No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

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

PETITION FOR WRIT OF MANDAMUS

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Movant:
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Natural Born Citizen Party National Committee
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Other Interested Parties

Approximately 50,000 immigrant youth who received three year employment authorization documents from the federal government between November 20, 2014 and March 3, 2015 under the Deferred Action for Childhood Arrivals program and who live in one of the 26 states that are plaintiffs in *Texas v. United States,* 14: CV-254-ASH (S.D. Texas filed Dec. 3, 2014).

/s/ Karen C. Tumlin
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On May 19, 2016, the district court for the Southern District of Texas issued an extraordinary order requiring the federal government, as a sanction for what the court viewed as misrepresentations by its counsel in *Texas v. United States*, to file an enormous trove of highly sensitive personal information belonging to some 50,000 individual recipients of Deferred Action for Childhood Arrivals ("the DACA recipients"), for future disclosure to the twenty-six States that are plaintiffs in that case.[1] No DACA recipient is or has ever been a party to *Texas*, much less committed any misconduct in that litigation, either directly or through counsel, and the Plaintiff States have expressly stated that they are not challenging the authority of the federal government to grant deferred action to the DACA recipients. Yet, the district court's order puts the DACA recipients, including the four Petitioners, at risk for devastating identity theft or fraud; the involuntary exposure of their own immigration status and that of their family members; and harassment or discrimination should their locations be made public; and forces the federal government to breach its commitment to keep their personal information confidential.

The district court's order is not only unjustifiable, but actually inexplicable, and amounts to a clear abuse of discretion. Neither the district court nor the Plaintiff States have any conceivable need for the personal information of the DACA

[1] The district court also imposed other requirements on the federal government that do not relate to the DACA recipients' personal information. This Petition does not address those requirements because Petitioners have no personal stake in those aspects of the district court's order.

recipients at this time, and there is no legitimate remedial or punitive purpose to which it could be put. Indeed, the district court did not even attempt to explain how it makes sense to order disclosure of the DACA recipients' personal information at all, much less why the district court ordered disclosure *now*, when the case has been stayed at the district court since December; the U.S. Supreme Court is expected to issue an opinion within the month that could dispose of the case entirely; and there is no chance the information will be unavailable in the future should an actual need for its production arise.

The order violates Petitioners' and other DACA recipients' constitutionally protected rights to privacy, vastly exceeds the district court's authority and proper judicial role, and constitutes an egregious abuse of discretion. If ever the extraordinary remedy of a writ of mandamus is warranted, it is here. The district court's order must be vacated.

STATEMENT OF RELIEF SOUGHT

Petitioners Angelica Villalobos, Juan Escalante, and Jane Does #4-5[2] (collectively, "Petitioners") respectfully request that this Court grant their petition for a writ of mandamus and direct the U.S. District Court for the Brownsville Division of the Southern District of Texas, the Honorable Andrew S. Hanen

[2] Petitioners are filing a motion for leave of the Court for Jane Does #4-5 to proceed under pseudonyms concurrently with this Petition.

presiding, to vacate that portion of its May 19, 2016 sanctions order that requires the United States and several officials thereof to produce to it by June 10, 2016 the highly sensitive personal information—including names, home addresses, Social Security numbers, DACA-specific information, and all other "personal identifiers" and "available contact information"—of approximately 50,000 non-party non-citizens who reside in the twenty-six states that are plaintiffs in *Texas v. United States*. *See* Ex. A (May 19 Order) at 22-23.

ISSUE PRESENTED

Whether the district court erred as a matter of law, clearly abused its discretion, and/or exceed its authority when it ordered the federal government to produce to it by June 10, 2016 the highly sensitive personal information of 50,000 non-citizens who were brought to this country as children and who have had their deportations deferred by the U.S. Department of Homeland Security where there has been no attempt to show that the information is relevant to any claim or defense in the case or necessary to accomplish any other legitimate purpose; where there is no risk of the information being unavailable should such a showing be made later; and where the U.S. Supreme Court will be soon issuing an opinion that could dispose of the litigation entirely, including for lack of subject matter jurisdiction.

