UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MAKE THE ROAD NEW YORK and MAKE THE ROAD CONNECTICUT,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF THE SECRETARY OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, OFFICE OF THE SOLICITOR GENERAL, OFFICE OF LEGAL COUNSEL, and DEPARTMENT OF JUSTICE, CIVIL DIVISION,

Defendants.

Civil Action No. 18-cv-2445-NGG-JO

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATIONS OF THE FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552 *et seq.*

Last September, the Trump Administration abruptly terminated the Deferred Action for Childhood Arrivals ("DACA") program, without notice or meaningful explanation. The decision to end DACA threw the lives of hundreds of thousands of immigrant youth into turmoil. With this lawsuit, Plaintiffs Make the Road New York ("MRNY") and Make the Road Connecticut ("MRCT"), community organizations working to build the power of immigrant and working class communities for dignity and justice, seek answers about this unusual and perplexing governmental decision—answers to which they are entitled under the Freedom of Information Act ("FOIA").

Since 2012, nearly 800,000 eligible young people received protection from deportation and work authorization through the DACA program, empowering many of these young people to support their families, pursue higher education, obtain driver's licenses, and live without fear in

the country they call home. Yet, on September 5, 2017, Attorney General Sessions precipitously announced DACA's termination claiming, without explanation, that DACA was illegal. Effective immediately, the U.S. Department of Homeland Security ("DHS") refused to accept new applications for deferred action through the DACA program and refused to accept all but a subset of renewal applications, provided applicants submitted their application and a hefty application fee within a month. MRNY filed a lawsuit challenging the legality of the Trump administration's sudden termination of the program, one of two such challenges pending in this Court: *Batalla Vidal v. Nielsen* and *New York v. Trump*.

MRNY and MRCT's membership, staff, and wider communities had fought for and benefited greatly from the DACA program. They now seek answers about the program's termination, having filed a FOIA request on the topic more than six months ago. To date, the defendant agencies have not produced a single document in response to their request.[1] Defendant United States Citizenship and Immigration Services—the agency responsible for administering the DACA program—has not even assigned the request a tracking number. Plaintiffs file this lawsuit to enforce their rights under FOIA and to shed light on three important questions: (1) Why did the Department of Justice, Department of Homeland Security, and their components suddenly change course on whether to continue the DACA program? (2) How did the government administer the "wind down" of the DACA program and related forms of immigration relief prior to the issuance of two preliminary injunctions ordering the halt of that

[1] The Department of Justice, Civil Division has provided records in response to Plaintiffs' September 22 request. Plaintiffs' current claim against the Civil Division concerns a later FOIA request, as discussed below.

process? (3) How is the government administering the program now that preliminary injunction orders, requiring the program to be partially reinstated, are in place?

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1346(a)(2). This Court has personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and (a)(6)(E)(iii).

2. Venue properly lies in this district under 5 U.S.C. § 552(a)(4)(B) and (a)(6)(E)(iii) and 28 U.S.C. §§ 1391(e) and 1402(a)(2) because Plaintiff Make the Road New York's principal place of business is in the Eastern District of New York.

3. Plaintiffs have exhausted their administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i). Plaintiffs are therefore entitled to seek relief directly from this Court. 5 U.S.C. § 552(a)(4)(B).

PARTIES

Plaintiffs

4. Plaintiffs Make the Road New York ("MRNY") and Make the Road Connecticut ("MRCT") are non-profit, membership-based 501(c)(3) organizations dedicated to empowering immigrant, Latino, and working-class communities in New York City and Bridgeport, Connecticut, respectively. MRNY has more than 22,000 dues-paying members residing in New York City and Long Island, many of whom are affected by the termination of the DACA program.

5. Plaintiffs MRNY and MRCT's missions include educating the public about civil rights issues affecting working-class and immigrant communities through electronic newsletters, reports, fact sheets, trainings, curricula, classes, and other

educational and informational material. MRNY also disseminates information about policies and litigation and mobilizes community members to advocate with their legislators.

6. Plaintiff MRNY also engages in organizing and public-policy advocacy efforts, including research on issues affecting the community it serves as well as substantial outreach to policymakers and the media. MRNY regularly conducts research and publishes reports, fact sheets, and other informational material on issues important to the immigrant, Latino, and working-class communities it serves. Additionally, MRNY frequently releases media statements, and disseminates information about local, state, and national issues to its thousands of members and to the public at large.

7. Plaintiff MRNY provides legal services and information related to the DACA program to its members and others within the community. Several of its employees have protection from deportation and work authorization granted through the DACA program.

8. Although Plaintiff MRCT is a newer organization with a smaller staff, it similarly engages in information dissemination as a core part of its advocacy and educational activities in Connecticut.

