IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, ET AL.	§	
	§	
Plaintiffs,	§	
v.	§	
	§	Civil Action No. 1:14-cv-254
UNITED STATES OF AMERICA, ET AL.	§	
	§	
Defendants.	§	
	§	

MOTION TO STAY MERITS PROCEEDINGS

The Plaintiff States move to continue the stay of proceedings on the merits of the claims until September 5, 2017 to allow the parties additional time to attempt to resolve this matter without further litigation. The Defendants are unopposed to this requested relief; the Intervenors are opposed. The basis for this Motion is as follows:

Background

1. On December 3, 2014, the Plaintiff States filed this lawsuit to immediately halt the implementation of the DAPA and Expanded DACA programs.

2. On February 16, 2015, this Court granted the requested relief and issued a preliminary injunction of DAPA and Expanded DACA. ECF Nos. 144, 145.

3. The Defendants appealed from this Court's preliminary injunction. The Fifth Circuit affirmed, finding that the Plaintiff States had standing and that the Plaintiff States satisfied the equitable requirements for a preliminary injunction. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam).

4. The Supreme Court of the United States subsequently affirmed, by an equally divided Court. 136 S. Ct. 2271 (2016) (per curiam).

5. On July 18, 2016, the Defendants filed a petition for rehearing in the Supreme Court. The parties subsequently agreed to continue the stay of this Court's merits proceedings until the Supreme Court ruled on the petition for rehearing.

6. On October 3, 2016, the Supreme Court denied the Defendants' petition for rehearing.

7. On October 6, 2016, this Court ordered the parties to propose a scheduling order by November 11, 2016. ECF No. 422.

8. On November 18, 2016, the parties filed a joint motion to stay the merits proceedings until February 20, 2017, to allow for the new Presidential Administration to consider its position in this litigation. ECF No. 430.

9. On January 19, 2017, this Court issued an order extending the stay of merits proceedings until March 17, 2017. In that Order, the Court noted that it would "consider an additional stay if good cause exists and if agreed to by all the parties." ECF No. 435.

10. On February 20, 2017, the Secretary of Homeland Security issued a memorandum providing new guidance on immigration enforcement priorities. *See* Enforcement of the Immigration Laws to Serve the National Interest, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf. The memorandum rescinded previous guidance on immigration enforcement priorities, but left DACA,

Expanded DACA, and DAPA in place. *Id.* at 2. DHS Secretary Kelly further stated that DAPA would "be addressed in future guidance." *Id.* at 2 n.1.

11. On March 17, 2017, the Defendants filed an unopposed motion to extend the stay of merits proceedings until June 15, 2017. ECF No. 438.

12. Finding that the parties had established good cause to continue the stay, this Court granted Defendants' unopposed motion on March 22, 2017, ordering the parties to file a proposed scheduling order by June 15, 2017. ECF No. 439.

13. On June 15, 2017, DHS Secretary Kelly issued a memorandum rescinding, in large part, the November 2014 memorandum that created the DAPA and Expanded DACA programs. A copy of the June 15, 2017 memorandum is attached hereto as **Exhibit A**.

14. DHS Secretary Kelly's memorandum provided that "[t]he June 15, 2012 DACA memorandum, however, will remain in effect," and certain permits issued pursuant to "Expanded DACA" would not be rescinded.

15. On June 29, 2017, the Attorneys General of the States of Texas, Alabama, Arkansas, Idaho, Kansas, Louisiana, Nebraska, South Carolina, Tennessee, and West Virginia, along with the Governor of Idaho, sent a letter to U.S. Attorney General Jeff Sessions, requesting that the Secretary of Homeland Security "reconsider the decision to retain the DACA program." A copy of the June 29, 2017 letter is attached hereto as **Exhibit B**.

16. The signatories of that June 29, 2017 letter requested that the Secretary of Homeland Security "phase out the DACA program by rescinding the

June 15, 2012 DACA memorandum and ordering that the Executive Branch will not renew or issue any new DACA or Expanded DACA permits in the future."

17. That June 29, 2017 letter stated that "[i]f, by September 5, 2017, the Executive Branch agrees to rescind the June 15, 2012 DACA memorandum and not to renew or issue any new DACA or Expanded DACA permits in the future," then the Plaintiff States would voluntarily dismiss this lawsuit. Otherwise, the letter indicated, "the complaint in [this] case will be amended to challenge both the DACA program and the remaining Expanded DACA permits."

18. In order to allow Defendants time to consider the proposal regarding DACA and Expanded DACA from the June 29, 2017 letter, the Plaintiff States seek to stay all merits proceedings until September 5, 2017.

Argument

19. A district court has "broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997).

20. Here, good cause exists to continue the stay of merits proceedings because the Defendants' consideration of, and their response to, the June 29, 2017 letter regarding DACA and Expanded DACA will dictate the further arguments of the parties and may affect the extent to which any further litigation will be necessary in this case.

