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.)

PETITION FOR A WRIT OF MANDAMUS

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
KENNETH MAGIDSON
United States Attorney
BETH S. BRINKMANN
Deputy Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. McINTOSH
JEFFREY CLAIR
WILLIAM E. HAVEMANN
SARAH W. CARROLL
Attorneys, Civil Division
Room 7243, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
202-514-4052

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Rules:

Regulations:

INTRODUCTION AND SUMMARY

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 the finding of bad faith and intent to misrepresent. The Department regrets the misunderstanding, has apologized to the district court, and again apologizes for its inadvertent miscommunications. The finding of bad faith and intent to misrepresent is wrong, however, and is made worse by (and perhaps explained by) the absence of the required process for the Department and its attorneys. And the district court exacerbated the problem by its sweeping remedy—including mandating five years' ethics training for thousands of Department attorneys if they appear in federal or state courts in 26 States—that far exceeds its jurisdiction. Mandamus is warranted.

First, even if intentional misrepresentations had occurred—and they did not—the sanctions imposed by the court clearly exceed the court's authority. The inherent authority to sanction misconduct is "not a broad reservoir of power, ready at an imperial hand," but rather is a "limited source" available only to "control the *litigation before* the court" or to redress "bad-faith conduct which is in direct defiance *of the sanctioning court*." *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 591 (5th Cir. 2008) (emphasis in

original, internal quotation marks, brackets, and ellipsis omitted). Yet the district court reached far beyond its authority here and dictated the scope and content of ethical and professional responsibility training for thousands of attorneys if they appear in any federal or state court in the 26 plaintiff States. These extraordinary measures imposed by the district court transgress the constitutional separation of powers and usurp the Attorney General's statutory authority to manage the Department and set policy for ethics training and enforcement and to determine which attorneys may represent the United States in litigation throughout the nation. *See* 28 U.S.C. 515-519, 530B.

The sanctions further require the government to produce to the court "all personal identifiers and locators," including "all available contact information" and other personally identifying information, for approximately fifty thousand aliens. Slip op. 23. The court imposed this burdensome and intrusive obligation without determining whether it is necessary to redress any injury to plaintiffs, without adequate consideration of its intrusion into privacy interests, and without regard to the impact on DHS's ability to collect and maintain confidentiality of information vital to its functions.

Second, the district court imposed the sanctions without the requisite procedural safeguards. A sanction issued under the court's inherent authority must be supported by clear and convincing evidence of bad faith or willful abuse of judicial process, *In re Moore*, 739 F.3d 724, 729-30 (5th Cir. 2014), and the sanctioning court

must comply with mandates of due process, *Chambers v. Nasco, Inc.*, 501 U.S. 32, 50 (1991). Sanctions imposed *sua sponte* under Rule 11 can be imposed only after an order to show cause and must be the least severe sanction adequate to deter sanctionable conduct. The court violated these safeguards by issuing sanctions without an order to show cause, failing to provide adequate notice that it was considering sanctions mandating five years' ethics training for thousands of attorneys and revocation of *pro hac vice* status for certain attorneys, failing to provide notice of who its sanctions would affect, and depriving the government and its attorneys of a meaningful opportunity to be heard and to develop a full record.

Third, even the incomplete record demonstrates that there is no support for a finding of bad faith or intentional misrepresentation, much less by clear and convincing evidence. The suit challenges as unlawful the Department of Homeland Security's (DHS) November 2014 Guidance on deferred action, which announced a new deferred action policy known as DAPA and broadened the eligibility criteria for requesting deferred action under the preexisting DACA policy. Plaintiffs allege that this expansion is unlawful and unconstitutional, and sought a preliminary injunction, alleging that the larger number of individuals with deferred action would irreparably harm them once the new policies went into effect, starting in February 2015.

As relevant here, the Guidance also changed from two to three years the length of deferred action under the preexisting 2012 DACA policy, and plaintiffs did not challenge that preexisting 2012 policy. The change in the length of the term was, at

most, tangentially relevant and plaintiffs did not argue that the length of the term had legal significance. Every alien who was accorded a three-year term of deferred action would have been accorded a two-year term if the Guidance had not issued, and thus even now would still be under that deferred action term because the initial two years is not yet complete. The Guidance itself states that DHS "shall" begin issuing three-year terms on November 24, 2014. Plaintiffs sued *after* that date, and did not seek a temporary restraining order against the change already in effect. The government later filed a declaration on January 15, 2015, that stated that DHS was already issuing three-year rather than two-year DACA terms. And when government attorneys realized that the district court might have been unaware, they unilaterally brought the fact to the court's attention.

