

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
A.C.R. et al., : 25-cv-03962-EK-TAM
: :
Plaintiffs, : :
: :
- versus - : U.S. Courthouse
: Brooklyn, New York
KRISTI NOEM et al., : :
: September 4, 2025
Defendants : 2:22 p.m.
-----X

TRANSCRIPT OF CIVIL CAUSE FOR ORDER TO SHOW CAUSE
BEFORE THE HONORABLE ERIC R. KOMITEE
UNITED STATES DISTRICT JUDGE

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1 THE CLERK: Civil Cause for Order to Show
2 Cause, docket number 25-cv-3962, *A.C.R. et al. v. Noem et*
3 *al.*

4 Counsel, please state your appearances for the
5 record beginning with the plaintiff.

6 MS. KRANER: Good afternoon, your Honor.
7 Natalie Kraner from Lowenstein Sandler on behalf of
8 plaintiffs.

9 MR. MAGLIERY: Good afternoon, your Honor.
10 It's John Magliery of Davis Wright Tremaine also on
11 behalf of plaintiffs.

12 Ms. Kraner and I will have the speaking roles
13 but we're here with our colleagues from Davis Wright
14 Tremaine, Lowenstein Sandler, National Immigration
15 Project, KIND, and I'm missing one, and Public Counsel.
16 Thank you, your Honor.

17 THE COURT: Good afternoon to you all. For the
18 government?

19 MR. DE LAS ALAS: Yes, your Honor. Dean De Las
20 Alas for the U.S. Government representing all defendants.
21 I'll be the main one speaking, your Honor.

22 MR. SILVIS: Your Honor, William Silvis,
23 Department of Justice. Your Honor, I just got filing
24 privileges so I'll be entering my appearance after the
25 hearing with the Court's indulgence.

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1 THE COURT: That's fine. Good afternoon to you
2 both as well.

3 All right. This case, as I'm sure you all
4 know, raises a number of issues, some of them fairly
5 complicated. I don't have anything booked after this
6 today, and so if we go long, that's fine with me. But
7 we'll start with counsel for the plaintiff, since it's
8 your motion for a preliminary injunction and for class
9 certification. I want to spend more time on the
10 preliminary injunction side of that divide.

11 You should assume however you want to divide up
12 the time that you'll have a half an hour or 45 minutes in
13 the first instance and then we'll hear from the
14 defendants.

15 MS. KRANER: Okay. Thank you, your Honor.
16 Would you prefer to hear from us from the lectern or the
17 table?

18 THE COURT: Whatever you're comfortable with.
19 The one absolute requirement is that we have you on a
20 microphone because we're doing electronic sound
21 recording.

22 MS. KRANER: Okay.

23 THE COURT: And so if you stray too far from
24 the microphones, you'll hear from the ESR people.

25 MS. KRANER: Okay. I prefer the lectern if

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1 that's possible just because --

2 THE COURT: Please.

3 MS. KRANER: Apologies to my colleagues.

4 Your Honor, with respect to the argument, Mr.
5 Magliery had planned to divide it as follows.

6 I will provide a brief factual overview that's
7 pertinent to both motions and address the jurisdiction
8 issue and briefly address the motion for class
9 certification. And Mr. Magliery will address the
10 standing and the motion for the preliminary injunction.

11 THE COURT: Please.

12 MS. KRANER: Okay. At its core, this case is
13 about the lives and safety of nearly 200,000 immigrant
14 children and youth who Congress explicitly intended to
15 place on a pathway towards permanent protection.

16 Instead, the government has set the stage for
17 their deportation through its unlawful and arbitrary
18 termination that Special Immigrant Juvenile Status, which
19 I'll refer to as SIJ, Deferred Action Policy.

20 The individual plaintiffs and putative class
21 members have all survived parental abuse, neglect or
22 abandonment, and were approved by the government or SIJ
23 giving them the pathway to lawful permanent residency.
24 The deferred action policy at issue furthered Congress's
25 intent to allow these children and young people to remain

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1 safely in the United States while they wait to apply for
2 a green card, a wait that lasts years.

3 But their lives have been upended by the
4 government sudden and improper termination of the policy
5 exposing them to deportation and other harms while they
6 wait for a visa to become available that allows them to
7 move along their already pre-approved and statutorily
8 enabled path towards permanent residence.

9 The APA ensures that defendants cannot unravel
10 that protection without a reasoned explanation which is
11 precisely what they did here. And we are here today
12 seeking class certification and a preliminary injunction
13 to address the irreparable harms that these vulnerable
14 youth are experiencing as a result of the unlawful
15 rescission.

16 Your Honor, I know --

17 THE COURT: Can I just make sure I understand
18 what -- you're seeking vacatur under the APA as a final
19 remedy.

20 MS. KRANER: Correct.

21 THE COURT: You're seeking a preliminary
22 injunction. You've not asked for relief under Section
23 705 of the APA.

24 MS. KRANER: Well, we believe it's incorporated
25 in our papers, or at least implicit, that we are seeking

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1 a stay as well under APA, but for purposes of the
2 preliminary injunction standard, we believe that we
3 satisfy it without having to rely on Section 705.

4 THE COURT: Okay. One difference between
5 Section 705 relief and preliminary injunctive relief is I
6 think that Section 1259 of the INA applies to preliminary
7 injunctions. I don't think anybody's arguing it applies
8 to Section 705 relief.

9 MS. KRANER: Correct. They could turn to the
10 APA and Section 705 does not fall -- every court that's
11 looked at this has held that 1252(f)(1) does not apply to
12 it. We believe that 1252(f)(1) does not apply in any
13 event here because the actual policy at issue, which is
14 the deferred action policy, does not fall within the
15 covered provisions of the statute under 1252(f)(1).

16 And I can jump ahead to jurisdiction because I
17 think that's a natural place to start the argument. And
18 you know, the best place to start is the statutory text
19 itself. And Section 1252(f)(1) states that no court with
20 respect to classwide injunctive relief, no court other
21 than the Supreme Court shall have jurisdiction or
22 authority to enjoin or restrain the operation of the
23 provisions of Part 4 of the subchapter.

24 Part 4 includes Sections 1221 to 32 which
25 pertain to the inspection, apprehension, examination, and

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1 removal of non-citizens. What you don't find within
2 there is anything relating to deferred action and that's
3 because deferred action is a creature of prosecutorial
4 discretion. It is not --

5 THE COURT: So when we look at -- hold on just
6 one second.

7 (Pause in proceedings)

8 THE COURT: I'm being told my files are synced
9 but I'm not finding what I'm looking for. Hold on just
10 one second.

11 (Pause in proceedings)

12 THE COURT: I'm just going to reboot my
13 computer. Hold on one second.

14 So *Aleman Gonzalez* was about bail and the
15 Supreme Court said something along the lines of an
16 injunction would restrain the operations of the statute
17 if it does I think either of two things.

18 MS. KRANER: Yes.

19 THE COURT: Right?

20 MS. KRANER: *Aleman Gonzalez* -- I'm sorry, your
21 Honor, I didn't mean to cut you off.

22 THE COURT: It does either of two things. One
23 is require the government to take some action that the
24 relevant statute which is on point does not require or
25 otherwise prohibit them from taking some action that the

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1 statute allegedly on point permits.

2 And bail is just the flip side of detention,
3 right? So plaintiffs are asking for bail pursuant to a
4 classwide injunction. The Supreme Court makes what I
5 think is a relatively uncontroversial observation that
6 granting bail on a classwide basis would inhibit the
7 operation of a detention statute because bail and
8 detention are just the flip sides of the same coin.

9 I understand Sections 1221 through 1231 don't
10 speak explicitly to deferred action, but isn't deferred
11 action just the flip side of removal --

12 MS. KRANER: It is not, your Honor.

13 THE COURT: -- or deportation?

14 MS. KRANER: It is not, your Honor. Just --
15 and I will answer that question, but just before I get to
16 that, *Aleman Gonzalez*, they were dealing with,
17 specifically dealing with Section 1231(a)(6) which was
18 immigration detention. There was no dispute in that case
19 that the policy at issue directly impacted a covered
20 provision. So that's in one way that *Aleman Gonzalez* is
21 different than our case here.

22 THE COURT: So --

23 MS. KRANER: But deferred --

24 THE COURT: So you'll hear me ask the
25 defendants here what section or sections within 1221

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1 through 1231 they think your injunction would inhibit or
2 restrain, enjoin or restrain. But let's just look
3 through the list.

4 MS. KRANER: They had identified in their
5 opposition brief, I don't have the exact numbers, but
6 essentially their argument is that the, and I have it
7 here, that restating the 2022 policy would restrict the
8 manner in which the government engages in enforcement
9 activity.

10 THE COURT: Right.

11 MS. KRANER: And you know, just to go back to
12 the language of *Aleman Gonzalez*, which I do think is
13 really instructive here, the court explained and
14 defined --

15 THE COURT: No, but just bear with me for a
16 second. We're talking about Part 4 --

17 MS. KRANER: Yes.

18 THE COURT: -- of Chapter 12, Sections 1221
19 through 1232. And among those are Section 1227, which is
20 titled *Deportable Aliens*; 1228, which is titled *Expedited*
21 *Removal of Aliens Convicted of Aggravated Felonies*; 1229,
22 *Initiation of Removal Proceedings*; 1229(a), *Removal*
23 *Proceedings*; 1229(b), *Cancellation of Removal and*
24 *Adjustment of Status*; and 1231, *Detention and Removal of*
25 *Aliens Ordered Removed*.

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1 So you don't think your proposed injunction
2 would restrain the operation of any of those provisions?

3 MS. KRANER: No, your Honor, and for a few
4 reasons.

5 First, the way that *Aleman Gonzalez* defined
6 operation, it was whether it restrain efforts to come and
7 I quote, "enforce, implement, or otherwise carry out the
8 covered provisions."

9 Your Honor had asked whether removal, deferred
10 action is the flip side of removal and the answer to that
11 is no. And that's because it is completely
12 discretionary.

13 The government itself concedes in its June 6th
14 internal memorandum, and this is what they had submitted
15 as Exhibit E to their PI was the ECF 42-5, that deferred
16 action is revokable and DHS may initiate criminal or
17 other enforcement action against a non-citizen granted DA
18 at any time. It is completely discretionary function
19 which they can grant, which they can revoke. And if
20 that's the case, if they themselves are saying that they
21 can initiate criminal or other enforcement actions at any
22 time and that they can move forward with removal at any
23 time, which is a language that's directly in the 2022
24 policy, how can that restrain their efforts to enforce,
25 implement, or otherwise carry out the provisions.

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1 Their interpretation of 1252(f)(1) would mean
2 that any challenge to any immigration benefit would
3 restrain their ability to engage in activities that fall
4 within those covered provisions. And every court that's
5 looked at it, your Honor, has found that that's just not
6 the case. And I think the closest -- so first of all, no
7 court has examined this with respect to deferred action
8 which is truly a unique creature because it's not
9 legislatively codified anywhere. Not only does it not
10 live in the current provision, it doesn't live in the
11 INA. It's entirely a creature of prosecutorial
12 discretion.

13 But the closest analogy is to cases that
14 involve challenges to asylum or adjustment of status.
15 For example, challenges to policies addressing them.

16 And what the courts have found in those cases,
17 and I'm quoting now --

18 THE COURT: It's finally booting.

19 MS. KRANER: -- *Gonzalez v. DHS*, is that --

20 THE COURT: Sorry. I'm having some computer
21 problems as you can tell.

22 I'm looking at page 551 of *Garland v. Aleman*
23 *Gonzalez* and the majority concludes that the orders in
24 question "enjoin or restrain the operation" of Section
25 1231(a)(6) for two reasons.

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1 One, because they require officials to take
2 actions that are not required by 1231(a)(6).

3 And two, to refrain from actions that are
4 allowed by 1231(a)(6).

5 And let me just look at your, starting from
6 there, to your prayer for relief. So you want, for
7 example, me to order the government, among other things,
8 to do the following. To take all steps necessary to
9 conduct deferred action determinations for members of the
10 proposed deferred action class within 90 days of my order
11 and to provide the class members the grounds for any
12 denials of deferred action in writing within 14 days
13 thereafter.

14 You're telling me that that is not an action --
15 so look at Section 1229(a) for example titled Removal
16 Proceedings, sets forth a bunch of procedures for how
17 removal proceedings are supposed to work. And I don't
18 think it says, or tell me if I'm wrong, provide the
19 grounds for any denial of deferred action in writing
20 within 14 days.

21 So in the ordinary course the way Section 1229
22 and Part 4 more generally work is the government can
23 remove people according to the provisions in Part 4. But
24 I think at least implicit in your request for injunctive
25 relief is that the government can't remove the plaintiffs

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1 while these considerations that you want me to order are
2 going on, can they?

3 MS. KRANER: That's separate. To answer your
4 question with respect to does this hinder their ability
5 to remove generally our injunction, the answer to that is
6 no, your Honor, because the relief that we're seeking is
7 to reinstate a policy where they considered individuals
8 for deferred action.

9 THE COURT: No, I want to be locked in my
10 specific question here if I can. relief.

11 So Part E, 13E of your prayer for relief, you
12 want me to order the government to take all steps
13 necessary to conduct deferred action determinations for
14 members of one of the classes at issue here within 90
15 days of my order and to provide a written explanation of
16 any denial within 14 days thereafter.

17 Am I right to understand that to mean that
18 during that 90-day period while deferred action is being
19 considered, the government can't remove the people as to
20 whom they're considering deferred action? That would
21 seem obviously implicit. Is it?

22 MS. KRANER: Our request -- well, just to back
23 up a little. We did request --

24 THE COURT: Let's not back up a little.

25 MS. KRANER: Okay.

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1 THE COURT: Yes or no if you can.

2 MS. KRANER: Yes.

3 THE COURT: Can the government remove the
4 people in the deferred action class during that 90-day
5 period while they're considering deferred action?

6 MS. KRANER: No. We would ask for the Court
7 not to permit that. However --

8 THE COURT: Right. So then just stop there.
9 You're saying that at a minimum these people can't be
10 removed for 90 days and yet you're telling me somehow
11 that would not inhibit the operation of any of these
12 provisions in Part 4.

13 If the test for what is enjoining or
14 restraining the operation is that it requires officials
15 to take actions that are not required or to refrain from
16 taking actions that are allowed, it seems pretty clear,
17 no?

18 MS. KRANER: Well, I think it's the difference
19 between an injunction and a stay, your Honor. What we're
20 asking for is a stay specifically with respect to our
21 individual plaintiffs under the All Writs Act which
22 courts have looked at this. And we cite this in our
23 brief, but the *MMM v. Sessions* case and *Gomez v. Reno*,
24 and courts have found that staying removal does not
25 offend 1252(f)(1) or 1252(g) because it's not stayed.

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1 You're not saying they can never remove them. We're not
2 asking for even affirmative specific adjudications of a
3 grant of deferred action --

4 THE COURT: What case are you speaking about?

5 MS. KRANER: *MMM v. Sessions*. That's 347
6 F.Supp.3d 526 and *Gomez v. Reno*. That's 167 F.3d 1228
7 (9th Cir.). And these are --

8 THE COURT: Sorry, *MMM v. Sessions*, Mr.
9 Sessions was the Attorney General --

10 MS. KRANER: Correct. This was --

11 THE COURT: -- well before 2022. That --

12 MS. KRANER: This is a 2018 case.

13 THE COURT: Okay. So predates *Aleman Gonzalez*.

14 MS. KRANER: It does predate *Aleman Gonzalez*.

15 THE COURT: And therefore, can shed no light on
16 it. Do you have any post *Aleman Gonzalez* cases that
17 support the proposition that you're urging?

18 MS. KRANER: With respect to the All Writs Act,
19 I believe so, your Honor. But we may need a few minutes
20 to locate that.

21 (Pause in proceedings)

22 THE COURT: Sorry, I wrote an outline for this
23 argument that I saved moments before I came upstairs and
24 it is not, for whatever reason, syncing to my computer
25 here. Give me two minutes.

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1 MS. KRANER: Okay.

2 (Pause in proceedings)

3 THE COURT: Sorry. I'm back with you.

4 MS. KRANER: That's okay, your Honor. I just
5 want to clarify a few things about what our relief is
6 because I think there's some confusion based on the prior
7 answer that I gave and looking at the order to show cause
8 as well.

9 We are only seeking a stay of removal on behalf
10 of the individual plaintiffs. That is not even
11 implicated by 1252(f)(1) because it's not classwide
12 relief. So the case --

13 THE COURT: So is that what the complaint says
14 or you're telling me not to read the complaint --

15 MS. KRANER: No, that's what the complaint says
16 and that's what the order to show cause says. We're
17 asking for adjudications on behalf of the class members
18 and we're asking for a stay of the rescission policy.
19 But we made no request with respect to a stay of removal
20 on behalf of of the class. We've only made the request
21 on behalf of the individual plaintiffs.

