IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re UNITED STATES; JEH JOHNSON, Secretary of Homeland Security; SARAH R. SALDAÑA, Director of U.S. Immigration and Customs Enforcement; R. GIL KERLIKOWSKE, Commissioner of U.S. Customs and Border Protection; RONALD D. VITIELLO, Deputy Chief of U.S. Border Patrol, U.S. Customs and Border of Protection; and LEÓN RODRÍGUEZ, Director of U.S. Citizenship and Immigration Services, Petitioners, ********** STATE OF TEXAS, et. al., Plaintiffs, v. UNITED STATES, et al., Defendants.	No. 16-____ No. 14-254 (ASH) (S.D. Tex.)

PETITIONERS' EMERGENCY MOTION
FOR STAY PENDING MANDAMUS

INTRODUCTION

The government seeks an emergency stay, pending this Court's disposition of a petition for a writ of mandamus filed concurrently with this motion, of the district court's May 19, 2016 sanctions order. Among other things, the order requires thousands of Department of Justice attorneys to attend annual ethics training for the next five years if they appear in any state or federal court in 26 States; intrusively regulates the Attorney General's management of the Department of Justice's attorney training; and requires the Department of Homeland Security (DHS) to produce to the court personally identifiable information and "all available contact information" for tens of thousands of individuals who were brought to this country as children, are not parties to this suit, and were accorded deferred action under the unchallenged eligibility criteria of 2012 DACA. Pursuant to Fifth Cir. R. 27.3, the government seeks this stay by June 8, 2016, in the event that the district court has not stayed its sanctions order by that date.

The district court's sanctions are as extraordinary as they are wrong. As an initial matter, the court's findings of bad faith and intentional misrepresentations are without foundation. 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 highest standards of ethical conduct and professionalism required to carry out that mission. The district court concluded that the government made certain intentional

misrepresentations to the court in bad faith. The government respectfully and emphatically disagrees with that conclusion. The Department regrets the misunderstanding, and has apologized to the district court. But the finding of bad faith and intent to misrepresent is wrong and is made worse (and perhaps explained) by the absence of the required process for the Department and its attorneys.

Moreover, even if there had been intentional misrepresentations—which there were not—the sanctions ordered by the district court clearly exceed its authority. In mandating a five-year regimen of ethics training for every Department of Justice attorney stationed in Washington, D.C., who appears in any state or federal court in any of the 26 plaintiff States—thousands of attorneys—the court far exceeded its authority to protect the integrity of the proceedings in the case before it; impermissibly sought to regulate the appearance of government attorneys in *other* federal and state courts; and usurped the Attorney General's statutory and constitutional role of managing the Department. And the district court's order that DHS produce to the court "all personal identifiers and locators," including names, addresses, and "all available contact information" of approximately fifty thousand aliens who were accorded three-year terms of deferred action under DACA before the preliminary injunction was entered here—and under substantive eligibility criteria that the plaintiff States have not challenged—is wholly unnecessary and unwarranted. The court imposed this burdensome obligation without determining that the information is necessary to redress any injury to plaintiffs; without adequate consideration of the

substantial intrusion on individual privacy interests involved; and without regard to the impact on DHS's ability to collect and maintain the confidentiality of personal information vital to the administration of the Immigration and Nationality Act.

The court purported to issue the order in part to remedy harm to the plaintiff States caused by a provision in DHS's 2014 Deferred Action Guidance that changed from two years to three years the term of deferred action accorded under the 2012 DACA policy—a policy that is not challenged in this case. But the Supreme Court is currently deciding whether the 2014 Guidance, which also broadened the substantive eligibility requirements for DACA and established another deferred action policy known as DAPA, causes the States any cognizable harm whatsoever. If the Supreme Court concludes that the 2014 Guidance causes the plaintiff States no legally cognizable injury, as the government has argued throughout this litigation, the change from two-year to three-year DACA terms cannot be held to have harmed the States. The district court's haste to impose these extraordinary sanctions in advance of the Supreme Court's decision only highlights its abuse of discretion. And even if the Supreme Court were to sustain the district court's preliminary injunction, that injunction provides no support for its order, which is wholly improper regardless of the Supreme Court's disposition of the case.