ISSUE PRESENTED AND RELIEF REQUESTED

Whether the May 19, 2016 sanction orders were entered without lawful authority, requisite procedural safeguards, or clear and convincing evidence of bad faith. Petitioners seek a writ of mandamus vacating those orders.

STATEMENT

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* CR 38-7. 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 (TRO), 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. CR 5 at 25-28.

Plaintiffs specified that they did not challenge the 2012 DACA policy. CR 106 at 90. 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. CR 144. 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." *Id.* at 2.[1]

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. CR 176. 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.

[1] 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).

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. CR 226 at 11. The government provided the material, some under seal, CR 242, 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. *Id.* at 6-15. 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. CR 281; *see* CR 285 (July 31 Report). The court convened a hearing on August 19, 2015, primarily to address other issues of compliance with the injunction, *see* CR 281 at 2-3, 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," CR 299 at 47. 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, CR 305 at 1-3, 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, *id.* at 4.

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* slip op 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. Slip. op. 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. *Id.* at 28.[2]

REASONS WHY THE WRIT SHOULD ISSUE

A writ of mandamus or prohibition is available "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). The writ may issue if there is no other adequate means of obtaining the desired relief; if the petitioner's right to issuance of the writ is "clear and indisputable"; and if the appellate court in its discretion is satisfied that mandamus is appropriate under the circumstances. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004) (quotation marks omitted); *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989); *In re Avantel, S.A.*, 343 F.3d 311, 317 (5th Cir. 2003). Each of these factors is satisfied here, as the sweeping sanctions clearly exceed the district court's authority and the government can vindicate its interests only through immediate review.[3]

---

[2] The government is filing the sealed order with this Court under seal.

[3] 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 order is appealable, the government is entitled to the same relief by appeal.

I. THE SANCTIONS CLEARLY EXCEEDED THE DISTRICT COURT'S AUTHORITY AND WERE ENTERED WITHOUT THE REQUISITE PROCEDURAL SAFEGUARDS OR CLEAR AND CONVINCING EVIDENCE OF BAD FAITH OR INTENTIONAL MISREPRESENTATION

At bottom, there is no evidence here of bad faith or intent to misrepresent by the government or its counsel. The record reflects inadvertent miscommunications and misunderstandings, and it refutes any suggestion of misfeasance. Under any standard, the sanctions should be vacated as a whole.

Sanctions issued under the court's inherent authority may be sustained "only if clear and convincing evidence supports the court's finding of bad faith or willful abuse of the judicial process," findings the appellate court reviews *de novo*. *In re Moore,* 739 F.3d 724, 729-30 (5th Cir. 2014). Sanctions issued under Rule 11 must be set aside if based on "an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The sanctions here appear principally based on the court's view of its inherent authority and are therefore subject to the searching standard of review prescribed by this Court in *Moore*. Under either standard, the court must observe both procedural and substantive limitations on its authority. The court here did neither.

A. Ordering Thousands Of Department of Justice Attorneys To Attend Annual Ethics Training If They Appear Before Other Courts Exceeded The District Court's Sanctions Authority

A court's inherent authority to impose sanctions for misconduct is narrowly limited to measures necessary to control the litigation before the court or to redress bad faith conduct that is in direct defiance of the sanctioning court. *Chambers*, 501

U.S. at 43; *Maxxam*, 523 F.3d at 591. It is "not a broad reservoir of power, ready at an imperial hand," but rather "a limited source" "squeezed from the need to make the court function." *Maxxam*, 523 F.3d at 591 (quotation marks omitted). It "may be exercised only if essential to preserve the authority of the court," *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 86 F.3d 464, 467 (5th Cir. 1996), and must be limited to "the least restrictive sanction necessary" to that purpose, *In re First City Bancorp. of Tex. Inc.*, 282 F.3d 864, 867 (5th Cir. 2002). A Rule 11 sanction must similarly be limited to measures that will "deter repetition of the conduct or comparable conduct by others similarly situated," Fed. R. Civ. P. 11(c)(4), and also be confined to "the least severe sanction adequate to" that purpose, *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988).