22 THE COURT: Then I don't understand what we
23 were talking about before.

24 MS. KRANER: That's why I wanted to clarify my
25 prior answer.

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1 THE COURT: Then let me just ask again. When
2 you say in paragraph 13E as in Edward of the prayer for
3 relief that you would like me to order the government to
4 take all steps necessary to conduct deferred action
5 determinations for members of the proposed deferred
6 action class within 90 days of my order, you told me a
7 few minutes ago that nobody can be removed until that 90-
8 day consideration has occurred. And that begs the
9 question I guess does the proposed deferred action class
10 include plaintiffs other than the named plaintiffs? I
11 thought it did.

12 MS. KRANER: It does but I just -- this is what
13 I wanted to clarify and it's my mistake because I
14 misspoke earlier. The basis for the stay is under the
15 All Writs Act which predates *Aleman Gonzalez*. It's
16 essentially an exercise of judicial discretion to allow
17 the stay to occur so they can participate in the
18 litigation until there's a decision on the merits. It's
19 not restraining or enjoining their removal. And the
20 courts that have looked at that and the cases that I just
21 cited --

22 THE COURT: So that I don't understand. It's
23 not -- you just told me that they can't remove anybody
24 until this 90-day period for the deferred action
25 determination has expired and a decision has been made.

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1 And if the decision is negative, they have to provide
2 results in writing. That's not restraining or enjoining?

3 MS. KRANER: Your Honor, that's what I'm trying
4 to clarify. The relief of the adjudications, the
5 deferred action adjudications for the class, we are not
6 asking the Court to issue an order that says you cannot
7 remove class members. That is not our intent. Our
8 intent was to ensure that the policy as it existed in
9 2022 is re-instituted and that they have the benefit and
10 opportunity to be considered for deferred action. And
11 that's --

12 THE COURT: Are you still asking me for 13E or
13 have you -- are you saying you're relinquishing that
14 request?

15 MS. KRANER: No, no. The request exists but it
16 is not a request to stay the removal. It is a request
17 for --

18 THE COURT: You just told me they can't remove.

19 MS. KRANER: This is what I'm trying to
20 clarify. They cannot remove that we are requesting a
21 stay for the individual plaintiffs only to not be removed
22 and it's a stay not for the class. So that's --

23 THE COURT: For everybody in the proposed
24 deferred action class.

25 MS. KRANER: Correct.

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1 THE COURT: Okay. But that's different from
2 what 13E says.

3 MS. KRANER: No, your Honor. And maybe we can
4 submit and take a look at the actual language, but the
5 intent under 13E was to essentially reinstate the 2022
6 policy which would provide an opportunity to be
7 considered for deferred action.

8 THE COURT: Just as to the named plaintiffs?

9 MS. KRANER: No, as to the class.

10 THE COURT: Okay.

11 MS. KRANER: As to the class. That's all it
12 would do. And that's why our request does not fall
13 within 1252(f)(1) and I apologize for any confusion about
14 this, because all we're risking is --

15 THE COURT: Was this required by the 2022
16 policy?

17 MS. KRANER: That they be granted a
18 consideration of deferred action? Yes.

19 THE COURT: Within 90 days of --

20 MS. KRANER: No. The 90-day is something that
21 we ask for. It's obviously 100 percent within the
22 Court's discretion with respect to what the scope of the
23 preliminary injunctive relief -- we didn't want to leave
24 it endless out there. But what we're asking for is the
25 reinstatement of the 2022 policy essentially and that

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1 includes determinations for the class as to whether they
2 are entitled to deferred action specifically
3 determinations under the guidelines of the 2022 policy.

4 And the reason why I say that is because that
5 policy identifies the fact that the individuals have SIJ
6 as a positive factor. The fact that the state juvenile
7 court has determined that it's in their best interest to
8 remain in the United States is a positive factor. There
9 are certain factors in that policy which, you know, the
10 USCIS passed and unlawfully rescinded. And if you
11 restore that policy, that would guide the deferred action
12 determinations.

13 But all we're asking for on behalf of the class
14 is to essentially set aside the rescission and to restore
15 the 2022 policy that was unlawfully terminated so they
16 have the opportunity to be considered for deferred action
17 which in and of itself is entirely discretionary and does
18 not stop the government from moving forward with removal.
19 And that's why it doesn't fall within 1252.

20 And the government concedes this themselves
21 that deferred action is something that they can grant,
22 it's something that they can revoke, it's something, you
23 know, that they have a discretion to determine whether to
24 delay a removal or not. But what they don't have the
25 discretion to do, your Honor, is to rescind the policy in

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1 violation of the APA. And that's the relief that we're
2 asking for is to revert back to that policy.

3 Does that clarify things?

4 THE COURT: Can you just remind me of the
5 definition of the deferred action class?

6 MS. KRANER: The deferred -- yes, your Honor.

7 THE COURT: And where I can find that?

8 MS. KRANER: The deferred action -- it's on
9 page 2 of our opening brief but I have it here. The
10 deferred action class includes all individuals whose SIJ
11 petitions were or will be approved on or after April 7,
12 2025 and who will no longer be considered for deferred
13 action based on SIJ because of defendants' rescission
14 policy.

15 So we want the individuals who have received
16 SIJ approvals and under the policy would be automatically
17 considered for deferred action. It's not an automatic
18 grant of deferred action. It's a consideration under the
19 policy's guidelines.

20 THE COURT: I may be making your argument for
21 you here in a way that you don't endorse, but tell me if
22 that's the case. If you get vacatur, then the 2025
23 policy alert is void and we go back to the status quo
24 ante where the 2022 memo is in effect and that memo
25 required, regardless of what additional injunctive relief

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1 I might contemplate, that memo requires contemplation of
2 deferred action not on a specific time period like 90
3 days from my order, but it requires contemplation. And
4 that, with or without further injunctive relief from me
5 might inhibit or restrain the government's ability to
6 remove people in the deferred action class because they
7 have to follow agency guidance again without an
8 injunction. And the agency guidance says consider these
9 people for a deferred action.

10 Is that correct? And if so, is that a reason
11 why 13E and provisions like it are maybe the proverbial
12 ice in the winter?

13 MS. KRANER: I don't think it's correct. I
14 think everything up until the last sentence was correct
15 in that considering them for deferred action does not in
16 any way restrain the government from moving forward. And
17 again, I'm going to quote again their own language --

18 THE COURT: From moving forward with removal?

19 MS. KRANER: Yeah. They themselves say they
20 can revoke it. It's completely discretionary whether to
21 grant it in the first place.

22 THE COURT: But assuming the 2022 policy
23 continues in effect and it says people who are in your
24 deferred action class I think will be considered for
25 deferred action. I take the 2022 policy memo to dictate,

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1 tell me if this is wrong, that you can't remove somebody
2 first and then consider them for deferred action. That
3 would be cold comfort if the government says oh, don't
4 worry, we're considering this but the person has already
5 been removed.

6 So is that how the 2022 policy operated that
7 yes, you could still remove people but you'd have to make
8 the deferred action determination first?

9 MS. KRANER: The policy does not contemplate
10 removal at all and that's because there are multiple
11 steps in the SIJ process. And you know, the government,
12 sure it is theoretically possible for the government to
13 have removed someone before they even reach the step of
14 being approved for SIJ and being eligible for a deferred
15 action determination.

16 THE COURT: That was possible under the 2022
17 memo?

18 MS. KRANER: Yes, yes. It's not an automatic
19 stay of immigration enforcement. It's a protection that
20 was given to basically confer and implement Congress's
21 intent. Congress intended for these kids to be safe for
22 the duration for them to be able to apply for a green
23 card. That's not in dispute. That's in the 2022 policy
24 memo itself. And they passed this policy memo to provide
25 protection but the policy itself does not speak to

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1 removal. It speaks to adjudication for deferred action
2 which is discretionary subject to those guidelines and
3 it's something that can be revoked assuming there is a
4 basis to determine that someone is removable in the first
5 instance. You know, the government can't obviously --
6 I'm not addressing other bases for not removing someone.
7 I'm just saying that deferred action in and of itself,
8 even as the government defines it, is their own
9 discretionary decision to delay removal. It does not
10 restrain them from engaging in removal.

11 And that's why 1252(f)(1) is not triggered here
12 and that's why the other cases that spoke to at most the
13 collateral effect on 1252(f)(1) is because even though
14 there's a challenge to a policy that may change the
15 outcome of a removal proceeding -- so for example, the
16 (indiscernible) case which we cite, even if there's a
17 policy on asylum statutes that --

18 THE COURT: Can --

19 MS. KRANER: -- it can change the outcome --

20 THE COURT: -- jump in here? I'm sorry. I
21 want to make sure I understand the argument you started
22 with. I'm looking now at the 2022 policy alert, March 7,
23 2022, the policy highlights second which says in the
24 first bullet point here's what this policy alert does.
25 It provides that USCIS will automatically conduct

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1 deferred action determinations for non-citizens with SIJ
2 classification who can't applied for adjustment of status
3 solely because an immigrant visa number is not
4 immediately available.

5 So let's say my hypo is you succeed in
6 achieving vacatur but you don't get a broader injunction
7 because you have the 1252 problem. I'm not saying I'm
8 deciding that but just in that world the government would
9 have to abide by the prior guidance, right? They
10 wouldn't like it because it's not this administration's
11 guidance, but that would be the rule set that they have
12 to follow.

13 And so that would be equivalent to saying to
14 them you must automatically conduct deferred action
15 determinations for people with SIJ classification who
16 can't get adjustment of status because a visa number is
17 not available.

18 You're saying that if they have to live under
19 that rule set they can still, even while they're
20 considering deferred action, they can just deport
21 somebody before they finish that consideration?

22 MS. KRANER: Yes, your Honor, because the
23 deferred action determination is a discretionary
24 determination and we want to provide the relief for
25 individual plaintiffs in the classes the protection that

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1 it affords.

2 And I should note that it's had a 99 percent
3 grant rate and that's because the positive factors are so
4 compelling about these kids and the fact that, you know,
5 a state court had already determined that it would not be
6 in their best interest to be removed. But all the relief
7 is is to give them a fair shot and to give them an
8 adjudication under the deferred action policy guidelines.

9 And --

10 THE COURT: But your reading of this 2022
11 policy memo is you have to conduct automatically a
12 deferred action determination but if you want to remove
13 somebody first and then conduct the deferred action
14 determination after removal, that's allowed?

15 MS. KRANER: The policy does not speak to the
16 timing of when this has to occur within removal
17 proceedings. And that's why even the government's own
18 internal memo says that -- and I just want to -- and I
19 know I started with this and I keep coming back to it,
20 but I think it really is telling in terms of their own
21 view of their discretion, and their own memo says that DA
22 is revokable and DHS may initiate criminal or other
23 enforcement action against the non-citizen granted DA at
24 any time. That's for someone who has deferred action.
25 We're talking about the step even before that process and

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1 what we're seeking is the reinstatement of the policy and
2 through that policy, the access to the opportunity to be
3 considered for deferred action.

4 THE COURT: Okay.

5 MS. KRANER: And that's why 1252 --

6 THE COURT: But so that the record is clear,
7 because you were shaking your head yes when you were
8 initially answering my question but I don't think you
9 said yes on the record, if the question is if the
10 government has to live with the 2022 policy guidance, can
11 they remove first and then automatically conduct the
12 deferred action determination second? Your position is
13 yes, there's nothing in the 2022 guidance that would
14 inhibit that. Correct?

15 MS. KRANER: Yes, that's my understanding of
16 the guidance itself.

17 THE COURT: Okay.

18 MS. KRANER: I will -- I just want to
19 differentiate the relief that we're seeking on behalf of
20 our individual plaintiffs and that is to stay the removal
21 on their behalf for the purposes of this litigation. But
22 yes, and that's why 1252(f)(1) is not -- you know,
23 there's no bar for purposes of jurisdiction here and your
24 Honor started with the question of are we also seeking a
25 standard 705, and I think that's implicit in our request

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1 as well. But our injunction does go a little bit further
2 than that in a sense that what we didn't want to happen
3 is for the Court to vacate the 2025 policy and reinstate
4 the 2022 policy and leave the hundreds of individuals
5 between that time period where the rescission was in
6 place and it was vacated who haven't had adjudications to
7 leave them out in the wind. We wanted to make sure --

8 THE COURT: Right.

9 MS. KRANER: -- that they were able to go back
10 and obtain the relief that they're entitled to as members
11 of the deferred action class. And we had proposed 90
12 days. We're not limited to 90 days. We choose, you
13 know, to leave it to your Honor's discretion in terms of
14 what's reasonable, but we want relief for those class
15 members because they desperately need the opportunity to
16 be considered for deferred action and all of the
17 protections that that affords in terms of protecting them
18 from deportation and providing them access to employment
19 authorization documents.

20 It's a discretionary step within the
21 government's powers but it's a very, very, very important
22 one and a meaningful one and one that protected almost
23 200,000 immigrant children and youth from being sent back
24 to countries where state courts have found it's not in
25 their best interests to be returned to.

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1 THE COURT: Okay. I realize I took up a lot of
2 your time just trying to figure out what is the nature of
3 the injunctive relief --

4 MS. KRANER: Yes, and --

5 THE COURT: -- being requested but --

6 MS. KRANER: -- I appreciate --

7 THE COURT: -- I want to leave some time for
8 you as well.

9 MS. KRANER: Well, I appreciate your Honor
10 asking the questions so we had the opportunity to clarify
11 exactly what our position is.

12 Does your Honor have any questions on the other
13 jurisdiction statute? I think that one is a little bit
14 more straightforward.

15 THE COURT: 1252(g)?

16 MS. KRANER: 1252(g) which only applies to
17 three very discrete actions covered by the statute which
18 are decisions to commence proceedings, adjudicate cases,
19 and execute removal orders. And as I think we just
20 discussed, deferred action determinations doesn't touch
21 upon any of those activities because it's an exercise of
22 discretion and it doesn't hinder the government from
23 moving forward with any of those activities.

24 So we believe for the same reasons, 1252(g)
25 does not apply.

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1 THE COURT: Okay. Do you agree that this
2 injunction is a mandatory injunction?

3 MS. KRANER: I'm going to leave that to Mr.
4 Magliery who's going to be addressing the motion for the
5 preliminary injunction because I know he's done some
6 serious thinking about this question.

7 With respect to class certification, I know
8 your Honor -- do you have specific questions or -- I
9 would just like to note, you know, we mentioned briefly
10 the deferred action class and these are young people like
11 our plaintiffs, A.C.R., J.G.V., E.A.R., and C.V.R. who
12 were granted SIJ on or after April 7th without
13 adjudication of deferred action.

14 And just so I think the Court understands the
15 true effect of what the relief we're seeking would have
16 on the class, A.C.R. just finished 10th grade. She wants
17 to go to college and work part time to support herself.
18 Her dream is to become an astronaut. She's currently in
19 removal proceedings and faces a substantial risk of
20 deportation without the opportunity to be considered for
21 deferred action and she'll have to put her dreams and
22 future on hold without the ability to obtain an
23 employment authorization document.

24 THE COURT: Who are the plaintiffs -- I think I
25 understand your complaint to allege that there are two

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1 plaintiffs resident in the eastern district who are
2 S.M.M. and Y.A.M. Is that correct?

3 MS. KRANER: Correct. And we also have an
4 organizational plaintiff which is CARECEN --

5 THE COURT: Right.

6 MS. KRANER: -- who resides in the eastern
7 district as well.

8 THE COURT: Okay. And how do you get to the
9 number that there are 200,000 people?

10 MS. KRANER: So there are 200,000 people who,
11 and I just want to make sure I get this right, who have
12 received approved SIJ petitions who are waiting for a
13 visa. I'm sorry, the 200,000 number is taking into
14 account from the policy's inception from 2022 through
15 April 7, 2025. There were 200,000 youths who were
16 waiting for a visa and received deferred action. And
17 that is from the declaration of Ms. Castillo-Granados,
18 paragraph 17 and 18.

19 And within our class, the renewal class, it's
20 actually a smaller number. These are roughly 150,000
21 individuals who received deferred actions but who are
22 still waiting for a visa. And the delta is likely that,
23 you know, once you obtain a visa and you can move forward
24 to adjust status, you drop out of the class. So the
25 120,000 individuals who currently have deferred action

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1 and do not have a visa.

2 THE COURT: Okay. And when you say in
3 paragraph 36 of your complaint that we're talking about
4 both court dependents and also children in juvenile
5 facilities, what does juvenile facilities mean?

6 MS. KRANER: Foster homes. There might be
7 other entities that have custody. A person can get a SIJ
8 predicate order through the juvenile delinquency docket
9 as well.