FACTUAL BACKGROUND

Petitioners are four immigrant youth who sought and received deferred action and work authorization from the federal immigration authorities pursuant to the 2012 DACA policy. That policy, issued June 15, 2012, authorized the Department of Homeland Security ("DHS") to defer immigration enforcement action against certain young people for a renewable period of two years.[3]

All four Petitioners applied for DACA in 2012, providing personal information and documentation to DHS as part of the process, including biographical information (name, date of birth, current address, past addresses, phone numbers, etc.), copies of passports and birth certificates, fingerprints, and, if applicable, a Social Security number ("SSN"). *See* Ex. B (Decl. of A. Villalobos) ¶ 5; Ex. C (Decl. of J. Escalante) ¶ 7; Ex. D (Decl. of J. Doe #4) ¶ 14; Ex. E (Decl. of J. Doe #5) ¶ 13. In order to demonstrate that they met eligibility requirements, particularly a requirement of continuous residence in the United States for five years prior to the announcement of DACA, Petitioners also submitted lots of documentary evidence, such as bank statements, college and high school transcripts, children's birth certificates, etc. *See* Ex. B ¶ 9; Ex. C ¶ 7; Ex. D ¶ 14; Ex. E ¶ 9.

[3] *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec. to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot., https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (June 15, 2012).

Between late 2012 and early 2014, Petitioners were each granted DACA, valid for a period of two years. *See* Ex. B ¶ 5; Ex. C ¶ 10; Ex. D ¶ 9; Ex. E ¶ 10. On the basis of their DACA grants, each then applied for and was granted a two-year Employment Authorization Document ("EAD"), which establishes that the holder is authorized to legally work in the United States. *Id*.

In the fall of 2014, with the end of that first two-year term approaching, Petitioners all applied to renew their deferred action and work authorization, anticipating an additional two-year term for each. *See* Ex. B ¶ 6; Ex. C ¶ 11; Ex. D ¶ 10; Ex. E ¶ 12. The application required Petitioners to submit updated personal information; for those Petitioners who obtained SSNs only as a result of their deferred action, this renewal application was the first time they disclosed that particularly sensitive information to DHS.[4]

On November 20, 2014—shortly after the Petitioners submitted their renewal applications, but before they were processed—President Obama announced, and the Secretary of the Department of Homeland Security, Jeh Johnson, issued, a Memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parent of U.S. Citizens or Permanent Residents"

[4] *See* Form I821-D Instructions, *available at* https://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf (June 4, 2014).

("expanded DACA and DAPA"). *Available at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf*. As relevant here, the 2014 memorandum expanded eligibility for deferred action to individuals who had not been eligible for DACA, and also extended the terms of deferred action and EADs from two to three years, including for those eligible for deferred action under the original 2012 DACA program. *Id*. The Directive stated that most of its provisions would take effect in 90 to 180 days, with one clear exception: The change from two to three year terms for deferred action and EADs "shall apply to all first-time applications as well as all applications for renewal effective November 24, 2014." *Id*. 3-4.

In the following weeks, Petitioners received notice that their periods of deferred action and EADs had been approved, and—consistent with the DHS Directive—for an additional three-year period. *See* Ex. B ¶ 7; Ex. C ¶ 12; Ex. D ¶ 11; Ex. E ¶ 12.

Meanwhile, on December 3, 2014, a number of states and state officials sued the United States and several DHS officials, alleging that the memorandum establishing expanded DACA and DAPA violated the Administrative Procedures Act and the Take Care Clause. *Texas v. United States*, No. 14-00254 (S.D. Tex. filed Dec. 3, 2014). *Texas* did not challenge DACA, as established through the 2012

memorandum, as the Plaintiff States in that litigation have repeatedly made clear. Nevertheless, the order challenged in this petition was issued in the *Texas* litigation.

The *Texas* district court issued a preliminary injunction on February 16, 2015, enjoining the entirety of the 2014 expanded DACA and DAPA memorandum—including the extension of original DACA/EADs to three years. The preliminary injunction was immediately appealed, and that challenge remains pending at the U.S. Supreme Court. *U.S. v. Texas*, No. 15-674 (U.S. filed Nov. 20, 2015).

Certain proceedings continued, however, before the district court. On March 3, 2015, the federal government Defendants informed the court and Plaintiff States that, prior to the injunction, DHS had issued three-year terms of deferred action and EADs to some 108,000 recipients of original DACA. Ex. A at 5. Petitioners' three-year renewals are among those.

The Plaintiff States moved the court for early discovery, asserting that while there was no injunction in place at the time those renewals were issued, counsel for the Defendants had allegedly misled the court and the Plaintiff States to believe that no such renewals would be issued before February 18, 2015. The district court held several hearings, including one on August 19, 2015, after which it invited briefing from the Plaintiff States and Defendants regarding the possibility of sanctions against the federal government for this alleged misrepresentation. *See* Ex. H (Tr. of Aug. 19, 2015 Hr'g); Ex. I (Pls.' Advisory dated Sept. 4, 2015); Ex. J (Defs.' Mem.

dated Sept. 4, 2015); *see also* Ex. K (Br. of Amicus Curiae J. Does #1-3 dated Sept. 4, 2015).