The district court's sanctions far exceed those limitations. The imposition of annual ethics training for five years on several thousand Department of Justice attorneys if they appear in any state or federal court in the 26 plaintiff States bears no rational relationship to controlling the particular litigation before the district court or rectifying any purported misrepresentations in this case.

The court justified its sanctions by suggesting that the purported misrepresentations were the product of what the court said "seems to be a lack of knowledge about or adherence to the duties of professional responsibility in the halls of the Justice Department." Slip op. 22. This leap by the court from its conclusions about statements made concerning one issue in this case to a 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.

Moreover, it is a clear and indisputable abuse of the court's sanction authority. A court can sanction attorneys who disobey its orders or fail to meet ethical standards in the course of the litigation over which it is presiding. That does not empower a court to regulate the terms on which attorneys practice law in other federal and state jurisdictions. Nor does it vest a court with authority to establish institutional ethics and training policy at the Department of Justice.

B. The Sweeping Order Usurps The Attorney General's Management Of The Department Of Justice And Violates The Separation Of Powers

1. The administration of the Department of Justice and supervision of attorneys conducting litigation involving the United States is committed by statute and the Constitution to the Attorney General. Congress has vested the Attorney General with authority to ensure that government attorneys comply with state and federal court ethical standards for attorney practice, 28 U.S.C. 530B, and the conduct of litigation involving the United States "is reserved to officers of the Department of Justice, under the direction of the Attorney General," 28 U.S.C. 516. In exercising this authority, the Attorney General may direct any officer of the Department of Justice to conduct litigation involving the United States. 28 U.S.C. 518(b); *see also* 28 U.S.C. 517. And the Attorney General "shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys * * * in the discharge of their respective duties." 28 U.S.C. 519.

The constitutional separation of powers entitles the Attorney General to exercise these powers without judicial oversight. "The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed." *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (en banc). Supervision of government attorneys must accordingly remain firmly under the control of the Attorney General and free of undue interference from other branches. *Cf. Morrison v. Olson*, 487 U.S. 654, 695-96 (1988) (appointment of independent counsel does not violate separation of powers where Attorney General retains adequate powers of supervision and control); *In re United States*, 791 F.3d 945, 957-58 (9th Cir. 2015) (court clearly erred in denying *pro hac vice* admission to all out-of-state federal government attorneys).

2. The sanctions against the Department of Justice interfere with the Attorney General's authority to prescribe the training and qualifications of attorneys representing the federal government. Government counsel must be members of a state bar to represent the United States in litigation. 28 U.S.C. 530B; 28 U.S.C. 530C(c)(1). They must consequently comply with their bar's standards of conduct and continuing legal education requirements. The Department of Justice requires its attorneys to satisfy generally applicable standards for admission to practice before the court in which they appear. And Department attorneys must meet any additional requirements imposed by federal statutes or regulations. Also, in addition to the ethics training requirements applicable to all federal agency employees, *see* 5 C.F.R.

2638.703-.705, attorneys in most of the Department's litigating divisions must annually complete two hours of professional responsibility training, one hour of government ethics training (which satisfies the requirements in 5 C.F.R.), and one hour of sexual harassment/nondiscrimination or equal employment opportunity training. *See* OARM Memorandum 2010-16, Revised Guidance on Professionalism Training for Department Attorneys (Oct. 4, 2010); OARM Policy 6-2.0.

The district court nonetheless prescribed its own regime of ethics training and practice requirements for thousands of Department attorneys stationed in Washington, DC, for the next five years, if they appear in any federal or state court in the 26 plaintiff States.[4] It mandated the content of the training, required the Attorney General to hire an outside individual or firm to provide the training, required the Attorney General to appoint a Department official to oversee the training, and required the Attorney General to submit to the court annual reports, for five years, on each attorney's compliance with these requirements, including the date and location of every appearance by each attorney in those courts. Each of these extraordinary provisions encroaches on the Attorney General's statutory and constitutional authority to supervise counsel representing the United States, while at the same time far exceeding the court's authority, which extends only to the case before it.