A stay of the district court's order is warranted. In addition to being wrong, the sanctions threaten irreparable injury to the Department of Justice and its attorneys, to DHS, and to the individuals whose personally identifiable information

would be produced to the court. The plaintiff States did not request the bulk of the district court's sanctions, and will suffer no harm if a stay is granted.

The government moved for a stay in the district court on May 31, 2016. Later that day, the district court scheduled a hearing for June 7, 2016, to consider the stay motion. That date is just three days before the June 10 deadline set by the district court for production by DHS under seal of the personally identifiable information of tens of thousands of aliens.

To provide the district court with an opportunity to rule on the government's stay motion after its hearing, this Court need not issue a stay until June 8, 2016. If the district court has not stayed its order by noon Central Time on June 8, however, the government respectfully asks that this Court stay the district court's order on that date to prevent irreparable harm to the government and the affected individuals pending a resolution of mandamus.[1] The government files this motion now to provide this Court with a sufficient opportunity to review the motion in the event that action from

[1]As explained in the government's petition for a writ of mandamus, to fully protect its rights, the government will also file a notice of appeal. The portions of the order that pertain to the Department of Justice impose burdensome affirmative obligations on the Attorney General and thousands of Department attorneys practicing in other jurisdictions where there is no clear connection to the litigation before the district court below, and might therefore be regarded as an injunction reviewable by right under 28 U.S.C. § 1292(a)(1). Similarly, the mandate that DHS file information concerning 50,000 non-parties appears to be a step towards relief on the merits by addressing hypothetical claims and might be regarded as an appealable injunction under section 1292(a)(1). If the sanctions order is appealable, the government respectfully requests a stay pending appeal.

this Court is needed on June 8. At a minimum, the government asks that, if this Court does not rule on the full stay motion by June 8, it grant a temporary administrative stay on that date to prevent irreparable injury while the Court continues to consider the government's request for a full stay.

We have notified counsel for the plaintiff States by phone of the filing of this motion. The plaintiff States oppose the motion.

STATEMENT

Pursuant to Fifth Cir. R. 27.3, undersigned counsel certifies that the following facts are true and complete. These facts are also set forth in the government's petition for a writ of mandamus.

A. The 2014 Deferred Action Guidance.

The underlying suit challenges the November 20, 2014, Guidance issued by the Secretary of Homeland Security regarding deferred action policies. *See* Attachment 1 (2014 Deferred Action Guidance). The Guidance established a new policy, known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), under which certain parents of United States citizens or lawful permanent residents may request deferred action. The Guidance provided that, with regard to the new DAPA policy, DHS "should begin accepting applications from eligible applicants no later than one hundred and eighty (180) days after the date of this announcement." *Id.* at 5. The Guidance also broadened the substantive eligibility requirements to allow more aliens to request Deferred Action for Childhood Arrivals (DACA), a preexisting

policy for aliens who arrived in this country as children. The Guidance provided that, with respect to this broadened DACA eligibility, DHS "should begin accepting applications under the new criteria from applicants no later than ninety (90) days from the date of this announcement." *Id.* at 4. In addition to these two new policies, the 2014 Guidance changed from two to three years the deferred action accorded under the policies, including under the 2012 DACA policy, which had narrower eligibility criteria. The Guidance stated that this change from two to three years for DACA "shall apply * * * effective November 24, 2014," *i.e.*, four days after issuance of the Guidance. *Id.* at 3.

B. District Court Proceedings

On December 3, 2014, plaintiff States filed suit challenging the 2014 Guidance as unlawful. They did not move for a temporary restraining order, but instead moved for a preliminary injunction, alleging that the Guidance needed to be enjoined or otherwise they would be irreparably harmed because the Guidance would trigger an influx of aliens entering the country unlawfully and make four million aliens already in the country newly eligible for deferred action.

Plaintiffs specified that they did not challenge the 2012 DACA policy. Nor did they allege any imminent harm from the increase to three years of the term of deferred action for aliens who were already eligible to request it under the unchallenged 2012 DACA policy.

