**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**
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NATIONAL DAY LABORER ORGANIZING NETWORK, CENTER FOR CONSTITUTIONAL RIGHTS, and IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW,

*Plaintiffs*,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FEDERAL BUREAU OF INVESTIGATION, and OFFICE OF LEGAL COUNSEL,

*Defendants*.

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**ECF CASE**

10 CV 3488 (SAS)(KNF)

[Rel. 10 CV 2705]

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR STAY PENDING APPELLATE REVIEW OF THE COURT'S OCTOBER 24, 2011 OPINION AND ORDER**

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Plaintiffs National Day Laborer Organizing Network ("NDLON"), Center for Constitutional Rights ("CCR") and Immigration Justice Clinic of the Benjamin N. Cardozo School of Law (collectively "Plaintiffs") oppose the Motion for a Stay Pending Appeal of the Court's October 24, 2011 Opinion and Order ("Stay Motion") filed by defendant United States Immigration and Enforcement Agency ("ICE" or "Defendant").

**PRELIMINARY STATEMENT**

Defendant has not met its burden to justify the detrimental delay (possibly another year) in the release of the document at issue in this Court's October 24 Opinion and Order ("Oct. 24 Order"), *i.e*, the memorandum dated October 2, 2010 which describes the legal justification for the mandatory nature of Secure Communities for states and localities ("Oct. 2 Memo"). According to Defendant, the Stay Motion is a mere formality because, it claims, in FOIA cases stays are routinely granted pending appeal where compliance with the order at issue would result in the release of information. This line of argument ignores the well-established four factor balancing test where harm to Defendant is but one factor to be considered.

Moreover, as this Court is aware, this is not a typical FOIA action because of the importance of the information that Defendant continues to withhold from the public, and the harm already experienced because of the long delay in releasing information that this Court ruled Defendant is statutorily obligated to release. This Court also has spent substantial time reviewing the questions related to this one record (Oct. 2 Memo), including numerous rounds of briefing, supplemental submissions and letters, oral arguments and *in camera* review, which Defendant now attempts to undermine through an appeal and stay of this Court's careful, fact-intensive, decision.

Even after this Court went to extraordinary lengths to provide Defendant every possible opportunity to justify the withholding of the Oct. 2 Memo, Defendant decided to let the record

provided by Plaintiffs, in the form of declarations and documents previously released by Defendant, remain uncontested concerning the purpose of the Oct. 2 Memo, and refused to provide this Court with any explanation regarding the purpose of the Oct. 2 Memo to help provide context to the assertion of attorney-client privilege. Having made that decision, Defendant cannot now muster a legitimate case that is likely to succeed on appeal.

The crux of the Oct. 24 Order is whether the Defendant can withhold a comprehensive summary of the legal justification for mandating Secure Communities, an important government policy that has a tremendous impact on states and localities, as well as thousands of immigrants, and thereby deprive state and local officials of the information they need to develop laws and policies to mitigate any perceived harm from the purported mandatory nature of Secure Communities. Defendant's continued refusal to release the Oct. 2 Memo tangibly harms the democratic process in numerous states and localities, and undermines principles of government transparency and accountability. State and local officials have been grappling with the impact of Secure Communities, and some have decided to opt-out or limit participation in the program. In response, the Department of Homeland Security (DHS) changed its policy by making it mandatory, but delayed informing the public, frustrating local and state measures to address the harmful impact of the program. State and local officials are currently drafting, debating and possibly passing legislation without understanding whether such legislation addresses the legal issues related to Secure Communities. Without the Oct. 2 Memo, which provides the Defendant's rationale for mandating the program, state and local officials risk having their efforts undermined again. And none of the above even addresses the harm to the rights of thousands of immigrants, and their families, caught up in Secure Communities, and the impact

on the relationship between local police departments and the immigrant communities. Peoples' lives lie in the balance here.

The question before this Court is whether Defendant can meet its substantial burden, after balancing the relative weight of the factors in the well-established four factor test, to demonstrate that a stay pending appeal is appropriate here. Defendant cannot do so.

First, Defendant fails to demonstrate a likelihood of success on the merits. In the Oct. 24 Order, this Court held that the release of the Oct. 2 Memo was appropriate because, as an initial matter, consistent with the law of the case established in the order of July 11, 2011 granting Plaintiffs' cross-motion for summary judgment ("July 11 Order"), Defendant had failed to establish that the Oct. 2 Memo was properly withheld based upon the deliberative process exemption. Thus, this Court looked to whether Defendant had established the right to withhold the Oct. 2 Memo based solely upon the claimed attorney-client privilege exemption. This Court rightly held that Defendant did not meet their burden for two independent reasons, both of which would need to be held erroneous for the Order to be over-turned: (i) Defendant adopted the analysis and conclusions of the Oct. 2 Memo as working law; and (ii) Defendant failed to meet its burden of showing that the Oct. 2 Memo was kept confidential. Defendant attacks the Court's analysis by ignoring clear law relating to adoption and confidentiality, reiterating its previous interpretation of the factual record submitted by Plaintiffs and carefully evaluated by the Court, and disregarding Defendant's decision not to supplement the record before the Court or to provide the Court with an explanation regarding the reason for, or the context surrounding, the preparation of the Oct. 2 Memo to help this Court determine whether the Oct. 2 Memo was privileged legal advice. In sum, it is difficult to imagine that this Court would be reversed on any of these grounds.

Second, Defendant fails to show that Plaintiffs and other interested parties would not be irreparably harmed by the granting of a stay pending appeal, and that the release of this information is not in the public interest. If the stay is granted, as noted above, crucial information that is needed immediately to influence the public debate about Secure Communities before this program is fully implemented would be withheld. Given the high stakes, it is remarkable that Defendant blithely conclude that there would be no irreparable harm to Plaintiffs and other interested parties, and it is not in the public interest to have an informed debate.