Without further hearing, on May 19, 2016, the district court issued the sanctions order at issue in this petition. As relevant here, the order requires the federal defendants in the case to compile and disclose a list including "all personal identifiers and locators including names, addresses, 'A' file numbers and all available contact information" of individuals, like Petitioners, who received three-year DACA and EAD (either renewals or original grants) between November 20, 2014 and March 3, 2015, and who live in one of the 26 Plaintiff States. Ex. A (May 19 Order) at 22-23.[5] In total, that list would contain personally identifying information for some 50,000 individuals. Ex. G (Decl. of L. Rodriguez) ¶ 5.[6] Not one of those persons was a party to the district court proceedings or had an opportunity to be heard.

[5] The order's timeframe, stretching back to EAD renewals issued in November 2014, is odd because the Defendants' purported misrepresentations, if any, did not begin until December 19, 2015. Ex. A (May 19 Order) at 5. All of Petitioners' DACA renewals and 3 year EADs were issued *before* that first purported misrepresentation. Ex. B ¶ 7; Ex. C ¶ 12; Ex. D ¶ 11; Ex. E ¶ 12.

[6] The court's decision to seriously burden the privacy interests of Petitioners is particularly inappropriate in light of the fact that they submitted their applications to renew DACA and their EADs *before* the expansion of DACA and the creation of DAPA were announced. Ex. B ¶ 6; Ex. C ¶ 11; Ex. D ¶ 10; Ex. E ¶ 12.

The court ordered that this list be filed with the court under seal by June 10, 2016. Ex. A at 22-23. The order then indicated that the court would entertain requests for the information from the Plaintiff States—predicated only on a vague standard of "good cause"—once the Supreme Court issues a decision regarding the preliminary injunction. *Id*. at 23.[7]

On May 31, 2016, the federal defendants moved the district court for a stay of its order. The court has set an argument on that motion for June 7—just three days before its deadline for the government to file sensitive personal information of 50,000 nonparties, including the Petitioners.

REASONS TO GRANT THE WRIT

A writ of mandamus may issue if three criteria are met:

> First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires, a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

In re Rolls Royce Corp., 775 F.3d 671, 675 (5th Cir. 2014) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–81 (2004) (alterations in original)). "These hurdles, however demanding, are not insuperable," *In re Volkswagen of Am., Inc*.,

[7] The order also imposed ethics education requirements on government attorneys; that requirement is not at issue in this petition.

545 F.3d 304, 311 (5th Cir. 2008) (en banc) (quoting *Cheney*, 542 U.S. at 381), and this Court has not hesitated to issue the writ when its requirements are met. *See, e.g.*, *id.* at 308-09 ("[W]e hold that mandamus is appropriate when there is a clear abuse of discretion," and issuing the writ to correct a district court's ruling on a venue transfer motion); *In re Rolls Royce Corp.*, 775 F.3d at 683 (same); *In re McBryde*, 117 F.3d 208, 230 (5th Cir. 1997) (granting petition of district court judge and issuing writ to vacate reassignment orders in two cases); *In re Dresser Indus., Inc.*, 972 F.2d 540, 546 (5th Cir. 1992) (issuing writ directing district court to enter an order disqualifying counsel); *In re Am. Airlines, Inc.*, 972 F.2d 605, 628 (5th Cir. 1992) (same); *Am. Trucking Ass'ns, Inc. v. I.C.C.*, 669 F.3d 957, 964 (5th Cir. 1982) (issuing writ to enforce and clarify mandate); *In re Collier*, 582 F. App'x 419, 423 (5th Cir. 2014) (granting writ to vacate contempt order entered without "the procedural protections required by law"); *United States v. Davis*, No. 01-30656, 2001 WL 34712238, at *3 (5th Cir. 2001) (issuing writ and directing district court to permit criminal defendant in capital case to exercise his Sixth Amendment right to self-representation).[8]

[8] In still other cases, this Court has held that although the requirements for mandamus were met, the writ "need not issue," and therefore did not issue, because the panel was "confident that the district court w[ould] reconsider its [challenged] determination in light of the appropriate legal standard" set out in the panel's opinion. *In re Aventel, S.A.*, 343 F.3d 311, 324-25 (5th Cir. 2003); *see also Matter of Green*, 39 F.3d 582, 584 (5th Cir. 1994) (same); *In re Stone*, 986 F.2d 898, 905 (5th Cir. 1993) (same). In this case, however, the impending deadline for disclosure of the DACA recipients' information renders that approach untenable.

As set forth below, all the prerequisites for issuance of the writ are present here.