10 THE COURT: Meaning criminal proceedings?

11 MS. KRANER: Criminal proceedings, yeah. So
12 these are individuals, all of them have gone through the
13 state court process and then placed in the custody by a
14 state court judge of either the state -- we have a
15 number. I think certain plaintiffs are actually in
16 foster care. They've been placed into the custody of a
17 state department or agency or individual. So A.C.R. for
18 example, she was placed in the custody of her older
19 brother. They both suffered parental abuse. And he came
20 to this country and is in a position to support her and
21 the court granted him, you know, guardianship and custody
22 over her. Do that's the way that SIJ works. These
23 children have -- you know, by the time we get to the
24 process where they have been approved for special
25 immigrant juvenile status, there has been, you know,

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1 they've been to a lot of trauma, there's been a lot
2 that's happened to them in their lives, and they have
3 finally stabilized in this country and have been placed
4 by a state court judge in a safe and stable home and now
5 are asking, you know, just to have the permission to
6 proceed on the path towards permanent residence that
7 Congress -- there's no dispute that Congress intended
8 them to remain safely in the United States while they
9 pursue their adjustment of status. That's in the policy
10 and the government has not and cannot dispute that.

11 So each of these children are, you know,
12 obviously facing significant risks without the deferred
13 action through no fault of their own. All they're
14 waiting for is for a visa to become available.

15 THE COURT: Thank you. Why don't we go issue
16 by issue so I can keep everything straight in my mind.
17 We're talking about the 1252 issues and maybe the delta
18 between what's available under APA Section 705 versus
19 preliminary injunction versus All Writs Act.

20 MR. DE LAS ALAS: Yes, your Honor. And would
21 you like me to stand up as I speak or would you like me
22 to sit down if I choose to sit at this table?

23 THE COURT: Sitting is fine as long as we have
24 you on the microphone.

25 MR. DE LAS ALAS: Thank you, your Honor.

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1 So to start with the 1252(f)(1) issue, we do
2 like to hone in on a very appropriate statement you made.
3 The flip -- so as for an initial matter, when we are
4 talking about the applicability of 1252(f)(1), as your
5 Honor said, it applies to Sections 8 -- it covers
6 Sections 8 USC 1221 to 1232. The sections we're really
7 looking at are Sections 1229 and 1229(a) regarding the
8 commencement of removal proceedings.

9 And as your Honor very helpfully pointed out
10 with your expression of a flip side, really the flip side
11 of 1229(a) is really deferred action because despite the
12 fancy label, deferred action at its heart is
13 prosecutorial discretion. It is prosecutorial discretion
14 regarding --

15 THE COURT: But can you --

16 MR. DE LAS ALAS: Yes.

17 THE COURT: Let's break this down maybe more
18 specifically.

19 MR. DE LAS ALAS: Yes, your Honor.

20 THE COURT: As to 1229 and 1229(a), what are
21 the specific actions in either of the two *Aleman Gonzalez*
22 categories, either actions that officials are required to
23 take that are within the scope of those provisions but
24 not required by them or that officials now must refrain
25 from taking that are allowed by those two provisions?

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1 MR. MAGLIERY: Yes, your Honor. In the
2 commencement of removal proceedings, normally the
3 Department of Homeland Security would be able to commence
4 a removal proceeding against removable aliens. And the
5 intersection between this provision and a lot of the
6 plaintiffs who have SIJ classification is that SIJ
7 classification is not a status. It's a classification
8 meant to facilitate adjustment of status because many of
9 the people who --

10 THE COURT: Sorry, so just to make sure I
11 understand what you're --

12 MR. DE LAS ALAS: Yes.

13 THE COURT: -- how what you're saying is
14 responsive to my question --

15 MR. DE LAS ALAS: Yes, your Honor.

16 THE COURT: -- you're saying that one action
17 that the proposed injunction would require you to refrain
18 from taking --

19 MR. DE LAS ALAS: Yes.

20 THE COURT: -- that is otherwise allowed by
21 Section 1229 is the initiation of removal proceedings.

22 MR. DE LAS ALAS: Yeah.

23 THE COURT: Is that correct?

24 MR. DE LAS ALAS: Yes, your Honor.

25 THE COURT: But you just heard the plaintiff's

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1 counsel say, to my surprise and maybe yours, we think you
2 can still remove people even while you're considering
3 them for deferred action. So in their view you are not
4 inhibited from taking action that Section 1229 permits if
5 the action we're talking about is the initiation of a
6 removal proceeding.

7 MR. DE LAS ALAS: Your Honor, the problem we're
8 having here, and this seems to have been developed
9 through your dialogue with counsel, it's kind of hard to
10 figure out where exactly they're lining their fire so to
11 speak. And when it comes to our case, when it comes to
12 our citation to the commencement of removal proceedings,
13 the thing about deferred action is prosecutorial
14 discretion in which the Department of Homeland Security
15 enters into a discretionary voluntary decision to, among
16 other things, refrain from commencing removal proceedings
17 they would ordinarily be able to commit, your Honor. So
18 that would be causing the government to refrain from
19 activity it could not perform, your Honor.

20 THE COURT: Sorry, say that again? Why would
21 you be -- why would you have to refrain from activity you
22 could otherwise carry out?

23 MR. DE LAS ALAS: Because deferred action,
24 which is prosecutorial discretion, it's --

25 THE COURT: But you don't have to award

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1 deferred action. You just have to consider people for
2 deferred action and you have to contend with a
3 presumption and you have to file some other procedural
4 requirements in the memo, but you don't have to give it.

5 MR. DE LAS ALAS: Yes. While we do not have to
6 give it, your Honor -- well, I don't want to make up some
7 issues, but the problem we have is that to the extent
8 that the plaintiffs are really challenging this idea of
9 having the whole process available, it's still binding
10 the prosecutorial discretion that is called deferred
11 action because during the consideration of this -- pardon
12 me, your Honor, I just want to make sure I'm ordering
13 things correctly.

14 (Pause in proceedings)

15 MR. DE LAS ALAS: Part of the deferred action
16 is considering who would fall under the category of
17 aliens that would be subject to removal proceedings, your
18 Honor. So in that sense, 1252(f)(1) is implicated, your
19 Honor.

20 THE COURT: Do you mean the 2022 guidance the
21 way the plaintiffs read it to say that you can still
22 remove anybody you want even during the consideration of
23 deferred action before a decision is rendered? To me
24 that would be absurd.

25 MR. DE LAS ALAS: Pardon me, your Honor, I just

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1 want to make sure I'm parsing this right.

2 (Pause in proceedings)

3 MR. DE LAS ALAS: Your Honor, we agree that it
4 would be an absurd interpretation to say that under the
5 old policy being able to remove someone while under
6 consideration for deferred action would be permitted. It
7 would be absurd because it would defeat the point of that
8 consideration. And at that point, as your Honor pointed
9 out, if a person is removed before a decision on deferred
10 action is made, then the deferred action is pointless and
11 then the policy becomes a nullity. So we do reject the
12 reading that a person could -- you know, that under the
13 old policy a person could be removed from the United
14 States pending assessment of that deferred action
15 request.

16 THE COURT: Where am I looking -- so I'm
17 looking at ECF document 1-1 which is the 2022 policy
18 alert. Remind me where the presumption is.

19 MR. DE LAS ALAS: Pardon me, would you please
20 clarify the presumption, sir?

21 THE COURT: So there were presumptions with
22 respect to work authorization. Is that correct?

23 (Pause in proceedings)

24 THE COURT: So the answer may be not in the
25 2022 policy manual but in the amendments. Not in the

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1 policy alert, excuse me, but in the amendments to the
2 policy manual --

3 MR. DE LAS ALAS: Are you --

4 THE COURT: -- that followed. We're talking
5 about a presumption that somebody in SIJ status is
6 eligible for a deferred action. Can you just remind me
7 where that is?

8 MR. DE LAS ALAS: I believe you're referring to
9 ECF 42-3. Yes, I believe you're referring to page 5 of
10 ECF 42-3 at the paragraph that says one particularly
11 strong factor, your Honor.

12 THE COURT: All right. I'm not -- oh, I see.
13 Yes, okay. So I'm looking at the same document just
14 under a different ECF number. The document is seven
15 pages. Remind me, sorry, what page consideration for --

16 MR. DE LAS ALAS: It's on ECF 42-3. It would
17 be on page 5 of 8. There is a paragraph that starts,
18 "One particularly strong positive factor." I believe
19 that's what your Honor is referring to.

20 THE COURT: Sorry. I'm with you now. Okay.

21 My question for both parties is this. So one
22 possible way that -- okay. All right. I withdraw my
23 question actually. Sorry.

24 MR. DE LAS ALAS: Your Honor, so still sticking
25 on the topic of 1252(f)(1), we do believe Sections 1229

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1 and 1229(a) are implicated because deferred action, among
2 other things, relates to the commencement of removal
3 proceedings because deferred action is prosecutorial
4 discretion is set forth in *Reno v. Anti-Arab [sic]*
5 *Discrimination Coalition*. It's described as a
6 discretionary and voluntary decision to temporarily
7 refrain from commencing removal proceedings, continuing
8 with the adjudication of removal proceedings in
9 immigration court and the execution of removal orders,
10 your Honor. So given that, we believe 1252(f)(1)
11 applies.

12 And to bring out a broader point, your Honor,
13 this case is ultimately about prosecutorial discretion
14 and we understand there may be some confusion in the
15 record. Part of it seems to be a lack of clarity about
16 what plaintiffs are ultimately objecting to and asking
17 for. But at bottom, your Honor, we are dealing with
18 prosecutorial discretion. Whether we're talking about a
19 process or an internal -- whether we're talking about
20 internal operational policy under the Department of
21 Homeland Security to automatically consider people or
22 we're dealing with what plaintiffs allege is a
23 categorical ban, ultimately we're talking about
24 prosecutorial discretion, the discretion of the
25 Department of Homeland Security on whether --

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1 THE COURT: But if there remedy is vacatur,
2 then you have to go back to the March 2022 status quo
3 ante, right? And there are, you can debate this, but
4 there are aspects of the March 2022 policy manual that
5 restrain your discretion, your prosecutorial discretion
6 on who gets removed.

7 For example, there's a presumption I just
8 pointed to that says you're going to consider it a very
9 strong factor, or one particularly strong factor, but the
10 plaintiffs don't have a 1252(f)(1) problem with that even
11 though it constrains your discretion because it's not
12 coming from an injunction let alone a classwide
13 injunction. It's coming from the mere fact that your
14 2025 policy memo has been vacated and is back in the
15 prior world. So what would be the 1252(f)(1) problem in
16 that case?

17 MR. DE LAS ALAS: Your Honor, two things. The
18 first thing is based on your dialogue, your colloquy with
19 counsel, are we still operating in the world in which
20 you're contemplating granting the relief as originally
21 stated in the complaint? For example, 90 days under the
22 March 2022 policy?

23 THE COURT: Put that question aside.

24 MR. DE LAS ALAS: Yes.

25 THE COURT: So yes, I think, as you may have

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1 divined from my questions, that there are at least
2 certain aspects of the request for injunctive relief that
3 go beyond merely restoring the status quo ante and that
4 may run into 1252(f)(1) problems like the time limits
5 that certain things have to be done within 30 days or 90
6 days, although 30 days with respect to individual
7 plaintiffs, so that may or may not --

8 Let me ask the following question about
9 1252(f)(1) while we're near that topic. Even as to the
10 individual plaintiffs, 1252(f)(1) says -- it doesn't talk
11 about class actions, right? It says you can't enjoin or
12 restrain the operation of any of the provisions in part 4
13 at all subject to one exception, and the exception is
14 with respect to the application of such provisions to an
15 individual alien against whom proceedings under such part
16 have been initiated. An individual alien against whom
17 proceedings under such part have been initiated.

18 And to my reading, not even all of the
19 individual plaintiffs meet that description, right?
20 There are two plaintiffs as to whom removal proceedings
21 have been initiated, neither of whom are based in the
22 eastern district to the extent that matters. But apart
23 from E.A.R. and C.V.R., are there in your view any
24 individual plaintiffs as to whom such proceedings have
25 been initiated?

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1 MR. DE LAS ALAS: I'm sorry, your Honor, would
2 you please repeat that last part?

3 THE COURT: Do you have 1252(f)(1) in front of
4 you? 1252(f)(1) limits the kind of injunctive relief
5 that can be granted. And it doesn't say, contrary to the
6 colloquial way in which we talk about the statute. It
7 doesn't say you can grant individualized relief to
8 individuals but not to a class. Instead it says you
9 can't grant injunctive relief to anyone to the extent it
10 would restrain the operation of these statutes except to
11 individuals, but not just any individuals, individuals as
12 to whom or against whom proceedings under part 4 have
13 been initiated.

14 So my question is what does Congress mean when
15 they say individuals against whom proceedings under part
16 4 have been initiated. Does that mean removal
17 proceedings? Does that mean -- let me ask the plaintiff
18 this, Ms. Kraner. Sorry to be jumping back and forth
19 here. Are your individual plaintiffs all individuals as
20 to whom proceedings have been initiated under part 4?

21 MS. KRANER: No, your Honor. No. I believe
22 there's only two that are currently in removal
23 proceedings --

24 THE COURT: Okay.

25 MS. KRANER: -- as your Honor had identified.

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1 THE COURT: So assuming that the injunction has
2 the problem of enjoining or restraining the operation of
3 part 4, the exception would only apply not to all
4 individual plaintiffs in this case, but the two
5 individual plaintiffs in this case, correct?

6 MS. KRANER: Correct. But I also just want to
7 go back to your Honor's earlier point that even if your
8 Honor feels constrained by the prohibition on injunction
9 in 1252(f)(1), we still have the ability to seek vacatur
10 under 705 which, you know, every court that has looked at
11 it has held does not carry the same inhibitions as
12 1252(f)(1). It doesn't apply when you're seeking an APA
13 vacatur and the vacatur would be on behalf of obviously
14 the individual plaintiffs, the organization plaintiffs
15 and the class.

16 THE COURT: Every plaintiff has standing --

17 MS. KRANER: Correct.

18 THE COURT: -- to seek vacatur.

19 MS. KRANER: Correct.

20 THE COURT: Okay. Thank you. All right.
21 Anything else you wanted to say on 1252(f)(1)? Because I
22 do want to get to the merits of the APA claim.

23 MR. DE LAS ALAS: Your Honor, alluding to the
24 broader point we were trying to get is that 1252(f)(1),
25 that is one problem with plaintiff's lawsuit.

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1 However, another statutory problem is the
2 application of 1252(g) which --

3 THE COURT: 1252(g), you run into the *Regents*
4 issue and I understand you try to distinguish DOPA from
5 SIJ DA, but those are some fairly fine distinctions.
6 Just run through that one more time for me. Why is
7 *Regents* not controlling on the 1252(g) question?

8 MR. DE LAS ALAS: *Regents* is distinguishable
9 from this case, your Honor, because as the Supreme Court
10 decided, *Regents* dealt with a standardized formalized
11 review process. Meanwhile, in this case there was no
12 solicitation of applications. Discretion was still made,
13 grant or denial of deferred action was still made on a
14 case-by-case basis.

15 Furthermore, the criteria --

16 THE COURT: Well, what is it about *Regents* that
17 makes that a distinction with a difference? I understand
18 that *Regents* described the DACA program and that you see
19 certain distinctions, but where in the *Regents* opinion,
20 if you can point me, does the Supreme Court say these
21 distinguishing factors are the sine qua non of 1252(g)
22 applying or not applying?

23 MR. DE LAS ALAS: I believe it's on pages, and
24 I don't have the exact opinion on it, but I believe it's
25 pages 17 and 18 in which the Supreme Court describes the

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1 DACA process as not really an internal policy of non-
2 enforcement as we maintain this old March 2022 policy is,
3 rather the Supreme Court described the DACA process as an
4 affirmative immigration relief program.

5 THE COURT: Right. But when they say that,
6 they marshal a bunch of reasons and some of them are
7 reasons that are also true of this program, right? Like
8 the fact that it could lead to employment authorization.

9 MR. DE LAS ALAS: Yes.

10 THE COURT: So okay, there are certain
11 distinguishing factors between this case and *Regents*, but
12 also certain common factors. And I guess the question is
13 what clues do you see in *Regents* that the common factors
14 are not enough, if anything?

15 I mean I view this process as a standardized
16 review process. It's standardized in the sense that
17 everybody who has the SIJ qualification is going to
18 benefit from the same presumption. That's a standard
19 provision. You know, the Supreme Court thought it was
20 important that there were benefits attendant to deferred
21 action in DACA, excuse me, not DOPA, such as the ability
22 to request work authorization and eligibility for Social
23 Security and Medicare. I don't think we have -- I don't
24 know if we have Social Security and Medicare here, but we
25 have the ability to request work authorizations.

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1 So at least a lot of what the Court is talking
2 about on the 1252(g) front is present here as well. I
3 think your better argument is the 1252(f)(1) claim.

4 All right. Let's turn to the merits and hear
5 from the plaintiffs when you're ready.

6 MS. KRANER:

7 MR. MAGLIERY: Thank you, your Honor. John
8 Magliery. I'd like to address the plaintiff's standing
9 and the merits of the preliminary injunction.