On February 16, 2015, the district court entered a nationwide preliminary

injunction. It enjoined DHS from implementing, *inter alia*, "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."[2]

On March 3, 2015, the government filed an Advisory with the district court informing it that between November 24, 2014, and the date of the preliminary injunction, more than 100,000 aliens who were eligible under the unchallenged 2012 DACA policy had been accorded a three-year, rather than two-year, period of deferred action pursuant to the change in length of DACA in the 2014 Guidance. *See* Attachment 2 (March 3 Advisory). The Advisory explained that the Government wished to clarify and eliminate any confusion that earlier statements may have created in referring to February 18, 2015, the date by which applications under the new eligibility criteria for DACA were required to be accepted. *See id.* at 3.

The March 3 Advisory precipitated an inquiry by the district court, which ordered the government to submit to the court "any and all drafts" of the March 3 Advisory as well as a list of any person who participated in the drafting, editing, or review of the Advisory or knew of the Advisory or DHS activity discussed therein, and the date and time each person was apprised of the Advisory, its contents, or the DHS activity discussed therein. The government provided the material, some under

[2] This Court later affirmed the preliminary injunction, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), and the matter is currently pending before the Supreme Court, *United States v. Texas*, No. 15-674 (U.S.) (argued Apr. 18, 2016).

seal, and also filed a memorandum of law explaining that it had had no intent to mislead the court, that it filed the Advisory very promptly after the Department learned that three-year terms had been accorded to more than 100,000 individuals, and expressly apologizing to the court for any confusion. After that filing, district court proceedings focused primarily on issues regarding compliance after the injunction was entered, although the parties met and conferred regarding sharing information concerning how to address the three-year terms that had been accorded before the injunction. The court stated that it would resolve "any and all questions regarding future discovery and/or sanctions once it reviews the parties' report" due on July 31, 2015 regarding that conferral.

The court convened a hearing on August 19, 2015, primarily to address other issues of compliance with the injunction, and then informed the government that it could file a memorandum addressing (1) what sanctions the court could impose if, "hypothetically, the Court finds that facts were misrepresented to it," and (2) "what should those sanctions be," "again, hypothetically, if the Court were to conclude that sanctions were appropriate of some kind for the misrepresentations made to the Court." The government's memorandum following the August hearing explained that counsel had not acted in bad faith or with any intent to mislead the court, and argued again that if the court were nonetheless contemplating sanctions, the government and its attorneys were entitled to procedural safeguards, including notice to the affected entities or individuals, the basis for the sanction, notice of all of the types of sanction

under consideration, and an individualized opportunity to respond.

C. The Sanctions Orders.

More than seven months later, on May 19, 2016, without any such notice, individualized or otherwise, that it was considering sanctions mandating five years' ethics training for thousands of attorneys and revocation of *pro hac vice* status for certain attorneys, and without providing the opportunity to respond to such notice, the district court issued a public sanctions order finding that the government had intentionally made misrepresentations in bad faith in oral statements and in briefing concerning the implementation of the 2014 Guidance. *See* Order at 7-13. Citing its inherent authority, *see id.* at 20, and Rule 11(b), *id.* at 12 & n.8, the court imposed the following mandates:

> (1) "[A]ny 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 [must] annually attend a legal ethics course" in person of at least three hours for the next five years. *Id.* at 25.
>
> (2) The annual ethics training ordered by the court must be "taught by at least one recognized ethics expert who is unaffiliated with the Justice Department," or be "a recognized, independently sponsored program." *Id.* at 25.
>
> (3) The Attorney General "shall appoint a person * * * to ensure compliance" by annually reporting to the court "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)." *Id.* at 26.
>
> (4) The Attorney General must report to the court within 60 days of its order with a "comprehensive plan to prevent this unethical conduct from ever occurring again," including steps 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.*

(5) The Attorney General is required to inform the court within 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." *Id.* at 27.

(6) The government must produce to the court under seal by June 10, 2016, the identity of each alien who resides in the plaintiff States who was "granted benefits during the period (November 20, 2014-March 3, 2015)." *Id.* at 22-23. The information must be aggregated by State and include "all personal identifiers and locators," including names, addresses, DHS "A" file numbers, "all available contact information," and the date the approval of a three-year term of deferred action was accorded. The information may be released to "the proper authorities" in plaintiff States after the Supreme Court issues its decision and upon a showing of good cause that such release could minimize some actual or imminent damage. *Id.* at 23.

The public sanctions order also explained that the court was revoking the *pro hac vice* status in this case of certain attorneys who represented the government and noted its simultaneous issuance of a separate, sealed order to that effect.