Third, Defendant fails to show that it will be *substantially* harmed if they must comply with the Order pending the appeal. The release of this information may irreparably harm Defendant's appellate rights on this limited issue. However, such harm is not substantial given the limited amount of information that is due to be released, and the fact that this Court has held that some of this information has been released in other forms. Moreover, the Supreme Court has ruled that the release of attorney-client privileged information during the pendency of a civil litigation is not substantial enough to justify special appellate rights, and thus the nature of the information being released here does not justify a stay.

Accordingly, the Court should deny Defendant's Stay Motion.

## BACKGROUND

Defendant's recitation of the factual background mischaracterizes the Court's prior rulings and omits key facts related to the harms caused by Defendant's delays, some of which this Court found in the July 11 Order at 1-3.

### I. JULY 11 ORDER

The July 11 Order granted in part and denied in part the partial summary judgment motions filed by both Plaintiffs and Defendants on the application of exemptions to the opt-out records. *Id.* at 24. The Court evaluated the specific FOIA exemptions claimed in relation to the

various documents that the Court reviewed *in camera*, including eighteen versions of the Oct. 2 Memo. *Id.* at 8, 17.

After a detailed analysis of the application of the deliberative process privilege under FOIA Exemption (b)(5), the Court concluded that the Oct. 2 Memo was not protected by that privilege. *Id.* at 18. With respect to the attorney client privilege, the Court ruled in general that attorneys may provide advice on a broad range of matters, "[s]o long as the predominant purpose of the communication is legal advice," *Id.* at 10. The Court specifically found that Defendant's *Vaughn* indices were insufficient to meet the burden of establishing that confidentiality. *Id.* The Court thus ordered Defendants to provide further representations regarding whether confidentiality had been maintained for each document, including the Oct. 2, Memo, that they continued to withhold under the attorney client privilege. *Id*. at 18. The Court ruled that if Defendant was not able to make such a representation about the document, and no other FOIA exemptions or privileges were asserted, the "document must be released." *Id*. at 10. Finally, the Court also indicated it would consider additional evidence from Plaintiffs regarding whether the Oct. 2 Memo had been adopted or incorporated by reference by the agency. *Id.* at 18.

**II. DEFENDANT'S RESPONSE TO THE JULY 11 ORDER**

Defendant did not move for reconsideration, or appeal, any aspect of the July 11 Order. (Aug. 18, 2011 Hr'g Tr. at 22). Accordingly, on August 15, 2011, Defendants reproduced a large portion of the opt-out production, releasing additional previously redacted materials based on the legal holdings of the July 11 Order. *Id.*

Defendant submitted supplemental *Vaughn* indices and the Declaration of Ryan Law ("First Law Decl.") in support of its application of FOIA Exemption 5. Stay Motion, at 5. The supplemental entry simply stated, "[t]he draft memo on SC participation was drafted by OPLA [Office of the Principal Legal Advisor] as advice to the client in response to a client request for

guidance on the question of mandatory v. voluntary question of participation in SC." ICE's Supplemental Vaughn Index, Ex. A to Decl. of C. Connolly, dated Sept. 2, 2011 ("Connolly Decl."). The parties submitted a series of letters to the Court discussing these additional submissions and Plaintiffs submitted additional evidence that the Oct. 2 Memo had been adopted and incorporated by reference. Aug. 18, 2011 Hr'g Tr. at 21. On August 18, 2011, the Court heard argument on the sufficiency of that additional evidence. Aug. 18, 2011 Hr'g Tr. at 21. The Court did not believe that Defendant had met its burden to establish the attorney client privilege had been maintained. *Id.* at 30. But the Court granted Defendant's the opportunity to submit additional evidence. *Id.* at 29-30. The Court ordered ICE "to submit a supplemental declaration that simply says how it is [that Mr. Law] was able to make the representation that each of these personnel responded that confidentiality has in fact been maintained, what they [were] asked to do, what did they do, how did he make this determination." Aug. 18, 2011 Hr'g Tr. at 30.

At a subsequent hearing and following further letter briefs from the parties, the Court considered a supplemental declaration of Ryan Law ("Second Law Declaration"). The Second Law Declaration stated that Law, through an intermediary, had queried the "senders and recipient(s) of each withheld document (based on the information reflected on the face of the withheld documents)" who responded that confidentiality had been maintained. Second Law Decl., Ex. D to Connolly Decl. The Court then ordered full summary judgment briefing on the issue of whether the Oct. 2 Memo was subject to disclosure. Aug. 24, 2011 Hr'g Tr. at 37.

## III. OCTOBER 24 ORDER

After extensive additional oral argument, briefing and submission, this Court granted Plaintiffs' cross-motion for summary judgment and ordered the Defendant to release previously

withheld portions of the Oct. 2 Memo. The Court held that the Oct. 2 Memo was not privileged and had been adopted and incorporated by reference into agency policy. *Id.* at 34-35.