9. Plaintiff MRNY's office and principal place of business is in Brooklyn, New York.

10. Plaintiff MRCT's office and principal place of business is in Bridgeport, Connecticut.

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Defendants

11. Defendant DHS is an executive department of the United States government with the purpose of enhancing security, protecting cyberspace, administering immigration, and responding to disasters. DHS is an agency within the meaning of 5 U.S.C. § 552(f)(1) and is in possession of, and exerts control over, records responsive to Plaintiffs' FOIA request.

12. Defendant Office of the Secretary of Homeland Security ("Office of the Secretary") is a component of DHS, with duties that include overseeing DHS efforts to pursue its statutory purposes. The Office of the Secretary is an agency within the meaning of 5 U.S.C. § 552(f)(1), and is in possession of, and exerts control over, records responsive to Plaintiffs' FOIA request.

13. Defendant United States Citizenship and Immigration Services ("USCIS") is an agency within DHS, which oversees lawful immigration to the United States with the stated mission, until recently, of securing America's promise as a nation of immigrants. Its work includes adjudicating and processing requests for deferred action and work authorization received through the DACA program. USCIS is an agency within the meaning of 5 U.S.C. § 552(f)(1), and is in possession of, and exerts control over, records responsive to Plaintiffs' FOIA request.

14. Defendant Department of Justice ("DOJ") is an executive department of the United States with the mission "to enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial

administration of justice for all Americans." "About DOJ," *The United States Dep't of Justice*, https://www.justice.gov/about (last accessed April 4, 2018). DOJ is an agency within the meaning of 5 U.S.C. § 552(f)(1), and is in possession of, and exerts control over, records responsive to Plaintiffs' FOIA request.

15. Defendant Office of Attorney General ("OAG") is comprised of the head of Department of Justice (DOJ), who is the chief law enforcement officer of the Federal Government, and his direct staff. The Attorney General's main duties involve representing the United States in legal matters and advising the President and heads of the executive departments of the Government when requested. OAG is an agency within the meaning of 5 U.S.C. § 552(f)(1), and is in possession of, and exerts control over, records responsive to Plaintiffs' FOIA request.

16. Defendant Office of Solicitor General ("OSG") is a component within the DOJ, which supervises and conducts government litigation before the United State Supreme Court. OSG is an agency within the meaning of 5 U.S.C. § 552(f)(1), and is in possession of, and exerts control over, records responsive to Plaintiffs' FOIA request.

17. Defendant Office of Legal Counsel ("OLC") is a component within the DOJ, which provides legal advice to the president and executive agencies. OLC is an agency within the meaning of 5 U.S.C. § 552(f)(1), and is in possession of, and exerts control over, records responsive to Plaintiffs' FOIA request.

18. Defendant Department of Justice, Civil Division ("DOJ-CIV") is a component of DOJ that represents the United States, its departments and agencies, Members of Congress, Cabinet Officers, and other federal employees in any civil or criminal matter within its scope of responsibility. DOJ-CIV is an agency within the

meaning of 5 U.S.C. § 552(f)(1), and is in possession of, and exerts control over, records responsive to Plaintiffs' second FOIA request, submitted on June 8, 2018.

STATEMENT OF FACTS

DHS's Creation and DOJ's Approval of the DACA Program

19. On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano announced the creation of the DACA program, which set out guidelines for USCIS to exercise its prosecutorial discretion to extend deferred action to certain young immigrants "who were brought to this country as children and know only this country as home." Mem. from Janet Napolitano, Sec'y of Homeland Security, to Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Servs., *Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children*, June 15, 2012 ("DACA Memorandum"). The DACA Memorandum established certain eligibility criteria, relating to education, criminal convictions, and other factors, that entitled individuals to consideration for deferred action under DACA. Those granted deferred action also became eligible for employment authorization. 8 C.F.R. § 274a.12(c)(14).

20. Then-Secretary Napolitano made findings that the individuals eligible to apply for DACA "have already contributed to our country in significant ways" and "lacked the intent to violate the law." DACA Memorandum at 1-2. She found that our nation's immigration laws "are not designed to be blindly enforced without consideration given to the individual circumstances of each case," and that the limited resources of DHS must be "focused on people who meet our enforcement priorities." *Id.*

21. In order to prove that they met the eligibility criteria, DACA applicants also routinely provided Defendants documents containing personal information,

including copies of school records, pay stubs, bank statements, passports, birth certificates, and similar records.

22. The information and records DACA applicants provided Defendants frequently included sensitive and personal information about third parties as well, including family members of DACA applicants.

23. Defendants consistently represented to DACA applicants that the information they provided would be protected from disclosure to U.S. Immigration and Customs Enforcement ("ICE") and Customs and Border Protection ("CBP") for immigration enforcement proceedings against them and their family members or guardians, except in limited, delineated circumstances.

24. Prior to the issuance of the DACA Memorandum, OLC orally advised that the DACA program was a lawful exercise of DHS authority. *See* Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 2014 WL 10788677 at *13 n.8 (O.L.C. Nov. 19, 2014).

