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

PETITIONERS' EMERGENCY MOTION FOR STAY

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Movant: Natural Born Citizen Party National Committee	Natural Born Citizen Party National Committee c/o Harold W. Van Allen, Co-Chairperson
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).	

FACTUAL BACKGROUND AND NATURE OF EMERGENCY

The factual background in this matter is set forth more fully in the petition for a writ of mandamus filed concurrently with this motion. *See* Petition for Writ of Mandamus (Pets.' Writ) at 4-9.

Petitioners are recipients of deferred action pursuant to the Deferred Action for Childhood Arrivals ("DACA") program. *See* Ex. B (Decl. of A. Villalobos) ¶ 5; Ex. C (Decl. of J. Escalante) ¶ 10; Ex. D (Decl. of J. Doe #4) ¶ 9; Ex. E (Decl. of J. Doe #5) ¶ 10. Each was issued an employment authorization document ("EAD") valid for three years between November 20, 2014 and March 3, 2015. Ex. B (Decl. of A. Villalobos) ¶ 7; Ex. C (Decl. of J. Escalante) ¶ 12; Ex. D (Decl. of J. Doe #4) ¶ 11; Ex. E (Decl. of J. Doe #5) ¶ 12. Each of them resides in a Plaintiff State. Ex. B (Decl. of A. Villalobos) ¶ 3; Ex. C (Decl. of J. Escalante) ¶ 2; Ex. D (Decl. of J. Doe #4) ¶ 5; Ex. E (Decl. of J. Doe #5) ¶ 3. Petitioners are not parties to *Texas v. United States*, No. 14-00254 (S.D. Tex.).

The district court in the *Texas* case issued a sanctions order against Defendants, the federal government, on May 19, 2016. *See* Ex. A (May 19 Order). Among other sanctions, the district court ordered Defendants to file a list of all personally identifying information for all individuals living in the 26 Plaintiff States to whom three-year EADs were issued between November 20, 2014 and March 3, 2015. *Id*. at 22-23. In total that list would contain personally identifying

information for some 50,000 individuals. Ex. G (Decl. of L. Rodriguez) ¶ 5. **The district court ordered this list to be filed not later than June 10, 2016.** Ex. A (May 19 Order) at 23.

Defendants have moved for a stay of the sanctions order. *See* Ex. F (Defs.' Mot. to Stay). The district court has not ruled on that motion, but has scheduled an argument regarding the motion on June 7, three days before the deadline to file the list.

Petitioners' sensitive personal information will be on that list if it is filed. As set forth in the petition for a writ of mandamus filed concurrently, the district court's order is completely unjustified and fails to take account of the constitutional privacy interests of Petitioners and some 50,000 other nonparty individuals. *See* Pets.' Writ at 14-24. Because the district court has ordered filing of the list immediately—even before the issues pending at the Supreme Court in the *Texas* case are resolved—an emergency stay is necessary to preserve the status quo and protect Petitioners' ability to assert their privacy rights before this Court. **Petitioners respectfully request that this Court enter a stay no later than June 8, 2016.**[1]

[1] Petitioners request that the Court rule at least 48 hours before the June 10 district court deadline so petitioners may seek further review if necessary.

ARGUMENT AND AUTHORITIES

Petitioners respectfully move this court for a stay of the portion of the sanctions order regarding the production of their personal information pending disposition of the petition for a writ of mandamus filed concurrently with this motion. This Court has authority under the All Writs Act, 28 U.S.C. § 1651, to issue a stay pending its resolution of the mandamus petition. Moreover, such a stay is amply warranted because the district court has entered an order infringing on the privacy rights of some 50,000 nonparty immigrant youth without justification and on extremely short notice.

I. THIS COURT HAS AUTHORITY TO GRANT A STAY

Petitioners are seeking mandamus relief pursuant to the All Writs Act, 28 U.S.C. § 1651, which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Under the All Writs Act, this Court also has the authority to enter an emergency stay pending final disposition of this mandamus petition. *See* Fed. R. App. P. 8 advisory comm. nn. (1967) (observing that "the power of a court of appeals to stay proceedings in the district court during the pendency of an appeal . . . exists by virtue of the all writs statute"); *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam) (noting the "flexibility" of the Supreme Court's

"longstanding approach to applications for stays and other summary remedies granted without determining the merits of the case under the All Writs Act") (citing *Heckler v. Lopez*, 463 U.S. 1328 (1983) (Rehnquist, J., in chambers)); *United States v. Lynd*, 301 F.2d 818, 823 (5th Cir. 1962) (granting a motion pursuant to the All Writs Act for an injunction pending appeal from the denial of a temporary injunction).

Because a petition for a writ of mandamus is an original action, Rule 8, which governs motions for stays pending appeal, does not apply. *Compare* Fed. R. App. P. Title II ("Appeal from a Judgment or Order of a District Court," including Rule 8) *with id*. Title V ("Extraordinary Writs," including rule governing mandamus). There is therefore no requirement that Petitioners first seek a stay in the district court pursuant to Rule 8(a)(1).