10 Could I just first point out to your Honor that
11 there's a sort of difficulty to answer the question that
12 the Court's struggling with about the vacatur of the 2025
13 policy because heretofore the SIJ petition and the
14 deferred action were considered at the same time so --

15 THE COURT: I think we're going to hear that
16 you should pull the microphone a little closer to you.

17 MR. MAGLIERY: Okay.

18 THE COURT: Yes.

19 MR. MAGLIERY: Is it on?

20 THE COURT: That's much better.

21 MR. MAGLIERY: Okay. So the SIJ petition and
22 the deferred action were granted at the same time. So we
23 have no practical, we have no real world answer to the
24 Court's inquiry whether the government would remove
25 during the pendency of a deferred action petition.

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1 There's simply no instances of that because they were
2 granted at the same time. You get your SIJ determination
3 and your deferred action determination at the same time.

4 If the government, as I heard them say, is
5 willing to say yeah, that would be absurd for us to
6 remove during the time we're considering deferred action,
7 we might have a different view of what the 2022 policy,
8 of restoring the 2022 policy would get us. But we just
9 don't have an answer, your Honor, because that's not how
10 it worked. We'd get both answers at the same time.

11 THE COURT: Or we can try to get both answers
12 by reading the 2022 memo but --

13 MR. MAGLIERY: Thank you, your Honor. I take
14 your point. So let me jump in, please.

15 As the Court's already well aware, and I don't
16 want to belabor the record, the SIJ program was
17 established in 1990. There was a visa backlog that
18 developed beginning in 2016 in certain countries.
19 Eventually it grew to be a backlog for visas for every
20 country from SIJ recipients which left them in legal
21 limbo while they had achieved such a status but were
22 awaiting the issuance of a visa.

23 So on March 7, 2022, as the Court already
24 knows, the 2022 policy alert was issued that said that
25 Congress likely did not envision that a SIJ petitioner

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1 would have to wait years before a visa became available
2 and instituted a deferred action program that allowed SIJ
3 recipients to both be granted deferred action and also to
4 be considered for deferred action and considered for
5 employment authorization.

6 And that was vested in a case-by-case
7 discretionary determination on the part of USCIS and if
8 granted, would allow for four-year renewable periods
9 which was revocable.

10 And then in April 2025, beginning on April 7th,
11 USCIS simply stopped issuing deferred action
12 determinations to SIJ beneficiaries in an unexplained sub
13 silentio reversal of the deferred action policy.

14 Beginning --

15 THE COURT: What's the specific remedy for the
16 Accardi, if I'm pronouncing that correctly, violation?

17 MR. MAGLIERY: It's to, I would think it's to
18 invalidate the failure to follow the existing policy, if
19 it's Accardi or Accardi. The case law requires that the
20 government follow its own written policy.

21 So here again we're back to --

22 THE COURT: So sorry, remind me on April --

23 MR. MAGLIERY: 7th.

24 THE COURT: -- 7th, what is it mechanically
25 that starts occurring differently? People start getting

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1 SIJ classification without deferred action --

2 MR. MAGLIERY: That's correct, your Honor.
3 That's right, with no determination. And heretofore they
4 had always received a determination on both.

5 THE COURT: But was required by the 2022 policy
6 memo? Or was that just the practice that the government
7 was following under that memo?

8 MR. MAGLIERY: It was the practice. I don't
9 see words on the page and say that the two decisions will
10 be made at the same time. But the fact that they ceased
11 entirely is completely undefended by the government.
12 They don't deny that --

13 THE COURT: They didn't really respond at all.

14 MR. MAGLIERY: Exactly. So --

15 THE COURT: But so, okay, so would your remedy
16 be --

17 MR. MAGLIERY: Your Honor --

18 THE COURT: -- you shouldn't have given people
19 notice of SIJ status without also granting deferred
20 action and therefore, what? You should now grant
21 deferred action or --

22 MR. MAGLIERY: It points up to what I believe,
23 I don't want to be presumptuous what the Court is
24 struggling with, and why at least some part of an
25 injunction may be necessary. Even if the 2025 policy

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1 were vacated, under the APA there's this group of people
2 who deserve, under the 2022 policy, to have deferred
3 action adjudicated, not --

4 THE COURT: Assuming -- oh, to have it
5 adjudicated, not to be granted.

6 MR. MAGLIERY: To have it adjudicated because
7 that's what they were entitled to under the 2022 policy.

8 THE COURT: And so the order would be not
9 granted but adjudicated within --

10 MR. MAGLIERY: That's correct.

11 THE COURT: -- a short period.

12 MR. MAGLIERY: A reasonable period of time.

13 The court would -- and that's really what we're
14 struggling with, your Honor, on even the preliminary
15 injunction. The goal here is, again if I'm not being
16 presumptuous, to find a remedy that works. And if we
17 vacate, if the Court were to vacate the 2025 policy and
18 we go back to the 2022 policy, can the government then
19 say well it now takes two years to adjudicate deferred
20 action when before it was adjudicated at the same time.
21 We're looking for something that would give effect, that
22 would restore the 2022 policy in a meaningful way.
23 That's why we've asked for not just an APA stay but a
24 preliminary injunction.

25 THE COURT: But so there are certain changes in

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1 policy that are subject to the doctrine and some that are
2 not. Right? It could be the policy of an agency that's
3 conducting interviews that nobody should have to wait
4 more than 15 minutes past their appointed time before
5 their interview starts. If that's not in any guidance
6 anywhere, it would be unlikely that I would order
7 somebody to go back to that policy.

8 We're talking about, you know, lawyers are
9 taught to draw a distinction between policy and practice
10 and I think you're telling me that it was a practice
11 prior to April 7 but not a policy that those two
12 determinations would be made simultaneously. And what
13 authority is there for what sounds to me like a change of
14 practice doctrine rather than a change of policy or
15 procedure doctrine?

16 MR. MAGLIERY: Your Honor, I think there are
17 probably two responses to that. One is when every or
18 nearly every deferred action adjudication is made at the
19 same time as SIJ, there is an expectation that those
20 adjudications would continue to occur at the same time.
21 But even, your Honor, if that's --

22 THE COURT: Sorry, change of position doctrine,
23 not policy or procedure or practice.

24 MR. MAGLIERY: Excuse me, your Honor?

25 THE COURT: We're talking about the change of

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1 position doctrine, right?

2 MR. MAGLIERY: The change of position
3 doctrine --

4 THE COURT: Is that --

5 MR. MAGLIERY: -- is a ground for increased
6 scrutiny on the 2025 policy. I think the Court is asking
7 about something slightly different which is if I vacated
8 it, then what would happen to those people who have
9 applied for SIJs and not had an adjudication of deferred
10 action, but I might be misunderstanding.

11 THE COURT: Well, there's something called
12 change of position doctrine --

13 MR. MAGLIERY: Yes.

14 THE COURT: -- which goes some part of the way
15 towards telling us what is arbitrary and capricious
16 action within the meaning of the APA. There is also a
17 requirement that when an agency changes position, it has
18 to explain why -- it has to acknowledge that it changed
19 position and it has to give good reasons for that. I was
20 lumping all that under a single umbrella and asking a
21 basic and primary question which is just what is the
22 position within the meaning of change of position
23 doctrine? Does it have to be something in writing or
24 could it just be a practice that even though nothing the
25 agency has ever written in the Federal Regulations, in a

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1 policy memo, in a policy manual, in anything requires
2 them to do it, it's just something they were doing, does
3 the change of position doctrine apply in that
4 circumstance? And what case would suggest that it does?

5 The *Fox Television* fleeting expletives case,
6 that was all written guidance that the agency then
7 reversed itself on. Right? The *White Lion* e-cigarettes
8 case, the allegation, which was not enough, but the
9 allegation was the agency changed its position with
10 respect to things that it had put in writing to the
11 e-cigarette manufacturers.

12 So what case from the Supreme Court, Second
13 Circuit, DC Circuit suggests that change of position
14 applies when the position is unwritten? And am I asking
15 the right question? If I'm asking the wrong question,
16 please tell me.

17 MR. MAGLIERY: It's a good question, your
18 Honor, that I simply don't have the answer to, a case
19 that would give the court some authority for an unwritten
20 more practiced oriented or procedural aspect of the
21 policy to be invalidated because it's an unexplained or
22 otherwise improper change of position.

23 I'm more focused on, and I'll offer this to the
24 Court as another alternative, I'm more focused on how the
25 Court would be able to ensure that vacating the 2025

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1 policy would meaningfully require USCIS to restore the
2 2022 policy. In other words --

3 THE COURT: I think we're at a prior question
4 which is why would we vacate it?

5 MR. MAGLIERY: I'm happy to address that.

6 THE COURT: I thought your answer was going to
7 be because, you know, Accardi, as to the eight-week
8 class --

9 MR. MAGLIERY: Yes.

10 THE COURT: -- and unexplained, or at least not
11 well explained, change of position with respect to the
12 remainder. And so just speaking with Accardi, Accardi
13 says what, that if you change your position sub silentio
14 it's arbitrary and capricious by definition.

15 MR. MAGLIERY: It really says, it, which I
16 think is from the 1960's and it progeny say the
17 government has to follow its written positions. That's
18 really what it says. Right? And so --

19 THE COURT: Right. But you're telling me the
20 change, the thing the government's not following was not
21 a written position, it was an unwritten practice.

22 MR. MAGLIERY: Oh, to the extent that all
23 they've done is slow the adjudications and we just don't
24 know what's going to happen for the class between --

25 THE COURT: Yes. Stop making the two

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1 determinations simultaneously. That's what they stopped
2 without explanation but that was not a written --

3 MR. MAGLIERY: But the record says that none of
4 those people have received their deferred action
5 determinations at all. And to the extent that there is a
6 debate here about whether or not the government can
7 institute removal proceedings, or not institute because
8 it's clear that they can, but whether they can physically
9 remove during deferred action and whether we make the
10 policy an absurdity, you know, we're now months after
11 April 7th. The record, all of the plaintiffs' records,
12 show --

13 THE COURT: Let's say that I am of the view,
14 which I don't know at this point if I am, that the change
15 that happens on April 7th has to contravene something in
16 writing either in the March 2022 memo or elsewhere.
17 What's the writing that gets closest to being violated by
18 the change?

19 MR. MAGLIERY: Your Honor, I'd like to approach
20 your question slightly differently which is to say I
21 don't believe the government has disputed that those
22 April 7th and the later deferred action applications are
23 subject to its new policy. They simply haven't said
24 that. They haven't said there's a group of people
25 between April and June that we just slowed down the

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1 determinations for. That's not what they've said at all.

2 THE COURT: No, but that's what you're saying.

3 And I'm saying --

4 MR. MAGLIERY: I'm saying they've rejected
5 them. I'm saying they've not granted them. I'm saying
6 from April 7th on --

7 THE COURT: Oh, they've rejected.

8 MR. MAGLIERY: They have not, but I'm saying,
9 your Honor, that the record shows that they have
10 functionally not granted deferred action. They have from
11 April 7th on not followed the 2022 policy. They haven't
12 granted deferred action to any of those applicants
13 between April and June.

14 THE COURT: I understand. But I'm asking you
15 what part of the written guidance that existed on April
16 7th does that contravene? Assume, assume for purposes of
17 my question that the Accardi Doctrine requires that
18 whatever policy is altered sub silentio has to be a
19 written policy. What's the written policy we're talking
20 about?

21 MR. MAGLIERY: The written policy must be the
22 2022 policy which required them to consider deferred
23 action. They have not considered them for deferred
24 action. That's the thing.

25 THE COURT: But it didn't say when. Right?

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1 So --

2 MR. MAGLIERY: Your Honor, I have to posit
3 again that this points out the need for some relief
4 beyond just vacating the 2025 policy. They can't wait to
5 consider them for five years..

6 THE COURT: I thought you were going to say
7 something like look, the 2022 policy and the policy
8 manual amendments that followed did not say the agency
9 will and must determine the deferred action determination
10 simultaneously with the grant of SIJ status.

11 However, the policy manual did say in writing
12 that one particularly important factor is SIJ status and
13 there was this presumption, I don't know if presumption
14 is the right word, and the fact that they stopped
15 granting deferred action simultaneously with SIJ status
16 suggests that they stopped applying the presumption. And
17 the presumption is in writing. So Judge, if you're
18 looking for something in writing that they changed
19 position on without telling us, maybe it's that. Does
20 that --

21 MR. MAGLIERY: That makes perfect sense. I
22 would again suggest that that's one thing in writing.
23 The other thing in writing is that they say in the 2022
24 policy that they will consider SIJ applicants for
25 deferred action and they've not disputed that they are

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1 not doing that. So I understand the Court's points
2 and --

3 THE COURT: But you only have May, June, July,
4 August and almost September, you have less than five
5 months of data to say that they're not -- maybe they are
6 still considering deferred action, they're just not doing
7 it on the same time table as the SIJ determination.

8 MR. MAGLIERY: Your Honor, that would be a
9 departure from the practice and also doesn't seem to be
10 something that they've even asserted. They say that
11 they're following the new policy. That's what they say.

12 THE COURT: And the new policy says you will
13 not be considered for deferred action until.

14 MR. MAGLIERY: No, it actually says, your
15 Honor, you won't be considered for deferred action and
16 SIJS status is no longer a ground to seek deferred
17 action.

18 THE COURT: Got it. So we know that they're no
19 longer considering deferred action because they're
20 telling us in the new memo we're no longer -- sorry, I
21 was a little slow on the uptake there.

22 MR. MAGLIERY: That's correct.

23 THE COURT: Okay.

24 MR. MAGLIERY: Your Honor, may I pick up on why
25 the new policy is arbitrary and capricious? Is this a

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1 good time to do that?

2 THE COURT: Yes, please.

3 MR. MAGLIERY: Okay. Thank you, your Honor.

4 First of all, perhaps there should just be a
5 word about standing. There's a dispute about standing.

6 I'm not sure --

7 THE COURT: I'm not that interested in the
8 standing question.

9 MR. MAGLIERY: Thank you. Then I'll move on to
10 arbitrary and capricious.

11 First, the government argues that the policy is
12 not reviewable. I think there was already colloquy with
13 the government's counsel about reviewability. This is
14 very much like the *Regents* case that did not announce a
15 passive --

16 THE COURT: Reviewability under Section 701
17 you're talking about, not --

18 MR. MAGLIERY: Correct, your Honor.

19 THE COURT: Okay.

20 MR. MAGLIERY: Correct. Correct. Whether it's
21 reviewable under the APA. And the idea is that just like
22 in *Regents* this deferred action policy did not merely
23 announce a passive non-enforcement policy but created a
24 program for conferring affirmative immigration relief.

25 And what the government argues is the policy in

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1 DACA was a lot more robust because there were these
2 factors and there was this application and we solicited
3 people. But what the government glosses over is SIJS
4 status is actually a far more rigorous and statutorily
5 created status that already had numerous qualification
6 requirements. These had to be abused and neglected
7 children who received a determination from a state court
8 that it was in their best interest to stay in the United
9 States. So that's a bunch of criteria that already
10 existed.

11 And then the 2022 policy created benefits in
12 the form of deferred action and the ability -- in the
13 form of consideration for deferred action and
14 consideration for employment authorization.

15 So in that sense it's as robust or maybe more
16 robust than the program at issue or the benefits as
17 Justice Roberts called it in *Regents*.

18 The government's argument says that SIJS didn't
19 create a program like DACA but actually the policy
20 automatically applied to SIJ applications, required no
21 separate application, and the SIJ criteria already
22 rigorous. And there's an eastern district case, *Alvarez*
23 *Sosa v. Barr*, that says that the SIJ criteria are already
24 rigorous criteria set by statute.

25 Then the next question is was the change in

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1 policy arbitrary and capricious? As the Court I'm sure
2 is completely familiar, agency actions have to be
3 reasonable and reasonably explained and that courts must
4 hold unlawful and set aside any agency action that's
5 arbitrary, capricious, and abuse of discretion or
6 otherwise not in accordance with law.

7 And specifically, an agency action must be set
8 aside as arbitrary and capricious where the agency fails
9 to give adequate reason for decision, it's decision, or
10 fails to consider all relevant factors and to articulate
11 a rational connection between the facts found and the
12 choices made. So --

13 THE COURT: So it's not entirely clear to me
14 what reasons the government is offering for the change of
15 position. There's some stuff about increased vetting and
16 we want fraud inspectors to have free rein especially in
17 footnote 4 of the policy. It's not clear from the
18 briefing how much the government is relying on that.

19 But one thing I the government is relying on is
20 this assertion that the new policy aligns better with the
21 statutory authority that the agency has from Congress.
22 And that's a species I think of the illegality argument
23 that came up at the district court level in DACA.

24 And would we agree as a threshold matter that
25 if the agency is right that the 2022 program exceeded

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1 statutory authority, or likely exceeded statutory
2 authority, that that is always a valid reason for
3 changing position assuming the change of position
4 actually fixes that problem in a way that overcomes
5 arbitrary and capricious review?