The Court acknowledged and reaffirmed that the Oct. 2 Memo is not protected by the deliberative process privilege, for "the reasons stated in [the July 11] opinion." Oct. 24 Order, at 17. As for the attorney-client privilege, while the Court found that "at least one purpose" of the Oct. 2 Memo was to provide legal advice, Defendants did not meet their burden under FOIA to establish that its confidentiality had been maintained. *Id.* at 18-19. In so finding, the Court adopted the burden-shifting rule from the D.C. Circuit, whereby "a plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Id.* at 21. Once the plaintiffs has done this, the burden shifts to the defendant. *Id.*

After a detailed analysis of the factual record, the Court concluded that the Second Law Declaration, submitted for the purpose of showing that the confidentiality of the documents had been maintained, failed to do so for at least two reasons: (1) Law simply queried the senders and recipients on the face of the withheld document as to whether they had disseminated it outside of the agency, and (2) Law failed to query whether ICE personnel had circulated the Oct. 2 Memo to individuals within the agency without authority to act or speak for the organization. *Id.* at 24-27. Finally, the Court found, after closely analyzing Plaintiffs' extensive direct and circumstantial evidence of adoption, that the agency had adopted the analysis and conclusions in the Oct. 2 Memo as working law. Therefore, the Court ordered the Oct. 2 Memo released on that additional, independent ground. *Id.* at 34-35.

**IV. IMPACT OF DEFENDANT'S DELAY IN RELEASING THE OCT. 2 MEMO**

Plaintiffs have been seeking the release of the Oct. 2 Memo for more than a year. During this time, public policy debate surrounding the implementation of Secure Communities has

developed considerably. *See generally* Declaration of Sunita Patel, Nov. 18, 2011 ("Patel Decl.") Exs. A-I and *infra* Sec. II at 16-21. DHS and ICE have shifted from a voluntary policy pursuant to which states and localities would be able to opt-out or negotiate with the federal government regarding the implementation of the program to a mandatory formula. *Id.* ICE unilaterally rescinded agreements with 44 states regarding Secure Communities. *Id.* Currently, ICE continues to activate states and jurisdictions across the country apace with the goal to activate the program nationwide by 2013. *Id.* State and local officials, advocates and the public have had to constantly reorient their strategies and policies as the federal government's policies and justifications for those policies have shifted on a monthly – and sometimes weekly – basis. *Id.* The documents from the instant litigation have played a crucial role in educating all of these groups about Secure Communities. *Id.* The documents have been particularly helpful since ICE and DHS have been less than forthcoming about their own policies or the precise legal authority for their policies. *Id.* A full understanding of the legal justification for the mandatory program is a key gap in the public's understanding. *Id.* More comprehensive information about the agency's legal authority is needed by advocates and others to inform upcoming specific time sensitive advocacy and participation in the democratic process. *Id.*

**ARGUMENT**

Defendant fails to demonstrate any legitimate basis to justify the extreme measure of staying an Order of this Court and further delaying Plaintiffs' ability to obtain and disseminate a document critical to understanding the basis for the government's current policy with respect to Secure Communities. "A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case." *Natural Res. Def. Council v. U.S. Envtl. Prot. Agency*, No. 09 Civ. 4317 (DLC), 2010 WL 431885, at *3 (S.D.N.Y. Feb. 8, 2010) (citation

omitted); s*ee also Tr. 5:13-25 (Apr. 21, 2011).* A court should consider the following factors when determining whether to issue a stay:

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

*Natural Res. Def. Council, 2010 WL 431885,* at *3 (citing *In re: World Trade Center Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (additional citations omitted).

"A party who moves for a stay pending appeal bears the burden of showing the balance of the four factors weighs in favor of the stay . . ." *People for the Am. Way Found. v. Dep't of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007); *see also Front Carriers Ltd. v. Transfield Cape Ltd.*, No. 07 Civ 6333 (RJS), 2010 WL 571967, at *1 (S.D.N.Y. Feb. 15, 2010); *Doe v. Lee*, No. 3:99CV314 (RNC), 2001 WL 536730, at *1 (D. Conn. May 18, 2001).

## I. DEFENDANT FAILS TO SHOW LIKELIHOOD OF SUCCESS ON THE MERITS

Defendant argues that when a movant establishes "substantial irreparable harm" it need only demonstrate a "substantial likelihood of success on the merits" rather than the normal "strong showing" standard required. Stay Motion at 10. However, Defendant has not established that "substantial" irreparable harm would result due to disclosure of all withheld portions of the Oct. 2 Memo. *See, infra* Sec. III at 22. Therefore, the higher standard should apply. Even under the lower standard, the Defendant cannot show a likelihood of success on the merits of their appeal.

### A. The Law of the Case Precludes Defendant's Argument Regarding Deliberative Process Privilege on Appeal

Defendant made a conscious and deliberate decision not to appeal the July 11 Order – a

final judgment pursuant to Fed. R. Civ. P. 56.[1] Accordingly, the specific ruling set forth in that Order, that the deliberative process privilege exemption did not apply to the Oct. 2 Memo, is law of the case in this matter. Accordingly, Defendant has waived its right to appeal that ruling.

The law of the case doctrine requires courts to adhere to their earlier decisions. *Doe v. New York City Dep't of Social Services*, 709 F2.d 782, 788 (2d Cir. 1983). The law of the case doctrine extends to "[a] decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not. . .". *County of Suffolk v. Stone & Webster Eng. Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997) (internal citations omitted). Final decisions by the district court that have not been appealed become law of the case. *Little Earth of the United Tribes, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 807 F.2d 1433, 1441 (8th Cir. 1986) (citation omitted). As such, the parties waive the right to challenge such a decision at a later stage in the case. *See Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir.1987). The law of the case doctrine applies both to issues that have been expressly decided and those decided "by implication." *Id.* at 108; *see also Munro v. Post*, 102 F.2d 686, 688 (2d Cir. 1939). The rationale underlying the law of the case doctrine is that it promotes fairness, judicial economy, and a general "societal interest in finality." *Id.* at 1117.