Even if Rule 8 did apply, "moving first in the district court would be impracticable" under the circumstances of this case. Fed. R. App. P. 8(a)(2)(A)(i). First, Petitioners are not parties to the *Texas* litigation, so seeking a stay would require Petitioners to seek to intervene, and have that intervention granted. Second, the sanctions order was filed just over two weeks ago. Because Petitioners were unaware until that time that their personal information might be put at risk in that matter, there has been only a truncated period of time to retain counsel, identify legal theories, and prepare to challenge the order. Requiring an additional

procedural step—intervention and pursuit of a stay before the district court—would be impracticable. Third, the Defendants have been ordered to file the list on June 10, one week from today. In light of that imminent deadline, it would likewise be impracticable to delay seeking mandamus in the Court of Appeals in order to first seek a stay in the district court. Accordingly, even if the standard of Rule 8 did apply, a stay is procedurally appropriate under these circumstances.

II. AN EMERGENCY STAY IS AMPLY WARRANTED

A stay of the district court's order to produce the list of personal identifying information is amply warranted in this case. The Court considers four factors in deciding whether to grant a stay pending disposition of the merits:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Texas v. United States, 787 F.3d 733, 746-47 (5th Cir. 2015) (internal quotation marks omitted). These factors substantially overlap with the mandamus merits analysis.

1. Petitioners are likely to succeed on the merits.

Petitioners have simultaneously filed a mandamus petition, setting out in full an explanation for why the writ should issue. *See* Pets.' Writ. For all the reasons

set forth in their petition, Petitioners respectfully submit that they are likely to succeed on the merits.

2. Petitioners will be irreparably injured absent a stay.

As set forth in the mandamus petition, the district court's order violates Petitioners' constitutional right against unwarranted disclosure of sensitive personal information. *See* Pets.' Writ at at pp. 14-24. Such unjustified disclosure would irreparably harm them. The violation of a constitutional right, including the right to privacy, generally "cannot be undone by monetary relief" and is therefore irreparable. *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). Moreover, even apart from the constitutional basis of Petitioner's claim, the unwarranted disclosure of private information is itself an irreparable injury. *See Roberts v. Austin*, 632 F.2d 1202, 1214 (5th Cir. 1980). Therefore, absent a stay, Petitioners will suffer irreparable injury.

3. No other parties will be injured absent a stay.

In their mandamus petition, Petitioners explain that neither the district court nor the Plaintiff States have *any* legitimate interest in their personally identifying information. *See* Pets.' Writ at pp. 14-17. Thus a stay of the district court's order would cause no injury to any party or anyone else. Moreover, even if the Plaintiff States had some conceivable legitimate interest in this information, the district court itself made clear that it would not entertain a request to disclose information

until the Supreme Court has issued a decision in *U.S. v. Texas*, No. 15-674 (U.S. filed Nov. 20, 2015). *See* Ex. A (May 19 Order) at 23. Thus, at a minimum, a stay of the district court's order until such time as the Supreme Court issues its decision could not harm the Plaintiff States.

4. The public interest strongly militates for a stay.

The public interest in this case uniformly argues in favor of a stay. Petitioners are only four out of some 50,000 individuals whose sensitive personal identifiers and immigration status information is put at risk of exposure because of the district court's order. Likewise, Defendants have explained that the court's order to produce that information will heavily burden the government's resources and undermine public confidence in the security of personal information disclosed to the government, chilling future applications for immigration benefits. *See* Ex. F (Defs.' Mot. to Stay) at 10-11.

By contrast, granting a stay will not harm the public interest in any way. As explained in the mandamus petition, there is not only no justification for any disclosure of that private information, there is no reason whatsoever for the requirement that the government file all such information with the district court immediately. *See* Pets.' Writ at p. 17 n.12. Indeed, the director of U.S. Citizenship and Immigration Services ("USCIS") the agency responsible for the relevant databases has sworn under oath that the information will remain secure

and available, should disclosure ever become warranted. Ex. G (Decl. of L. Rodriguez) ¶ 9. Thus there is simply no harm in staying the order until this Court has an opportunity to resolve the mandamus petition.

The pendency of the *Texas* litigation at the U.S. Supreme Court further underscores the appropriateness of a stay. One possible resolution of the issues before the Supreme Court would be a holding that the Plaintiff States lack standing to bring the underlying suit at all. But absent a stay, Petitioners' sensitive personal information will be disclosed *before* the Supreme Court can weigh in regarding the federal courts' subject matter jurisdiction—or lack thereof—over this entire litigation. A stay is therefore by far the most prudent course and the one most consistent with the public interest.

CONCLUSION

For the reasons above, Petitioners respectfully request that the Court stay the portion of the district court's May 19, 2016 order that requires the government to file certain information relating to the DACA recipients, pending resolution of the petition for a writ of mandamus in this matter.

I certify that the facts supporting emergency consideration of the motion are true and complete.

Dated: June 3, 2016

Respectfully submitted,

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Counsel for Petitioners

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
Counsel 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
Counsel for Petitioners

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/s/ Karen C. Tumlin
Karen C. Tumlin
Counsel 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*, No. 14-cv-00254 (S.D. Tex. filed Dec. 3, 2014).

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
United States District Clerk's Office
United States Courthouse
600 East Harrison St., #101
Brownsville, TX 78520
Judge_hanen@txs.uscourts.gov

/s/ Karen C. Tumlin
KAREN C. TUMLIN
Counsel for Petitioner