[4] The Department's litigating Divisions employ more than three thousand attorneys stationed in Washington, D.C., most of whom have a national practice that may require them to appear in federal or state court in any of the 26 plaintiff States.

The sanctions also encroach on the Attorney General's authority to manage the Department of Justice. The court directs the Attorney General to report to it on measures improving the efficacy of the Department's Office of Professional Responsibility, and to develop and report on a "comprehensive plan" to prevent unethical conduct by Department attorneys. Slip op. 26-27. That, too, is beyond the authority of the district court.

Ethical conduct by all government attorneys is essential and of vital concern to the Department of Justice. To that end, the Department has adopted training requirements relating to attorney ethics and professional responsibility—requirements that the district court did not mention. Because the court did not provide notice of this sanction it intended to impose, the government had no opportunity to submit such information and the court did not have highly relevant information before it.

The establishment of such programs and policies is entrusted to the Attorney General, not the judiciary. The court has no authority to assume oversight of the Attorney General in the discharge of this responsibility. *See, e.g.*, *Booth v. Fletcher*, 101 F.2d 676, 682 (D.C. Cir. 1938) ("[I]t is not the function of the trial court to supervise the Attorney General in the exercise of the discretion * * * vested in him.").

3. The court also exceeded the proper exercise of its authority in mandating that DHS produce "all personal identifiers and locators," including "all available contact information" and other personally identifiable information, related to approximately 50,000 individuals who had been accorded deferred action under the

unchallenged 2012 DACA policy for a three- instead of two-year period under the change in the November 2014 Guidance. Slip op. 23. Unlike the other sanctions imposed by the court, this potential course was discussed by the parties and the court. But the court's sanctions order did not explain how such measures are necessary or appropriate, especially in light of their sweeping scope, the impact on privacy and confidentiality in administering the immigration laws, and the government's explanation of the costs and timing it would entail, and the lack of any harm suffered by the plaintiff States, thereby making such a remedy unwarranted. Moreover, the stay application accompanying this petition demonstrates that producing that information within the strict time limits ordered by the court imposes serious administrative burdens on the government and undermines federal immigration policy. And if the Supreme Court sustains the validity of the Guidance, the production of such information would be demonstrably unnecessary.

C. The Sanctions Were Imposed Without The Requisite Procedural Safeguards And Are Not Supported By Evidence Of Bad Faith Or Intentional Misrepresentation

Before a court may invoke its inherent authority to impose sanctions, it "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. The "fundamental requirement[s] of due process" include both "fair notice" and the "opportunity to be heard at a meaningful time and in a meaningful manner." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980). Fair notice includes notice to affected

parties that sanctions directed at them are under consideration, the reasons why, and the types of sanctions under consideration. *See Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 230 (5th Cir. 1998) (Rule 11); *Browning v. Kramer*, 931 F.2d 340, 346 (5th Cir. 1991) (28 U.S.C. 1927).

Rule 11 imposes similar safeguards. Rule 11 prohibits a party from moving for sanctions until the opposing party has been given an opportunity to cure a challenged contention, and a court may not issue sanctions *sua sponte* without first giving the party opportunity to show cause why its conduct did not violate the rule. *See* Fed. R. Civ. P. 11(c)(2), (3). Likewise, "revocation of *pro hac vice* status is a form of sanction that cannot be imposed without" adequate process. *Martens v. Thomann*, 273 F.3d 159, 175 (2d Cir. 2001) (Sotomayor, J.). This Court has recognized that the necessary process normally involves notice and a hearing. *See United States v. Nolen*, 472 F.3d 362, 375 (5th Cir. 2006) (in case where sanction was imposed after show cause hearing, explaining that "[w]e agree with the Eleventh Circuit that once a district court has admitted an attorney to practice before it *pro hac vice*, it may revoke that attorney's admission if, after following the proper disciplinary procedure, it concludes that the attorney violated a clearly identifiable ethical rule") (citing *Schlumberger Techs., Inc. v. Wiley*, 113 F.3d 1553 (11th Cir. 1997)); *see Schlumberger*, 113 F.3d at (explaining that, in a prior case, "[w]e reversed" when the "district court revoked an attorney's admission *pro hac vice* without giving him notice of the charges against him or affording him a hearing").

