1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant will be irreparably harmed if the stay is not granted; (3) whether issuance of a stay will substantially harm the other parties; and (4) whether granting the stay serves the public interest. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013).

ARGUMENT

I. DEFENDANTS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON FURTHER REVIEW.

A. The Court's Findings of Intentional Misrepresentations Are Not Supported by the Evidence, and Certainly Not by Clear and Convincing Evidence.

We respectfully submit that the Defendants are substantially likely to prevail on further review because the sanctions imposed by the Court are not supported by the evidence, and certainly not by clear and convincing evidence of bad faith. A sanction issued under the Court's inherent authority and predicated on a putative finding of bad-faith misconduct by a party or its attorneys, like the one here, May 19 Order at 19, must be supported by a specific finding that is based on clear and convincing evidence. *In re Moore*, 739 F.3d 724, 730 (5th Cir. 2014); *City of Alexandria v. Cleco Corp.*, 547 F. App'x 568, 569 (5th Cir. 2013); *Crowe v. Smith*, 151 F.3d 217, 236 (5th Cir. 1998). "[M]ere

negligence does not trigger a court's inherent sanctioning power." *Maguire Oil Co. v. City of Hous.*, 143 F.3d 205, 211-12 (5th Cir. 1998).

For all of the reasons set forth in Defendants' Response to the Court's Order of April 7, 2015 (ECF No. 242), the Government submits that the record, when viewed as a whole, does not support a clear and convincing finding that the Government or its attorneys deliberately withheld information, or otherwise sought to mislead the Court or the Plaintiff States, about DHS's issuance of three-year rather than two-year terms of deferred action to recipients under the 2012 DACA policy.

B. The Court Did Not Provide Necessary Procedural Protections.

Certain specific procedural protections are required before a Court may impose sanctions, including notice to the entities and/or individuals against whom sanctions are contemplated, the basis for such potential sanctions, the type of sanctions being contemplated (including whether the potential sanctions are personal in nature), and an opportunity for the entity and/or individual to respond to the specific sanctions being contemplated. *See, e.g.*, ECF No. 243 at 18-22; ECF No. 265 at 15; ECF No. 287 at 50 n.22; ECF No. 305 at 4-5; ECF No. 345 at 2. Required procedures intended for the protection of parties and individual counsel targeted for sanctions were not followed here. For this reason, too, the Government is likely to succeed on further review.

C. The Sanctions Imposed Exceed the Court's Authority.

The Government is also likely to succeed on further review because the sanctions imposed by the May 19 Order exceed the scope of a court's inherent power.

A district court's power to sanction "is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function." *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 591 (5th Cir. 2008). It is "based on the need to control court proceeding[s] and [the] necessity of protecting the exercise of judicial authority in

connection with those proceedings." *In re FEMA Trailer Formaldehyde Prods. Liab.*, 401 F. App'x 877, 882 (5th Cir. 2010); *see also Crowe*, 151 F.3d at 240 (inherent power derives from the control vested in courts "to manage their own affairs"). Accordingly, the inherent power "may be exercised only if essential to preserve the authority of the court." *Union Pump. Co. v. Centrifugal Tech., Inc.*, 404 F. App'x 899, 905 (5th Cir. 2010). The Court's exercise of its authority in this instance went beyond this limitation.

As concerns DHS, the order directing the agency to prepare a State-by-State list of persons who received three-year rather than two-year terms of deferred action prior to the Court's preliminary injunction—persons who satisfied the criteria of the 2012 DACA policy, which the Plaintiff States have not challenged—is likely to be overturned on further review. Although inherent-power sanctions may be imposed to make an opposing party whole for injuries caused by the misconduct of the sanctioned litigant, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991), no showing has been made here of injury to the States that can be attributed to DHS's pre-injunction grants of three-year rather than two-year terms of deferred action to aliens who already fell within the existing 2012 DACA policy, especially where that policy has not been challenged by the States, and the third year still has not come into effect. Instead, the May 19 Order, we submit, improperly requires DHS to produce sensitive personally identifiable information regardless of whether a State makes the showing of remediable harm required under the Court's Order, *see* May 19 Order at 22-23, and does so, moreover, while the November 2014 Guidance remains under review by the Supreme Court, as the Order recognizes, *id.* at 23. Thus, the Court's Order compels immediate transmission of highly personal information about tens of thousands of individuals that (even though that information is to be kept under seal for the time being) could irrevocably breach the confidence of these individuals (and of others who submit

information to USCIS) in the privacy of such records, and will impose significant administrative burdens and expense on DHS, *see* Declaration of León Rodríguez, dated May 31, 2016 (filed herewith) ("Rodríguez Decl."), ¶¶ 6-26, all without a showing that it is "necessary to accomplish [a] legitimate … purpose" for which the inherent power may be summoned. *See Kenyon Int'l Emergency Servs., Inc. v. Malcolm*, 2013 WL 2489928, at *6 (5th Cir. May 14, 2013).

With regard to the Department of Justice, the Court's Order directs, for the next five years, "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," of no less than three hours' duration, that "include[s] a discussion of the ethical codes of conduct … applicable in that jurisdiction." May 19 Order at 25. The stated purpose of this mandate is "to ensure that all Justice Department attorneys who appear in the courts of the Plaintiff States … are aware of and comply with their ethical duties …." *Id.* at 24-25. This, and other obligations imposed on the Department,[2] exceed the Court's authority.