Defendant argues that the Court erred by finding that the Oct. 2 Memo was not subject to the deliberative process privilege. Stay Motion at 24. Defendant neglects to recognize that the Court issued a clear decision in the July 11 Order that the deliberative process privilege does not apply to the Oct. 2 Memo based on the record available to the Court at that time. July 11 Order at *17-18; (August 18 Tr. at 21-24; August 24 Tr. at 24). The Court re-affirmed that holding in the

[1] Partial motions for summary judgment in FOIA cases that result in disclosure orders are final orders and are thus appealable. *See, e.g., Ferguson v. FBI*, 957 F.2d 1059, 1063–64 (2d Cir. 1992) (noting that "partial disclosure orders in FOIA cases are appealable.").

Oct. 24 Order based upon an even more comprehensive record supplied by Plaintiffs. Oct. 24 Order, at 17.[2]

However, Defendant did not appeal the Court's decision that the Oct. 2 Memo was not protected by the deliberative process based on the existing record, nor did the Defendant seek reconsideration of the July 11 Order. *See, supra* at 6. In so doing, Defendant accepted that the legal and factual issues decided in that order would become law of the case. *See Little Earth*, 807 F.2d at 1441 (holding that district court decision implicitly ordering government agency to fund repair was law of the case and could not be re-litigated). Thus, Defendant's argument regarding the applicability of the deliberative process to the Oct. 2 Memo is precluded and Defendant cannot succeed on that argument on appeal.[3]

**B. The Court's Legal Rulings Were Correct And Will Be Upheld on Appeal**

1. *The Court correctly ruled that ICE did not meet its burden to establish that the Oct 2 Memo was kept confidential*

Defendant misstates the law and mischaracterizes the Court's rulings on attorney client privilege with respect to confidentiality and waiver. *See* Stay Motion, at 17. The Court correctly held that if Defendant cannot meet its initial burden to establish that confidentiality has been maintained, the Court does not even reach the question of waiver. Oct. 24 Order at 34. However, the Court sensibly explained that evidence supporting a finding of waiver would also support a finding that confidentiality had not been maintained, and can be considered in both

[2] Given the extensive record, and the fact-intensive ruling by this Court on the deliberative process exemption, it is doubtful that the Court's decision on the deliberative process exemption would be reversed by the appellate court.

[3] The law of the case precludes Defendant from challenging the substance of certain underlying legal rulings from the July 11 Order regarding the applicability of the attorney-client privilege exemption to the Oct. 2 Memo, including the legal standards for waiver, maintenance of confidentiality and the adoption and incorporation by reference of the legal analysis in the Oct. 2 Memo as working law. Those rulings became law of the case. August 18 Tr. at 31.

contexts. *Id*. Therefore, the Court properly considered the facts in the record to support a finding that the Government had not met its initial burden to show that confidentiality had been maintained. *See id*. (noting that "[i]n the face of plaintiffs' specific evidence of waiver, the [second] declaration of Ryan Law is insufficient to show that the agency maintained confidentiality of the Memorandum"). The Court ruled that the evidence of waiver that Plaintiffs submitted shifted the burden to Defendant to demonstrate that confidentiality had been maintained and that Defendant did not submit sufficient evidence to satisfy this burden. *See id*.

Defendant relies on illogical and irrelevant arguments to dismiss the clear evidence in the factual record of waiver—the same evidence that tends to show that confidentiality was not maintained. For example, Defendant argues that the Court's entire underlying ruling on attorney client privilege should be questioned because the Court inadvertently cited the incorrect date of an email relied upon in a footnote. Stay Motion at 18 (citing Oct. 24 Order, at n.75). The discrepancy is a simple typographical error. July 11 Order at 34 n.111 (citing same document with correct date). More importantly, relying upon an email dated 2010 is not inconsistent with the Court's reasoning in the Oct. 24 Order. Indeed, the Court stated that it had relied on statements that occurred at "various times" during both "2010 and 2011." Oct. 24 Order, at 22. Defendant's emphasis on a typographical error lays bare the weakness of its argument.

Unable to muster a viable argument that they had met their burden of demonstrating the that confidentiality was maintained solely based on the existing factual record, Defendant impermissibly attempts to supplement the record by submitting a *third* additional declaration. *See* Declaration of Ryan Law, dated Nov. 14, 2014 ("Third Law Decl."). Defendant would not be able to provide such new factual evidence in a motion to reconsider, nor on appeal, s*ee Nat'l Union Fire Ins. Co. of Pittsburgh v. Stroh Cos*., Inc., 265 F.3d 97, 115 (2d Cir. 2001) (noting that

a party moving for reconsideration may not "advance new facts, issues, or arguments not previously presented to the Court."); *Leibowitz v. Cornell University*, 445 F.3d 586, 592 n.4 (2d Cir. 2006) (declining to supplement the record with new evidence where appellant did not show that it was mistakenly omitted from the record on appeal).

However, Defendant attempts to circumvent these restrictions by providing new evidence aimed at demonstrating their ultimate success on the merits without even attempting to make an argument that it is permissible for the Court to consider this additional factual submission. *See* Stay Motion at 21. Defendant had ample opportunity to supplement the Second Law Declaration. *See, supra* at 6. Any new facts in the Third Law Declaration are not part of the record for appeal and should not be considered in this Stay Motion.

Most importantly, the Third Law Declaration does not provide sufficient additional information to justify a departure from the Court's ruling that Defendant has not met its burden to establish that confidentiality of the Oct. 2 Memo was maintained. The court ruled that given the Plaintiffs' factual evidence, the Defendant's "effort to verify confidentiality should have been more robust." Oct. 24 Order at 26-27. For example, the accompanying emails reveal that ICE shared the Oct. 2 Memo with at least one individual who was not queried according to the Second and Third Law Declarations – David Martin, Principal Deputy General Counsel of DHS. October 24 Order, at 24 (citing 10/8/10 Email, Ex. V to Lin Decl.) Moreover, as noted by the Court, Law failed to query whether ICE personnel had circulated the Oct. 2 Memo to individuals within the agency without authority to act or speak for the organization. *Id.* at 24-27. Law also did not attempt to determine whether any hard copies of the Oct. 2 Memo were distributed at meetings or otherwise, and whether individuals who may have received the hard copy maintained its confidentiality.