21. If the Defendants agree to rescind the June 15, 2012 DACA memorandum and not to renew or issue any new DACA or Expanded DACA permits

in the future, the Plaintiff States will voluntarily dismiss their complaint under Fed. R. Civ. P. 41.

22. The Defendants are not opposed to a continuation of the stay, but take no position on the Plaintiff States' arguments in support of the stay. Further, the parties agree that, with the filing of this motion, no party has waived any rights or arguments they would otherwise maintain.

Conclusion

The Plaintiff States respectfully request that the Court grant a stay of the proceedings on the merits until September 5, 2017.

Dated: July 7, 2017

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

/s/ *Angela V. Colmenero*
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COUNSEL FOR PLAINTIFF STATES

Certificate of Conference

I hereby certify that on July 6, 2017 counsel for the Plaintiff States, the Defendants, and the Intervenors conferred regarding this motion. Defendants indicated that they were not opposed to the relief requested herein; Intervenors indicated that they were opposed.

/s/ *Adam Arthur Biggs*
ADAM ARTHUR BIGGS
Assistant Attorney General

Certificate of Service

I hereby certify that on this 7th day of July, 2017, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system and served on all attorney(s) and/or parties of record, via the CM/ECF service and/or via electronic mail.

/s/ *Adam Arthur Biggs*
ADAM ARTHUR BIGGS
Assistant Attorney General

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

June 15, 2017

MEMORANDUM FOR:

Kevin K. McAleenan
Acting Commissioner
U.S. Customs and Border Protection

James W. McCament
Acting Director
U.S. Citizenship and Immigration Services

Thomas D. Homan
Acting Director
U.S. Immigration and Customs Enforcement

Joseph B. Maher
Acting General Counsel

Michael T. Dougherty
Assistant Secretary for Border, Immigration, and Trade Policy

FROM: John F. Kelly

SUBJECT: Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")

On January 25, 2017, President Trump issued Executive Order No. 13768, "Enhancing Public Safety in the Interior of the United States." In that Order, the President directed federal agencies to "[e]nsure the faithful execution of the immigration laws . . . against all removable aliens," and established new immigration enforcement priorities. On February 20, 2017, I issued an implementing memorandum, stating that "the Department no longer will exempt classes or categories of removable aliens from potential enforcement," except as provided in the Department's June 15, 2012 memorandum establishing the Deferred Action for Childhood Arrivals ("DACA") policy[1] and November 20, 2014 memorandum providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") and for the

[1] Memorandum from Janet Napolitano, Sec'y, DHS to David Aguilar, Acting Comm'r, CBP, et al., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (June 15, 2012).

expansion of DACA[2]. After consulting with the Attorney General, I have decided to rescind the November 20, 2014 DAPA memorandum and the policies announced therein.[3] The June 15, 2012 DACA memorandum, however, will remain in effect.

Background

The November 20, 2014 memorandum directed U.S. Citizenship and Immigration Services ("USCIS") "to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis," to certain aliens who have "a son or daughter who is a U.S. citizen or lawful permanent resident." This process was to be known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or "DAPA."

To request consideration for deferred action under DAPA, the alien must have satisfied the following criteria: (1) as of November 20, 2014, be the parent of a U.S. citizen or lawful permanent resident; (2) have continuously resided here since before January 1, 2010; (3) have been physically present here on November 20, 2014, and when applying for relief; (4) have no lawful immigration status on that date; (5) not fall within the Secretary's enforcement priorities; and (6) "present no other factors that, in the exercise of discretion, make[ ] the grant of deferred action inappropriate." The Memorandum also directed USCIS to expand the coverage criteria under the 2012 DACA policy to encompass aliens with a wider range of ages and arrival dates, and to lengthen the period of deferred action and work authorization from two years to three ("Expanded DACA").

Prior to implementation of DAPA, twenty-six states—led by Texas—challenged the policies announced in the November 20, 2014 memorandum in the U.S. District Court for the Southern District of Texas. In an order issued on February 16, 2015, the district court preliminarily enjoined the policies nationwide on the ground that the plaintiff states were likely to succeed on their claim that DHS violated the Administrative Procedure Act ("APA") by failing to comply with notice-and-comment rulemaking requirements. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015). The Fifth Circuit Court of Appeals affirmed, holding that Texas had standing, demonstrated a substantial likelihood of success on the merits of its APA claims, and satisfied the other requirements for a preliminary injunction. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). The Supreme Court affirmed the Fifth Circuit's ruling by equally divided vote (4-4) and did not issue a substantive opinion. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

The litigation remains pending before the district court.

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[2] Memorandum from Jeh Johnson, Sec'y, DHS, to Leon Rodriguez, Dir., USCIS, et al., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents" (Nov. 20, 2014).

[3] This Memorandum does not alter the remaining periods of deferred action under the Expanded DACA policy granted between issuance of the November 20, 2014 Memorandum and the February 16, 2015 preliminary injunction order in the Texas litigation, nor does it affect the validity of related Employment Authorization Documents (EADs) granted during the same span of time. I remind our officers that (1) deferred action, as an act of prosecutorial discretion, may only be granted on a case-by-case basis, and (2) such a grant may be terminated at any time at the agency's discretion.