The Department of Justice is committed to maintaining high standards of ethical conduct and professionalism for its attorneys. Department policy requires, with few exceptions, that its attorneys annually complete at least four hours of professionalism training (above and beyond any State bar requirements), including at least two hours of instruction in professional responsibility and one hour in government ethics, to ensure that Department of Justice attorneys receive the training needed to perform at the high level of professional and ethical standards

[2] The Attorney General is also directed (1) to "appoint a person within the Department to ensure compliance" with the Court's ethics-training requirements, May 19 Order at 26, (2) within 60 days, to develop a "comprehensive plan" to ensure that Department lawyers "will not … unilaterally decide what is 'material' and 'relevant' in a lawsuit and then misrepresent that decision to a Court," *id.*, and, (3) also within 60 days, to inform the Court "what steps she is taking to ensure that the Office of Professional Responsibility effectively polices the conduct of the Justice Department lawyers and appropriate disciplines those whose actions fall below [expected] standards," *id.* at 27.

expected of them. Declaration of Lee J. Lofthus, dated May 31, 2016 (filed herewith) ("Lofthus Decl."), ¶¶ 6, 8.[3] We submit that this Court has no inherent authority to superimpose additional ethics-training requirements applicable to more than 3,000 Department of Justice attorneys, *see id.*, ¶ 11, for the purpose of assuring that Department lawyers meet qualifications of the Court's choosing when they appear *before other tribunals*, such as state and federal courts in the Plaintiff States, *see* May 19 Order at 24. "[T]he limited reach of [a] court's inherent authority" does not extend to policing proceedings in other courts that do not threaten its own judicial authority in the cases before it. *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 619 F.3d 458, 460-61 (5th Cir. 2010) (citing *Maxxam*, 523 F.3d at 593); *see also In re FEMA Trailer*, 401 F. App'x at 883-84. Rather, the purpose of the inherent power is "the control of the litigation before [the court]." *Maxxam*, 523 F.3d at 591. It cannot be said that judicial supervision over the ethical training of more than 3,000 Department of Justice attorneys who may appear in courts (state or federal) located in one or more of twenty-six States is essential to preserve the Court's authority over the cases pending, or the counsel appearing, before it. *Positive Software*, 619 F.3d at 460; *In re FEMA Trailer*, 401 F. App'x at 884.

The Court's Order also exceeds its authority because compelling the Attorney General to implement a prescribed supplementary program of legal ethics instruction for over 3,000 Department Attorneys unconnected to this case, and to appoint an official to implement the Court's order, contravenes the Constitution's separation of powers. "[I]f any power whatsoever

[3] In addition, the Department's Professional Responsibility Advisory Office is available to all Department attorneys to provide expert advice when questions arise about how to conform their conduct to the rules of professional responsibility. *See* https://www.justice.gov/prao/about-office. And when allegations are made of professional misconduct by Department attorneys, the Office of Professional Responsibility reviews and as appropriate investigates each allegation, and refers findings of misconduct to the Professional Misconduct Review Unit for review and a determination of appropriate disciplinary action. *See* https://www.justice.gov/opr/about-office-and-opr-policies-and-procedures.

is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010); *see Myers v. United States*, 272 U.S. 52, 164 (1926). By imposing a different standard as to the qualifications that Department of Justice attorneys must meet in order to appear on behalf of the United States in state and federal courts located in the twenty-six Plaintiff States, the Government respectfully submits that the Court has interfered with the Attorney General's executive authority both to determine who will appear on behalf of the United States in litigation, *see* 28 U.S.C. § 517, and to direct the attorneys under her supervision in the performance of their duties, *id.* § 519. We therefore submit that the Court's May 19 Order encroaches on central prerogatives of the Executive Branch as established by the Constitution and statutes, in violation of the separation of powers. *See Miller v. French*, 530 U.S. 327, 341 (2000); *see also Bond v. United States*, 564 U.S. 211, 222 (2011); *New York v. United States*, 505 U.S. 144, 182 (1992).

The Government is therefore likely on further review to succeed in arguing that the Court's sanctions orders must be reversed.

II. THE GOVERNMENT WILL BE IRREPARABLY HARMED ABSENT A STAY.

The Government will suffer irreparable harm if the May 19 Order is not stayed pending review in the Fifth Circuit.

The May 19 Order intrudes on core Executive functions and imposes heavy administrative burdens and costs on both DOJ and DHS that cannot be recouped. As discussed above, the relief ordered against the Department of Justice encroaches upon the Attorney General's authority to oversee the conduct of litigation involving the United States and to supervise Department of Justice attorneys in the performance of their duties. Involvement by the Court in such matters of executive administration constitutes a significant injury, *Stieberger v.*

Bowen, 801 F.2d 29, 33-34 (2d Cir. 1986), which is irreparable as it involves the "intrusion by a federal court into the workings of a coordinate branch of the Government." *INS v. Legalization Assistance Project of Los Angeles Cty. Fed'n of Labor*, 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers) (citing *Heckler v. Lopez*, 463 U.S. 1328, 1336-37 (1983) (Rehnquist, J., in chambers); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940)).

The expenditures of money and manpower that the order requires of the Department of Justice are also significant. The estimated cost to the Department (and in turn, to the American taxpayer) in terms of direct expenditures and lost productivity would be between approximately $1 million and $1.5 million this year alone. *See* Lofthus Decl. ¶ 10. The costs over five years could total nearly $8 million. *See id.*; *see also id.* ¶¶ 11-20. These losses of taxpayer funds and productivity can never be recouped.

Further, requiring DHS to produce "all personal identifiers" and "all available contact information" for approximately 50,000 individuals by June 10, 2016, could undermine public trust in DHS's commitment to protecting the confidential information contained in immigration files and will create a significant burden. Rodríguez Decl. ¶¶ 6-26. With respect to public trust, even though the information is to be provided under seal, the production of sensitive personal information in such large quantities would be very likely to undermine individuals' trust in DHS's ability to maintain the confidentiality of personal information provided to it, a trust that is essential to its mission. *See id.* ¶¶ 6-21. With respect to the burden, and particularly in light of the short deadline for compliance, we understand the May 19 Order to encompass all contact information that is practically available by that deadline, namely, all contact information available in DHS's main electronic database, which includes A-numbers, names, addresses, and dates of deferred action. If this Court's Order were interpreted more broadly to demand any

contact information in DHS's possession, including in other electronic systems and hardcopy files that potentially have contact information different from or not included in the CLAIMS 3 system, that review would be extraordinarily burdensome, taking an estimated 17,350 personnel hours at a cost of more than $1 million, Rodríguez Decl. ¶ 22, all of which will be unrecoverable, and expended for little additional practical gain. *See, e.g., id*. ¶¶ 23-25.

A stay of the public order is necessary, therefore, to prevent irreparable injury to the Government.

III. THE PUBLIC INTEREST AND BALANCE OF EQUITIES FAVOR A STAY.

Although the first two stay factors are most critical, the Court should consider whether "issuance of the stay will substantially injure the other parties interested in the proceeding" and "where the public interest lies." *Chafin v. Chafin*, --- U.S. ---, 133 S. Ct. 1017, 1027 (2013). Where the Government is a party, its interests and the public interest overlap in the balancing of harms. *See Nken v. Holder*, 556 U.S. 418, 420 (2009).