6 MR. MAGLIERY: The answer to that has to be no
7 because that's what *Regents* was about, right? The cases
8 are, the DACA cases, you know, the Attorney General said
9 I think this is illegal and the Supreme Court said that's
10 not enough reason.

11 But your Honor, let me take a --

12 THE COURT: The Supreme Court said something
13 different from that as I read it.

14 MR. MAGLIERY: Your Honor, before we go down
15 this --

16 THE COURT: Let me just --

17 MR. MAGLIERY: Can I just posit that I don't
18 think that the 2025 policy says that it is in alignment
19 with statutory authority? It does not use the word
20 statutory authority. It says it's in alignment with
21 other authority and then it cites an executive order.
22 They didn't even engage with the 2022 determination that
23 the deferred action policy was in alignment with
24 statutory authority.

25 THE COURT: No, that's not true. They say that

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1 the desire to grant deferred action and related
2 employment authorization to this population are not
3 compelling reasons, supported by any existing statute or
4 regulation to continue to provide a deferred action
5 process for this immigrant category. It's not a fair
6 reading of that sentence --

7 MR. MAGLIERY: Your Honor --

8 THE COURT: -- sentence to say that they think
9 this is unsupported by statute?

10 MR. MAGLIERY: It's a fine and also critical
11 point so please let me posit this. They say Congress did
12 not expressly permit deferred action. Their point is
13 there's not a statute that creates deferred action.
14 That's not the same as an analysis of whether deferred
15 action aligns with previous statutory authority.
16 Statutory authority is there's a 35-year-old program
17 called SIJS that allows neglected and abused children who
18 already have a court finding that it's in their best
19 interest to stay in the United States to have a pathway
20 to lawful permanent residency in this country. That's
21 what the 2022 policy said.

22 The 2025 policy just says we can't find a
23 statute that says we can have deferred action while at
24 the same time arguing deferred action is prosecutorial
25 discretion. What do they need statutory authority for?

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1 THE COURT: But both sides have some tension,
2 right, in their arguments and have to thread quite narrow
3 needles. I get that. But just stay with the prior
4 question for a moment.

5 MR. MAGLIERY: Okay.

6 THE COURT: I thought I heard you to say that
7 you don't even see the 2025 memo offer as a reason that
8 this is unsupported by statute, statutory authority. And
9 I was trying to point to the sentence I read. I think
10 that says that we don't see this as supported by any
11 existing statute or regulation. Why am I reading that
12 incorrectly?

13 MR. MAGLIERY: Your Honor, forgive me. Can you
14 point me to the sentence again? I'm sorry to have lost
15 it.

16 THE COURT: Yes. Page 1 --

17 MR. MAGLIERY: Yes.

18 THE COURT: -- to the June 6, 2025 policy
19 alert.

20 MR. MAGLIERY: I have it.

21 THE COURT: It's the paragraph that begins,
22 "While Congress likely did not envision," the last
23 sentence of that paragraph, the second to the last
24 clause.

25 MR. MAGLIERY: To me, your Honor, I'm sorry if

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1 I'm repeating myself and I want to meet the Court's
2 question, they just reiterate that the grant of deferred
3 action is not supported by an existing statute or
4 regulation.

5 THE COURT: Right.

6 MR. MAGLIERY: But what they say right before
7 that is Congress did not expressly permit deferred
8 action. That's the key line. That's table ante. We
9 know that. They say it's completely discretionary. It's
10 prosecutorial discretion.

11 If Congress had created deferred action, we
12 wouldn't be here. But USCIS created deferred action and
13 then they withdrew it by saying there's no statute that
14 lets us do this. That doesn't constitute a reasonable
15 ground.

16 THE COURT: And so I understand that they have
17 to be contradicting themselves a little bit in threading
18 the needle between the Section 701 and this issue. But
19 you have to be contradicting yourself a little bit also,
20 right? Because you're saying to me here's why 701 dozen
21 bar vacatur. 701 says if it's committed to agency
22 discretion by law, then it's un-reviewable judicially
23 under the APA.

24 You are saying, and you did say, this is not a
25 matter committed to agency discretion, it's a program

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1 with mandatory requirements that goes well beyond the
2 singular exercise of prosecutorial discretion. And that
3 argument you have to make on the 701 front to my mind
4 puts some pressure on what I think is the view you're
5 articulating now that this policy is one that can be
6 enacted even in the absence of any grant of statutory
7 authority. And why is that? That's my question.

8 Like --

9 MR. MAGLIERY: I totally comprehend the Court's
10 question and the answer is in *Regents*. The Court should
11 appreciate the distinction between the policy which is
12 that every SIJS recipient will be considered for deferred
13 action and if they're granted deferred action will
14 receive as a positive factor that they are SIJS
15 recipients, and if granted deferred action will be
16 entitled to employment authorization. That's the program
17 or policy that's at issue.

18 We are not challenging that they must grant
19 deferred action to every recipient. We're not telling
20 them that's what the 2022 policy was. That's their
21 discretion. And in fact, they can even revoke it if
22 there is a ground for revoking it.

23 What we want restored is the policy because the
24 rescission was arbitrary and capricious. That's not a
25 discretionary act within the APA.

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1 The individual case-by-case assessment, we're
2 not telling the Court go order them to grant deferred
3 action to every SIJS recipient. That's the key
4 distinction here. That's *Regents*. That's the DACA case,
5 right? There was a system of benefits set up. It was
6 purely a deferred action. The DACA recipients were
7 considered for --

8 THE COURT: I think *Regents* sidestepped this
9 question entirely. Judge Roberts, or Chief Justice
10 Roberts has that passage about how we're not going to
11 deal with the -- the briefing on the illegality issue is
12 wonky for these highly specific reasons and therefore,
13 we're just not going to consider the illegality
14 arguments.

15 MR. MAGLIERY: Your Honor --

16 THE COURT: But here I think the government is
17 making the illegality argument and they did in their
18 effort to justify their policy change. And so I have to
19 take it on.

20 MR. MAGLIERY: I don't think so, your Honor. I
21 have not heard -- I do not believe the government has
22 asserted in this case that the 2022 policy or deferred
23 action is illegal. That's --

24 THE COURT: They're saying we don't think it's
25 supported by any statute.

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1 MR. MAGLIERY: Well, at the same time saying --

2 THE COURT: If that's true --

3 MR. MAGLIERY: -- that they have the right to
4 grant deferred action or to defer actions? How is that
5 possible?

6 THE COURT: They have the right to grant
7 deferred action. But a program that tells them if you
8 exercise your prosecutorial discretion not to remove
9 somebody, then you must give them employment
10 authorization. That's not just prosecutorial discretion.
11 That's creating a whole new class of rights for a group
12 of people that Congress has said are subject to removal
13 and Congress has never said can work legally in the
14 United States.

15 And so maybe, I don't know, there's some class
16 of agency action that does not have to be supported by
17 any statutory authority. Right? If the agency wants
18 to -- if I'm the head of agency X, Y, Z and I say I want
19 to institute a policy that we're never going to let
20 anybody we interview wait more than 15 minutes for the
21 start of that interview after the appointed time, I don't
22 need Congress to tell me that I have that authority.
23 Right? It's like an All Writs Act kind of thing. It's
24 just inherent in their need to do their job.

25 But there is a lot of stuff that agencies do

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1 that does require a grant of authority, otherwise the
2 agency is acting beyond -- the agencies are creatures of
3 statute, right? They only have the power in certain
4 arenas to do that which Congress tells them. And to me,
5 for an agency to say we're going to grant work
6 authorization to a very large hundreds of thousands of
7 people class that Congress has just said are subject
8 removal, period, and Congress has said nothing about work
9 authorization, you don't think that requires a source of
10 statutory authority? And where would I look for the
11 limits on that?

12 MR. MAGLIERY: Your Honor, the word I would
13 change in the question is the word must. There's nothing
14 in the 2022 policy that said that USCIS must grant
15 deferred action or must grant employment authorization.
16 It was a policy that required consideration just like
17 DACA.

18 THE COURT: But even the power, not the
19 requirement, but the ability to grant work
20 authorization --

21 MR. MAGLIERY: Well, the statute --

22 THE COURT: -- that doesn't require --

23 MR. MAGLIERY: There's a statute about work
24 authorization while -- there is statutory authorization
25 about work authorization.

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1 THE COURT: Okay.

2 MR. MAGLIERY: I'm sorry, my colleague has just
3 handed to me, Congress has said deferred action is a
4 basis for EAD in the CFR. It's in 274.14(c)(14).

5 So I think the concerns about a statutory
6 authority for employment authorization for people who
7 have deferred action is not really at issue. There's a
8 whole category. That's 14 categories of people who are
9 able to get employment authorization before they've had,
10 you know, an adjustment of status.

11 THE COURT: And work authorization is
12 discretionary?

13 MR. MAGLIERY: Yes, work authorization, the
14 granting of work authorization is discretionary.

15 THE COURT: But you see how you're cabined
16 between these two walls? Like if everything is just
17 discretionary, discretionary, discretionary, then you
18 have the 701 problem, right? You have to point to
19 something that's not discretionary. What is it that's
20 not discretionary? I thought you were saying per *Regents*
21 we get EAD, we get -- what is not discretionary?

22 MR. MAGLIERY: What's not discretionary is what
23 *Regents* called a system of benefits beyond non-
24 enforcement. Those are the words. It is a system of
25 benefits that's not just non-enforcement. The entire

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1 case, Justice Roberts goes on to say that the reason that
2 the Secretary did not exercise her decision-making
3 properly, the reason her decision was arbitrary and
4 capricious is she didn't consider forbearance versus
5 benefits or other ways to address the arbitrary, I'm
6 sorry, the Attorney General's perspective on the legality
7 of the DACA program, but they talk about --

8 THE COURT: So in Section 701 --

9 MR. MAGLIERY: Yeah.

10 THE COURT: -- discussion in *Regents*, the Chief
11 Justice says -- and I think Ms. Kraner flagged this, it's
12 not discretionary because among other things the DACA
13 program instituted a standardized review process. To me,
14 it's not obvious that that's non-discretionary, right?
15 The U.S. Attorney could say look, we have prosecutorial
16 discretion to prosecute some wire frauds are not other
17 wire frauds and I'm going to institute a standardized
18 review process inside the office to decide which we
19 prosecute and which we forbear.

20 And I would have argued pre-*Regents* that the
21 mere fact that the U.S. Attorney has a standardized
22 process doesn't make anything more non-discretionary than
23 it started. But Justice Roberts is saying one reason we
24 know this is non-discretionary is because it comes with a
25 standardized review process built in. And that's true of

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1 SIJ DA, right?

2 MR. MAGLIERY: Yes. That's correct, your
3 Honor.

4 THE COURT: So but you don't think that
5 requires congressional authorization?

6 MR. MAGLIERY: It doesn't. Your Honor, in fact
7 what I would say, what I would posit to the Court is that
8 the SIJ 2022 policy is superior to the DACA policy which
9 had absolutely no basis in any statutory authority. But
10 here, the 2022 policy says we're doing this on the basis
11 of the SIJS statute. So it's actually, it's got an
12 advantage over a program that the Supreme Court already
13 said is subject to APA challenge.

14 There is a non-discretionary aspect, your
15 Honor, and this is what it is. Whether they have the
16 opportunity to be considered. That's the non-
17 discretionary aspect. The policy was that they had an
18 opportunity, and in fact automatically, were considered.
19 That's the non-discretionary aspect. The discretion is
20 what they do with the consideration. But that doesn't
21 mean the system of benefits like in *Regents* doesn't
22 exist. It does.

23 THE COURT: So I've just been handed the
24 regulation you cited about employment authorization, 8
25 CFR 274(a)(12), Classes of Aliens Authorized to Accept

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1 Employment. And you're telling me that SIJ, the SIJ
2 population is one of those classes under this reg?

3 MR. MAGLIERY: Excuse me, your Honor. I beg
4 your pardon. May I just --

5 THE COURT: Yes, please.

6 MR. MAGLIERY: I believe that (c)(14) says --
7 excuse me, your Honor, I wasn't speaking in the
8 microphone. I believe (c)(14) says that recipients of
9 deferred action can be considered for employment
10 authorization and that's why the policy, the 2022 policy
11 says you'll be considered for deferred action and then
12 SIJ deferred action recipients can apply under (c)(14).

13 THE COURT: But have you cited a statute or
14 just this regulation?

15 MR. MAGLIERY: For what?

16 THE COURT: Because I was asking -- sorry. Did
17 you ask me a question?

18 MR. MAGLIERY: I just asked for the Court to
19 clarify. I'm sorry. Did I cite a statute for which
20 proposition, your Honor?

21 THE COURT: Yes. The way I started my question
22 on this was trying to understand whether any part of the
23 2022 memo might have required statutory authorization
24 that it lacked. And the part I posited was that the 2022
25 memo talks about granting employment authorization to

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1 200,000 people in the SIJ population under said
2 circumstances. And my question was is that authorized by
3 statute and you said there is a statute. But then what
4 my law clerk handed me in response was a reg.

5 So my question is where has Congress actually
6 authorized employment authorization for people who did
7 not have a work visa or for people who are in the SIJ
8 status?

9 MR. MAGLIERY: I don't think there's a statute
10 that authorizes work authorization but there's a statute
11 that empowers the Secretary to create rules and that's
12 happened. And so I that when we're talking about
13 authorities for purposes of the APA we're still within
14 what courts have assessed as authorities.

15 I think maybe the Court's asking, again, please
16 correct me if I'm wrong, where do they get the idea in
17 the 2025 policy of saying we couldn't have the deferred
18 action policy because there wasn't day statute
19 authorizing us to have it? That would be anathema to
20 everything the government has ever said. They've always
21 said that prosecutorial discretion is within their power
22 and I think *Arpaio v. Obama* hold discretion exercised by
23 immigration officials is a principle feature of the
24 immigration system.

25 So I don't think the government is going to

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1 just claim that they have the authority to exercise
2 deferred action for a wide variety of reasons.

3 Here the question is was there a rescission of
4 a non-discretionary system of benefits? And again, your
5 Honor, I just don't see any daylight between this and
6 DACA or, if anything, I think this is more powerful
7 because it has --

8 THE COURT: Than *Regents*.

9 MR. MAGLIERY: Exactly.

10 THE COURT: But *Regents*, tell me why I'm wrong
11 about *Regents* because I think it's clear we disagree
12 there. So *Regents* -- where's the illegality. Headnote
13 20 in *Regents*, it's on page 25, the Court is telling us
14 that there is basically this question about how the DHS
15 Secretary's discretion to decide was legal and illegal is
16 cabined by a statute that says she has to defer to the
17 Attorney General on those questions and that the parties
18 basically missed that issue in their briefing. Right?

19 And then the opinion goes on at headnote 20 to
20 say, "Because of these gaps in respondent's briefing, we
21 do not evaluate the claims challenging the explanation
22 and correctness of the illegality conclusion. We do not
23 evaluate the claims challenging the explanation and
24 correctness of the illegality conclusion."

25 We don't have the, whatever that gap in the

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1 briefing was that led the Supreme Court to simply
2 sidestep that issue, I don't think we have it here.

3 And so I think I do need to take on the
4 legality question because I hear the government, I see
5 the government in the June 2025 memo at least saying we
6 don't see a statute that supports this program even if
7 they're not saying explicitly we think it's a separation
8 of powers violation.

9 And I think that threshold issue on which I
10 might want supplemental briefing is what is the outer
11 limit on the universe of agency action that requires a
12 grant of authority from Congress? Right?

13 My example that I'll keep going back to about
14 the waiting room policy that the Secretary of a given
15 agency institutes, she doesn't need an affirmative grant
16 of authority from Congress to implement that policy. But
17 lots of stuff that agencies do, major questions and even
18 a lot of minor questions, requires the agency to point to
19 a grant of authorization from Congress.

20 And my question is before we even start
21 applying that rule to the June or the, sorry, May or
22 March 2022 memo I want to know what the rule is. And I
23 don't think it's clear in the briefing.

24 Where is the dividing line between the things
25 that agencies do that require an expressed grant of

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1 authorization and the things that don't?

2 MR. MAGLIERY: Your Honor, respectfully, we're
3 not here challenging the 2022 policy and no one is. No,
4 they are not, your Honor. They are absolutely not
5 challenging the legality of the 2022 policy, nor has
6 there ever been, your Honor, a written determination by
7 the Attorney General.

8 THE COURT: I mean I'll get into this with
9 them --

10 MR. MAGLIERY: All they say --

11 THE COURT: but I just, I think you're just
12 wrong about that. The June 2025 memo, I'm reading the
13 same thing again, says that our reason for withdrawing
14 the prior guidance and substituting this guidance is that
15 we don't see how the prior guidance was supported by any
16 existing statute. And I could be wrong but I think that
17 if they're right about that, that goes a long way towards
18 overcoming the arbitrary and capricious label. And if
19 they're wrong, then that's a whole different story.