ARGUMENT

This Court considers four factors in evaluating a request for a stay: whether (1) the movant is likely to succeed on the merits; (2) the movant will suffer irreparable harm absent a stay; (3) a stay will substantially harm the other parties; and (4) a stay serves the public interest. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). Where the government is a party, its interests and the public interest overlap in the balancing of harms. *Nken v. Holder*, 556

U.S. 418, 420 (2009). Applying these standards, the district court's sanctions are an extraordinary act of judicial overreach that should be stayed pending mandamus.

I. THE GOVERNMENT IS LIKELY TO PREVAIL ON MANDAMUS.

As explained in more detail in the government's petition for a writ of mandamus, the sanctions imposed by the district court far exceed the settled limits on its authority. We summarize those arguments briefly here.

A. A court's power to issue sanctions is limited to protecting the integrity of the proceedings before it. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 43-44 (1991). And a sanction must be "the least severe sanction adequate" to redress the misconduct. *Jenkins v. Methodist Hosps. of Dallas, Inc.*, 478 F.3d 255, 265 (5th Cir. 2007). The district court's order of annual ethics training for five years for thousands of Department of Justice attorneys if they appear in any state or federal court in 26 States runs roughshod over these limits. The court's leap from its conclusions about the circumstances of this case to the need for ethics training for thousands of Department attorneys is without any record support and indeed is a grave affront to the Department and thousands of dedicated public servants.

Sanctions "are properly applied only to cases before the court, not to cases in other courts." *Woodard v. STP Corp.*, 170 F.3d 1043, 1045 (11th Cir. 1999). But the sanctions purport to dictate the terms on which Department attorneys may and may not represent the United States in state and federal courts in more than half of the Nation. The district court may not, through its "limited" sanctions authority, *Positive*

Software Solutions, Inc. v. New Century Mortgage Corp., 619 F.3d 458, 460 (5th Cir. 2010), broadly restrict who may represent the United States in unrelated litigation and in other courts, thereby invading the authority of those courts to regulate the standards under which attorneys may practice before them.

The district court's order additionally interferes with the statutory and constitutional authority of the Attorney General. "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010). Congress has therefore vested the Attorney General with authority to determine who will appear on behalf of the United States in litigation, *see* 28 U.S.C. § 517; to direct the attorneys under her supervision in the performance of their duties, *see id.* § 519; and to ensure that those attorneys comply with state and federal court ethical rules governing attorney practice, *see id.* § 530B. The district court's appropriation of the Department's ethical training requirements impermissibly arrogates to the court authority that the Constitution and federal statutes vest with the Executive. *Cf. United States v. Cox*, 342 F.2d 167, 172 (5th Cir. 1965) (en banc).

B. The court further exceeded its authority in requiring DHS to provide to the court names, "all available contact information," and other personally identifiable information of tens of thousands of aliens who are not parties to this suit. The States have suffered no injury attributable to the three-year (instead of two-year) terms of deferred action accorded under the unchallenged 2012 DACA eligibility criteria—

which is made plain by the fact that the States have not challenged that policy and that the third year has not even taken effect. The district court's order improperly requires production of this information to the court immediately even though the States have not shown any discrete harm that production of the information would redress and even though there is no justification for the urgency of the order. To the contrary, if the Supreme Court holds that plaintiffs do not have standing to challenge the 2014 Guidance or sustains the Guidance against plaintiffs' challenge, any production of such information would be demonstrably unnecessary. A decision in the Supreme Court is expected this month.

C. The district court's sanctions are not predicated on any proper finding. Imposition of a punitive sanction requires a specific finding, supported by "clear and convincing evidence," that the offending party acted in bad faith. *In re Moore*, 739 F.3d 724, 730 (5th Cir. 2014). But there is no clear and convincing evidence to support the district court's conclusion that the government or its attorneys engaged in bad faith or intentional misrepresentations.