2. *The Court Correctly Ruled that ICE Expressly Adopted the Oct. 2 Memo*

Defendant does not indicate that it intends to challenge the Court's analytical framework for determining adoption. Instead, it attacks the Court's review of the factual record. Defendant's basis for its appeal of the Court's holding regarding adoption is without merit. *First*, Defendant argues that the factual record demonstrates that ICE may have adopted the conclusions of the Oct. 2 Memo, but not the underlying analysis. Stay Motion at 14. However, Defendant ignores the Court's review of the Oct. 2 Memo and detailed analysis of the factual record to reach the conclusion that ICE adopted the conclusions and analysis contained in the Oct. 2 Memo as its working law. *See* Oct. 24 Order, at 31-34. Defendant does not address the record as a whole, rather, it looks at a few of the documents relied upon by the Court separately to argue that no document on its own establishes adoption of the memo's analysis. Def. Br. at 14-16. Such analysis disregards the Court's conclusion that the direct evidence and persuasive circumstantial evidence in the record showed agency adoption of the memo. *Id.* 32-33. It also disregards the Second Circuit's directive that courts consider "all facts and circumstances" when determining adoption. *La Raza*, 411 F.3d at 357 n5. Defendant dismisses the Court's observation that the purpose of the Oct. 2 Memo was to compile an already-decided legal justification for an existing policy. Stay Motion at 15. But this clearly indicates that the Oct. 2 Memo was not a new legal opinion, but reflective of a legal analysis that was pre-decided.

*Second*, Defendant points to the fact that there is no evidence in the factual record where ICE or DHS explicitly cited the Oct. 2 Memo by name or by date. Stay Motion at 15. This fact is far from conclusive. Defendant specifically notes that DHS Secretary Janet Napolitano's statement on October 6th did not reference the Oct. 2 Memo—or any legal basis. The point, however, is that advocates were frustrated that DHS announced such a significant policy shift in an informal statement to the press with no indication of the authority relied upon. Patel Decl. Ex.

A ¶6. As demonstrated by the Court's further analysis of the factual record, the agency did not promptly, or ever, provide meaningful clarification. Defendant does not dispute this finding. *See* Stay Motion at16-17. This is precisely the sort of situation that FOIA is intended to avoid – the application of Government policy without full information about its legal foundation.

Moreover, Defendant's attempt to create a narrow test for adoption using the precise facts from *La Raza* will be unsuccessful. It is well established that agency adoption may be formal or informal, explicit or implicit. *See* Oct. 24 Order at 31-32; Pls.' SJ Br. at 19-21 (citing cases). The Second Circuit in *La Raza* took special care to note that adoption may occur when no explicit public reference to a document occurs and rejected the government's arguments to the contrary. *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 357 n.5 (2d Cir. 2005); *See also Bronx Defenders v. Dep't of Homeland Sec.*, No. 04 Civ. 8576 (HB), 2005 WL 3462725, at *6-*7 (S.D.N.Y. Dec. 19, 2005) (Courts do not require "magic language" or "express statement[s]" to find adoption). There is no bright-line test for adoption, and it would be a narrow and wholly unjustified interpretation of the working law doctrine to place the burden on Plaintiffs to make a showing of adoption or to show an explicit public citation to a specific document, particularly here, where the forums in which the Secure Communities mandatory policy were discussed were far more generalized then the specialized forum at issue in *La Raza*.[4]

*Third*, Defendant argues that the Government did not expressly adopt the Tenth Amendment analysis in the Oct. 2 Memo, by including a similar analysis in an earlier memorandum, because the earlier memorandum came to a different conclusion – that Secure

[4] In addition, the policy outlined in the memorandum ordered released in *La Raza* was not the basis for implemented federal government policy. Here, the federal government is or will be actively enforcing the mandatory policy in every state and municipality in the country.

Communities could not be mandatory.[5] Stay Motion at 16. However, the public needs access to the later memorandum because the analysis undergirds the policy that Secure Communities will be mandatory – the policy that now applies. The Court was correct in concluding, after a detailed factual analysis of both direct and circumstantial evidence, that all of the factors taken together establish informal adoption and incorporation by reference. Oct. 24 Order at 34.

*Fourth*, the Defendant cannot overcome the Court's observation that it has "fail[ed] to even assert that the October 2 Memorandum was not adopted by the agency." *Id.* Abundant evidence in the record establishes agency adoption, and nothing in the record suggests otherwise.

Accordingly, the likelihood of success on the merits weighs substantially in Plaintiffs' favor.

**II. FURTHER DELAY WILL HARM THE PLAINTIFFS AND THE PUBLIC**

Defendant does not contest that the delayed release of the Oct. 2 Memo will cause harm to the Plaintiffs, it only asserts that the harm to the Government outweighs the interest of the Plaintiffs and the public. It does not. No conceivable public interest is served by enabling Defendant to delay the production of a critical non-exempt document concerning a key public policy. Defendant's contention that the public would benefit from non-disclosure runs counter the core purpose of FOIA: to promote transparency about government policies.