I. A WRIT OF MANDAMUS IS THE ONLY MEANS PETITIONERS HAVE TO PREVENT THE IRREPARABLE HARM THREATENED BY DISCLOSURE OF THEIR HIGHLY SENSITIVE PERSONAL INFORMATION

There can be no real dispute that Petitioners "have no . . . adequate means to attain the relief" they seek other than through mandamus. *In re Rolls Royce Corp.*, 775 F.3d at 675 (citation omitted). Like the approximately 50,000 other individuals whose personal privacy is threatened by the district court's sanctions order, Petitioners are not and have never been parties to the underlying litigation, and so in the ordinary course cannot appeal any order of the district court.[9] *See Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); *Karcher v. May*, 484 U.S. 72, 77 (1987). Even if they were parties, moreover, Petitioners would have been hard pressed to find an avenue of appeal in light of 28 U.S.C. § 1291. *See Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 210 (1999) (holding that a sanctions order is not a "final decision" under § 1291, and therefore is not immediately appealable).

[9] Petitioners' nonparty status is no bar to mandamus relief. *See Castillo v. Cameron Cty., Tex.*, 238 F.3d 339, 349 n.16 (5th Cir. 2001) (noting that "nonparty status . . . need not bar a petition for mandamus review") (citation and quotation marks omitted); *see also, e.g.*, *In re McBryde*, 117 F.3d 208, 223 (5th Cir. 1997) (granting mandamus to a nonparty). While Article III standing is of course is a prerequisite, *see Castillo*, 238 F.3d at 349 n.16, Petitioners' concrete, particularized, and redressable interest in protecting their personal information from disclosure establishes clear standing, *cf. McBryde*, 117 F.3d at 223.

In short, Petitioners do not have access to the regular appeals process, and so their petition is not an attempted substitute therefor.

Were that not enough to satisfy the first requirement for the writ—and it unquestionably is, *see Cunningham v. Hamilton Cty.*, 527 U.S. 198, 211 (1999) (Kennedy, J., concurring); *In re Rolls Royce Corp.*, 775 F.3d at 676—features of this particular sanctions order make relief by any avenue other than mandamus even less adequate than in the ordinary case. In addition to affecting a huge and diffuse class of unnamed nonparties (without providing any of them with notice or an opportunity to be heard), the district court's May 19 Order set a strikingly short deadline of June 10 for the federal government to disclose that trove of personal data, giving Petitioners just 22 days to do *everything* necessary to obtain relief, including learning of the order and that it applied to their information; locate and retain counsel; explore possible legal theories and mechanisms of relief; and finally seek review with enough time for it to be meaningful. In these circumstances, mandamus is Petitioners' only option. *Cf. In re Collier*, 582 F. App'x at 421-22 ("Due to the nature of the forty-eight hour jail sentence and the obvious time restrictions to obtain relief, Collier 'has no other adequate means to attain the relief he desires.'").

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II. PETITIONERS' RIGHT TO MANDAMUS IS CLEAR AND INDISPUTABLE, AS THE DISTRICT COURT CLEARLY ABUSED ITS DISCRETION

Petitioners' right to mandamus here is clear and indisputable, for the district court's order constitutes a clear abuse of discretion.

As this Court, sitting en banc, has held: "If the district court clearly abused its discretion . . . , then [the petitioner's] right to issuance of the writ is necessarily clear and indisputable." *In re Volkswagen of Am., Inc.*, 545 F.3d at 311. A district court abuses its discretion if it: "(1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *Id.* at 310 (quoting *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003)). This Court therefore reviews for these types of errors on mandamus review, and "will grant mandamus relief when such errors produce a patently erroneous result." *Id.* Petitioners' entitlement to mandamus is unmistakable under this standard.

1. <u>The district court's failure to find relevant facts or identify (much less apply) relevant law is a clear abuse of discretion</u>

Petitioners' right to the writ is unmistakably clear solely upon consideration of the above-cited abuse of discretion standard and the sanctions order itself. One would think, for example, that prior to ordering the federal government to produce such highly sensitive information about so many individuals, none of whom are parties to the case, the district court would have made factual findings, reached