The district court's finding that the government made intentional misrepresentations in bad faith is wrong—an error perhaps explained by the absence of the process that must be provided for the Department and its attorneys before any sanctions may be imposed, as discussed below. The court's view that the government sought to conceal the effective date of the change from two to three year terms of deferred action under the unchallenged 2012 DACA policy is contrary to public fact;

that date was disclosed on the face of the 2014 Guidance itself, *see* Attachment 1 (2014 Guidance at 3), as well as in a government declaration filed with the district court, *see* Attachment 5 (Neufeld Decl. ¶ 12 n.3). There is a ready explanation for the miscommunications between the government and the district court; counsel and the court had different understandings as to what was meant by "revised DACA" and other references to parts of the Guidance. Moreover, even indulging the court's unwarranted assumption that the government would engage in intentional misrepresentations, the government would have had no *reason* to make the purported misrepresentations here because the plaintiff States did not rely on any alleged harm from the change from two to three year terms to support their request for preliminary relief, which was the subject of the proceedings. The accompanying mandamus petition provides a more detailed analysis on each of these points.

D. What is more, the inadequate process afforded by the district court before imposition of the sanctions stands as a foundational error that invalidates the sanctions in their entirety. Before imposing sanctions under its inherent powers or Rule 11, a court "must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing [the sanction]." *Chambers*, 501 U.S. at 50. Those fundamental requirements of due process include notice to the parties against whom sanctions are contemplated, the basis for the potential sanctions, the type of sanctions being contemplated, and an opportunity to respond to those sanctions. *See Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 230 (5th Cir. 1998).

The district court did not afford the requisite process. It failed to provide the government or its attorneys an order to show cause, nor did it provide notice that it intended to impose mandatory five years' ethics training for thousands of attorneys, to oversee the Department's professional responsibility governance, or to revoke the *pro hac vice* status of specific attorneys. The government's mandamus petition explains in greater detail that the court's order flouts these well-settled requirements.

II. THE BALANCE OF HARMS AND PUBLIC INTEREST FAVOR A STAY.

A. The sanctions imposed will irreparably harm the government if they are not stayed. The sanctions encroach upon the Attorney General's authority to oversee the conduct of litigation involving the United States and to supervise Department attorneys in the performance of their duties. The sanctions purport to command institutional revision of internal Department practices—practices that the Constitution and Congress have committed to the Executive Branch, not the district court. The district court's order is an "intrusion by a federal court into the workings of a coordinate branch of the Government" that itself constitutes an irreparable injury warranting a stay. *See INS v. Legalization Assistance Project of L.A. Cnty. Fed'n of Labor*, 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers); *Heckler v. Lopez*, 463 U.S. 1328, 1336-37 (1983) (Rehnquist, J., in chambers); *Cobell v. Norton*, 334 F.3d 1128, 1141 (D.C. Cir. 2003).

The expenditures of money and human resources that the sanctions require of the government are also significant and could not be recouped even if the government

ultimately prevails before this Court. The estimated cost to the Department (and in turn, to the American taxpayer) in terms of direct expenditures and lost productivity is between approximately $1 million and $1.5 million this year alone. *See* Attachment 4 (Lofthus Decl. ¶ 10). Moreover, the sanctions that require DHS to produce "all personal identifiers" and "all available contact information" for approximately 50,000 individuals by June 10, 2016, would require an enormous administrative undertaking. *See* Attachment 3 (Rodríguez Decl. ¶¶ 22-25). Some responsive information for the affected aliens is available in an electronic format, but other information is stored only in individual paper case files. If the order were interpreted to command DHS manually to review case files of 50,000 aliens, it would require more than 17,000 employee work hours and a total estimated cost of more than $1 million—an all but impossible task to complete in the 22 days that the Government has been provided to comply with the court's order, and an exceptionally burdensome and expensive one even if more time had been allowed. *See id.* ¶ 25.

B. The sanctions also threaten irreparable harm to tens of thousands of third-party aliens and will deter others from seeking immigration benefits from DHS.

The production of the names, "all available contact information," and personally identifiable information of approximately 50,000 individuals would require an unprecedented breach of the government's practice of protecting the private information of the millions of persons who are required to submit such information to DHS. That agency requires parties to submit extensive identifying information

necessary for background checks and for accurate adjudication of a wide array of immigration benefits and determinations, far beyond deferred action. *See* Attachment 3 (Rodríguez Decl. ¶ 7). Even though the sanctions direct that the information regarding the 50,000 individuals here be provided to the court under seal, disclosing this information for any purpose—and particularly in circumstances where the affected aliens are not parties to the proceedings and are not alleged to have engaged in wrongdoing—would undermine DHS's ability to maintain the confidence of the individuals whose information it is charged with protecting. Safeguarding the personal information of DACA applicants is particularly important, given that these aliens were brought to this country as children and were repeatedly encouraged to disclose their identity to DHS. The large-scale production of such sensitive personal information would also be likely to undermine the trust of the broader public in DHS's ability to protect the information submitted to it—a trust that is essential to DHS's mission.