Moreover, sanctions may be imposed under court's inherent authority "only if clear and convincing evidence supports the court's finding of bad faith or willful abuse of the judicial process," findings the appellate court reviews *de novo*. *In re Moore,* 739 F.3d at 729-30. Rule 11 sanctions must be set aside if based on "an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell*, 496 U.S. at 405.

1. The Court Failed To Provide Adequate Notice and Opportunity To Be Heard Before Imposing Sanctions

The sanctions were imposed here in violation of the requisite minimum standards. The court did not issue an order to show cause or provide notice of the nature of all of the types of sanctions it was proposing to impose. The court provided the government an opportunity to brief what sanctions it believed the court could impose, and what the government would propose, but neither the court, the government, nor the plaintiffs suggested or proposed sanctions that included mandatory five years' ethics training for thousands of attorneys, oversight of the Department's professional responsibility governance, or revocation of *pro hac vice* status for specific attorneys. *See* CR 299 at 47-48. And the court did not hold an evidentiary hearing for introduction of evidence regarding the circumstances surrounding the government's statements, the absence of bad faith, or the inappropriateness of the extraordinary and unforeseen sanctions the court ultimately imposed. The court directed the government to submit specific evidence—much of it privileged—concerning the preparation of the government's March 3 Advisory (in

which the government, *sua sponte*, brought the possible confusion to the court's attention), and a list of individuals in the government who were aware of that Advisory and that deferred action under the unchallenged 2012 DACA policy was being issued for three years after the change in the 2014 Guidance. But because only this information was ordered to be produced, the record is necessarily incomplete.

Due to the lack of procedural safeguards, the court revoked the *pro hac vice* status of specified attorneys without notice directed to them of possible individual sanctions or evidence related to the court's determination of intentional misrepresentations by those specific individuals. The court imposed training requirements on thousands of Department attorneys without intimating the possibility of such sanctions or eliciting any evidence regarding the basis for such sanctions or their appropriateness in light of current training requirements, costs, or scope of the sanction. And the court purported to identify deficiencies in the operation of the Department's Office of Professional Responsibility without any evidence regarding that office's operations, and indeed, without even any prior mention of the office.

The district court order purported to find prejudice to the plaintiff States and intentional deception because the government did not file its March 3 Advisory until two weeks after the preliminary injunction was entered. Slip op. 11-12. But the record demonstrates that the Advisory and the subsequent government filings reflected a conscientious and expeditious effort to inform the court of an inadvertent miscommunication and of relevant facts and circumstances. Indeed, it was the

government's March 3 Advisory that brought the miscommunication to the attention of the district court in the first place, and the government's subsequent filings and explanations clarified the miscommunication well before the district court's imposition of sanctions. Even if misconduct had occurred, such remedial efforts are highly relevant to whether sanctions should be imposed. *Cf.* Fed. R. Civ. P. 11(c)(2) (precluding sanctions motion "if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days" or time set by court).

2. The District Court's Finding Of Bad Faith Or An Intent To Misrepresent Is Not Supported By Clear And Convincing Evidence

The record does not support the district court's conclusion that the government intentionally concealed the fact that DHS had begun issuing three-year instead of two-year terms under the unchallenged 2012 DACA criteria.

a. The record demonstrates that the government repeatedly made public the effective date of the Guidance's change from two- to three-year terms for DACA:

(i) The 2014 Guidance itself—the focus of the suit—unambiguously states that DHS "shall" begin issuing three-year terms of deferred action under DACA on November 24, 2014; that the terms "will be" extended to three years, not the current two years; and that "[t]his change shall apply" both to new applications and renewals "effective November 24, 2014." CR 38-7, at 3-4.

(ii) The government filed a sworn declaration by a DHS official stating, in a detailed discussion of the 2014 Guidance: "Pursuant to the November 20, 2014 memo issued by Secretary Johnson, as of November 24, 2014, all first-time DACA

requests and requests for renewal now receive a three-year period of deferred action." CR 130-11 at 6 n.3 (filed Jan. 30, 2015).