25. In February 2017, DHS announced the rescission of several guidance documents regarding immigration enforcement priorities. At this time, however, the agency decided to retain DACA and reassured DACA recipients that the agency's rescission of other guidance documents did not affect the DACA program or its beneficiaries.

Termination of the DACA Program

26. In the summer of 2017, Texas Attorney General Ken Paxton, along with the attorneys general of nine other states, wrote Attorney General Sessions threatening to

amend their complaint in *Texas v. United States*, No. 1:14-cv-00254 (S.D. Tex.), to challenge the DACA program if Defendants did not terminate DACA by September 5, 2017.

27. On September 5, 2017, Attorney General Sessions held a press conference to announce the termination of the DACA program.

28. At the press conference, he falsely asserted that DACA "contributed to a surge of unaccompanied minors on the southern border that yielded terrible humanitarian consequences." He stated further, "It also denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens."

29. He also announced his determination that the DACA program was unconstitutional and unlawful. He had communicated this determination to then-Acting Secretary of Homeland Security Elaine Duke in a one-page letter the day before.

30. The same day, then-Acting Secretary Duke issued a memorandum terminating the DACA program. *See* Mem. from Elaine C. Duke, Acting Sec'y of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship and Immigration Servs., *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, 2017 WL 3868210 (Sept. 5, 2017) ("Duke Memorandum").

31. Notwithstanding the Duke Memorandum and Sessions letter, government officials promptly represented a different explanation for the DACA termination. At a press briefing, the White House Press Secretary represented that the President himself had "chose[n]" to end the DACA program, and a talking points document that the White House sent to allies described how "President Trump [d]irect[ed]" the end of DACA. For his own part, the President undermined the purported reasons for the DACA termination,

announcing via Twitter that if Congress did not provide status to DACA recipients, he would "revisit this issue!"

32. In the *Batalla Vidal v. Nielsen* litigation, DHS repeatedly represented that the decision to terminate DACA was a joint decision by both DHS and DOJ.

33. The Duke Memorandum directed DHS to categorically reject all new applications for deferred action received after September 5, 2017. It also directed DHS to consider deferred action renewal applications only from existing DACA recipients whose status expired on or before March 5, 2018, but only if such renewal applications were received by October 5, 2017.

34. The implementation of these deadlines was chaotic. Thousands of DACA recipients who were eligible to apply for renewal under the Duke Memorandum discovered that their applications were rejected due to arbitrary mail pick-up times, postal delay, or minor real or perceived clerical errors that would not have previously barred them from consideration for deferred action under DACA.

Litigation Regarding the End of DACA

35. Following the termination of the DACA program, individuals, community organizations, state and local governments, and universities filed lawsuits challenging the government's termination on administrative law and constitutional grounds. Ten lawsuits

challenged the termination in its entirety.[2] Others challenged specific aspects of the termination.[3]

36. MRNY is a plaintiff in one of the legal challenges pending in this Court, *Batalla Vidal v. Nielsen*.

37. The State of New York, along with many other states, is a plaintiff in another of the lawsuits in this Court, *New York v. Trump*.

38. The factual record underpinning the decision to terminate DACA has been heavily contested in both of the cases in this Court, as well as the set of cases in the U.S. District Court for the Northern District of California.

39. In the several cases challenging the termination of the DACA program, the government presented a 256-page Administrative Record, consisting largely of judicial opinions and entirely of publicly available documents.

40. The government represented that this Administrative Record consisted only of non-privileged materials that were personally considered by then-Acting Secretary Duke in making the decision to terminate the DACA program.

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[2] *Batalla Vidal v. Nielsen*, No. 1:16-cv-4756 (E.D.N.Y) (Second Am. Compl. Sept. 19, 2017; Third Am. Compl. filed Dec. 11, 2017); *New York v. Trump*, 1:17-cv-5228 (E.D.N.Y.) (filed Sept. 6, 2017; First Amended Compl. filed, Oct. 4, 2017); *Regents of the Univ. of Cal. v. Dept. of Homeland Security*, No. 3:17-cv-5211 (N.D. Cal.) (filed Sept. 8, 2017); *California v. Dept. of Homeland Security*, No. 3:17-5235 (N.D. Cal.) (filed Sept. 11, 2017); *Garcia v. Trump*, No. 3:17-cv-5380 (N.D. Cal.) (filed Sept. 18, 2017); *City of San Jose v. Trump*, No. 5:17-cv-5329 (N.D. Cal.) (filed Sept. 14, 2017); *County of Santa Clara v. Trump*, No. 3:17-cv-5813 (N.D. Cal.) (filed Oct. 10, 2017); *NAACP v. Trump*, No. 1:17-cv-1907 (D.D.C.) (filed Sept. 18, 2017); *Trustees of Princeton University v. United States of America*, No. 1:17-cv-2325 (D.D.C.) (filed Nov. 3, 2017); *CASA of Maryland v. Dept. of Homeland Security*, No. 8:17-cv-2942 (D. Md.) (filed Oct. 5, 2017).