20 MR. MAGLIERY: Your Honor, I categorically
21 disagree. We're not here challenging the 2022 policy and
22 I don't think the government is. I don't think the 2025
23 policy memo says that.

24 THE COURT: What do you understand that phrase
25 to mean when they say we don't see support in any

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1 existing statute?

2 MR. MAGLIERY: I think as I just said, your
3 Honor, the difference is in *Regents* the Attorney General
4 issued a determination that the DACA policy was illegal.
5 Here they've just said we're changing our policy, we're
6 changing our interpretation.

7 THE COURT: Because they say we don't see how
8 it's supported by any existing statute.

9 MR. MAGLIERY: And in 2022 --

10 THE COURT: And my question is --

11 MR. MAGLIERY: -- they found that it was
12 supported.

13 THE COURT: -- what do you understand that
14 particular language to mean? If not, we think there are
15 legal problems with the prior action.

16 MR. MAGLIERY: Oh thanks. Okay. So in the
17 government's policy memo which is submitted in
18 opposition, it's at ECF 42-5, they issued a --

19 THE COURT: Can we just stick with my question
20 for a moment, please? My question was in the June 6,
21 2025 policy order, ECF 1-2, the government says that
22 United States Citizenship and Immigration Services Agency
23 says that thing in that paragraph I pointed you to about
24 how we don't see this 2022 policy being supported,
25 "supported by any existing statute."

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1 In my question is what do you understand that
2 to mean?

3 MR. MAGLIERY: I understand that to be a pure
4 policy departure from the 2022 finding that it was
5 supported by statute. A --

6 THE COURT: But it's a legal view, right?

7 MR. MAGLIERY: I don't think so. It's not a
8 determination by the Attorney General under 8 USC 1103.
9 It's nothing like what happened in DACA.

10 THE COURT: Why would it have to be?

11 MR. MAGLIERY: It's a view, your Honor. It's a
12 view and we've challenged the view as being unreasonable,
13 not considering all relevant factors, not taking into
14 account an existing statutory scheme, not engaging with
15 the prior policy. It's a view.

16 THE COURT: But a legal view.

17 MR. MAGLIERY: It's a propounding of a view,
18 but it's not --

19 THE COURT: It's not a policy view, right? It
20 is a legal view. Can we agree on that?

21 MR. MAGLIERY: Absolutely not, your Honor.
22 This is USC --

23 THE COURT: The notion that the 2022 policy is
24 not "supported by any existing statute" you think is a
25 matter of pure politics and policy not there's no legal

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1 component to that view.

2 MR. MAGLIERY: I think it's that and also I
3 think the Court is now entering into a world where it's
4 questioning whether there has to be statutory regulations
5 provide for deferred action which the government says
6 there does not need to be. The government in 42-5, their
7 own policy memo. There is no expressed statutory basis
8 for deferred action. I'm quoting. That's the
9 government.

10 THE COURT: But is there a statutory
11 requirement for anything in SIJ DA? That was my original
12 question and I pointed you to the work authorization
13 component and you said well there is authorization and
14 somebody handed me up a regulation, not a statute.

15 So is there anything in the 2022 policy that
16 could arguably require congressional authorization? And
17 that's why I say I would like supplemental briefing from
18 both parties by two weeks from tomorrow let's say on the
19 following question which is where is the line between
20 agency actions that the agencies are free to take with no
21 explicit source of statutory authority and agency actions
22 that require an explicit source of statutory authority?

23 MR. MAGLIERY: Your Honor, that seems like a
24 far-reaching question. We really only need to answer it
25 I think with respect to deferred action. And deferred

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1 action, according to the government, is a --

2 THE COURT: No, but you're telling me this
3 program is a lot more than deferred action. It's work
4 authorization, it provides a systematized structure. You
5 can fight the hypo as much as you like. You can put in
6 whatever you want in response to that request for
7 supplemental briefing but I'd like that from both sides,
8 please.

9 MR. MAGLIERY: Understood, your Honor.

10 THE COURT: Because that -- I'm going to ask
11 the government a series of pointed questions also about
12 their quote/unquote reasons for the change of position.
13 But what I understand to be their lead argument is
14 pointing to this thing that we explained our reasons when
15 we put out the June memo and the reason is that we don't
16 see any statutory support for the 2022 program. So that
17 for me begs the question of whether any statutory support
18 is required.

19 Anyway, one of their other reasons is maybe or
20 maybe not this thing about wanting better vetting and
21 screening that you see in footnote 4 of the June 6, 2025
22 policy alert. Do you understand that to be offered up as
23 a justification for this change of position?

24 MR. MAGLIERY: I understand it to be offered up
25 but not be a valid offer because even in the 2022 policy

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1 the government was permitted to obtain additional
2 biometric screening and further vet potential recipients.
3 So the idea that the 2022 policy in any way did not allow
4 additional vetting is a falsity. So I don't think it's
5 valid.

6 And also, I think I've already raised with the
7 Court that SIJ already requires a vigorous --

8 THE COURT: But you're saying, you were saying
9 earlier when we were talking about Accardi that it was at
10 least the practice of the agency to render both the
11 determination on SIJ status and deferred action at the
12 same time.

13 MR. MAGLIERY: In the vast majority, over 99
14 percent of the cases.

15 THE COURT: So if they -- let's say we
16 understand them to be required under the prior regime to
17 do that, would that inhibit in any way the ability to vet
18 and screen?

19 MR. MAGLIERY: No.

20 THE COURT: Why?

21 MR. MAGLIERY: Because the 2020 -- if the Court
22 were to vacate the 2025 policy, the 2022 policy would be
23 restored.

24 THE COURT: Right.

25 MR. MAGLIERY: And the 2022 policy provided for

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1 additional biometric scanning or vetting. I don't have
2 it in front of me, your Honor, but I can get it, the
3 changes in the policy manual that accompanied the 2022
4 policy also provide for that.

5 THE COURT: And those screening changes are
6 required in connection with SIJ status or deferred action
7 or both?

8 MR. MAGLIERY: With deferred action. So they
9 are a specific permitted inquiry respecting whether to
10 grant deferred action to SIJS recipients and that points
11 up the fact that this is a program.

12 THE COURT: Right. And so is there any time
13 limit on the SIJ determination in the prior regime?

14 MR. MAGLIERY: It's six months I'm told by my
15 colleagues.

16 THE COURT: Six months from what?

17 MR. MAGLIERY: From lead time that the I-360
18 application is made.

19 THE COURT: From the time the application is
20 made. So a 360 application is made. The agency is on a
21 six-month clock to determine SIJ status. And you're
22 telling me that you think it was a requirement
23 essentially of the prior regime that the deferred action
24 determination be rendered simultaneously with the SIJ
25 determination. So that would be a six-month clock on

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1 deferred action and that would not inhibit the agency's
2 ability to engage in vetting measures of any kind?

3 MR. MAGLIERY: I did not -- if I said it was a
4 requirement, I misspoke, but I don't think I did. What I
5 said is that it was a practice. And if the government
6 were to now take the position that it could take as long
7 as months or years, under the 2022 policy it would render
8 it a meaningless vacatur of the 2025 policy.

9 But I didn't say, and I clarify for the
10 Court --

11 THE COURT: Right.

12 MR. MAGLIERY: -- that it's required to do it
13 in that time frame.

14 THE COURT: So then go back with me for a
15 second because maybe we didn't finish that conversation,
16 go back with me to the question of what is the remedy on
17 the Accardi violation?

18 MR. MAGLIERY: That's what --

19 THE COURT: It isn't --

20 MR. MAGLIERY: Excuse me.

21 THE COURT: It's what?

22 MR. MAGLIERY: That is where I think even if
23 the Court is inclined to vacate the 2025 policy, and I'm
24 not presuming that the Court is, even if that were where
25 we went, it still seems there has to be some order that

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1 the April 7th to June 6th applications be adjudicated.
2 Not that deferred action be granted but they be
3 adjudicated so they are not lost.

4 THE COURT: But not on any specific time table?

5 MR. MAGLIERY: Your Honor, I would posit that
6 an attempt by the government to indefinitely delay or
7 intentionally withhold adjudication would render vacating
8 the 2025 policy meaningless. But I'm not here asking the
9 Court to say that there was some number or amount of time
10 in the 2022 policy if it doesn't exist.

11 THE COURT: But again, you see the tension
12 maybe that on the one hand the old practice included a
13 rapid determination on deferred action and 99 percent of
14 the time it happened in the same six-month time table as
15 exists for the SIJ determination. And you want whatever
16 remedy I issue here to give you some facsimile of that,
17 like a rapidity of deferred action decision. But at the
18 same time you have to argue there's no difference in the
19 government's ability to vet people between the old regime
20 and the new regime, and that's where I'm getting tangled
21 up.

22 So like I have False Claims Act cases, for
23 example, where the statute says the complaint can be
24 filed under seal but it needs to be unsealed within six
25 months of filing unless a certain number of exceptions

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1 are satisfied. And one of the exceptions is the
2 government needs more time to investigate and decide
3 whether it wants to intervene and take over the relator's
4 claims or not.

5 And the government in those civil actions just
6 right here in the U.S. Attorney's Office in Brooklyn is
7 often saying they need years to complete their
8 investigation.

9 To the extent there was some analogous dynamic
10 in the world of deferred action where the government
11 thought it needed meaningfully more time to vet and
12 screen people who were coming in, you would have me
13 forbid that, right? Because you're saying as to the
14 Accardi violation it's not enough, Judge, just to say
15 change the policy back and consider deferred action. You
16 need to tell them to do within a certain time frame.

17 MR. MAGLIERY: There needs to be some effect to
18 the rescission which is that the adjudication, the
19 consideration required by the 2022 policy occurs.

20 THE COURT: But I don't understand how you can
21 say that and say then there's no difference in vetting in
22 the timeline for vetting between the old policy and the
23 new policy. Those two things can't simultaneously be
24 true.

25 MR. MAGLIERY: I'm sorry, I didn't understand

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1 that last part, your Honor. Forgive me.

2 THE COURT: If you're telling me we want to go
3 back to the old world and the old world was one in which
4 they rendered a decision on deferred action within the
5 same six-month period as they considered SIJ status, or
6 something like it, right, Judge, you're telling me you
7 need to put a time limit on the deferred action
8 determination. And the new policy is one that has no
9 time limit on the deferred action determination. Not
10 only that, they're not even making a deferred action
11 determination until a visa number becomes available.

12 I don't understand how you can then say -- like
13 you would cut short -- if you're saying they have to
14 grant deferred action within a certain time period, you
15 would by definition be limiting the amount of time
16 available to the agency to conduct the vetting and
17 screening that they say they want to conduct, and you
18 can't have it both ways, can you?

19 MR. MAGLIERY: I don't think we're asking for
20 the latter. The rescission of the 2025 policy would have
21 the government resume a SIJ application constituting an
22 automatic application for deferred action and for it to
23 be considered. And if that's what --

24 THE COURT: And consider within a certain time
25 period you just said.

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1 MR. MAGLIERY: There's nothing in the policy
2 about that.

3 THE COURT: No, but you said you want it.

4 MR. MAGLIERY: Only to the extent, your Honor,
5 that the absence of some good-faith adjudication by the
6 government would render the rescission moot. But I'm not
7 here to prescribe to the Court or ask the Court to
8 prescribe that now the Court's going to impose a
9 requirement that they be adjudicated at the same time as
10 the SIJ application. That's what happened.

11 I think a very material variance from that in
12 the future if this Court were to rescind the 2025 policy
13 and no deferred action adjudications took place for the
14 next year, we'd come back with a new claim that says
15 something different. That's not what we're here for
16 today. We're here today to challenge that the 2025
17 policy is arbitrary and capricious and is invalid under
18 the APA.

19 THE COURT: So here's my dilemma in case it's
20 not obvious already, and I just want you to help me
21 resolve what I see as the tension between these two
22 imperatives. I think you have a very strong argument on
23 the Accardi prong that a policy change occurred and
24 contrary to my initial detour, which I apologize for
25 because I just missed the point, it was a policy change

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1 in respect of a policy that had been in writing, i.e.,
2 the policy that we will consider people for deferred
3 action when they get SIJ status. And they made that
4 change and ran it for a two-month period without telling
5 anybody. And that is an Accardi violation.

6 And then the question becomes what to do about
7 it. And I have I think two options at least, the two
8 that I'm focused on, for what to do about it where option
9 one is just tell them you need to consider these people
10 for deferred action, full stop.

11 And option two is you need to consider these
12 people for deferred action and you need to render that
13 consideration within a certain time frame.

14 And if you're asking for option two, then I
15 don't think, as I tried to indicate, that you can
16 simultaneously say on the merits of the change of
17 position question oh, there's no limitation here on the
18 government's ability to vet people. They have the same
19 ability they always had.

20 There is a limitation. It's a time limitation
21 and, you know, that's meaningful. And it will, based on
22 my experience with how investigations work, if you say
23 anything like you need to render the deferred action
24 determination within the same six-month period as you did
25 the SIJ decision, you will be inhibiting investigation.

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1 That's just how the world works.

2 And so then what? Then I suppose I could just
3 say option one, consider everybody for deferred action
4 and interposed no time period. And if individuals a year
5 from now, 18 months from now believe that the agency is
6 dragging its feet, they can file individual APA claims
7 for agency action delayed rather than arbitrary and
8 capricious review.

9 And I think you want, I think that's the option
10 you want because if you're pushing for option two, you're
11 undermining your argument that there's no change in the
12 government's ability to vet people.

13 MR. MAGLIERY: I think it's a Court is inclined
14 to grant any sort of preliminary injunction, and I
15 believe it has the power to, I think that in *Batalla*
16 *Vidal v. Nielsen* it does, I think under its inherent power
17 it does, if the Court were to do that, it could require
18 that that group of people have an adjudication in some
19 reasonable amount of time. But if the Court is not going
20 to grant an injunction, certainly vacating the rescission
21 would be enough for SIJ recipients who are not receiving
22 adjudications to come back for other relief in the
23 future.

24 We only have as much of a record as we have
25 right now. We don't have -- we're not dealing with

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1 people who we believe have been unduly delayed. The
2 current record is that they are not adjudicating it.

3 THE COURT: Right. I understand.

4 MR. MAGLIERY: So that's what we have.

5 THE COURT: All right. Let me hear from the
6 government. Thank you.

7 MR. MAGLIERY: Thank you.

8 THE COURT: On the merits of the change of
9 position.

10 MR. DE LAS ALAS: Yes.

11 THE COURT: Assuming this is a change of
12 position.

13 MR. DE LAS ALAS: Your Honor, just to clarify a
14 few things.

15 THE COURT: Let me just say, sorry, before I
16 forget it, I'm also interested in -- you know, there's
17 this passage in *Regents* where the opinion says before we
18 decide on the validity of the agency's articulated
19 reasons for changing its position, we need to think about
20 where to look for those reasons. You know what I'm
21 talking about? And there's --

22 MR. MAGLIERY: Yes.

23 THE COURT: Okay. You pointed me at some point
24 to this memorandum also issued on June 6, 2025 but not
25 issued publicly I don't think, this memo from the

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1 associate director in charge of field operations and a
2 couple of other people. Oh no, I'm sorry, from the
3 acting director of the whole agency to some of the field
4 operations people and the chief counsel and otherwise.

5 Can we, on the question of where we look for
6 the reasons that we're going to judge, does this memo
7 count if it's not issued publically?

8 MR. MAGLIERY: It seems like *Regents* says an
9 agency has to defend its actions based on the reasons it
10 gave when it acted and --

11 THE COURT: I assume that means gave to the
12 public.

13 MR. MAGLIERY: I think that's probably the
14 right interpretation, your Honor, yes. I think we'd have
15 to agree with that.

16 THE COURT: I'd be happy to hear from both
17 sides on that question too in the supplemental briefing
18 of do intra-agency statements of reason count for the
19 arbitrary and capricious determination?

20 MR. MAGLIERY: So the only reason I hesitate,
21 your Honor, is they've put this forward in their briefing
22 as part of their justification so I think it would
23 warrant some additional consideration and we would
24 appreciate the opportunity.

25 THE COURT: Yes. I mean the policy alert that

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1 was disseminated publicly is thin and I understand why
2 they'd want to harness the private announcement within
3 the agency to buttress their reasoning but I'm not sure
4 that works.

5 MR. MAGLIERY: Thank you, your Honor.

6 THE COURT: Thank you. So what are the reasons
7 that the government offered and that it relies on now.

8 MR. DE LAS ALAS: Your Honor, when it comes to
9 the reasons that the government offered, I know that your
10 Honor just asked for supplemental briefing on this but
11 our position is that the final agency action, the thing
12 that your Honor must consult in order to ascertain the
13 reasons for the agency's actions are actually the June 6,
14 2025 policy -- sorry, decision memo. It's not the policy
15 alert, your Honor.