First, the order risks injury to tens of thousands of third parties who were brought to this country as children, and who are not parties to this litigation, in circumstances where the States have not identified harm that would justify such an intrusion. The urgency of providing private information about these 50,000 individuals is also unexplained; the information is contained in permanent DHS files, will remain available, and can be produced at a future time if warranted. Rodríguez Decl. ¶ 9. In addition to the injury to these persons risked by the disclosure of their sensitive personal information, requiring the United States to produce that information to the Court and potentially to the States would deter aliens from providing the Government with personal information that is critical to the administration and enforcement of immigration laws in any number of circumstances. That includes, but is not limited to, participants in 2012 DACA (a

policy which is unchallenged in this litigation) by undermining public confidence in the safety of personal information provided to DHS. *See, e.g.,* Rodríguez Decl. ¶¶ 6-14, 17-19. Second, if not stayed the May 19 Order would require both DOJ and DHS to divert financial and personnel resources from their intended public purposes, to the detriment of the public interest. Lofthus Decl. ¶¶ 11-20; Rodríguez Decl. ¶¶ 22-26.

In contrast to the distinct and immediate harm to third parties, and to the public interest in effective law enforcement and the conservation of public resources, Plaintiffs have demonstrated no injury that would be remediated by the sanctions imposed by the May 19 Order, and any injury to Plaintiffs suggested by the Order would not be imminent, and ultimately likely would be minimal given the ability of 2012 DACA recipients to request renewal of their terms whether they end after two or three years. *See* ECF No. 305. Thus, the "balance of the equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court's public order issued May 19, 2016, be stayed pending further review, whether by appeal, mandamus, or both.

Dated: May 31, 2016

Respectfully submitted,

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

STATE OF TEXAS, *et al.* Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	No. 1:14-CV-254

DECLARATION OF LEÓN RODRÍGUEZ

I, León Rodríguez, hereby make the following declaration with respect to the above-captioned matter.

1) I am the Director of U.S. Citizenship and Immigration Services (USCIS), a component of the Department of Homeland Security (DHS). I was confirmed by the U.S. Senate on June 24, 2014, and began serving as USCIS Director on July 9, 2014. USCIS has a workforce of approximately 18,500 people, including both federal employees and contractors, and handles approximately eight million matters each year.

2) I have spent a large portion of my professional career as a state and Federal prosecutor. Throughout my career I have also served in a number of leadership positions in Federal and local government.

3) I make this declaration on the basis of my personal knowledge and information made available to me in the course of my official duties. The statements made in this declaration are based on USCIS's current understanding of information available at this time.

4) In this Court's May 19 Order, the Court states that the Government must "file a list of each of the individuals in each of the Plaintiff States" who were granted Deferred Action for Childhood Arrivals (DACA) prior to this Court's injunction and pursuant to the 2012 DACA Directive, but who were granted three-year instead of two-year DACA terms and associated Employment Authorization Documents (EADs). Memorandum Opinion and Order (ECF 347) at 22-23. The Court's Order specifies:

> 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.

Id. at 23. The Order further states that although the list "will remain sealed until a further order of this Court," the personally identifiable information (PII) may be released to the "proper authorities" of one or more of the Plaintiff States on a "showing of good cause." *Id.* Finally, the Court's Order states that it "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." *Id.*

5) In a letter to Plaintiffs dated July 17, 2015, USCIS indicated that of the approximately 108,000 DACA recipients who were granted three-year terms under the 2012 DACA Directive prior to this Court's injunction, approximately 50,000 were associated with addresses indicating residence in Plaintiff States according to an electronic query of USCIS's CLAIMS 3 system.[1] Joint Status Report of July 31, 2015 (ECF 285-4) at 7-9. USCIS understands the Court's May 19 Order to refer to these approximately 50,000 individuals.

[1] As discussed further below, the CLAIMS 3 system is an electronic records system used by USCIS to track and update the actions taken in individuals' cases. USCIS considers the CLAIMS 3 system to be the authoritative system of records documenting individuals' deferred action and/or work authorization.

HARM TO USCIS AND THIRD PERSONS

6) The Court's Order to produce the names and detailed PII of approximately 50,000 individuals would require an unprecedented breach of USCIS's longstanding commitment to zealously guard the private and sensitive information of the millions of persons who provide such information for an array of immigration adjudications. Based on my experience as Director of USCIS, I believe the production of such information would have a chilling effect on the willingness of individuals to seek a wide range of immigration benefits from USCIS and to provide all information necessary for USCIS to adjudicate their petitions, applications, and requests ("applications"). The chilling effect is of particular concern given that the Order compels disclosure of sensitive personal information concerning individuals who are not parties to the proceeding and are not alleged to have engaged in any wrongdoing.

7) Protecting personal information is essential to USCIS's fulfillment of its mission because the agency necessarily requires petitioners, applicants, and requestors ("applicants")—including millions of U.S. citizens, U.S. businesses, and foreign nationals—to submit extensive background and identifying information. That information is necessary for careful and thorough adjudication of eligibility and background checks. It is essential to the agency's function and to fulfilling its statutory role that applicants have confidence in the privacy of the information they submit. Providing this information under circumstances where the affected individual is not a party to the case, no wrongdoing by the individual is alleged or demonstrated, and where no security, public safety or other danger is alleged, would undermine the public trust and confidence established by USCIS.