[3] *See, e.g.*, *Park v. Sessions*, No. 17-cv-1332 (E.D. Va.) (filed Nov. 21, 2017).

41. The government also produced to the *Batalla Vidal* plaintiffs 56 pages of records from the Department of Homeland Security in response to a Request for Production under Fed. R. Civ. P. 34.

42. This Court found that the Administrative Record did not contain all of the factual material that was considered by DOJ and DHS in making the decision to terminate DACA. It ordered the government to complete the administrative record. This Court also allowed the *Batalla Vidal* plaintiffs and Plaintiff States to seek discovery on certain constitutional claims. *See Batalla Vidal v. Duke*, Nos. 16-cv-4756 & 17-cv-5228, 2017 WL 4737280 (E.D.N.Y. Oct. 19, 2017).

43. The government sought a writ of mandamus from the Court of Appeals for the Second Circuit to prevent discovery and record-completion from going forward. The Court of Appeals denied the petition. The Court of Appeals likewise found that there was a strong suggestion that the Administrative Record was incomplete, noting that judicial opinions made up almost 200 pages of the Administrative Record and "[i]t is difficult to imagine that a decision as important as whether to repeal DACA would be based upon a factual record of little more than 56 pages." The Court of Appeals therefore held that Plaintiffs are entitled to discovery on the completeness of the record. The Court of Appeals declined to address whether discovery was available on constitutional claims. *See In re Nielsen*, Order, ECF No. 171, No 17-3345 (2d Cir. Dec. 21, 2017).

44. In the California cases, after *in camera* review of some of the documents withheld by the Government, the district court likewise found that the Administrative Record was incomplete and ordered completion of the administrative record. *See*

Regents of the Univ. of Cal. v. U.S. Dept. of Homeland Sec'y, No. C 17-05211, 2017 WL 4642324 (N.D. Cal. Oct. 17, 2017).

45. The Court of Appeals for the Ninth Circuit agreed. *In re United States*, 875 F.3d 1200 (9th Cir. 2017).

46. On a motion for a stay, four Justices of the Supreme Court also expressed doubts about the completeness of the administrative record. *In re United States*, 138 S. Ct. 371 (2017) (Breyer, J., dissenting).

47. Ultimately, the Supreme Court ordered that the California court forgo completion of the administrative record until it resolved certain threshold questions about the viability of the plaintiffs' claims. *In re United States*, 138 S. Ct. 443 (2017).

48. At the time of this filing, there has been no further document production in either of the cases in this Court or in the California cases. *See Batalla Vidal v. Nielsen*, Nos. 16-cv-4756 & 17-cv-5228, 2018 WL 333515 at *5 (E.D.N.Y. Jan. 8, 2018) (staying record completion and discovery pending resolution of a petition for interlocutory appeal).

49. The Freedom of Information Act, 5 U.S.C. § 552, provides an independent right of access to agency records, distinct from any obligations under the Administrative Procedure Act or the Federal Rules of Civil Procedure.

Plaintiffs' FOIA Request

50. On September 22, 2017, Plaintiffs submitted identical FOIA requests to Defendants DHS, Office of the Secretary, USCIS, DOJ, OAG, OSG, and OLC, among other agencies.

51. Plaintiffs' request seeks records from January 20, 2017 until the time that a responsive records search is conducted, related to or referring to the process and decision to terminate the DACA program. In summary, the request seeks:

a. Records relating to the decision to terminate the DACA program, including the policy and legal reasoning underlying the decision to terminate DACA, and associated materials;

b. Records regarding the *Texas v. United States* litigation, including communications between federal government officials and the plaintiff states in that litigation;

c. Records relating to or referring to the DACA program sent to or received from a range of government officials and prominent anti-DACA advocates;

d. Records relating to the DACA program that were sent to or received from Congressional or state governmental entities;

e. Records relating to the implementation of the termination of the DACA program, including standards for adjudicating DACA applications, changes to other forms of prosecutorial discretion, information-sharing, and advance parole; and

f. Records relating to the nature of the search.

52. The complete FOIA request is attached as Exhibit A.

53. Plaintiffs' request also seeks expedited processing of the request and a waiver of all costs.

54. Plaintiffs' request seeks a waiver of all costs on the grounds that disclosure of the records is in the public interest because disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government" and is not in the Plaintiffs' commercial interest. 5 U.S.C.

§ 552(a)(4)(A)(iii). MRNY and MRCT are non-profit entities and have no commercial interest in the records requested, which are crucial to the public's understanding of the termination of the DACA program.

55. Each Defendant was required to respond in writing within 20 working days after receiving the request and notify Plaintiffs whether the Defendant intended to comply with the request, 5 U.S.C. §552(a)(6)(A)(i), or, in "unusual circumstances," could extend the time for making such a determination by up to ten working days, 5 U.S.C. § 552(a)(6)(B).