A stay will cause substantial harm to current policy deliberations and the public interest. First, given the Government's continuous change in opt out policy, and its delay in disclosing its true intent, the Oct. 2 Memo is necessary to avoid further waste of government and community resources. Secure Communities was initiated and promoted in part by informing the public that opt out was possible. NDLON and other similar organizations devoted significant time and

[5] Defendant raises this argument for the first time in this Stay Motion. Thus this argument will not be part of the record for any appeal.

resources to educating law enforcement, public officials and community members that Secure Communities would harm the public. Advocates held numerous press conferences, meetings, vigils, rallies, town halls, education forums and events. *See e.g.*, Patel Decl. Ex. A ¶¶5-7, Ex. C ¶¶3-5, Ex. E ¶¶3-4, 17. This effort in leveraging local legislative processes led to numerous jurisdictions expressing their intent to opt out of the program, including Amherst, San Francisco, Arlington, District of Columbia, Cambridge, and Santa Clara. Patel Decl. Ex. A ¶5, Ex. D ¶4, Ex. E ¶6. However, in October 2010 when the Government revealed, for the first time, that localities could not opt out, resources were necessarily redirected toward state governments, which were believed to control the implementation of Secure Communities. *See* Patel Decl. Ex. A ¶¶6-10, Ex. B ¶¶11-12, Ex. C ¶¶3-5, Ex. D ¶5, Ex. F ¶¶6-7. As a result of this renewed effort, several states—namely New York, Illinois and Massachusetts (the "Opt Out States")—publically announced their withdrawal or refusal to sign onto the program. *See, e.g.*, Patel Decl. Ex. A ¶7. Other states continued to resist signing agreements that would authorize automatic information sharing between the FBI and ICE, but did allow localities to opt *into* the program. *See* Patel Decl. Ex. A ¶9, Ex. G ¶3. Some states negotiated oversight provisions to monitor potential constitutional violations or considered legislation to provide for a local opt out, amendment to the MOA or oversight of the program. *See* Patel Decl. Ex. A ¶8, Ex. D ¶5. On August 5, 2011, DHS again changed its policy and announced that states—despite countless hours and taxpayer dollars spent on careful negotiations, legislative processes and meetings—would be required to participate in the Secure Communities program. *See, e.g.*, Patel Decl. Ex. A ¶10.

Now, national and local advocates urgently need the Oct. 2 Memo to determine the most appropriate responses to the federal policy, including legislative or policy strategies to prevent or mitigate the harm Secure Communities will undoubtedly inflict on immigrant communities. *See*

Patel Decl. Ex. A ¶¶12-14, 17-18, Ex. B ¶¶12-15, Ex. C ¶¶7-11, Ex. D ¶¶6-8, Ex. E ¶¶15-17, Ex. F ¶¶11-14, Ex. G ¶¶ 4-7. The public, Congressional, state and local government's core concerns—that Secure Communities is a program that will increase racial profiling, distance police from immigrant communities and lead to deportations of low level offenders—continue. *See* Patel Decl. Ex. A ¶¶*12-14, 17, Ex. B ¶4, Ex. C ¶2, Ex. D ¶¶10-12, Ex. E ¶6, Ex. F ¶¶2, 9-11, Ex. G ¶7; Ex. H, Ex. I.* Moreover, serious questions remain regarding the legal authority to require participation in this federal program. As a result, interest in the legal authority to mandate the program (i.e., the Oct. 2 Memo) has been on-going and remains urgent. *See, e.g.*, Patel Decl. A ¶¶*14-18; Ex. C ¶¶7-9; Ex. E ¶¶ 12-17; Ex. F ¶12; Ex. G ¶6.* This Court should not allow federal agencies to blind-side the public and elected officials again with another change in policy after significant time and resources were devoted to a strategy addressing yet another of the Government's ever-shifting explanations of, and justifications for, Secure Communities. The public, along with advocates and Plaintiffs, are entitled to immediate full disclosure of the legal underpinnings of the latest mandatory Secure Communities policy through the release of the Oct. 2 Memo.

In fact, officials and residents of states that are actively crafting policies to protect immigrant communities (such as California or Washington), as well as the opt out states, lie in limbo waiting to obtain the October 2 Memo to determine the best way to proceed. *See, e.g.* Patel Decl. Ex. A ¶17. While the federal government and advocates continue to debate whether federal agencies will permit limits to information sharing, some states and localities have resorted to compromise with alternative strategies. In Cook County, Illinois and Santa Clara, California, local law enforcement will limit the circumstances in which "detainers" (immigration requests to hold non-citizens in the agencies' custody) will be honored. Patel Decl. Ex. F ¶¶11,

Ex. D ¶¶12-14. Further, California officials and advocates require the Oct. 2 Memo to facilitate amended legislation before January. Patel Decl. Ex. D ¶¶6-8. But these stop-gap measures do not address the root problem for elected officials across the country working to understand the impact of Secure Communities—to fully comprehend the Government's policies and justifications concerning the sharing of information between the FBI and immigration authorities. These withheld documents will provide the legal reasons for the shift in policy from an opt-out/opt-in program to a mandatory one, and, therefore, ensure that final policy solutions will comport with the *actual* federal policy and legal authority. *See, e.g.*, Patel Decl. Ex. D ¶8. Thus, similar to the Defendant's six-month delay in producing Opt Out Records and delay in releasing certain Final Production List records, the Defendant resists this Court's order to provide records important to a current public policy debate and instead requests a stay. However, Defendants ignore the reality that state and local officials and their constituents must decide now, not next year, how to proceed with the FBI, ICE and DHS. *See, e.g.* Patel Decl. Ex. C ¶¶ 7-8, 11-12, Ex. D ¶¶ 8, 11, Ex. E ¶¶14-17, Ex. F ¶12, Ex. G ¶ 7.