8) The danger to that trust and confidence is particularly important with regard to DACA, which depends on eligible individuals who arrived in the United States as children,

through no fault of their own, disclosing their identity and voluntarily submitting their requests. Because of the complexity of this litigation, past orders in this case, and the lack of precision in public reporting, there is already a high level of reported fear, concern and confusion among DACA recipients with regard to the disclosure of their information. Based on inquiries USCIS has received and the fear publicly expressed by DACA recipients and their advocates, after the Court's May 19 Order, I believe that production of this information, no matter how cabined, could fundamentally compromise USCIS's ability to obtain full disclosure in the future.[2]

9) The fear and confusion would be further exacerbated by the fact that the Court has ordered production of the information for the purpose of potentially providing it to the Plaintiff States. As an officer of the court and former prosecutor, I fully appreciate and understand the integrity of the judicial process and the significance of information filed under seal. However, in this case, even if the Court were never to release the information to Plaintiff States, the restriction of filing under seal does not sufficiently diminish the harmful effect of producing this information to the Court.

a. First, the stated purpose of the sealed production is for potential disclosure to the Plaintiff States that have expressed their opposition to the three-year DACA grants that these individuals have received. Hence, it is understandable that recipients would perceive the sealed filing by USCIS as the first and critical step in disclosure of information to state actors adverse to their DACA grants.

b. Second, the subset of DACA recipients whose information would be disclosed have complied in all respects with the requirements of DACA and have no reason to be singled out simply because they received their periods of deferred action

[2] Regardless of how the validity of the affected three-year DACA extensions is resolved, DACA remains in place and individuals continue to be eligible to request two-year periods of deferred action.

between November 20, 2014 and the issuance of this Court's preliminary injunction on February 16, 2015.[3]

c. Third, the production of information in this circumstance would be different than the earlier production of information relating to a limited number of individuals,[4] under a carefully-developed protective order, where the Plaintiff States asserted a need for the information in order to update or verify their own data *after* the periods of deferred action were converted from three years to two. In this case, there has been no change in the deferred-action term of any individual and there is no evident purpose in the Plaintiff States receiving the information that the Court has ordered or, therefore, in the Court's ordering it be filed with the Court in anticipation of furnishing it to the Plaintiff States.

d. The production of information in this circumstance is also different than automated USCIS responses to queries by state agencies about particular individuals through USCIS's Systematic Alien Verification for Entitlements (SAVE) program. The SAVE program is a service provided by USCIS to government agencies that enter into a detailed memorandum of agreement (MOA) to help them determine the eligibility of applicants for benefits.[5] When

[3] The Court's Order seeks information for individuals granted three-year terms of deferred action between November 20, 2014, and March 3, 2015, but only if such terms have not been withdrawn. Because USCIS has withdrawn all three-year terms that were granted after the injunction, USCIS understands the Court's Order to apply only to individuals granted three-year terms prior to that date.

[4] These were individuals who had been issued three-year periods of deferred action, or whose three-year documents were re-mailed to them, *after* the Court's injunction was issued.

[5] *See* "Sample Memorandum of Agreement Between the Department of Homeland Security, U.S. Citizenship and Immigration Services, and State or Local Government Agency," USCIS, Nov. 2015, available at https://www.uscis.gov/sites/default/files/USCIS/Verification/SAVE/SAVE%20Publications/save-non-fed_moa-sample.pdf (requiring states to "[s]afeguard such information . . . to ensure that it is not used for any other purpose than described in this MOA and protect its confidentiality; including ensuring that it is not disclosed to any unauthorized persons(s) without prior written consent of DHS-USCIS," and to "[c]omply with the Privacy Act . . . and other applicable laws, regulations, and policies . . . in safeguarding, maintaining, and disclosing any data

submitting a query through the SAVE program, the state agency submits personal information it collects directly and voluntarily from the benefit applicants. The SAVE program validates that information and confirms the immigration status and/or employment authorization of the benefit applicant. If it is relevant and provided for in the MOA with the state agency, the response would also include the expiration date of that status or authorization. The exchange of information is governed by the privacy provisions of the MOA, and the program does not otherwise share personal information with state agencies.

e. Finally, the urgency of production by June 10 is not apparent. There is no urgent need for the Plaintiff States to receive the information or evident reason the production could not be deferred until the propriety of the Court's Order is fully resolved. The information in USCIS's files is permanently preserved, can be produced at any time in the future, and will be equally available if ordered at a future time.

10) USCIS is responsible for the proper adjudication of more than eight million applications annually. A necessary and fundamental aspect of this duty is the collection of PII to make determinations and ensure that the individuals who are the subject of those applications are properly vetted for law enforcement and national security purposes.

11) USCIS rigorously guards against the unauthorized disclosure of all PII submitted and entrusted to it by applicants. Although the Privacy Act does not apply to non-U.S. persons, USCIS applies privacy protections to all records held by the agency regardless of the status of the alien for important public policy and foreign relations reasons, including to promote

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provided or received pursuant to the MOA," and requiring that states "[p]rovide all benefits-applicants who are denied benefits based . . . on the SAVE response with adequate written notice of the denial" and opportunity to appeal.).

commensurate protections for records of U.S. citizens held by foreign countries.[6] As noted in the Department of Justice's *Overview of the Privacy Act of 1974*,[7] one of the important purposes behind the Privacy Act is "to balance the government's need to maintain information about individuals with the rights of the individuals to be protected against unwarranted invasion of their privacy stemming from federal agencies' collection, maintenance, use, and disclosure of personal information about them." This important purpose applies equally to all individuals who come before USCIS, regardless of nationality or immigration status.

12) If the safeguards in place for PII are compromised, it may affect the actions of other countries with regard to U.S. citizen PII held by those nations. Preventing the disclosure of PII of foreign nationals in the possession of USCIS is necessary to insist upon similar protections for U.S. citizens abroad.

13) Though USCIS may disclose PII pursuant to a federal court order, the agency has an obligation to safeguard such information and to honor the public's expectation that PII will be protected from release to third parties absent a compelling purpose and particularized showing of need. Thus, while we recognize the authority of a court to compel disclosure, no showing of a compelling purpose or need has been demonstrated for this information under the circumstances presented here.

14) If the public were to lose confidence in the security of PII in USCIS's possession, it could negatively affect the number of individuals who come forward to seek benefits and other services administered by USCIS. The distinctions between filing information under seal, further disclosure at some later point to the Plaintiff States, and disclosure to the public at large are not

[6] *See* Department of Homeland Security Privacy Policy Guidance Memorandum (Jan. 7, 2009), available at https://www.dhs.gov/sites/default/files/publications/privacy-policy-guidance-memorandum-2007-01.pdf.

[7] United States Department of Justice Overview of the Privacy Act of 1974, 2015 ed., available at https://www.justice.gov/opcl/file/793026/download.

readily understandable distinctions among the public we serve, including the DACA-eligible community.