conclusions of law, and applied the latter to the former in order to justify such a massive intrusion of personal privacy in some form or fashion. As the abuse of discretion standard itself implies, all of these are required steps in the ordinary course; and yet, inexplicably, the district court engaged in *none* of them, at least with regards to the part of the sanctions order that concerns Petitioners. Ex. A at 22-23. *Cf. McKinney ex rel. NLRB. v. Creative Vision Res., LLC,* 783 F.3d 293, 298 (5th Cir. 2015) ("A district court abuses its discretion when it . . . ignores or misunderstands the relevant evidence, and bases its decision upon considerations having little factual support"); *FDIC v. Morriss*, 273 F. App'x 390, 390-391 (5th Cir. 2008) ("A court abuses its discretion when it acts 'in an unreasonable or arbitrary manner . . . without reference to any guiding rules or principles'") (quoting *Bollore S.A. v. Imp. Warehouse, Inc.*, 448 F.3d 317, 321 (5th Cir. 2006)); *Maiz v. Virani*, 311 F.3d 334, 338 (5th Cir. 2002) ("[A] trial court's failure to properly analyze the law or apply it to the facts is an abuse of discretion."); *In re First S. Sav. Ass'n*, 820 F.2d 700, 708-709 (5th Cir. 1987) (holding that the district court "clearly abused its discretion" and, in light of the district court's failure to note any facts or conclusions other than referring to findings and conclusions "on file herein," noting that "the setting forth of findings and conclusions, be they in writing or simply dictated into the record, is not only required, but is also prudent.").

2. The utter disconnect between any legitimate sanctions purpose and the demand for the DACA recipients' personal information also clearly demonstrates that the district court abused its discretion

There is no legitimate reason for disclosure of the Petitioners' personal information to either the district court or the Plaintiff States.

The district court's order is a *sanctions* order. But disclosure of one's personally identifying information ("PII") cannot be a proper punitive sanction. And even if it could, the district court has already recognized that the DACA recipients are obviously innocent of any purported litigation misconduct, as they have not been a part of this case at all. Ex. H at 44-45. Moreover, the DACA recipients' personal information is utterly irrelevant to the merits of the case.

Thus any reason offered for requiring the DACA recipients' information would of necessity be in the nature of *compensatory* sanctions. But any compensatory theory regarding the Petitioners' personal information is similarly flawed. The Plaintiff States originally sought the PII at issue here as part of a larger request for a court order *both* reducing the three-year DACA renewals to a two-year term *and* providing PII so the Plaintiff States could then ensure that driver's licenses for those individuals were likewise reduced to two years. *See* Ex. I (Pls.' Advisory dated Sept. 4, 2015) at 7; Ex. H at 22. But the district court did not order the

revocation of the three-year DACA renewals, and those renewals remain valid.[10] Because the Petitioners have deferred action for three years, there is no correction to be made in the Plaintiff States' driver's license records—and therefore there is no reason for the Plaintiff States to need their PII. *See* Ex. G (Decl. of L. Rodriguez) ¶ 19 (noting that the information at issue here "is unrelated to any change in the DACA duration" because these DACA recipients' "three-year DACA terms and EADs remain valid").[11]

Beyond this untenable basis for the sanctions order, not only has no party established any harm which the PII might remedy, no party has even *gestured* at any such harm. There is simply no legitimate reason for the Plaintiff States to receive

[10] The district court was correct in refusing to grant the Plaintiff States' request to effectively revoke the three-year DACA grants. As the defendants previously explained, any such order would be a mandatory injunction, and the States' request could not be justified under the demanding requirements of that type of order. *See* Ex. K (Br. of Amicus Curiae dated Sept. 4, 2015); Ex. J (Defs.' Mem. dated Sept. 4, 2015) at 5-13.

[11] Indeed, the Plaintiff States *agreed* that no driver's license modifications are warranted in the absence of an alteration of the three-year extensions:

> The fact remains that over 108,000 individuals were issued, and continue to hold, three-year terms of deferred action and work authorization based on the now-enjoined DHS Directive—a program that Defendants expressly stated was not being implemented. Once these individuals received federal work authorization, they were entitled to obtain—*and, to this day, still are entitled to obtain*—certain State-issued licenses and benefits tied to the length of time for which the federal government represents they are authorized to work in the United States.

Ex. I at 6 (emphasis added); *but see* Ex. H at 32-34 (taking the opposite position).

this trove of sensitive PII—and indeed, the States have never sought that information as a standalone matter.[12]

The district court's unexplained and inexplicable decision to nonetheless order disclosure of the DACA recipients' personal information is thus plainly an abuse of discretion.

3. The district court's order unquestionably violates the DACA recipients' constitutionally protected privacy rights

The district court's order is also clear abuse of discretion for the separate reason that it plainly violates the Constitution's privacy protections. Because of those protections, a court may order disclosure of sensitive personal information only where an adequate justification outweighs the privacy interests harmed by disclosure. *ACLU of Mississippi, Inc. v. State of Miss.*, 911 F.2d 1066, 1070 (5th Cir. 1990); *see also Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 146 n.9 (2011) (recognizing that the Fifth Circuit, like several other circuits, has adopted a balancing test); *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978) (explaining that "more than mere rationality must be demonstrated"). Yet the district court's order offers *no* justification—much less an adequate one—for disclosure of

[12] Notably, should circumstances ever change in this regard, the director of USCIS has declared under penalty of perjury that the information is "permanently preserved, can be produced at any time in the future, and will be equally available if ordered at a future time." Ex. G ¶ 6.

the PII of the DACA petitioners and tens of thousands of others to the district court or the Plaintiff States, and, as noted above, no such justification exists.