(iii) The same declaration also referenced publicly available documents that set forth the relevant effective date. *See* CR 130-11, Ex. B, at 1 (Frequently Asked Questions, DHS DACA website) ("Individuals who demonstrate that they meet the guidelines below may request consideration of [DACA] for a period of three years * * * . "). Nowhere in its sanctions orders did the district court acknowledge any of these disclosures.

b. The statements that the district court deemed to be intentional misrepresentations do not suggest bad faith or intent to mislead when considered in context, but rather constituted the government's good faith effort to address the timing of matters which would result in what was the prime focus for plaintiffs—a significant increase in the number of aliens newly eligible for deferred action under the new policies. That honest effort led to inadvertent miscommunications regarding what was meant by "revised DACA" and other references to parts of the Guidance.

The government's statements are all consistent with the understanding by government counsel that "revised DACA" referred to the broadened eligibility requirements for requesting DACA created by the 2014 Guidance, which would allow new requests for DACA from a larger number of individuals previously not eligible to make such requests under the 2012 DACA policy. Significantly, the 2014 Guidance did not specify the earliest date that new criteria might go into effect, but provided

only that DHS "should begin accepting applications under the new criteria" for DACA "*no later than* ninety (90) days from the date of this announcement" (emphasis added), *i.e.,* no later than February 18, 2015. Hence, it was reasonable for the government to understand the court and plaintiffs to be seeking assurance that DHS would not begin considering requests for, or according deferred action under, the new broadened eligibility criteria *before* February 18, 2015, the period referenced in the government statements at issue.

By contrast, the district court appears to have understood "revised DACA" to include the change from two to three years for deferred action accorded even for the unchallenged 2012 DACA policy. The May 19 sanctions order states that "the revised DACA * * * includes the three-year extensions," slip op. 10, but that specificity and precision is not found in the briefing or transcript of the hearing on the preliminary injunction.

Specifically, the government's statement during the December 19, 2014, conference call with the court to set a date for a hearing on the preliminary injunction motion was made after plaintiffs' counsel had asserted that the United States had "hired a thousand employees" in anticipation of processing millions of new requests for deferred action, and plaintiffs wanted to ensure that they were not prejudiced before the hearing by the government's on-going efforts to implement the Guidance. CR 184 at 10-11. The government responded that the agency "was directed to begin accepting requests for deferred action I believe beginning sometime in—by mid-

February but even after that we wouldn't anticipate any decisions on those for some time thereafter. So there—I really would not expect anything between now and the date of the hearing." *Id.* at 11. The reference to mid-February is consistent with the first date by which the Guidance mandated the agency to begin accepting requests for deferred action under the expanded 2014 DACA eligibility criteria (February 18, 2015), and was critical information for the court and the States because the Guidance allowed those new requests to be approved earlier, but did not specify when approvals would start. Neither the court nor plaintiffs expressed any concern with the continued processing of requests for deferred action under the 2012 DACA policy.

Similarly, the government's motion filed on January 14, 2015, for an extension of time for its sur-reply on the preliminary injunction motion stated that plaintiffs would not be prejudiced by a two-week extension because the agency "does not intend to entertain requests for deferred action under the challenged policy until February 18, 2015, and even after it starts accepting requests, it will not be in a position to make any final decisions on those requests *at least* until March 4, 2015." CR 90 at 3. Again, the reference to mid-February is consistent with the deadline mandated by the Guidance for acceptance of requests for deferred action under the expanded DACA eligibility criteria.

The government's statement at the preliminary injunction hearing the next day referred to that motion and indicated that it had "reiterated that no applications for the revised DACA—this is not even DAPA—revised DACA would be accepted until

the 18th of February, and that no action would be taken on any of those applications until March the 4th." CR 106 at 133. In response to the court's question whether anything was "happening on DAPA," the government responded that "the memorandum said that DAPA should be implemented no sooner than mid May, so DACA is really the first—the revised DACA is the first deadline." *Id.* at 133-34. In a further exchange, the government corrected the implementation time for DAPA as "no later than" mid-May. *Id.* at 134. When the court stated that "as far as you know, nothing is going to happen in the next three weeks," counsel responded, "No, Your Honor," and when the court then asked "Okay. On either.", counsel responded, "In terms of accepting applications or granting any up or down applications," and "For revised DACA, just to be totally clear." *Id.* Much earlier in the hearing, the court posed one incomplete question that referenced "[t]he increase in years," but the question was posed in response to the government's statement about "a revision or expansion of the group that would be eligible to apply for" DAPA and for revised DACA (which expanded DACA by increasing the age of those who qualified, and extended the cutoff by which they must have entered United States by around 2.5 years), not about a change from two to three years for DACA. *Id.* at 91. Counsel for the plaintiffs and the government appear to have begun to speak at the same time, and neither provided a clear response to the question. *Id.*