15) In this case, disclosure to the Court (even under seal) for the further potential dissemination to the Plaintiff States is not to remedy any misconduct or wrongdoing by the DACA recipients whose terms of deferred action have not changed. Nor is it evident for what proper purpose the Plaintiff States might use the information sought by the Court for dissemination to them. The anticipated dissemination, therefore, sows greater confusion and fear because it bears no nexus to any actions by the individuals whose PII will be shared. The resulting fear in the DACA-eligible community that personal information may be subject to future disclosure for reasons unrelated to their own actions could lead to fewer requests, thereby frustrating the purposes of the Secretary's initiative to efficiently allocate DHS resources by "encourag[ing] these people to come out of the shadows, submit to background checks, pay fees, and apply for work authorization…and be counted." Mem. from Jeh Charles Johnson, Sec'y of Homeland Security, to León Rodríguez, Director, USCIS, *et. al.*, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents* (Nov. 20, 2014). Even those who continue to request DACA may be more fearful of sharing PII comprehensively, thereby diminishing the ability of USCIS to adjudicate claims and fully scrutinize all applications based on all PII that would otherwise be provided.

16) The likelihood of fear and confusion is demonstrated by misunderstandings resulting from earlier orders related to three-year DACA grants. When USCIS revoked and collected incorrectly-issued three-year EADs, USCIS received innumerable questions from the public regarding the scope of the revocation and reissuance order, and the validity of pre-

injunction three-year EADs. Among the three-year EADs converted to two-year periods were a number of EADs unilaterally and proactively submitted by individuals whose EADs were not at issue because they were issued *before* the injunction issued. These individuals mistakenly believed they were obliged to return their EADs notwithstanding extensive USCIS efforts to specify which EADs were covered by the return order and which were not.

17) The effect on applicants would not be limited to this DACA population. USCIS maintains extensive files with PII on all individuals seeking U.S. citizenship, lawful permanent residence, temporary immigration classification, or asylum or other humanitarian protection, as well as employers in the United States seeking immigrant or nonimmigrant status for current and prospective employees. Absent stringent privacy protections, all such information would be at risk and many would either seek to limit the information they provide or forego immigration benefits to which they are entitled, thereby undermining the fulfillment of our mission, thwarting the purposes of the immigration laws, and diminishing the benefits of our immigration system to the Nation.

18) Moreover, the Court's Order anticipates further sharing of the information with Plaintiff States without specifying what, if any, safeguards may apply to the PII and what prohibitions on further dissemination may be imposed. The essential protection that the PII be filed under seal (which, as noted, does not sufficiently ameliorate the harm to USCIS) does not provide assurance of further protections and, to the contrary, invites fear and speculation that wide dissemination without safeguards may be forthcoming. The immediacy of the production order without articulation of specific and explicit limitations on downstream disclosures leaves individuals and the community with the understandable impression that such protections are not essential and that ensuring confidence in privacy is not important to USCIS.

19) The current Order stands in contrast to the PII provided by USCIS in August of 2015, with regard to a limited group of approximately 2,600 individuals. In that instance, the Plaintiff States asserted to the satisfaction of the Court that the information was necessary for the States to determine if further corrective action with regard to their own records was needed to update the eligibility duration for DACA recipients whose term had been reduced from three years to two. The change in duration of DACA triggered the States' concerns that their own records may not fully reflect the change. By contrast, in this order the PII is unrelated to any change in the DACA duration. For all individuals whose PII is at issue, their three-year DACA terms and EADs remain valid.

20) Furthermore, when USCIS provided PII information in August 2015, it did so under a carefully crafted protective order that USCIS prepared in agreement with Plaintiff States, which limited the use of such information to specific individuals to address only the correction of state records related to the invalid three-year EADs. *See* Stipulated Protective Order (ECF 298). Here, the Court has not articulated any limitations for the release of such information to Plaintiff States, except for a vague reference to "good cause."

21) Finally, certain statutory confidentiality provisions further govern USCIS's ability to share the information of certain DACA recipients. Particularly, USCIS may not "disclos[e] to *anyone*… *any* information which relates to an alien who is the beneficiary of an application" for a T visa (for victims of human trafficking), a U visa (for victims of serious crimes), or certain protections under the Violence Against Women Act (VAWA). 8 U.S.C. § 1367(a)(2) (emphasis added). This provision would thus restrict the sharing of information related to DACA recipients who are also T, U, or VAWA applicants. *Id.*

BURDEN TO USCIS

22) As explained in detail below, if compliance with the Court's Order is understood to require more than an electronic query and compilation from USCIS's CLAIMS 3 system, which reflects DACA adjudication decisions, because of the Order's requirement to produce "*all* personal identifiers and locators" and "*all* available contact information" in the agency's possession (which could include information unavailable through the automated query of electronic systems), such compliance would present an extraordinary burden on the agency that would divert significant resources and personnel from other ongoing tasks. While USCIS has produced aggregate statistical information for courts based on queries of the agency's electronic systems, the large quantities of personal information requested by the Court's Order is unprecedented. Depending on the scope of data collection the Court intended, in addition to running electronic queries against CLAIMS 3 and perhaps other USCIS systems, USCIS personnel would be required to (1) review and validate the information retrieved from each system; (2) retrieve and manually review the physical case file for each affected individual, if the Court intended that as well; and (3) merge and crosscheck the information retrieved from various sources to compile the information in an accurate and usable manner. Due to the format of the information produced from various USCIS systems and the extensive nature of individual case files, USCIS estimates that gathering all such information would require 17,350 employee work hours along with other contractor and overhead costs, with a total estimated cost of $1,071,353, including lost hours of productivity.[8] As also explained below, allowing USCIS to comply with

[8] These and other estimates below represent USCIS's best understanding at this time. Because USCIS does not normally use its systems for the purpose of gathering personal information on large numbers of people, it is not certain what complications may arise. As results are received, these estimates may require adjustment.

the Court's Order by querying only the agency's electronic systems would mitigate, but not eliminate, the significant burden to the agency posed by the Court's Order.[9]

23) As noted above, if the Court's Order were understood to require the production of "all personal identifiers and locators" and "all available contact information" located anywhere in the agency's possession, regardless of the medium on which it is stored (electronic, paper, or otherwise), compliance would be exceedingly burdensome. Although some information for each affected individual is available in an electronic and searchable format in USCIS's CLAIMS 3 system, the agency also has information about affected individuals stored in individual paper case files as well as in other electronic systems, including the Verification Identification System (VIS) used by USCIS for its SAVE and E-Verify programs. As noted previously, the CLAIMS 3 system is the internal USCIS records system designed to assist in the processing of applications related to a wide range of immigration benefits and visas. The system is used to track individual cases, including for DACA recipients, through all aspects of the immigration process. It is also used, among other things, to reflect USCIS's official adjudication decisions documented in individuals' A-Files, track case histories, produce statistics, and ingest data captured through electronic and physical case filing. The VIS system is a composite information system that incorporates data from various DHS and other Government databases, and is the underlying information technology platform that supports the SAVE and E-Verify programs. As noted above, the SAVE program is a service provided by USCIS to help government benefit-issuing agencies determine the eligibility of applicants for benefits. The E-Verify program is a service