56. Each Defendant has failed to timely respond to Plaintiffs' FOIA request.

57. Each Defendant has failed to provide even a single record in response to Plaintiffs' FOIA request.

58. Each Defendant has constructively denied Plaintiffs' FOIA request.

Expedited Processing

59. Plaintiffs' request seeks expedited processing under 5 U.S.C. § 552(a)(6)(E)(v)(II), 6 C.F.R. § 5.5(e)(1)(iii), 28 C.F.R. § 16.5(e)(1)(iii), 6 C.F.R. § 5.5(e)(1)(iv), and 28 C.F.R. § 16.5(e)(1)(iv), which provide for expedited processing of requests for records in cases where there is an urgency to inform the public concerning Federal Government activity when the requester is one engaged primarily in dissemination of information, there is a loss of substantial due process rights, and the information sought is a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence, respectively.

60. Plaintiffs MRNY and MRCT meet the statutory requirement for expedited processing for a requester that is "primarily engaged in disseminating information." Expedited processing is appropriate because Plaintiffs' need for the requested information is compelling and urgent given the short period of time DACA recipients initially had to decide whether to apply for renewal of their DACA status and work authorizations and uncertainty DACA recipients now face regarding the length of time requests for deferred action through the DACA program will continue to be accepted pursuant to the preliminary injunction orders. Further, the abrupt termination of the DACA program left many questions unanswered, including how DHS will treat personal information gathered through the DACA application process and the treatment of current and former DACA recipients by immigration enforcement agencies.

61. Lack of information about the wind down of the DACA program threatens the loss of substantial due process rights for DACA recipients around the country, including members of MRNY and MRCT. Without clarity regarding the effect of the DACA termination on the information provided to DHS, DACA recipients may lose their substantive due process rights in the confidentiality of that information.

62. The termination of the DACA program has been a "matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity that affect public confidence." 6 C.F.R. § 5.5(e)(1)(iv); 28 C.F.R. § 16.5(e)(1)(iv). The DACA program has been subject to ongoing national debate and attracted substantial media attention.

63. Furthermore, the rationale for ending the program appears inconsistent, unclear, and confusing to many observers. The reasons underlying of the termination of

the program have raised significant questions. The agencies offered scant explanation for the termination, and White House representations conflict with even those limited rationales. For example, the Duke Memorandum appears to conclude that DACA was an unlawful executive exercise, but the President suggested that he could resume the program unilaterally. The inconsistencies have continued throughout the government's litigation in defense of the DACA termination and throughout a legislative process during which the administration presented shifting and unreasonable demands in exchange for Presidential support of legislative action on behalf of DACA recipients.

64. Currently, ten lawsuits are challenging the termination of the program on the grounds that it violated the Administrative Procedure Act's requirement that agency decisions be reasonable and adequately explained. Three courts, including this one, have found at least a substantial likelihood that the decision to end DACA was arbitrary and capricious. *Regents of Univ. of Cal. v. U.S. Dept. of Homeland Sec.*, 279 F. Supp. 3d 1011, 1037-46 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 420-33 (E.D.N.Y. 2018); *NAACP v. Trump*, No. 17-cv-2325 (D.D.C. April 24, 2018) (slip op.). Moreover, many of these lawsuits allege that the decision to end DACA was motivated by racial animus. Two courts, including this one, have ruled that the claim was plausibly alleged. *See Batalla Vidal*, No. 16-cv-4256, 2018 WL 1532370 at *6-*10 (E.D.N.Y. March 29, 2018); *Regents of the Univ. of Cal.*, No. 3:17-cv-05211-WHA, 2018 WL 401177 at *6-*7 (N.D. Cal. Jan. 12, 2018).

Fee Waiver

65. Plaintiffs' request seeks a waiver of all costs on the grounds that disclosure of the records is in the public interest because disclosure is "likely to

contribute significantly to public understanding of the operations or activities of the government" and is not in the Plaintiffs' commercial interest. 5 U.S.C. §552(a)(4)(A)(iii). MRNY and MRCT are non-profit entities and have no commercial interest in the records requested, which are crucial to the public's understanding of the termination of the DACA program.

DHS and Office of the Secretary Response

66. Plaintiffs sent the FOIA request via UPS and electronic mail to Defendant DHS, including Defendant Office of the Secretary, on September 22, 2017.

67. On September 25, 2017, Plaintiffs received an email with a letter attached acknowledging receipt of their request. *See* DHS Acknowledgement Email and Letter, attached as Exhibit B. The request was assigned tracking number 2017-HQFO-01398.

68. Defendants DHS and the Office of the Secretary granted expedited processing and also invoked the provision for a ten-day extension, claiming unusual circumstances. Additionally, they conditionally granted the request for a fee waiver pursuant to DHS FOIA regulations.

69. DHS and the Office of the Secretary have made no further communications with regard to this FOIA request.

70. According to the DHS FOIA Tracking Website, the status of the request is "Request for Docs Sent." *See* Screenshot of FOIA Tracking Website, attached as Exhibit C.