Finally the government, in its motion for a stay of the injunction pending appeal, stated that "DHS was to begin accepting requests for modified DACA on

February 18, 2015." CR 150 at 3. Again, the reference to February 18 is consistent with the earliest deadline mandated by the Guidance for acceptance of requests for deferred action under the expanded DACA eligibility criteria.

Read in context, the record thus demonstrates the government's good faith effort to address the timing issues that it believed were relevant to the proceedings before the court, in which the plaintiffs claimed that they needed preliminary injunctive relief because they faced imminent harm from the millions of individuals they alleged would be *newly* eligible to request deferred action under the new DAPA policy and the broadening of the eligibility criteria for DACA, not from the change from two to three years for individuals already eligible for deferred action under the unchallenged 2012 DACA eligibility criteria.

The miscommunications that arose from these apparent different understandings do not support a finding of bad faith or intentional misrepresentations. The preliminary injunction was couched in broad terms that encompassed all aspects of the Guidance. After the injunction issued, when Department of Justice attorneys came to realize the significant number of individuals who had been accorded deferred action under the unchallenged 2012 DACA policy since the November 24, 2014 effective date for the change of DACA to three years, the Department very promptly filed an Advisory to notify the court of that fact, specifically referencing its own prior statement regarding the implementation date of

the 2014 Guidance. *See* CR 176. The government's prompt filing of that Advisory, and the candor that it exhibits, demonstrates the opposite of bad faith.

c. The government would have had no reason (and no reasonable basis) to misrepresent the effective date of the Guidance's change from two to three years for 2012 DACA. The date was on the face of the Guidance and on DHS's website. The public nature of the change refutes the suggestion that government counsel would have sought to intentionally conceal it from the court.

Moreover, the plaintiff States did not suggest that they needed a preliminary injunction to address any alleged harm attributable to that change. Preliminary injunctive relief requires a demonstration that the movant will suffer *imminent*, irreparable harm unless an injunction maintains the status quo during the litigation, and any injunction must be narrowly tailored to remedy the specific harms demonstrated by the movant. Plaintiffs, however, identified no harm, much less any imminent harm, flowing from the change from two to three years for deferred action accorded under the unchallenged 2012 DACA policy in their motion for a preliminary injunction, nor did they suggest that the change was independently unlawful.

The plaintiffs proposed to enjoin the Guidance on its face, but their legal arguments against the lawfulness of the Guidance—as well as the harms they alleged it would cause—were tied to the increase in the number of aliens who would be eligible to request deferred action under the new DAPA policy and the expanded DACA eligibility criteria, not the duration of deferred action once accorded. Indeed,

every alien who was accorded three years of deferred action instead of two because of the Guidance would have been accorded a two-year term of deferred action if the Guidance had not issued and even now would still be under that deferred action term because the initial two years do not begin to expire until November 2016. At that point the individuals may be eligible to make a new request under 2012 DACA.

The court nonetheless indicated repeatedly that the purported intentional misrepresentations caused plaintiffs to give up a "valuable legal right" to seek more immediate relief. Slip op. 19, 22. But that conclusion is not supported by the record and is belied by plaintiffs' failure to seek a TRO or to allege harm, including in their injunction motion, based on the change from two to three years for 2012 DACA that was effective, according to the face of the Guidance, before they filed suit.[5]

II. MANDAMUS IS WARRANTED HERE AND THE COURT SHOULD EXERCISE DISCRETION TO PREVENT IRREPARABLE INJURY

A. Mandamus is warranted to remedy the district court's violation of separation of powers. Article II confers on the President "the general administrative control of those executing the laws." *Myers v. United States*, 272 U.S. 52, 164 (1926). This supervisory authority is an essential attribute of the Article II power. Indeed, "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot

[5] After the government alerted the court and plaintiffs to the misunderstanding, Texas suggested that it would have issued drivers licenses for two- rather than three-year terms if DACA aliens had continued to receive two year terms of deferred action, *see, e.g.*, CR 203 at 9, but the State identified no specific harm from licenses of greater length. Indeed, the record suggests that the longer term could *save* Texas money by reducing the costs to the State for renewal of licenses. *See* CR 64-43 at ¶ 8 (longer-term drivers licenses are less costly to the State).

oversee the faithfulness of the officers who execute them." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.,* 561 U.S. 477, 484 (2010).