[9] Although USCIS believes it should be possible to provide by June 10 the particular information that is contained in CLAIMS 3 that is specifically listed by the Court in its Order (i.e., name, address, A number, and date that the three-year approval or renewal was granted), the agency has never undertaken such a task of this magnitude and cannot predict with certainty what complications could arise in retrieving and compiling this information.

provided by USCIS that allows employers to electronically check the eligibility of their employees to work in the United States.

24) Depending on the scope of the Court's Order, collecting and compiling all such potentially responsive information in the agency's possession could require USCIS to engage in the following steps:

a. At a minimum, USCIS is being required to design and run an electronic query in its CLAIMS 3 system to obtain potentially responsive information contained in that system. This task is not simple or quick; while the CLAIMS 3 system is designed to run data pulls for statistical purposes, it is not designed for the purpose of collecting and producing personal information regarding large numbers of individuals. Information maintained by the CLAIMS 3 system generally includes the individual's current name and address, as well as (if available) telephone number, date of birth, social security number, DHS-assigned "Alien number" (or "A number"), current immigration status, date on which such status was granted, date on which such status expires, and various other types of information.[10] Finally, to ensure the production of requested information in an accurate manner, USCIS would need to review and validate the information obtained from the CLAIMS 3 system by manually reviewing the results to identify anomalies. When such anomalies are identified, USCIS would need to crosscheck the relevant information against other information systems to attempt to resolve any issues. In cases where electronic systems could not resolve the issue, USCIS would manually review individual paper case files, known as "A-

[10] Some of this information is not required for particular types of applications and thus only available if provided by the individual. It is also possible that some of this information is missing or incomplete in any individual record.

files." Absent unforeseen and significant review of paper files in the validation process,[11] USCIS estimates that this process would require approximately 100 employee work hours and cost approximately $11,458, including lost employee productivity and overhead.

b. If the search were to be extended beyond CLAIMS 3, there may also be potentially responsive locator and personal identifying information that could be retrieved from the VIS system, although much of this information would duplicate the information in the CLAIMS 3 system. As noted above, the VIS system is used for the SAVE and E-Verify services, which are available to government agencies and employers, respectively, for the purposes of validating information obtained by them from third-party individuals. Specifically, the VIS system is not a database in itself, but retains the case history of (1) queries run by government agencies through the SAVE system with respect to applicants for benefits; and (2) queries run by employers through the E-Verify system with respect to employees. These queries would provide possible information about the source and location of the querying entity and some personal identifying information (such as Social Security numbers and dates of birth) related to the subjects of those queries. To search the VIS system, USCIS would be required to design and run an electronic query to obtain such information. As with the CLAIMS 3 system, the VIS system is not designed for the purpose of providing locator and other personal information, and initial queries will likely have errors, missing information, and

[11] Previous queries run for this litigation often have required significant modification following quality review and verification. Each query is different, and unpredictable issues frequently arise. As this would be the first time USCIS runs this type of query on 50,000 cases, it is likely that unforeseen complications would be encountered, requiring some individual electronic and paper file review. This could greatly increase the number of work hours involved.

anomalous results that would require further review. For quality assurance, USCIS would thus review and validate the information obtained from the VIS system by manually reviewing responses for discrepancies and abnormalities, and potentially accessing other systems and perhaps the physical A-files to resolve. Absent unforeseen and significant review of paper A-files in the validation process, USCIS estimates that this process would require approximately 500 employee work hours and cost approximately $28,511.

c. If the search were to be extended further, there may also be potentially responsive information in other electronic systems maintained by USCIS, including the Service Request Management Tool (SRMT) system used by USCIS customer service representatives to record and respond to requests for service. For example, when an individual submits a service request to USCIS, the agency normally records contact information in the SRMT system, including limited information that may not be reflected in the CLAIMS 3 or other USCIS systems. As with the CLAIMS 3 and VIS systems, USCIS would be required to design and run electronic queries to obtain relevant information from its other electronic systems. And because these systems are also not designed for the purpose of providing locator and other personal information, initial queries will likely have errors, missing information, and anomalous results that would require further review and validation. USCIS does not currently know how many of the approximately 50,000 individuals covered by this Court's Order would have information in the SRMT or other electronic systems maintained by USCIS.

USCIS is thus currently unable to accurately estimate employee work hours and costs for retrieving data from such systems.

d. If the search were to be extended even further, there may also be potentially responsive information in the approximately 50,000 relevant A-files maintained by USCIS, potentially including information not contained in any of the electronic systems described above. Although certain current biographic and case-specific information is maintained in the CLAIMS 3 system, and other locator and identifying information may be obtainable through other electronic systems, those systems do not necessarily contain all potentially responsive information maintained by USCIS. While much of the information in A-files would be reflected in the CLAIMS 3 system, those files may contain additional addresses, alternate phone numbers, email addresses, and other contact information, as well as personal identifiers, not maintained in electronic databases. To review such files, USCIS would generally be required to locate and retrieve them from the National Records Center or Federal Records Center (which are co-located). In cases where the A-file is not stored in one of those two locations, USCIS would also have to retrieve the file and transport it to the National Records Center. USCIS personnel would be required to manually review the A-files for potentially responsive information and manually enter such information into a database for further use. For context, A-files can run from several pages to several thousand pages in length. USCIS's Service Center Operations states that the average A-file is 50 pages. Assuming that average, reviewing the A-files for 50,000 individuals would mean a manual review of approximately 2.5 million pages. USCIS

estimates that this process would require approximately 16,500 employee work hours and cost approximately $1,011,132.

e. Finally, merging and crosschecking the information from these different systems and paper files, for accuracy and usability, would entail some automated processes, but would rely heavily on manual compilation and review for accuracy. Again, these additional steps would be necessary to ensure that the information was appropriately combined and produced in an accurate and usable manner. USCIS estimates that this process would require approximately 250 employee work hours and cost approximately $20,252.