71. Once expedited processing was granted on September 25, 2017, the Secretary of Homeland Security was required to process the underlying request "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii).

72. Defendants DHS and Office of the Secretary have therefore constructively denied Plaintiffs' request.

73. Plaintiffs have exhausted their administrative remedies.

USCIS Responses

74. Plaintiffs sent the FOIA request to Defendant USCIS via UPS and electronic mail on September 22, 2017.

75. That day, Plaintiffs received an automatic reply email acknowledging that Defendant USCIS had received of Plaintiffs' FOIA request. *See* Autoreply Email, attached as Exhibit D.

76. UPS tracking information shows delivery of the mailed copy of the request to Defendant USCIS on September 26, 2017.

77. USCIS did not notify Plaintiffs that it had assigned a tracking or other identification number.

78. Plaintiffs called the USCIS FOIA help line and sent an email to follow up and check the status of the request on January 9, 2018. Plaintiffs received an automatic email in response the next day, stating that USCIS "will respond to [the] inquiry as soon as possible." *See* Inquiry Acknowledgment, attached as Exhibit E.

79. USCIS did not respond to the inquiry.

80. As of the date of this Complaint, Plaintiffs have not received any formal acknowledgment or a determination as to whether Defendant USCIS will comply with the request.

81. Nor has Defendant USCIS stated whether it will grant the requests for expedited processing and for a fee waiver.

82. Defendants USCIS constructively denied Plaintiffs' FOIA request, as well as their requests for fee waiver and expedited processing by failing to respond or acknowledge the requests.

83. Plaintiffs have exhausted their administrative remedies.

DOJ and Office of the Attorney General Responses

84. Plaintiffs submitted their FOIA Request to DOJ and the OAG via the FOIAOnline website and UPS on September 22, 2017.

85. Plaintiffs received confirmation from the FOIAOnline website that the request was received and assigned tracking number DOJ-2017-006763. *See* Acknowledgment, attached as Exhibit F.

86. UPS tracking information shows that UPS delivered a hard copy of the request to DOJ on September 26, 2017.

87. On October 2, 2017, Plaintiffs received a letter from the DOJ Office of Information Policy, on behalf of Defendants DOJ and OAG, granting expedited processing, but also invoking the ten-day extension allowed for unusual circumstances. The Office of Information Policy also notified Plaintiffs that it had not yet decided whether to grant a fee waiver. *See* Acknowledgement Letter, attached as Exhibit G.

88. On November 29, 2017, the Office of Information Policy admitted that it would not respond to the FOIA request on behalf of Defendants DOJ and OAG by the Act's statutory deadline. A representative stated that there is a significant backlog for email searches and that it does not expect to receive initial search results from the email search for another 2-3 months. *See* Email Correspondence, attached as Exhibit H.

89. The FOIA Online website currently shows the status of Plaintiffs Request as "Under Agency Review." *See* Screenshot, attached as Exhibit I.

90. The statutory deadline for Defendants DOJ and OAG to respond to Plaintiffs' request given the ten-day extension was November 6, 2017.

91. As of the date of this Complaint, Plaintiffs have not received any production of documents in response to their request.

92. Defendants DOJ and OAG have constructively denied Plaintiffs' FOIA request and request for a fee waiver.

93. Plaintiffs have exhausted their administrative remedies.

Office of Solicitor General Responses

94. Plaintiffs submitted their FOIA request to the Office of the Solicitor General by UPS and electronic mail on September 22, 2017.

95. UPS tracking information shows UPS delivery of the mailed copy of the request to DOJ on September 26, 2017.

96. On October 16, 2017, Plaintiffs received a letter acknowledging the request and assigning it tracking number 2017-126913. *See* OSG Acknowledgment Letter, attached as Exhibit J.

97. On October 17, 2017, Plaintiffs received an email denying their request for expedited processing. *See* Email from Bridget Tanyi, Expedited Processing Request Denied, attached as Exhibit K.

98. OSG did not invoke the ten-day extension for unusual circumstances.

99. On administrative appeal, Plaintiffs were granted expedited processing of their FOIA request.

100. On November 28, 2017, Plaintiffs left a voicemail and sent an email to check the status of the request.

101. OSG did not respond to the voicemail or email.

102. On January 10, 2017, Plaintiffs sent a second email to check the status of the request.

103. OSG did not respond to the January 10, 2017 email either.

104. As of the date of this Complaint, Plaintiffs have not received any production of documents in response to their request or a determination as to whether OSG will comply with the request, including the request for a fee waiver.

105. OSG has constructively denied Plaintiffs' FOIA request and request for a fee waiver.

106. Plaintiffs have exhausted their administrative remedies.

Office of Legal Counsel Response

107. Plaintiffs submitted their FOIA request to the Office of Legal Counsel by email and UPS courier on September 22, 2017.