Beyond the jurisdictions considering policy changes, the harm to thousands of individuals whose fingerprints have already or will be shared with immigration authorities is ongoing and, once inflicted, may be impossible to undo. Patel Decl. Ex. A ¶16, Ex. E ¶16, Ex. F ¶13, Ex. G ¶4. Based on the latest ICE statistics, over 140,000 people have been deported through Secure Communities, with more than 33,000 of those deportations occurring in the five months between May and September 2011.[6] In the Opt Out States, nearly 600 people have been deported since

[6] *See* U.S. Immigration and Customs Enforcement, "Secure Communities IDENT/IAFIS Interoperability Monthly Statistics through September 30, 2011," available at: http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf. ICE's recent data reflects that from the time that Illinois, New York, and Massachusetts opted out of Secure Communities, hundreds of people in those opt-out states alone have been removed

the time those states declared their desire not to participate in the program. *See also* Patel Decl. Ex. C ¶9. For the thousands of people who have been and will likely be removed from these opt-out states alone in the upcoming months while an appeal is pending, the urgency of the release of the October 2 Memo and the ability to challenge mandatory implementation of Secure Communities is life-altering. In short, granting the Defendant's Stay Motion will cause irreparable damage to the lives of thousands of interested parties.

Second, withholding the Oct. 2 Memo harms the public's interest in oversight of Secure Communities. Advocates require the Oct. 2 Memo to adequately educate Congressional representatives on the nature of the program and the ways it should balance executive authority. Patel Decl. Ex. B. Additionally, the DHS Office of Inspector General (OIG) has discussed, and will review, the legal authority for the mandatory policy as part of its current inquiry into Secure Communities. *Id.* This process is expected to conclude at the end of this year or early next year. Thus, an extensive delay in releasing the Oct. 2 Memo during the appeals process may substantially curtail the oversight authority of the OIG and the ability to provide input into the review. *Id.* ¶7. The Government Accountability Office (GAO) is likewise engaged in a review of Secure Communities and has discussed the potential inquiry into legal justification for the mandatory policy with advocates. *Id.* ¶8. The Oct. 2 Memo is needed immediately to assist the GAO, which will end its review early next year. *Id.* Withholding release of the Oct. 2 Memo until the appellate process is complete hinders the GAO, OIG and possibly Congress's ability to investigate and reveal potential wrongdoing by federal authorities. *Id.* ¶¶ 5-8. *See also* Ex. A ¶15. This severely harms the public.

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as a result of the program. In Illinois, 296 individuals were removed as a result of Secure Communities from June through September; in New York, 239 individuals were removed during the same months; and in Massachusetts, where Boston is currently the only activated jurisdiction, 43 individuals were removed. *Id.*

Finally, Defendant's contention that the public will benefit from appellate consideration of the instant motion is false. Stay Motion at 24-25. This Court has thoroughly considered the substantial factual record and has determined that the deliberative process privilege and attorney-client privilege were improperly applied. Oct. 24 Order at 26-27, 34. Given the strong likelihood of Plaintiffs' success on the merits, *supra* at 10-18, the only interest Defendant serves through an appeal is their own desire for delay. Such delay only thwarts the public policy debate and the widespread attempts to limit or prevent Secure Communities from injuring hundreds of thousands of people and families.

Accordingly, the factors regarding harm to Plaintiffs and interested parties as well as the public interest weighs substantially in Plaintiffs' favor.

**III. DEFENDANT WILL NOT SUFFER SUBSTANTIAL HARM ABSENT A STAY**

Defendant fails to show substantial harm if it must comply with the Oct. 24 Order pending appeal. FOIA requires *prompt* disclosure of government records. 5 USC § 552(a)(3); 5 U.S.C. §552(a)(6)(C)(i) (requiring agency to make records requested under FOIA "promptly available" unless they are exempt from mandatory disclosure.). Therefore, in the context of FOIA, it is particularly inappropriate to allow the Government a blanket, unquestioned right to deny plaintiffs the statutory right to disclosure without delay, simply to preserve the right to futile appellate review. In this context, justice delayed is the equivalent of justice denied.

On the other hand, Defendant's purported irreparable harm is insubstantial – it risks losing *appellate* rights with respect to *some* information in *one* document. This Court has reviewed this document *in camera* and found that its disclosure is in the public's interest and will not result in harm to Defendant. Moreover, the inability of Defendant to show a substantial likelihood of success on the merits makes it inevitable that the Oct. 2 Memo, or portions of it, will eventually be released to the public.

Defendant cites *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) to support their argument that denial of the stay would cause substantial irreparable harm. While *Providence* involved documents containing the results of an illegal wiretap at a *single* business and "relatively slight harm to requestors," *id.* at 889-890, the instant case involves a document that is the subject of widespread public interest, and grave harm to the public would result from any further delay in the release of that document, *see, supra* Sec. II at 18-22. While acknowledging the importance of the right to appellate review, the court observed that an agency would *not* be entitled to a stay pending appeal where, as here, it is unable to establish a likelihood of success on the merits. *Id.* at 890; *see, supra* Sec. I at 10-18. Furthermore, in this case, the Court has specifically found that significant portions of the memorandum have *already been disclosed* to the public. Oct.24 Order at 23. Disclosure of portions of legal analysis already in the public domain, or discussed publically by agency officials, cannot arguably cause any harm to Defendant, much less harm that is irreparable.