The Constitution mandates "that one branch of the Government may not intrude upon the central prerogatives of another" and that one branch may not impair another in the performance of its constitutional duties. *Loving v. United States*, 518 U.S. 748, 757 (1996). "Even when a branch does not arrogate power to itself, * * * the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Id.* Thus, "[w]hile the boundaries between the three branches are not hermetically sealed, the Constitution prohibits one branch from encroaching on the central prerogatives of another." *Miller v. French,* 530 U.S. 327, 341 (2000) (internal citations, quotation marks omitted). The Supreme Court has made clear that "[a]ccepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Cheney*, 542 U.S. at 382; *see also Cobell* v. *Norton*, 334 F.3d 1128, 1140-43, 1150 (D.C. Cir. 2003) (issuing mandamus to vacate order that violated separation of powers by interfering with internal deliberations of Executive Department). Here, the sanctions are a substantial and enduring intrusion on managerial and supervisory powers at the core of the Attorney General's authority. Mandamus is warranted to remedy this constitutional injury.

The sanctions impose other injuries that could not be remedied after final judgment. Timely compliance with the training, hiring, and reporting requirements

would entail considerable expenditure of funds and resources that cannot be recovered if immediate review is not granted. *See* Stay Application, Loftus Decl., ¶¶ 11-23. The production of sensitive personally identifying information for approximately 50,000 individuals for the purpose of potential further transmission to plaintiffs would entail unrecoupable administrative expense, undermine the confidence of individuals in the preservation of confidential information submitted to USCIS for specified purposes, and, if dissemination is permitted, expose these individuals to an irremediable invasion of their privacy, *see* Stay Application, Rodriguez Decl., ¶¶ 6-26, all without a finding that it is "necessary to accomplish [a] legitimate * * * purpose" for which inherent authority may be summoned. *See Natural Gas Pipeline Co.*, 86 F.3d at 468. Mandamus affords the government the only adequate avenue of review.

B. The encroachment on the Attorney General's authority and the clear abuse of discretion in the finding of bad faith and intent to misrepresent without adequate process justify exercise of the Court's mandamus power. The constitutional error and interference with litigation in other jurisdictions further favor mandamus. *Cf. In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) (en banc) (mandamus "particularly appropriate" if issues have importance beyond immediate case).

CONCLUSION

For the foregoing reasons, the Court should issue a writ of mandamus vacating both the district court's May 19, 2016, public and sealed sanction orders.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

KENNETH MAGIDSON
United States Attorney

/s/ *Beth S. Brinkmann*
BETH S. BRINKMANN
Deputy Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
JEFFREY CLAIR
WILLIAM E. HAVEMANN
SARAH W. CARROLL
Attorneys, Civil Division
Room 7243, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
202-514-4052

CERTIFICATE OF SERVICE

I certify that on June 3, 2016, I served the foregoing petition for a writ of mandamus and accompanying attachments by e-mail on the counsel listed below. All counsel have consented to e-mail service:

Scott A. Keller
Solicitor General, State of Texas
Scott.Keller@texasattorneygeneral.gov.

Office of the Attorney General
209 W. 14th St.
Austin, Texas 78711-2548
Tel. 512-936-1700

Counsel for Plaintiffs

Nina Perales
Mexican American Legal Defense
and Educational Fund
NPerales@Maldef.org
110 Broadway, Ste 300
San Antonio, Texas 78205
(210) 224-5476

Counsel for Intervenors

I further certify that on the same date I have caused the petition and accompanying attachments to be hand-delivered to the district court on Monday, June 6, 2016, the most expeditious means of service available to us. The petition

will be delivered to:

The Honorable Andrew S. Hanen
United States District Court for the Southern District of Texas
600 E. Harrison St.
Brownsville, Texas 78520
Tel. 956-548-2500

/s/ William E. Havemann, Attorney