108. On October 20, 2017, OLC sent an acknowledgement letter for the FOIA request, which assigned it tracking number FY17-297 and denied expedited processing. The acknowledgment noted that OLC would determine whether to grant a fee waiver after conducting the search for documents, and stated, without legal authority, that the agency would not meet the twenty-day statutory deadline. *See* OLC Acknowledgment, attached as Exhibit L.

109. Plaintiffs timely filed an administrative appeal, and the agency affirmed the denial of expedited processing on March 8, 2018. *See* March 8, 2018 Appeal Decision, attached as Exhibit M.

110. On January 5, 2018, undersigned counsel for Plaintiffs agreed to narrow the FOIA request to OLC to only final legal advice and correspondence with certain identified individuals or entities outside the federal executive branch. *See* January 5, 2018 Email Correspondence, attached as Exhibit N.

111. As of the date of this complaint, Plaintiffs have not received any documents in response to their FOIA request or determination whether OLC will produce documents.

112. OLC has constructively denied Plaintiffs' FOIA Request and request for a fee waiver.

113. Plaintiffs have exhausted their administrative remedies.

Plaintiffs' Second FOIA Request and Denial of Expedited Processing

114. On May 1, 2018, a group of state attorneys general, led by the Texas Attorney General, filed a lawsuit alleging that the original creation of DACA was unlawful. *See Texas v. United States*, No. 1:18-cv-68 (S.D. Tex.). The anti-DACA states also moved for a preliminary injunction prohibiting the federal government from issuing or renewing "DACA permits." By "DACA permits," the anti-DACA states appear to mean grants of deferred action or work authorization.

115. The anti-DACA states sought for the preliminary injunction to be entered before July 23, when the District Court for the District of Columbia's April 24, 2018 court order will take effect to vacate the Duke Memorandum in its entirety. The Texas

district court has accordingly set a hearing on the preliminary injunction motion for July 17, 2018.

116. The federal defendants in the Texas litigation have generally refused to defend the lawfulness of the DACA program. In contrast to litigation challenging the end of DACA, including before this Court, they have not asserted jurisdictional limitations regarding immigration matters and exercise of prosecutorial discretion. Instead, they have expressed an eagerness for the Texas district court to rule quickly, including by offering to respond to the motion for a preliminary injunction before a deadline was even set.

117. In 2017, when Texas threatened to sue over the DACA program, DOJ—and particularly Chad Readler, the head of DOJ-CIV—engaged in several conversations with the Texas Attorney General's office. The existence of those conversations was uncovered through discovery in the *Batalla Vidal* litigation.

118. The facts above raise the suspicion that the federal government invited or otherwise colluded with the anti-DACA states to orchestrate the *Texas* litigation.

119. Plaintiffs believe that the information sought falls within the original FOIA request. However, in an abundance of caution and "due to the urgent need for transparency regarding any communications between DOJ and the states involved in anti-DACA litigation," Plaintiffs submitted a second FOIA request to the Department of Justice on June 8, 2018, to uncover information about whether such collusion had occurred. *See* June 8 FOIA Request, attached as Exhibit O.

120. The request seeks records concerning DACA-related communication between DOJ officials and the offices of the Texas Attorney General and other attorneys

general that sued to challenge the DACA program. The request was directed toward DOJ, specifically seeking records from OAG, Office of the Deputy Attorney General, Office of the Associate Attorney General, and the "front office" of DOJ-CIV. The time frame of the request is from June 1, 2017 until a complete search is conducted.

121. Plaintiffs sought expedited processing of their request. The potential collusion between the government and the anti-DACA states raises questions about the government's integrity and affects public confidence, and there is an urgent need for information about the 2018 *Texas v. United States* lawsuit due to its expedited schedule. Additionally, DACA recipients' substantial due process rights would be harmed from loss of deferred action and work authorization due to potentially collusive litigation.

122. The DOJ Office of Information Policy granted expedited processing of the request for the Office of the Attorney General, Office of the Deputy Attorney General, and Office of the Associate Attorney General.

123. DOJ-CIV denied expedited processing on the grounds that there was no urgency for the public to gain understanding of potential collusion between the federal government and the anti-DACA states; that the lack of information did not threaten substantial due process rights; and that questions about collusion between the anti-DACA states and the federal defendants failed to raise possible questions about the government's integrity that affect public confidence. *See* DOJ-CIV Acknowledgment and Denial of Expedited Processing, attached as Exhibit P.

124. Plaintiffs are not required to file an administrative appeal of the denial of expedited processing before seeking relief from this Court.

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FIRST CLAIM FOR RELIEF

Violation of FOIA for Failure to Disclose and Release Records Responsive to Plaintiffs' Request (Defendants DHS, Office of the Secretary, USCIS, DOJ, OAG, OSG, and OLC)

125. Plaintiffs repeat and re-allege each and every allegation contained in the previous paragraphs as if repeated and incorporated herein.