Moreover, in stark contrast to the total lack of any legitimate reason to disclose the DACA recipients' PII, the Petitioners' "privacy interest in confidentiality" of that information is "extensive." *ACLU of Mississippi*, 911 F.2d at 1070. Petitioners are deeply concerned that their sensitive private information will be mishandled and used against them by identity thieves, third parties hostile to immigrants in general and DACA recipients in particular, or the Plaintiff States themselves—all, as explained above, without any legitimate justification for any disclosure at all. *See* Ex. B ¶¶ 11-14; Ex. C ¶¶ 16-21; Ex. D ¶¶ 15-19; Ex. E ¶¶ 15-18.

i. The Petitioners' privacy interests

The DACA petitioners, in applying for benefits, were expressly assured that the information provided would be used only for certain specific purposes.[13] Their understanding, accordingly, was that the personal information they shared with DHS would be kept confidential and only used in connection with the DACA application.

[13] *See* U.S. Citizenship & Immigration Serv., Form I821-D Instructions, *available at* https://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf (June 4, 2014). These assurances were made pursuant to the Privacy Act. The Act does not by its terms apply to non-citizens other than lawful permanent residents, but the Department of Homeland Security maintains all personal information—regardless of immigration status—under Privacy Act standards. *See* Department of Homeland Security, Privacy Policy Guidance Memorandum, *available at* https://www.dhs.gov/sites/default/files/publications/privacy-policy-guidance-memorandum-2007-01.pdf (Jan. 7, 2009); *see also* Ex. G ¶ 11 ("USCIS rigorously guards against the unauthorized disclosure of all" personally identifying information "regardless of the status of the alien").

Ex. B ¶ 9; Ex. C ¶ 18; Ex. D ¶ 14; Ex. E ¶ 9. Likewise, DHS acknowledges its obligation "to honor the public's expectation that PII will be protected from release to third parties absent a compelling purpose and particularized showing of need." Ex. G ¶ 13. In other words, both DACA applicants and DHS operated with the understanding that the information shared in the course of applying for DACA would be protected from disclosure. The Fifth Circuit has found similar assurances indicative of substantial privacy interests. *See, e.g.*, *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1991) (recognizing privacy claim where plaintiff provided personal information "under a pledge of confidentiality").

Even in the absence of a specific guarantee of privacy, PII is so sensitive that, particularly when multiple pieces of such information are at issue, "an individual's informational privacy interest in" that information is as a rule "substantial." *See Sherman v. U.S. Dep't of Army*, 244 F.3d 357, 365 (5th Cir. 2001) (interpreting the Freedom of Information Act). Petitioners' declarations document their reasonable fear that their PII—including social security numbers (SSNs), date of birth, and current addresses[14]—will be exposed and used in any of a variety of harmful and frightening ways. Ex. B ¶¶ 10-14; Ex. C ¶¶ 15-21; Ex. D ¶¶ 14-19; Ex. E ¶¶ 15-18. Unauthorized use of such information is an enormous problem:

[14] DHS has explained that it requires applicants "to submit extensive background and identifying information," and that its relevant database includes a variety of personal information. Ex. G ¶¶ 6, 24(a).

> The privacy concern at issue is not, of course, that an individual will be embarrassed or compromised by the particular SSN that she has been assigned. Rather, the concern is that the simultaneous disclosure of an individual's name and confidential SSN exposes that individual to a heightened risk of identity theft and other forms of fraud.

Id. at 365.[15] The sensitivity of such information has repeatedly been recognized in federal statutes. *See, e.g.*, Privacy Act, 5 U.S.C. § 552a(a)(5), (b) (limiting the circumstances in which federal agencies can disclose PII); E-Government Act of 2002, 107 P.L. 347, 116 Stat. 2899 § 208 (establishing requirements "to ensure sufficient protections for the privacy of personal information").[16] *See Sherman*, 244 F.3d at 364-65 (relying in part on the legislative history of the Privacy Act in recognizing informational privacy interest); *see also Nelson*, 562 U.S. at 156; *Greidinger*, 988 F.2d at 1352-55.

Petitioners' legitimate privacy concerns, however, extend beyond the robust privacy interest in sensitive personal information they share with the general public, because they have an additional significant privacy interest in not being involuntarily

[15] S*ee also Greidinger v. Davis*, 988 F.2d 1344, 1353 (4th Cir. 1993) ("armed with one's SSN, an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain the person's paycheck"). As these cases make clear, personal information need not relate to embarrassing or intimate matters to be protected from unjustified disclosure. *See, e.g.*, *Plante*, 575 F.2d at 1135-36.