It requires no speculation to recognize that the court's order will cause fear, uncertainty, and distrust among large populations of aliens with whom the agency interacts. As explained in the declaration of León Rodríguez, the Director of U.S. Citizenship and Immigration Services, many aliens accorded DACA under the unchallenged 2012 policy were, prior to the district court's order, already fearful that their private information would be disclosed. *See* Attachment 3 (Rodríguez Decl. ¶ 8). DHS has received inquiries suggesting that those fears have increased since the court

issued its sanctions order, and indicating that production of the information would fundamentally compromise the agency's ability to obtain full disclosure from many aliens in the future. *See id.* ¶¶ 6-15. Because the district court ordered this information produced on June 10, 2016—a week from the date of this filing—a stay is required to ensure that DHS does not suffer this irreparable injury pending appellate review.

For important public policy and foreign relations reasons, DHS seeks to ensure that information submitted by aliens is not made publicly available, including to state and local authorities, except for limited purposes and subject to stringent safeguards. *See id.* ¶ 11-13. These safeguards are designed to protect against the risk that private information will be disseminated to third parties who might use it for improper purposes, and to promote reciprocal protections for records of U.S. citizens held by foreign countries. The court's suggestion that it would disclose the personally identifiable information of DACA recipients to "the proper authorities in [a] particular state" "upon good cause shown," *see* Order at 23, undermines these important interests.

C. Granting a stay will not harm the plaintiff States. The plaintiff States did not request the bulk of the district court's order, and they would not be injured by staying the sanctions pending review. The court's imposition of an ethics training regimen for thousands of Department attorneys, and its commands for institutional changes within the Department, have no plausible bearing on the interests of the plaintiff States in this litigation. And the States will not be harmed by staying the

order that DHS provide to the court the names, "all available contact information," and personally identifiable information of tens of thousands of DACA recipients until the propriety of the sanctions is resolved on appeal. The district court provided no basis for the urgency of its order, and there is none—particularly given that the third year of deferred action for those aliens will not even begin until late November, 2016, at the earliest. The information in DHS's files is permanently preserved and will be available, if needed, at a future date. *See id.* ¶ 9(e).

The balance of interests plainly favors a stay. The district court's extraordinary sanctions rest on findings of bad faith and intentional misrepresentations that were entered without adhering to required procedures; are profoundly mistaken; intrude on the exclusive constitutional and statutory prerogatives of the Executive Branch; and impose a significant and unnecessary burden on the Department of Justice and DHS. The sanctions threaten to undermine the public's confidence in DHS's ability to protect their personal information. And they substantially rely on a theory of injury to the plaintiff States that is now pending before the Supreme Court, whose disposition of the matter could render demonstrably unnecessary, within weeks of this filing, the sweeping production of personally identifiable information required by the sanctions.

A stay of the May 19 sanctions order pending this Court's disposition of a petition for a writ of mandamus is warranted. In light of the district court's scheduling of a hearing on June 7, 2016, on the stay motion pending before that court, and in light of the June 10, 2016 deadline set by the court for production of the

personally identifiable information of tens of thousands of non-parties, the government respectfully asks that if the district court does not enter a stay by June 8, then this Court grant a stay on that date. At a minimum, the government asks that this Court grant a temporary administrative stay on that date to prevent irreparable injury to the government while the Court considers granting a full stay.

D. In light of the urgency of obtaining relief from the district court's order, the government requests that, if the Court denies this motion, the court expedite review of the government's petition for a writ of mandamus. *See* Fifth Cir. R. 27.5.

CONCLUSION

For the foregoing reasons, the district court's May 19, 2016, sanctions order should be stayed pending this Court's disposition of the Government's petition for a writ of mandamus.

Respectfully submitted,

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JUNE 2016

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on June 3, 2016.

I further certify that on June 3, 2016, I caused the foregoing motion to be served, by e-mail on:

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