Moreover, the Supreme Court has ruled that the release of attorney-client privileged information during the pendency of a civil litigation is not substantial enough to justify special appellate rights, and thus the nature of the information being released here (purportedly privileged information) does not justify a stay. *See Mohawk Industries, Inc. v. Norman Carpenter*, 130 S. Ct. 599 (2009). The Supreme Court recognized that, despite the importance of the attorney-client privilege, an order to disclose privileged material is of no special import and went on to equate such an order with the typical discovery burdens assumed by all litigants. *Mohawk Industries*, 130 S. Ct. at 608. ("[A]n order to disclose privileged material may, in some situations, have implications beyond the case at hand. But the same can be said about many categories of pretrial discovery orders."). The Court further found that while "an order to

disclose privileged information intrudes on the confidentiality of attorney-client communications . . . deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel." *Id.* Similarly here, Defendant cannot make a plausible argument that an order disclosing this information pending the appeal would impact the way Defendant consults regularly with its counsel in the future. Thus, given the nature of the information potentially disclosed here, there is relatively insignificant harm compared to more serious harm that would result from the disclosure of information relating to national security or personal privacy which may warrant a stay pending an appeal for the release of information under different FOIA exemptions.

Accordingly, the factor regarding Defendant's harm weighs slightly in Defendant's favor.

## IV. AN APPROPRIATE REMEDY AFTER BALANCING THE FOUR FACTORS

As demonstrated above, a stay should not be granted pending the appeal given the appropriate weight that should be given to the following four factors: (i) the irreparable harm to the Plaintiffs and interested parties in not having this information when making important public policy decisions; (ii) the public interest in the release of this critical information at this time; (iii) the relatively insubstantial harm to Defendant in losing its appellate rights in a matter it is likely to lose, and would only result in the release of potentially privileged information from a single document; and (iv) the failure of Defendant in showing that it has any likelihood of success on the merits of an appeal, much less a substantial one, whereby the Defendant would need to demonstrate to the Second Circuit that this Court's fact-intensive determination on two independent grounds regarding the propriety of the claimed exemption was fatally flawed.

If this Court was inclined to grant a stay pending appeal, under the circumstances described above, a conditional stay is an appropriate remedy. Notably, Defendant relies on *In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 342 (S.D.N.Y. 2007) for the proposition that the right

to appellate review is inviolate in stay motions concerning disclosure orders in FOIA case. In that case, the court acknowledged that even where, as here, the denial of a stay pending appeal could arguably moot the underlying appeal, "two weighty interests" must be carefully considered: the appellants' right of appeal and the substantive right the appellee is trying to enforce. *Id.* at 342. In *Adelphia*, the court granted a stay pending appeal only upon a condition requiring the posting of a very substantial bond – making the appellant bear some of the cost of the appeal. *Id.* at 343.

When confronting the dilemma of balancing these competing, seemingly absolute interests in FOIA cases, courts have found it appropriate to grant a conditional stay. *See, e.g.*, *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative*, 240 F. Supp. 2d 21, 23 (D.D.C. 2003) ("the Court has discretion to impose conditions upon any such stay."); *Palazetti Import/Export, Inc. v. Morson*, No. 98 civ. 722(FM), 2002 WL 562654, at *4 (S.D.N.Y. Apr. 16, 2002) (granting stay on conditions including, defendants post a bond, cooperate in discovery, make no out of the ordinary course of business transfers, put profits in a special interest bearing account, and give plaintiffs the right to audit defendants' books).

As here, where there is demonstrable harm in the delay in enforcing an order, courts have conditioned the stay on the appellants' agreement to expedite the appeal. *See e.g.*, *People for the Am. Way Found. V. Dep't of Educ.*, 518 F. Supp. 2d 174, 177-78 (D.D.C. 2007) (conditioning a stay on noticing an appeal by a certain date, expediting that appeal and not seeking extensions unless based on unforeseen circumstances). Thus, if the Court elects to grant Defendant's stay application, Plaintiffs seek the following expedited briefing schedule: (i) Defendant's opening brief and appendices shall be filed within twenty-one days of entry of the Order granting the conditional stay; (ii) Plaintiffs' brief shall be filed within twenty-one days of the filing of

Defendant's brief; and (iii) Defendant's reply brief shall be filed within ten days of the filing of Plaintiffs' brief. *See, e.g.*, *Chevron Corp. v. Steven R. Donziger, et. al.*, No. 11-1150-cv (L), 11-11264-cv (Con), (2d Cir. May 12, 2011) (granting expedited briefing on a similar schedule); *Silverman v. MLB Player Relations Comm.*, 1995 U.S. App. LEXIS 8163 (2d Cir. Apr. 4, 1995) (same); *Gregorio T. By and Through Jose T. v. Wilson*, 54 F.3d 599, 600 (9th Cir. May 14, 1995) (same).[7]

Even with expedited briefing, as noted above, there would still be irreparable harm to Plaintiffs, interested parties, and the public at large. *See, supra* Sec. II at 18. This Court should use its discretion to craft a remedy that mitigates this harm pending the stay by providing the information the Plaintiffs seeks in a different form. Thus, Plaintiffs request, as a condition of any stay, an order granting an evidentiary hearing before this Court where an ICE official who has the authority to speak on behalf of the agency on matters relating to Secure Communities, such as John Morton or Beth Gibson, can provide a sworn statement regarding the legal justification for the mandatory nature of Secure Communities, with appropriate cross-examination by Plaintiffs subject to objections by Defendants' counsel and this Court's determinations as to the basis of any objections. Such relief provides Plaintiffs and the public the information they need while Defendant pursues its appeal, and this Court would have the discretion at the hearing to determine the appropriate scope of disclosure of such information.

**CONCLUSION**

Plaintiffs respectfully request, for the reasons stated above, that this Court deny Defendant's Motion for a Stay of the October 24 Order pending the appeal to the Second Circuit.

[7] Plaintiffs will be filing an emergency motion to the Second Circuit requesting a similar expedited briefing schedule early next week.

Dated: November 18, 2011
New York, New York

Respectfully submitted,

/s/

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