16 So starting from that standpoint --

17 THE COURT: That alone?

18 MR. DE LAS ALAS: Your Honor --

19 THE COURT: Not the policy alert as well?

20 MR. DE LAS ALAS: Your Honor, when it comes to
21 the policy alert, it's our position that's not the final
22 agency action. It's meant to implement the final agency
23 action which is the decision memo, your Honor, because as
24 the decision memo said, yes, as the decision memo said
25 all program officers and directorates will immediately

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1 update procedures and operational guidance to align with
2 this memorandum. The Office of Policy and Strategy will
3 update the USCIS policy manual within five days of the
4 date of this memorandum.

5 So the relation of the policy alert and the
6 decision memo is the decision memo is a final agency
7 action while the policy alert is merely implementation,
8 your Honor, because the policy alert is not the
9 consummation of the agency's thinking nor is it the same
10 from which legal consequences flow. The thing from which
11 legal consequences flow and the consummation of the
12 agency's thinking is the decision memo, your Honor.

13 So starting from that standpoint, and if your
14 Honor thinks we should address this in supplemental
15 briefing --

16 THE COURT: So one thing an agency is not
17 allowed to do, and I don't think this is controversial,
18 is change its policy sub silentio. Right? It has to
19 tell the world that it's changing its policy. Oh, and I
20 guess you're going to suggest maybe that they can tell
21 the world they're changing their policy publically but
22 not tell the world why. They get to keep their reasons
23 private as long as the reasons are contemporaneous or
24 prior. That's your position?

25 MR. DE LAS ALAS: Your Honor, pardon me if

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1 I'm -- I will get to your question but I think your
2 question is premised on this idea, on plaintiff's
3 characterization of the April 7, 2025 --

4 THE COURT: You may be right that my question
5 rests on a faulty premise but just by way of order of
6 operations because I lose the thread otherwise, it would
7 help me if you would answer my question first and then
8 tell me why you think it's the wrong question instead of
9 in the reverse order.

10 So is it the case that you think your
11 obligation to articulate quote/unquote good reasons for
12 the policy change can be satisfied in a non-public
13 document disseminated only within the agency or do your
14 good reasons have to be made public? Tell me which of
15 those you think is the answer and then tell me why I'm
16 asking you the wrong question.

17 MR. DE LAS ALAS: Court's indulgence, your
18 Honor.

19 (Pause in proceedings)

20 MR. DE LAS ALAS: Your Honor, when it comes to
21 your question --

22 THE COURT: The answer can be we don't know,
23 we'll tell you in the supplemental briefing.

24 MR. DE LAS ALAS: Yes.

25 THE COURT: But just tell me what the answer --

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1 MR. DE LAS ALAS: Yeah. In the interest of
2 candor, your Honor, we think it would be appropriate to
3 address that question in supplemental briefing.

4 THE COURT: Okay.

5 MR. DE LAS ALAS: But to move on to address the
6 assumption that we on the defense side seem to be
7 struggling with is that it's premised on plaintiff's
8 characterization of what happened around April 7, 2025
9 using plaintiff's --

10 THE COURT: Well, forget about their
11 characterization.

12 MR. DE LAS ALAS: Yes.

13 THE COURT: Can you just tell me what were the
14 reasons for the policy change?

15 MR. DE LAS ALAS: So the reasons for the policy
16 change, your Honor, were threefold.

17 First, not only did the agency question
18 legality of the policy --

19 THE COURT: Where do you question, whether it's
20 in a public source or a private source, where would I
21 look to see you questioning the legality of the policy?
22 Is it that language I was pointing to before or is it
23 somewhere else?

24 MR. DE LAS ALAS: There are two locations, your
25 Honor. First, it is the location that you pointed to

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1 before, but also in the SIJ decision memo on page --
2 sorry, this would be document 42-5, it would be page 8
3 out of -- it would be page 5 out of 8. It would be in
4 the paragraph starting with, "On April 4, 2025."

5 And towards the end of that decision, towards
6 the end of that paragraph it states, "The memorandum
7 referencing an April 4, incorporating by reference an
8 April 4, 2025 memorandum, the memorandum went on to
9 identify numerous key principals in any deferred action
10 including DHS should be very cautious before using
11 prosecutorial discretion to circumvent the expressed will
12 of Congress," your Honor.

13 So in those two locations, the agency is
14 questioning the legality of the March 22, sorry, March
15 2022 policy. That's the first reason.

16 The second reason, your Honor, is that as
17 explained by the agency in the decision memo, the agency
18 saw that the March 20 --

19 THE COURT: Does the agency say anywhere why
20 the 2022 memo could be characterized as having
21 circumvented the expressed will of Congress? It seems
22 like you're just talking about deferred action there and
23 not anything about employment authorization.

24 This case is very much like the student loan
25 case for reasons that at least on first glance -- maybe I

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1 could be disabused of this. There was a regulation, I'm
2 sorry, there was a statute in the student loan context
3 that said the Secretary of Education, I don't know what
4 Secretary it was, has the authority to modify or cancel
5 loan agreements. And the Supreme Court said that means
6 you can renegotiate individual agreements, it doesn't
7 mean you can just forgive \$50 trillion worth of student
8 debt or whatever the number was. I have no idea.

9 Is that analogous that yes there's
10 prosecutorial discretion in the immigration law to say
11 we're going to go after these kinds of, like people who
12 have violent criminal records or whatever and not other
13 people but not to essentially grant legal status to
14 hundreds of thousands or millions of people? Am I -- I'm
15 getting way ahead of myself here because I don't know
16 even the more basic rules about what congressional
17 authorization is required. But tell me that from a first
18 principle's perspective what is the requirement that
19 these regulations be able to point to a source of
20 congressional authorization. Where does that come from?

21 MR. DE LAS ALAS: Your Honor, and this is why
22 we -- your Honor, I will answer your question but this is
23 why we grapple with the larger point of this is
24 ultimately boiling down to prosecutorial discretion.
25 There is no statutory authorization for deferred action

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1 specifically for SIJ classified --

2 THE COURT: Why does there have to be
3 authorization?

4 MR. DE LAS ALAS: Your Honor, there has to be
5 statutory authority in the agency's view because what had
6 happened is that the agency perceived the March 2022
7 policy issued under the prior administration as, in your
8 Honor's characterization, creating a process in which
9 rather than exercising discretion on a case-by-case
10 basis, it was exercising discretion, it was categorically
11 granting deferred action and thus in essence creating a
12 pathway to staying in the United States that Congress did
13 not contemplate because --

14 THE COURT: Well, what source of authority
15 would dictate that before the agency does that they need
16 to point to a grant of statutory authority from Congress?

17 MR. DE LAS ALAS: Pardon me, your Honor? Would
18 you please repeat the question? I just want to make
19 sure.

20 THE COURT: You seem to be taking for
21 granted -- we're having a debate here that is sort of
22 left below the surface for the most part. I'm trying to
23 bring it above the surface. The plaintiffs are saying
24 you have this language in your memos about how this is
25 unsupported by any grant of authorization from Congress

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1 but this doesn't require any grant of authorization from
2 Congress. It's a matter of essentially prosecutorial
3 discretion or enforcement discretion. Right? And the
4 same way the SEC enforcement staff has discretion to
5 decide we'd rather go after boiler room securities
6 fraudsters or we'd rather go after crypto or we'd rather
7 go after large public company accounting fraud. They
8 don't need authorization from Congress to decide those
9 priorities. That's just the kind of thing that the
10 agencies get to decide for themselves as a matter of
11 discretion.

12 And put aside for the moment the tension with
13 Section 701. I don't want to hear that that's contrary
14 to their views on Section 701. I'm asking a different
15 question.

16 You all are saying no, this is not just
17 prosecutorial discretion, this is a grant of status, this
18 is work authorization, this is a systematic program that
19 the agency is building along the lines of DACA. They
20 need -- you're either saying this explicitly or strongly
21 implying, and you're saying explicitly here now they need
22 to point to a source of statutory authority to do this.
23 That's the reason why you didn't act arbitrarily and
24 capriciously, right? You have to have good reasons, and
25 the good reason that you're leading with, your first

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1 document is we thought the prior program was illegal in
2 the sense that it exceeded -- or at least was likely
3 illegal, couldn't find support for in any statute. And
4 that just begs the obvious question why do they have to
5 find support in the statute?

6 MR. DE LAS ALAS: Your Honor --

7 THE COURT: Right? Where does that requirement
8 come from?

9 MR. DE LAS ALAS: The requirement from the fact
10 that Congress creates, under the constitution, has sole
11 power over the rules of naturalization and as creators,
12 creator of statutes set forth by Congress, in order to
13 act and create a de facto status the agency would have to
14 point to congressional authorization to do that, your
15 Honor.

16 THE COURT: Not if it's a matter of agency
17 priorities. Right? If Congress says to the agency
18 remove every person who's in the country without legal
19 status immediately but there just aren't enough Customs
20 agents to effectuate that, they have to prioritize. And
21 in setting the priority, I don't think anybody believes
22 that they have to point to an act of Congress to justify
23 their order of prioritization.

24 I understand you think that this statute did
25 more than that, that it created a path to work

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1 authorization, et cetera. But what case from the Supreme
2 Court, is it *Youngstown Sheet and Tube*? Is it -- you
3 know what is the case that says that the executive acts
4 beyond its authority when it does the 2022 memo absent an
5 expressed grant of authorization from Congress?

6 MR. DE LAS ALAS: Your Honor, I don't want to
7 get ahead of myself either in that I think this is a
8 question that's probably best broached in supplemental
9 briefing. I know you're trying to get a preview from the
10 government but I think the more prudent option would be
11 to address that outer limit question you posed earlier --

12 THE COURT: Right.

13 MR. DE LAS ALAS: -- in the supplemental
14 briefing.

15 THE COURT: So everybody's telling me why this
16 is not the right question on both sides.

17 If your argument number one for your having had
18 good reasons for withdrawing the 2022 memo is we thought
19 it was unsupported by any statutory authority, that
20 obviously begs the question, doesn't it, what impetus
21 there is for pointing to supporting statutory authority?
22 Like why did they have to? Do you agree with that?

23 MR. DE LAS ALAS: Yes, I agree that would be a
24 question appropriate for supplemental briefing and we
25 will address it then, your Honor.

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1 THE COURT: Okay.

2 MR. DE LAS ALAS: Yes.

3 THE COURT: Apart from the question of whether
4 the 2022 guidance was supported by statutory authority or
5 not, what other reasons did the agency articulate?

6 MR. DE LAS ALAS: Your Honor, the agency also
7 found that the March 2022 policy was inconsistent with
8 the practices of how the agency in the past had made its
9 determinations of on deferred action. Specifically, it
10 observed that because under the March 2022 policy the
11 vetting requirements weren't routine, because under the
12 form I-360 that --

13 THE COURT: Where are you looking?

14 MR. DE LAS ALAS: I'm looking at the --

15 THE COURT: Is it ECF 42-5?

16 MR. DE LAS ALAS: Yes, 42-5, your Honor.

17 THE COURT: Can you point me --

18 MR. DE LAS ALAS: Yes, your Honor.

19 THE COURT: -- to the passages in question?

20 MR. DE LAS ALAS: Yes. I'm pointing to -- I'm
21 looking at the paragraph on page 6 of 8 that starts,
22 "Historically USCIS required a biometrics." Yes. On
23 that -- yes, as part of the decision memo explains, your
24 Honor, what had happened under the March 2022 policy, the
25 agency, inconsistent with its prior practice on deferred

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1 action, had essentially not given itself a full view of
2 the evidence in order to do the proper case-by-case
3 analysis required for its --

4 THE COURT: Is that in the 2022 memo itself
5 though or that's just a practice that changed behind the
6 scenes?

7 MR. DE LAS ALAS: Your Honor, wasn't it --

8 THE COURT: You could have fixed that problem,
9 unless the 2022 memo is actually contrary, you could have
10 fixed that problem by saying we're re-instituting the
11 biometric submission requirement, not we're canceling the
12 whole program unless the 2022 memo, something about the
13 memo itself, required you to abandon the biometrics
14 requirement.

15 MR. DE LAS ALAS: Your Honor, this is similar
16 to one of our previous lines of questioning in that we
17 believe that your Honor's questions premised on a
18 factually inaccurate premise that there's somehow,
19 according to plaintiffs, a categorical ban on
20 consideration of deferred action request from SIJ
21 classified aliens.

22 Really what has happened, your Honor, is that
23 as articulated in the June 2025 decision memo, SIJ
24 classified aliens can still apply for deferred action and
25 make requests for employment authorization. The

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1 difference is that unlike the March 2022 policy where
2 they had to just file the I-360, now they have to file
3 the G-325(a). So they're still considered for deferred
4 action, your Honor. It's just that they have to file an
5 extra piece of paper.

6 So for our first point, we believe the question
7 is --

8 THE COURT: But am I right to say that there's
9 nothing about the 2022 policy on its face, either in the
10 policy alert or in the changes to the policy manual, that
11 says don't require a biometrics submission anymore, is
12 there?

13 MR. DE LAS ALAS: No, your Honor. The agency's
14 view that it was implicit in that it was not routine and
15 not required under the previous policy because the form
16 I-360 made biometrics requests optional as opposed to --

17 THE COURT: All right. What made biometrics
18 optional?

19 MR. DE LAS ALAS: So under the instructions of
20 the form I-360, biometrics may be requested but they're
21 not required to be provided.

22 THE COURT: But the 360 is just for SIJ status,
23 right? And you could have said, you could have added a
24 question to the form that said by the way, if you want to
25 be considered for deferred action, you need to submit

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1 biometric information. You know, go to your local police
2 station for a fingerprint scan. Right? But you wouldn't
3 have canceled the entire program. And I think there has
4 to be a relationship between your reason for not liking
5 the prior program and your remedy, right?

6 MR. DE LAS ALAS: Yes.

7 THE COURT: Okay. Yes. All right. Let me
8 just go through my questions list and make sure I haven't
9 missed anything.

10 The Supreme Court is questioning in *White Lion*
11 whether agency decision making that occurs outside of
12 noticing common process is even subject to change of
13 position doctrine. Is it in the government's view?

14 MR. DE LAS ALAS: The Court's indulgence.

15 THE COURT: Both sides can address that in the
16 supplemental briefing as well.

17 (Pause in proceedings)

18 THE COURT: And let me just ask this question
19 of both parties starting with the plaintiffs while I have
20 you. Are there any facts in dispute here that might
21 require a fact hearing? I think the answer is no but --

22 MS. KRANER: No, your Honor, but I do think
23 there needs to be some clarification on certain
24 statements, for example, what the G-325(a) is and what it
25 actually does. I don't think that's in dispute. But

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1 it's not just a new form that you can file that gives you
2 access to the SIJ deferred action policy.

3 You know, the declaration that was submitted in
4 opposition pointed to that form and cited -- one second,
5 your Honor. I just have this in front of me. The G-
6 325(a) form is actually a general form that's used for
7 any non-citizen to request deferred action. It deals
8 with a request based on emergency or unforeseen
9 circumstances, someone needs to have medical attention --

10 THE COURT: I'm not following what part of our
11 discussion here today you're referring back to.

12 MS. KRANER: Well, counsel just said that -- I
13 just want to make sure the record is clear that deferred
14 action based on someone's status being a SIJ beneficiary
15 is not available for consideration or adjudication now.
16 The G-325(a) form is not an actual substitute for that.
17 It's not what we're talking about. And I just want to
18 make sure the record's clear on that. I don't think it's
19 a fact that's in dispute at all. I just think it's been
20 stated throughout the briefing and I just want your Honor
21 to understand that as we sit today under the 2025 policy
22 and the rescission there is no opportunity for
23 individuals who have SIJ to be considered for deferred
24 action under the 2022 policy, and the G-325(a) form does
25 not accomplish that.

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1 THE COURT: I didn't think that was
2 controversial.

3 MS. KRANER: Okay.

4 THE COURT: The new policy dictates that you
5 don't get considered for deferred action until a visa
6 number is available. Do you disagree with that?

7 MR. DE LAS ALAS: I disagree with that. Our
8 understanding, your Honor, of facts on the ground is that
9 a person who has SIJ classification, like many other
10 aliens can apply for deferred action, your Honor. They
11 just have to apply using form G-325(a) instead of being
12 automatically considered after filing an I-360.

13 THE COURT: But sorry, so your first bullet in
14 the June 6, 2025 memo under the heading policy highlights
15 says highlight number one, U.S. Customs and Immigration
16 Services will no longer conduct deferred action
17 determinations for aliens with SIJ classification who
18 cannot apply for adjustment of status because an
19 immigrant visa -- oh, are you talking about whether they
20 can apply for deferred action for other reasons?

21 MS. KRANER: Under other grounds. Correct.

22 THE COURT: I don't understand why you read
23 this memo that way. I think I disagree with you, so
24 explain that to me.

25 MS. KRANER: No, no, I actually wasn't saying

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1 that. Counsel keeps referring to the G-325(a) form.