126. Defendants have unlawfully withheld records requested by Plaintiffs pursuant to 5 U.S.C. § 552.

127. Defendants were obligated under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for records responsive to Plaintiffs' request and to issue a determination concerning Plaintiffs' request within the time period set forth in 5 U.S.C. § 552(a)(6): 20 working days, to be extended by no more than 10 working days in the event that the agency finds the existence of "unusual circumstances."

128. Defendants failed to conduct a reasonable search within the statutory period for records responsive to Plaintiffs' request, and there exists no legal basis justifying Defendants' failure to search for these records within the statutory time period.

129. By failing to conduct a reasonable search for records responsive to Plaintiffs' request and to disclose responsive records, Defendants violated 5 U.S.C. §§ 552(a)(3)(A), (a)(3)(C), and (a)(6)(A), as well as regulations promulgated thereunder.

130. The Defendants' failure to make a determination concerning Plaintiffs' request for documents within the statutory time period constitutes a constructive denial of Plaintiffs' request, and Plaintiffs are deemed to have exhausted their administrative remedies with respect to each Defendant.

SECOND CLAIM FOR RELIEF

Violation of FOIA for Denial of Plaintiffs' Request for Expedited Processing (Defendants USCIS and OLC)

131. Plaintiffs repeat and re-allege each and every allegation contained in the previous paragraphs as if repeated and incorporated herein.

132. Plaintiffs are entitled to expedited processing of their request, pursuant to 5 U.S.C. § 552(a)(6)(E)(v)(II), 6 C.F.R. § 5.5(e)(1)(iii), (e)(1)(iv), and 28 C.F.R. § 16.5(e)(1)(iii), (e)(1)(iv).

133. Defendant USCIS has not responded to Plaintiffs' request for expedited processing of their FOIA request.

134. This constitutes a constructive denial of the request for expedited processing, and Plaintiffs have exhausted their administrative remedies with regard to this request.

135. Defendant OLC wrongfully denied Plaintiffs' request for expedited processing.

136. Defendants USCIS and OLC have violated Plaintiffs' right to expedited processing under 5 U.S.C. § 552(a)(6)(E) and Defendants' own regulations, 6 C.F.R. § 5.5(e) and 28 C.F.R. § 16.5(e), with respect to Plaintiffs' request.

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THIRD CLAIM FOR RELIEF

Defendants Have Not Responded to Plaintiffs' Request for a Fee Waiver (Defendants USCIS, DOJ, OAG, OSG, and OLC)

137. Plaintiffs repeat and re-allege each and every allegation contained in the previous paragraphs as if repeated and incorporated herein.

138. Plaintiffs are entitled to a fee waiver under 5 U.S.C. §552(a)(4)(A)(iii).

139. Defendants USCIS and OSG have not responded to Plaintiffs' request for a fee waiver for their FOIA request. This serves as a constructive denial of Plaintiffs' request for a fee waiver.

140. Defendants DOJ, OAG, and OLC have not made a decision regarding Plaintiffs' request for a fee waiver within the statutory deadline. This serves as a constructive denial of Plaintiffs' request for a fee waiver.

141. Defendants USCIS and OSG have violated Plaintiffs' right to a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii) and the Defendants' own regulations, 6 C.F.R. § 5.11(k), 28 C.F.R. § 16.10(k).

FOURTH CLAIM FOR RELIEF

Violation of FOIA for Improper Denial of Plaintiffs' Request for Expedited Processing (Defendant DOJ-CIV)

142. Plaintiffs repeat and re-allege each and every allegation contained in the previous paragraphs as if repeated and incorporated herein.

143. Plaintiffs are entitled to expedited processing of their request, pursuant to 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. § 16.5(e)(1)(iii), (e)(1)(iv).

144. Defendant DOJ-CIV wrongfully denied Plaintiffs' request for expedited processing.

145. Defendant DOJ-CIV has violated Plaintiffs' right to expedited processing under 5 U.S.C. § 552(a)(6)(E) and Defendant's own regulations, 28 C.F.R. § 16.5(e).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1) Declare that Defendants violated FOIA by failing to determine whether to comply with the request within 20 business days (or 30 business days for agencies that invoked the ten-day extension for unusual circumstances) and notify Plaintiffs of their decision; by unlawfully withholding the requested records; by constructively denying the request for expedited processing; and by failing to respond to the request for a fee waiver;

2) Order Defendants to conduct a search of any and all responsive records to Plaintiffs' FOIA request on an expedited basis and demonstrate that they employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiffs' FOIA request, and to disclose those records in their entirety to Plaintiffs;

3) Enjoin Defendants from assessing fees or costs for the processing of the FOIA request;

4) Award costs and attorneys' fees incurred in this action as provided by 5 U.S.C. § 552(a)(4)(E); and

5) Grant other such relief as this Court may deem just and proper.

Dated: June 25, 2018

Respectfully submitted,

/s/ Trudy S. Rebert

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