[16] Likewise, courts, including the district court below, have established detailed policies to protect personally identifying information from disclosure. *See, e.g.*, S.D. Tex. Gen. Order 2004-11, *available at* http://www.txs.uscourts.gov/sites/txs/files/general-orders/2004-11.pdf.

identified as DACA recipients. Ex. B ¶¶ 10-11; Ex. C ¶ 15; Ex. D ¶ 14; Ex. E ¶¶ 15-16. Moreover, for Petitioners, like many DACA recipients, those fears are compounded by the privacy interest in not exposing their family members' immigration status through the disclosure of their own personal information. Ex. B ¶ 13; Ex. C ¶ 17; Ex. D ¶ 16; Ex. E ¶ 16. Finally, the DACA recipients have good cause to fear that disclosure of their information beyond the district court—whether authorized or unintentional—could expose them to harassment, stigma, and discrimination based on their immigration status and resulting from political opposition to DACA. Ex. B ¶ 12; Ex. C ¶¶ 16-17; Ex. D ¶ 20; Ex. E ¶ 15.

The Petitioners' privacy concerns in this regard must be understood against the backdrop of recent events in the Plaintiff States. Some of these very states have previously sought to regulate immigrants in ways that are unlawful and unconstitutional. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012) (striking down as preempted an Arizona provision purporting to authorize state officials to arrest noncitizens on the basis of possible removability); *Doe v. Hobson*, 17 F. Supp. 3d 1141, 1146, 1149 (M.D. Ala. 2014); *id.* (consent judgment, Dkt. No. 68) (prohibiting enforcement of an Alabama provision requiring the publication of the names of suspected undocumented noncitizens). DACA recipients in particular have been singled out for special status-based regulations—which have been struck down by the federal courts. *See Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053,

1059 (9th Cir. 2014) (discussing the singling out of DACA recipients for the denial of driver's licenses); *id*. at 1063-67, 1069 (affirming temporary injunction on equal protection grounds); *Arizona Dream Act Coal. v. Brewer*, No. 15-15307, 2016 WL 1358378, at *15 (9th Cir. Apr. 5, 2016) (affirming permanent injunction on preemption grounds). Many public officials in the Plaintiff States have declared their opposition to DACA and/or DACA recipients. *See Arizona Dream Act Coal.*, 757 F.3d at 1059. Against this backdrop, the magnitude of the privacy interests at stake is plain.

ii. The sanctions order's potential to damage DACA recipients' personal privacy interests is further magnified because it establishes no system to prevent unauthorized disclosure

The risks that the district court's order poses to the privacy of 50,000 individuals are further exacerbated by its failure to establish any safeguards to limit the further disclosure of personal information if the Court does provide it to the Plaintiff States.[17]

[17] To be clear, even if the district court had ordered disclosure only to the court itself, with no possibility of further disclosure, that would not eliminate the DACA petitioners' privacy concerns. Human error as well as technical malfunctions can intervene to render public filings that were intended to be kept private. *See, e.g.*, *Oneida Indian Nation v. Cty. of Oneida*, 802 F. Supp. 2d 395, 401 (N.D.N.Y. 2011), *aff'd sub nom. Oneida Indian Nation of New York State v. Bond Schoeneck & King, PLLC*, 503 F. App'x 37 (2d Cir. 2012) (excusing the accidental failure to file a document under seal as required by a court order); *Salomon Smith Barney, Inc. v. HBO & Co.*, No. 98CIV8721(LAK), 2001 WL 225040, at *1 (S.D.N.Y. Mar. 7, 2001) (denying motion to remove from the public record certain documents that were marked as subject to a protective order but "found their way into the Court's public file"). Thus some justification is still necessary, and there simply is none here.

The Supreme Court has recognized "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files" without adequate safeguards. *Whalen*, 429 U.S. at 605. Where such protections are absent, courts are especially likely to find violations of the right to informational privacy. *See, e.g.*, *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 551-53 (9th Cir. 2004) (rejecting required disclosure provisions that failed to adequately establish safeguards for sensitive personal information); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 117-18 (3d Cir. 1987) (holding that certain portions of an employment questionnaire were not inherently objectionable on privacy grounds, but leaving in place an injunction against those questions because safeguards in that case were essentially nonexistent).