2 THE COURT: Right.

3 MS. KRANER: And the G-325(a) form is currently
4 being phased out. They're in the process of revising it.
5 It has a box under there that says grounds for
6 application and one of those boxes is SIJ deferred action
7 and that no longer exists. So there is no way for anyone
8 to just file that form and to be considered under the
9 criteria of the 2022 policy.

10 And I just want to make sure the record's clear
11 about that because when counsel says they can still be
12 considered for deferred action, someone who has SIJ may
13 be able to, under I think the government's view, request
14 deferred action for extraordinary reasons such as a
15 natural disaster occurred and, you know, I need to stay
16 in the United States or I need to get treatment, cancer
17 treatments. That from their perspective is still
18 available. But what's not available is the adjudication
19 deferred action under the criteria under the 2022 policy.

20 So that's the clarifying point that I just
21 wanted to make because I --

22 THE COURT: I don't understand how they could
23 dispute that in light of bullet number one.

24 MS. KRANER: I agree, your Honor, but I --

25 THE COURT: How do you thread that needle?

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1 MR. DE LAS ALAS: Well, your Honor, we do agree
2 that they're not being considered under the March 2022
3 policy. They're just going to have to file another form.
4 But I think we were responding to the point, and thank
5 you for counsel's clarification --

6 THE COURT: No, but if I'm somebody in SIJ
7 status and I say to you now I would like to be considered
8 for deferred action but I can't tell you there's an
9 immigration visa number available because my number
10 hasn't come up yet, you're telling me you're at least,
11 your SIJ status is no longer a sufficient basis to
12 warrant consideration of deferred action. If that's your
13 only basis, call us back when a reason number is
14 available and we'll consider deferred action at that
15 point. Is that disputed?

16 MR. DE LAS ALAS: If I understand your point
17 currently, your Honor, is that it assumes that -- you're
18 saying that SIJS would be necessary and sufficient for a
19 grant of deferred action. But even under the prior
20 policy, it was not -- it was considered heavily but it
21 was not dispositive. And what's really happening under
22 the current policy --

23 THE COURT: Who are you considering for
24 deferred action now? What classes of visa seeker?

25 MR. DE LAS ALAS: Oh, pardon me, your Honor.

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1 THE COURT: Let me withdraw that question. I'm
2 sorry. Under the old policy achieving SIJ status was
3 enough to get you consideration for deferred action,
4 right? And it was also a particularly important factor
5 in the analysis, right?

6 MR. DE LAS ALAS: Yes.

7 THE COURT: You may have been in the one
8 percent of SIJs who didn't get deferred action but 100
9 percent of SIJs were getting considered for deferred
10 action when they were considered for SIJ status as I
11 understand it.

12 I understand this now to say if your only basis
13 for asking us to consider deferred action is your SIJ
14 status, don't bother because when people articulate that
15 basis our response is going to be call us back when a
16 visa number is available. Is that understanding
17 incorrect?

18 MR. DE LAS ALAS: We don't think that's
19 accurate, your Honor. Rather, the consideration of SI --

20 THE COURT: Which part is not accurate? My
21 description of the old process or the new process?

22 MR. DE LAS ALAS: The description of the new
23 process, your Honor, because under the new process SIJ
24 classification is merely one of several factors to be
25 considered, your Honor. And rather than having that way

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1 that was attached to the March 2022 policy, it is
2 considered as one of many factors in a case-by-case
3 analysis says consistent with prior practices of deferred
4 action, your Honor.

5 THE COURT: But this first bullet says we will
6 no longer conduct DA determinations for people with SIJ
7 classification but for whom an immigrant visa is not
8 immediately available. And you're telling me you will
9 consider SIJ, consider DA for people that slice of the
10 Venn diagram? Is this bullet true? It's on page 2 of
11 the June 2025 policy alert.

12 MR. DE LAS ALAS: Your Honor, we emphasize it's
13 just not an automatic consideration. It's just that they
14 have to file an extra form, the G-325(a) and then their
15 grant of SIJ classification is merely one of several
16 factors to be considered in a case-by-case analysis.

17 THE COURT: Case-by-case analysis of what? Of
18 deferred action?

19 MR. DE LAS ALAS: Yes, your Honor.

20 MS. KRANER: Your Honor, can I also add the G-
21 325(a) form --

22 THE COURT: Do you dispute what --

23 MS. KRANER: Yes, 100 percent.

24 THE COURT: Why is that not true?

25 MS. KRANER: So the G-325(a) form currently has

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1 a box for SIJ as one factor. There's many different
2 grounds. If I have a family member who's in the
3 military, that's a grounds for seeking deferred action.
4 If I need, you know --

5 THE COURT: Is this form in the record, by the
6 way?

7 MS. KRANER: There is actually -- we submitted
8 a, with our replies, we submitted a G-325(a) request from
9 our -- for two of our clients who submitted it.

10 But your Honor, what the government has not
11 mentioned is that they are currently in the process of
12 changing that form to take the SIJ box off of it. And if
13 you go to their public website right now with the
14 G-325(a) is listed, and no longer has SIJ there and it
15 actually points to the June 6, 2025 rescission.

16 So again, I don't think this is a factual
17 dispute because it's so clear.

18 THE COURT: Yes. I don't think this matters.
19 I'm going to assume that the statement that CIS is making
20 in that first bullet is an accurate statement of the
21 current position of the federal government. And if the
22 federal government wants to clarify that, he can do it in
23 the supplemental briefing that we're talking about.

24 All right. You know, there's this discussion
25 in *Fox Television*, it's a question I think for Mr.

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1 Magliery.

2 MR. MAGLIERY: Yes.

3 THE COURT: *Fox Television* talks about new
4 policies that rest upon factual findings that contradict
5 the factual findings underpinning the prior policy. Do
6 we have that here, a contradiction of factual findings or
7 contradictory factual findings?

8 MR. MAGLIERY: Bear with me, your Honor. Let
9 me just review the grounds that the 2025 policy recites.

10 (Pause in proceedings)

11 MR. MAGLIERY: I think there's sort of mixed
12 questions of fact in policy is what I would say. Whether
13 there's sufficiently compelling reasons supported by
14 statutes and regulations to continue to provide deferred
15 action, that seems like it almost begs the question of
16 what are the compelling reasons? The national and public
17 interests seems like a mixed question of policy and fact.

18 THE COURT: Okay. I mean I'm not going to
19 resolve factual disputes about what's in the national
20 interest I don't think.

21 And then here's one more question that
22 everybody who elects to can address in the supplemental
23 briefing if they choose. There is the *Fox Television*
24 requirement that quote/unquote serious reliance interests
25 be taken into account prior to a change of position. I

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1 wonder if that requirement still holds when the reason
2 for the change of position is we believe, and maybe
3 credibly so and maybe not, but assume that the reason is
4 we believe and credibly so that the prior policy was a
5 violation of the separation of powers as exceeding
6 statutory authority. It wouldn't make sense to require
7 an assessment of reliance interest in that circumstance,
8 would it?

9 MR. MAGLIERY: Your Honor, we're back to, you
10 know, my assertion that the government is not asserting
11 that and I don't think that there's any analog to the
12 DACA cases because the Attorney General was given
13 explicit authority to determine legality and they issued
14 a decision according to a statute. I don't think the
15 government is saying that because --

16 THE COURT: But in a hypothetical case where
17 the government was arguing that and credibly so, and I
18 understand you don't think that's this case, if the
19 quote/unquote good reason that the government is
20 articulating for its change of position is a view that
21 the prior policy was illegal, would the government still
22 be required to consider reliance interests in that
23 circumstance?

24 MR. MAGLIERY: I think so because the act
25 provides that people with SIJ have not been adjusted to

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1 permanent resident status, right? So and in *Regents* the
2 court said we still have to consider the reliance
3 interest, we still have to consider whether there was a
4 less onerous way of going about whether the Secretary
5 should have considered forbearance versus benefits, et
6 cetera. So I think that there still has to be a reliance
7 determination when it's something like the way that
8 prosecutorial discretion is exercised. I mean we're
9 already talking about prosecutorial discretion. So it
10 seems like you do have to consider reliance interest
11 there.

12 THE COURT: Okay. And as far as what counts as
13 a reliance interest, I would have thought intuitively
14 that reliance means I put myself in a position where I
15 was worse off, where I am now worse off having relied on
16 your prior policy than I would have been had I not. You
17 know, it's reliance to your detriment, right? Not just
18 general reliance.

19 So for example in *Fox Television*, you know, you
20 told all of us TV stations that fleeting expletives would
21 not be subject to fines and we produced some TV shows
22 with fleeting expletives on that basis and now you're
23 fining us. How are the individual plaintiffs here worse
24 off for having relied on the prior policy?

25 MR. MAGLIERY: I think the record establishes

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1 that there are various ways that they relied on the
2 policy.

3 So for example, if a SIJ recipient has enrolled
4 in higher education on the basis of the expectation of
5 deferred action, that's a reliance interest. They have
6 begun matriculating and they can't proceed --

7 THE COURT: But why are they worse off for
8 having done so?

9 MR. MAGLIERY: Their investment may be lost,
10 they might no longer be deferred, they could be --
11 removal proceedings could be begun against them at some
12 point.

13 THE COURT: What would they have done in the
14 but for world?

15 MR. MAGLIERY: They would not have had a means
16 of making money for themselves. They would have been at
17 risk of labor abuses. They would not have enrolled in
18 higher education. They would not have had health
19 insurance. They would have been potentially unable to
20 open bank accounts. They couldn't get the social
21 security number to be able to have identification. They
22 couldn't get drivers licenses.

23 THE COURT: I don't think I'm being clear with
24 my question. If the government -- let's say there was a
25 government program like UBI, right? The Treasury

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1 Department creates it by rule and says we're going to
2 give everybody money and that program runs for two years.
3 Everybody gets a check every month in the mail and then
4 the new administration cancels the program. I don't
5 think anybody can say I am worse off for having gotten
6 money free of charge in the mail every month for two
7 years than I would have been otherwise. Right?

8 So the benefits can't be -- the loss of the
9 benefits can't be the detrimental reliance. A person
10 has -- they go to college, take on debt in the belief
11 that they're going to be able to stay in this country and
12 work here legally. And then because of a change in
13 position by a new administration they become subject to
14 removal again when they thought they wouldn't be. And
15 yes, they've spent money on college for some period of
16 time but they've got an education in response.

17 If we're comparing that world to the but for
18 world in which they didn't get legal status or a path to
19 legal status or deferred action even temporarily, the
20 university schooling doesn't make them worse off. And
21 the expenditure of the money doesn't make them worse off
22 because they got fair value for the money they expended.
23 How are they worse off than had they lived in a world
24 where the new policy inured all along?

25 MR. MAGLIERY: I can think of three ways, your

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1 Honor.

2 First is that even the 2022 policy found that
3 SIJ beneficiaries had a reliance interest in the SIJ
4 program leading to a consideration for a path to legal
5 permanent residency. That's in the 2022 policy. So the
6 2022 policy found that there were already reliance
7 interests. It increased the benefits that were available
8 to SIJ recipients. And I don't agree, or I'm certainly
9 not going to stipulate on the record that investing in
10 education that is then cut short or having a period where
11 you can work and then not having a period where you could
12 work or being denied health insurance or the loss of
13 health insurance isn't a reliance interest. That's one
14 idea.

15 A second idea is that these SIJ recipients who
16 were subject to the 2022 policy relied on the policy to
17 not choose a different potential pathway to staying
18 lawfully in this country. So for example, many of them
19 did not feel like they needed to seek asylum even though
20 they might have qualified because they were automatically
21 going to be the beneficiaries --

22 THE COURT: Is that alleged?

23 MR. MAGLIERY: Okay. It's in the, excuse me,
24 it's in the Castillo --

25 THE COURT: Or in the affidavits.

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1 MR. MAGLIERY: Okay, okay. It's in CARECEN-NY
2 and Centro's declarations. That's the Engen declaration
3 and the Greenberg declaration. I think it's paragraphs
4 23 through 27 of Engen and 34 through 38 of Greenberg.

5 THE COURT: They say what? People pursued this
6 path when they would have pursued a different basis?

7 MR. MAGLIERY: Correct. They say that they
8 rendered services to people seeking pathways to stay in
9 this country and that they made decisions in reliance of
10 the policy of how to seek that pathway.

11 THE COURT: But is it too late? Let's say
12 somebody could have sought asylum and instead pursued SIJ
13 status and deferred action. They can still submit an
14 asylum claim now.

15 MR. MAGLIERY: They can't because of the one-
16 year limitation on when to seek asylum. So a serious
17 reliance interest on deferred action could have led to a
18 loss of opportunity.

19 THE COURT: That one-year limit comes from
20 where? Statute or regulation?

21 MR. MAGLIERY: My colleagues are telling me it
22 comes from a statute. I'm sure we can make sure that --

23 THE COURT: All right. So they've lost their
24 opportunity to apply for asylum.

25 MR. MAGLIERY: That's right, your Honor.

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1 THE COURT: And the affidavits from Ms.
2 Greenberg and/or Ms. --

3 MR. MAGLIERY: Engen. It's --

4 THE COURT: Engen.

5 MR. MAGLIERY: I have the cites here. Bear
6 with me. Oh, it's 9-9 and 9-10.

7 THE COURT: I'm looking at 9-10 now.

8 MR. MAGLIERY: Okay. Thank you.

9 THE COURT: But what paragraph?

10 MR. MAGLIERY: Okay. Bear with me, your Honor.
11 I believe -- I'm sorry. Thank you. We're just looking,
12 your Honor. Bear with us, please. Thank you.

13 (Pause in proceedings)

14 THE COURT: You know where it is?

15 MR. MAGLIERY: I'm sorry -- oh, I'm sorry, I
16 thought your Honor was speaking to me.

17 THE COURT: No, I was talking to my wandering
18 law clerk.

19 MR. MAGLIERY: Okay. In 9-9, forgive me, here
20 it is.

21 THE COURT: Sorry, so what paragraph?

22 MR. MAGLIERY: I'm looking at 9-9, looking at
23 paragraphs 32, 33, 34.

24 THE COURT: You can supplement these if you
25 feel the need.

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1 MR. MAGLIERY: I'm sorry, here it is. I just
2 found it. It's in paragraph 34 in docket 9-9 and the
3 affiant says -- oh, actually that's talking about other
4 pathways of potentially seeking forms of relief. I'm
5 sorry. I don't think I have it in front of us now but we
6 may very well have to -- okay. We're looking, your
7 Honor. I'm sorry.

8 THE COURT: Okay. I was reminded moments ago
9 that the reliance interest we can consider may include
10 not only those of the plaintiffs but also third parties
11 like employers. We'll think about that. But if you feel
12 any need to supplement these two affidavits, you should
13 feel free to do that.

14 It would help me for the timetable that we're
15 working on, but tell me if this would be too much time
16 pressure, to get the briefs two weeks from yesterday
17 rather than two weeks from tomorrow. Is that an
18 unreasonable time period with respect to intervening
19 holidays or anything else?

20 MR. MAGLIERY: We're certainly prepared to
21 supplement the briefing on the 17th, your Honor. Thank
22 you.

23 THE COURT: As is the government? The
24 government is always ready.

25 MR. DE LAS ALAS: September 17 works for us

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1 here too, your Honor.

2 THE COURT: All right. I've asked a lot of
3 questions. You all will use some judgment as to how you
4 allocate your pages here. I don't expect these
5 submissions to exceed 20 pages and I would imagine that
6 they would be even shorter than that, but I'll set 20
7 pages double spaced as a page limit and the day on
8 September 17th.

9 All right. As I said at the outset, this case
10 raises a number of complicated issues and was briefed I
11 know under substantial time pressure all around and I
12 appreciate the quality of the legal submissions here and
13 what seems like the rather sizeable contribution of pro
14 bono legal services to that high quality briefing.

15 All right. We will be adjourned. I will wait
16 for those submissions to come in and I will endeavor to
17 rule as quickly as possible thereafter. Thank you, all.

18 MR. DE LAS ALAS: Thank you.

19 MR. MAGLIERY: Thank you, your Honor.

20 MR. DE LAS ALAS: Thank you.

21 MS. KRANER: Thank you, your Honor.

22 MR. MAGLIERY: Does the Court want to issue or
23 discuss the questions or would you like us to meet and
24 confer with the government and make sure we're addressing
25 the same questions?

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1 THE COURT: You should absolutely talk to each
2 other to the extent there's any confusion about what I am
3 asking for. If there is enduring confusion, feel free to
4 put a letter in to that effect and I'll at least think
5 about whether to clarify what I've asked for here.

6 Again, if both sides agree, for example, that
7 non-public but contemporaneous explanations of reason can
8 be considered, then you don't both have to write ten
9 pages on that subject. Just say we agree and maybe cite
10 the one case that gives you both confidence. Thank you.

11 MR. MAGLIERY: Thank you, your Honor.

12 MR. DE LAS ALAS: Thank you.

13 MR. DE LAS ALAS: Thank you, your Honor.

14 (Matter concluded)

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C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 7th day of September, 2025.



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