25) If USCIS were required to engage in all of the steps described above in order to produce all responsive information in its possession, the agency estimates that compliance with the Court's Order would require a total of 17,350 employee work hours and cost approximately $1,071,353. This would present a significant burden on the agency, impacting its core mission to provide immigration services on a timely basis. Among other things, the USCIS personnel needed to retrieve and compile responsive information would be diverted from their normal functions, thus resulting in the loss of productivity for the agency. The agency's resources are already stretched to meet the current service needs of its paying customers. Should the agency be required to divert a significant amount of resources to comply with this Court's Order, backlogs in services would result.

26) For context, in August of 2015, USCIS agreed to provide Plaintiff States with information related to approximately 2,600 DACA recipients—including name, address, date of birth, A number, immigration receipt number (which is a unique number assigned to any application that USCIS receives), Social Security number, SAVE query identifying number, and

the type of document that the relevant State agency used to query the VIS system through the SAVE service. Even though this information could be just a subset of the information maintained by USCIS that may be deemed responsive based on an expansive reading of the Court's Order, the production of this information for about 2,600 individuals required approximately 650 employee work hours to prepare and validate the information for accuracy. The process required multiple queries of the CLAIMS 3 and VIS systems, as well as manual review of data for verification and accuracy.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 31, 2016

León Rodríguez

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

STATE OF TEXAS, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:14-cv-254-ASH
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants.	)	

DECLARATION OF LEE J. LOFTHUS

I, Lee J. Lofthus, hereby make the following declaration with respect to the above-captioned matter.

1) I am the Assistant Attorney General for Administration for the Department of Justice (DOJ). I lead the Justice Management Division (JMD). I was appointed by the Attorney General as Acting Assistant Attorney General for Administration on June 1, 2006 and as Assistant Attorney General for Administration on December 15, 2006.

2) JMD provides senior management officials with advice relating to basic Departmental policy for budget and financial management, personnel management and training, procurement, ethics, equal employment opportunity, information processing, telecommunications, security, and all matters pertaining to organization, management, and administration. JMD provides policy oversight and guidance in those areas for Department components.

3) I joined the Department of Justice in 1982, and have served in management positions overseeing financial operations, financial policy, reporting, and systems, throughout

my career. I currently serve as the Department's Chief Financial Officer and Chief Acquisition Officer.

4) I also serve as the Designated Agency Ethics Official (DAEO) for the Department overseeing the Departmental Ethics Office and the government ethics program for all Department components. In that capacity, my office provides direction and guidance to ensure that all ethics training requirements are met and that quality training is provided covering all required government ethics topics impacting the work of the component.

5) I make this declaration on the basis of my personal knowledge and information made available to me in the course of my official duties. The statements made in this declaration are based on JMD's current understanding of information available at this time.

* * *

6) The Department of Justice is committed to maintaining high standards of ethical conduct and professionalism for its attorneys. The Department of Justice recognizes the importance of training its employees, and the benefit appropriate training confers on Department employees. It is for this reason that, with few exceptions, the Department's Professionalism Policy currently requires that attorneys certify that they have completed at least four hours of professionalism training (two hours of Department of Justice professional responsibility, one hour of government ethics, and one hour of sexual harassment and non-discrimination training) each calendar year. Attorneys have various other annual training requirements related to issues such as electronic discovery, computer security, and the Department's telework policy. In addition to these requirements, individual components may require additional training on issues pertinent to their specific missions.

7) Further, DOJ attorneys are required by law, *see* 28 USC 530C(c)(1), to certify each year that they remain in good standing with a bar of any state or the District of Columbia. Individual attorneys, therefore, must also comply with state bar requirements, including those pertaining to professional ethics and continuing legal education.

8) The Departmental policies impose these requirements to ensure that Justice Department attorneys receive the training needed to perform at the high level of professional and ethical standards expected of them.

* * *

9) I have reviewed the May 19, 2016 Order in *Texas v. United States*, No. 14-254 (S.D. Tex.), and provide the following estimates regarding the resources required for the Department to comply with the Order.

10) The estimated total dollar cost to the Department of compliance with the training and reporting requirements imposed by the Order is $1,561,059 or $959,587 for the first year, depending on factors discussed below. The estimated total dollar cost of compliance with the training and reporting requirements imposed by the Order over the next five years, taking into account 1 percent inflation, is $7,973,121 or $4,905,011, depending on factors discussed below.

Estimated Cost of Providing Ethics Training To Covered Attorneys

11) The total estimated number of attorneys employed in litigating components" at the Justice Department in Washington, D.C.," *see* Order at 25, that handle cases throughout the United States, is approximately 3,400. (Some of these attorneys are located in field offices outside Washington, D.C.)

a. This includes the following litigating components: Antitrust Division; National Security Division; Civil Division; Criminal Division; Civil Rights Division; Environmental and Natural Resources Division; and Tax Division.

b. Although individual attorneys or groups of attorneys within these components may handle cases only in particular jurisdictions, the Department seeks to ensure that its attorneys are available to practice in any jurisdiction should the need arise. Thus, I have included all attorneys employed in these litigating components potentially covered by the Order in my estimate. The time constraints on creating this estimate did not allow for attorney-specific, or even sub-component-specific, inquiries.

12) In order to provide "at least three hours of ethics training per year" on "the ethical codes of conduct . . . applicable in" all jurisdictions in which an attorney may appear, *see id.*, I estimate that each attorney will require three hours of general ethics and professionalism training, as well as at least one hour of additional training to account for possible differences between states in their ethics rules. This is a conservative estimate, which may require enhancement to account for attorneys with cases pending in multiple States among the 26 identified jurisdictions and additional time to accommodate the differences between their ethics codes.

13) Because "self-study or online study [does] not comply with th[e] Order," *id.*, I estimate that the most cost-effective method for ensuring compliance with the Order is to provide in-person training sessions at the main Department of Justice building that can accommodate large numbers of attorneys.

a. I received an estimate from a "recognized ethics expert . . . unaffiliated with the Justice Department," *id.*, regarding the costs and operational requirements of providing in-person training as described above. I was not able to obtain estimates from additional training providers due to time constraints.

b. Based on that information, I estimate that no more than 200 attorneys may attend a training session at one time.

c. The room large enough to accommodate an audience of 200 attorneys is located at the Department of Justice Headquarters.

d. Most of the 3400 attorneys covered by the Order do not work in the Department of Justice Headquarters. The majority of these attorneys are located in other Department buildings throughout the Washington, DC, metro area.