The same is true of the district court's sanctions order. The Plaintiff States and their employees, unlike the Department of Homeland Security, are not subject to the Privacy Act's robust requirements, which apply only to federal agencies. *See* 5 U.S.C. § 551(1).[18] Nor does the district court's order establish similar restrictions on the Plaintiff States' handling of PII once it is released to them. The order does

[18] Indeed, state law may *require*, in some circumstances, the disclosure of the DACA recipients' personally identifying information if it is placed in the possession of the Plaintiff States. *Accord ACLU of Mississippi*, 911 F.2d 1173 (noting that Mississippi Public Record Act "generally would require disclosure of all materials" to the public).

not, for example, establish limits on what the Plaintiff States may do with the information; does not prohibit its disclosure to the public; does not establish penalties for wrongful disclosure; does not meaningfully limit the state personnel who may access the information or the circumstances under which they may do so; and does not require that individuals to whom information is disclosed agree to any obligations.[19] Disclosure is therefore especially unwarranted in light of this total lack of safeguards.

III. ISSUANCE OF THE WRIT IS APPROPRIATE HERE

As discussed above, Petitioners clearly satisfy the first two requirements for issuance of a writ, namely that Petitioners have no other adequate means to attain the relief they seek; and that they have satisfied the burden of showing that their right to issuance of the writ is clear and indisputable. Even once these factors are satisfied, however, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *In re U.S.*, 397 F.3d 274, 282 (5th Cir. 2005), subsequent mandamus proceeding sub nom. *United States*

[19] In contrast, when the federal government agreed to release personally identifying information of certain individuals issued three-year DACA renewals after the preliminary injunction was put in place, it did so only pursuant to a stringent protective order. *See* Stipulated Protective Order, *Texas v. United States*, No. 1:14cv254, ECF No. 298. That was so even though those individuals' DACA terms *had* been reduced from three years to two—so the Plaintiff States had an arguable interest in using that personally identifying information to conform their driver's licenses to the shorter period. Here, as discussed above, the states have *no* such interest. Yet the district court's sanctions order establishes far fewer safeguards against the wrongful disclosure of proposed intervenors' personal information—indeed, once the information is disclosed to the states, no safeguards at all.

v. Williams, 400 F.3d 277 (5th Cir. 2005); *Kerr v. U. S. Dist. Court for N. Dist. of California*, 426 U.S. 394, 403 (1976) ("Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.").

This Court has previously found that when "the writ of mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course." *See also United States v. Denson*, 603 F.2d 1143, 1145 (5th Cir. 1979) (en banc). That is precisely the situation here, where the district court exceeded its prescribed authority by requiring the federal government to produce to it a list of personally identifying information for approximately 50,000 DACA recipients despite the fact that no good cause showing had been made for that information by the Plaintiff states and that the production was ordered at precisely in the time that the Supreme Court has under submission argument in the underlying matter and where its decision could result in the dismissal of the entire case for lack of standing.

In addition, when determining that the writ is appropriate under the particular circumstances at issue this Court often looks to the "nature of the 'sanction' imposed by the trial court" to determine whether the trial court abused its discretion. *In re U.S.*, 397 F.3d 274, 286-87 (5th Cir. 2005). Here again, the facts and circumstances surrounding the court's order make clear that the writ it fully appropriate, given the

potentially grave consequences to thousands of immigrant youth (as well as the significant harms imposed on the federal government, *see* Ex. F (Defs.' Mot. to Stay)) at 8-10, if the sanctions order stands.

CONCLUSION

For the reasons above, Petitioners respectfully request that the Court grant the petition and vacate the portion of the district court's May 19, 2016 order that requires the government to file certain information relating to the Petitioners and other DACA recipients.

Dated: June 3, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Petition complies with the page and type-volume limitations of Federal Rule of Appellate Procedure 21(d) and 32(a) because:

1. Exclusive of the exempted portions in Fed. R. App. P. 21(d) and 5th Cir. R. 21, this certificate of compliance, and the tables of contents and authorities, the Petition contains 26 pages.

2. The brief has been prepared in proportionally spaced typeface using MS Word 2000, Font Size 14.

3. The undersigned understands a material representation in completing this certificate, or circumvention of the type-volume limits, may result in the court's striking the Petition and imposing sanctions against the person signing the Petition.

/s/ Karen C. Tumlin
Karen C. Tumlin
Attorneys for Petitioner

CERTIFICATE OF CONFERENCE

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

/s/ Karen C. Tumlin
Karen C. Tumlin

Attorneys for Petitioners

CERTIFICATE OF ELECTRONIC COMPLIANCE

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

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

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

CERTIFICATE OF SERVICE

I certify that this document has been filed with the clerk of the court and served by ECF or email on June 3, 2016, upon counsel of record in the underlying litigation, *Texas v. United States*.

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

Honorable Andrew S. Hanen
c/o Cristina Sustaeta, Case Manager
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/s/ Karen C. Tumlin
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