Rescission of November 20, 2014 DAPA Memorandum

I have considered a number of factors, including the preliminary injunction in this matter, the ongoing litigation, the fact that DAPA never took effect, and our new immigration enforcement priorities. After consulting with the Attorney General, and in the exercise of my discretion in establishing national immigration enforcement policies and priorities, I hereby rescind the November 20, 2014 memorandum.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 29, 2017

The Honorable Jeff Sessions
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Re: *Texas, et al. v. United States, et al.*, No. 1:14-cv-00254 (S.D. Tex.)

Dear Attorney General Sessions:

The State plaintiffs that successfully challenged the Obama Administration's DAPA and Expanded DACA programs commend the Secretary of Homeland Security for issuing his June 15, 2017 memorandum rescinding, in large part, his predecessor's November 20, 2014 memorandum creating those DAPA and Expanded DACA programs.

As you know, this November 20, 2014 memorandum creating DAPA and Expanded DACA would have granted eligibility for lawful presence and work authorization to over four million unlawfully present aliens. Courts blocked DAPA and Expanded DACA from going into effect, holding that the Executive Branch does not have the unilateral power to confer lawful presence and work authorization on unlawfully present aliens simply because the Executive chooses not to remove them. Rather, "[i]n specific and detailed provisions, the [Immigration and Nationality Act] expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present." *Texas v. United States*, 809 F.3d 134, 179 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). "Entirely absent from those specific classes is the group of 4.3 million illegal aliens who would be eligible for lawful presence under DAPA." *Id.* Likewise, "[t]he INA also specifies classes of aliens eligible and ineligible for work authorization . . . with no mention of the class of persons whom DAPA would make eligible for work authorization." *Id.* at 180-81. Thus, "DAPA is not authorized by statute," *id.* at 184, and "DAPA is foreclosed by Congress's careful plan," *id.* at 186.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

For these same reasons that DAPA and Expanded DACA's unilateral Executive Branch conferral of eligibility for lawful presence and work authorization was unlawful, the original June 15, 2012 DACA memorandum is also unlawful. The original 2012 DACA program covers over one million otherwise unlawfully present aliens. *Id.* at 147. And just like DAPA, DACA unilaterally confers eligibility for work authorization, *id.*, and lawful presence without any statutory authorization from Congress.[1]

Nevertheless, the Secretary of Homeland Security's June 15, 2017 memorandum provided that "[t]he June 15, 2012 DACA memorandum, however, will remain in effect," and some "Expanded DACA" permits will also remain in effect.

We respectfully request that the Secretary of Homeland Security phase out the DACA program. Specifically, we request that the Secretary of Homeland Security rescind the June 15, 2012 DACA memorandum and order that the Executive Branch will not renew or issue any new DACA or Expanded DACA permits in the future. This request does not require the Executive Branch to immediately rescind DACA or Expanded DACA permits that have already been issued. This request does not require the Secretary to alter the immigration enforcement priorities contained in his separate February 20, 2017 memorandum.[2] And this request does not require the federal government to remove any alien.

If, by September 5, 2017, the Executive Branch agrees to rescind the June 15, 2012 DACA memorandum and not to renew or issue any new DACA or Expanded DACA permits in the future, then the plaintiffs that successfully challenged DAPA and Expanded DACA will voluntarily dismiss their lawsuit currently pending in the Southern District of Texas. Otherwise, the complaint in that case will be amended to challenge both the DACA program and the remaining Expanded DACA permits.

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[1] *See, e.g.*, USCIS, DACA Frequently Asked Questions, https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (last visited June 29, 2017) (DACA recipients "are considered to be lawfully present").

[2] *See* DHS, Enforcement of Immigration Laws to Serve the National Interest, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

We appreciate the opportunity to continue working with you, and the entire Presidential Administration, to cooperatively enforce federal immigration laws.

Sincerely,

Ken Paxton
Attorney General of Texas

Steve Marshall
Attorney General of Alabama

Leslie Rutledge
Attorney General of Arkansas

Lawrence G. Wasden
Attorney General of Idaho

C.L. "Butch" Otter
Governor of Idaho

Derek Schmidt
Attorney General of Kansas

Jeff Landry
Attorney General of Louisiana

Doug Peterson
Attorney General of Nebraska

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Patrick Morrisey
Attorney General of West Virginia

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	§	Civil Action No. 1:14-cv-254
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	§	
Defendants.	§	
	§	

ORDER GRANTING MOTION TO STAY MERITS PROCEEDINGS

On this day came on to be considered the Plaintiff States' Motion to Stay Merits Proceeding. After due consideration, the Court finds that the Motion should be and is hereby **Granted.**

IT IS HEREBY ORDERED that all merits proceedings are stayed until September 5, 2017.

SIGNED this the _____ day of _____, 2017.

_____
Honorable Andrew S. Hanen
U.S.D.J.