14) I estimate that at least 20 training sessions, accommodating up to 200 attorneys each, will need to be offered every year for which the Court's order remains in effect. I estimate that twenty sessions will provide sufficient opportunities to have make-up sessions for covered attorneys to attend a training, given that many of these attorneys have limited availability due to their litigation schedules. However, this estimate is conservative, as additional sessions may be necessary to accommodate attorneys' availability.

15) I estimate that the cost to the Department for purchasing the 20-session training program would be $80,000 for a four-hour training serving no more than 200 attorneys per training for the current year. The total cost over five years is estimated at $418,231.

a. Based on the estimate I received, an outside provider would charge $5,000 to develop an in-person, general ethics training. The charge for a second session of the same training would be $3,500, and each additional training session would

cost $2,500. These estimates include materials for the training, such as hand-outs or visual aids.

b. I estimate that the one-hour training session on the ethical rules of specific states would cost an additional $26,500 per year to develop and provide.

c. In calculating the cost for subsequent years covered by the court order, I estimated an additional $2,500 in years two through five to ensure the program accounts for new developments with respect to all 26 state ethical codes and included a 1% inflationary factor during that same period.

d. If it were determined that this training program fulfilled the pre-existing Departmental requirement for professionalism training discussed below, I estimate that the net cost of the program over and above pre-existing training development costs to be $60,000 for Fiscal Year 2016 and $316,211 for the five years covered by the Court's Order. The lower price accounts for the estimated savings from not providing the two-hour DOJ professionalism training that would be fulfilled by the four-hour training course described above. The five year cost was calculated as described in ¶ 16(b).

16) In addition to the cost of implementing the specific training aspects of the program itself, the Department will incur an additional dollar loss resulting from the productivity cost of Department attorneys spending either three or five hours away from their duties. Quantifying the dollar loss to the department is necessarily inexact, but to the extent it can be quantified, the numbers below reflect my best estimate.

a. Based on the information available at this time I cannot determine whether the estimated four hours of ethics training required by the Order—the three hours of

general ethics and the one hour accounting for the differences among the states—would fulfill the two-hour, professional responsibility training requirement imposed by the Department.

b. Accordingly, I cannot determine at this time whether Department attorneys must complete at least four hours of ethics training in addition to the four hours already required by the Department for a total of at least eight hours of ethics training per year, or whether the four hours of training required by the Order would result in a productivity cost of two hours per attorney.

c. Assuming that the four-hour training does not overlap with the Department's own four-hour professionalism training requirement, compliance with the Order would result in the Department incurring a total productivity cost of five hours from each attorney: four additional hours of training per year, as well as one hour to account for travel to and from the training. This amounts to an estimated total dollar value loss of $1,453,679 annually. Taking into account a 1 percent inflation rate, the estimated total dollar value loss of productivity for five years is $7,415,224.

d. This number was calculated by using the total attorney hours lost per component, and the average attorney salary and benefits per component.

17) Adding the procurement costs for the training results in an estimated total cost to the Department of $1,533,679 annually, and $7,833,455 for five years taking into account a 1 percent inflation rate associated with providing training in accordance with the Order to covered attorneys.

18) If the four hours of training required by the Order count towards the Department's two-hour professionalism requirement, the Department incurs a total productivity cost of three

additional hours per attorney. In this scenario, the total dollar value loss annually is estimated at $872,207. Taking into account a 1 percent inflation rate, the total dollar value loss of productivity for five years is estimated at $4,449,134.

19) Adding the procurement costs for the training results in an estimated total cost to the Department of $932,207 annually, and $4,765,345 for five years taking into account a 1 percent inflation rate, associated with providing training in accordance with the Order to covered attorneys.

20) I estimate that the procurement process, including contracting with an outside expert to develop and conduct the required training course will likely require a minimum of 60 days to complete. In addition, I estimate at least 30 days will be required to develop, review, and finalize the course content. This could leave only approximately three months to schedule and hold the trainings, and to complete the certification and reporting requirements for 2016.

Estimated Cost of Complying With Reporting Requirement

21) The Order also requires the Attorney General to "appoint a person within the Department to ensure compliance with this Order," who must "annually file one report with this Court including a list of the Justice Department attorneys" who are covered by the Order, and a certification—including the name of each lawyer, the court(s) in which she appeared, the date(s) of the appearances, and the time and location of the ethics training she attended.

22) I estimate that filing such a report would require the work of one senior-level employee and one administrative employee, working in conjunction with one administrative employee in each component, to compile, organize, and file the information in accordance with the Order.

23) The total productivity cost of requiring these employees to divert their attention to complying with the Order's reporting requirement is $27,380 annually. Taking into account a 1 percent inflation rate, I estimate that the total dollar value of lost productivity required by these employees to comply with the Order's reporting requirement for five years is $139,666.

a. I estimate that it would require approximately 40 hours of work per year by the senior-level employee and 200 hours of work per year by the administrative employee to oversee the collection of information and preparation of a report.

b. I estimate that the administrative employee in each component who collects information and certifications for that component will require 200 hours of work per year to complete those tasks.

c. I calculated these estimated amounts using the above work-hour estimates and the average salaries of such employees.

* * *

24) The above estimates are based on the best available data at this time. As we continue to collect data and understand the implications of the Order, these estimates could change.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 31, 2016

Lee J. Lofthus

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

STATE OF TEXAS, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:14-cv-254-ASH
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants.	)	

[PROPOSED] ORDER

Upon consideration of Defendants' Motion to Stay May 19, 2016 Order Pending Further Review, and for good cause shown, it is hereby:

ORDERED that Defendants' Motion to Stay May 19, 2016 Order Pending Further Review is GRANTED; and it is

FURTHER ORDERED that this Court's May 19, 2016, Memorandum Opinion and Order [ECF 347] is stayed pending disposition of the review Defendants seek, whether by appeal, mandamus, or both, with respect to the Order.

Signed on _____, 2016

_____
The Honorable Andrew S. Hanen
United States District Court Judge