



Privilege Pointers: Protecting Attorney-Client Privilege and Work Product in Internal Investigations

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William J. Stellmach is a Partner at Willkie Farr & Gallagher LLP and Co-Chair of the firm's White Collar Defense Group, where he leads one of the premier compliance, investigations and enforcement defense practices in United States. He is a distinguished former federal prosecutor and regulator, and previously served as head of the Fraud Section of the U.S. Department of Justice's Criminal Division as well as in the Division of Enforcement at the Securities and Exchange Commission. Drawing on a unique range of experience, Bill regularly represents a broad range of companies, financial institutions and their executives in matters involving securities fraud, foreign bribery, sanctions, antitrust, cybersecurity, insider trading and money laundering. He also has extensive experience representing corporations and individuals outside the United States in responding to inquiries and investigations.



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Liz is a partner at Willkie in the Litigation Department and co-head of Willkie's Cybersecurity & Privacy Practice Group. Liz concentrates her practice on complex, commercial litigation, as well as significant corporate internal investigations. Liz's practice focuses on representations of accounting firms and auditors, insurance companies, insurance brokers, audit committees, and other financial institutions and corporations, in a variety of disputes, including civil securities actions, accounting and other professional liability actions, various contract and business disputes, adversary proceedings in bankruptcies, SEC enforcement actions, PCAOB investigations, FCPA investigations, and data breach and security response.



Presentation Summary

- I. Mounting Pressure on Privilege
 - II. Attorney-Client Communication Privilege and Work Product Doctrine
 - III. Disclosure in Subsequent Civil Litigation
 - IV. Anticipating Government Investigations and Enforcement Actions
 - V. Best Practices for Preserving Privilege and Work Product in Internal Investigations
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Privilege in Internal Investigations

I. Mounting Pressure on Privilege

Capital One Consumer Data Security Breach Litigation

- Third-party cybersecurity consultant
- Subsequent consumer class action
- Disclosure in June 2020

(Sources: [The Wall Street Journal](#); Order, *In re: Capital One Consumer Data Security Breach Litig.*, No. 1:19-MD-2915 (E.D. Va. June 25, 2020).)





Disclosure v. Waiver

Sec. and Exch. Comm'n v. RPM Int'l, Inc. (2020):

- Jones Day was hired by RPM's Audit Committee after the SEC initiated the formal investigation.
- The Court concluded that Jones Day's investigation was conducted "because of" EY's position that it would not sign the company's Form 10-K unless such an investigation were conducted, rather than "because of" the SEC enforcement action.
- The work product doctrine could not be invoked to shield the witness interview memoranda from discovery.
- The court also found that RPM **waived** both work product protection (to the extent it existed) and the attorney-client privilege by sharing the contents of the interview memos with EY, which were also thereafter disclosed to the SEC.

Source: *Sec. and Exchange Comm'n v. RPM Int'l, Inc.*, No. 1:16-cv-01803-ABJ, Minute Order (D.D.C. Feb. 12, 2020)

The Stakes

- Fact finding construed as “admissions”
- Roadmap to potentially culpable conduct
- Damages analysis
- Undercuts remediation and effective response



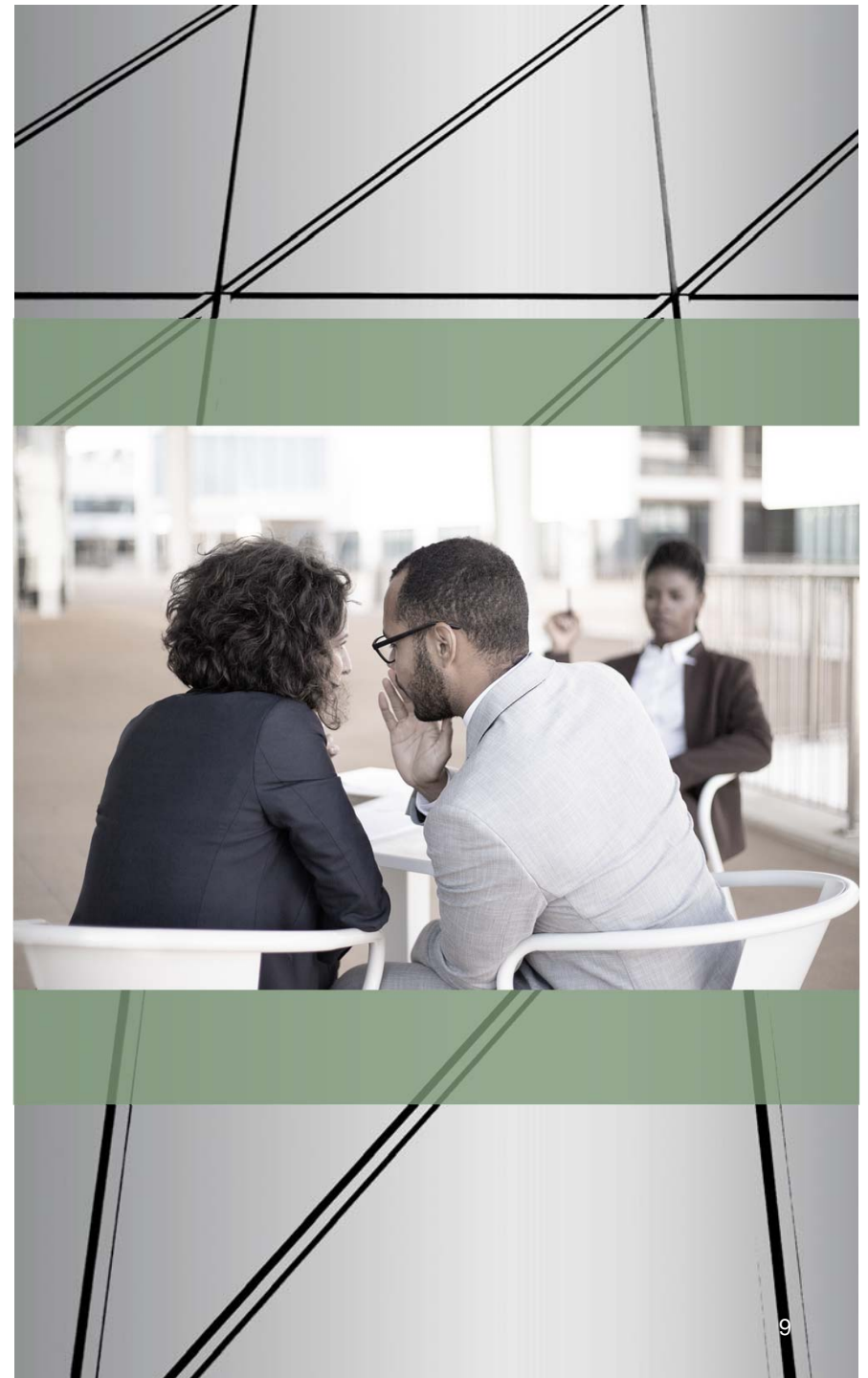
Privilege in Internal Investigations

II. Attorney-Client Privilege and Work Product Doctrine

Attorney-Client Communication Privilege

1. Communication;
2. Between an attorney and his or her client (or their agents);
3. Made to secure or provide legal advice;
4. Transmitted in confidence; and
5. Maintained in confidence (*i.e.*, not waived).

Restatement (Third) of Law Governing Lawyers § 68.



In the Corporate Context

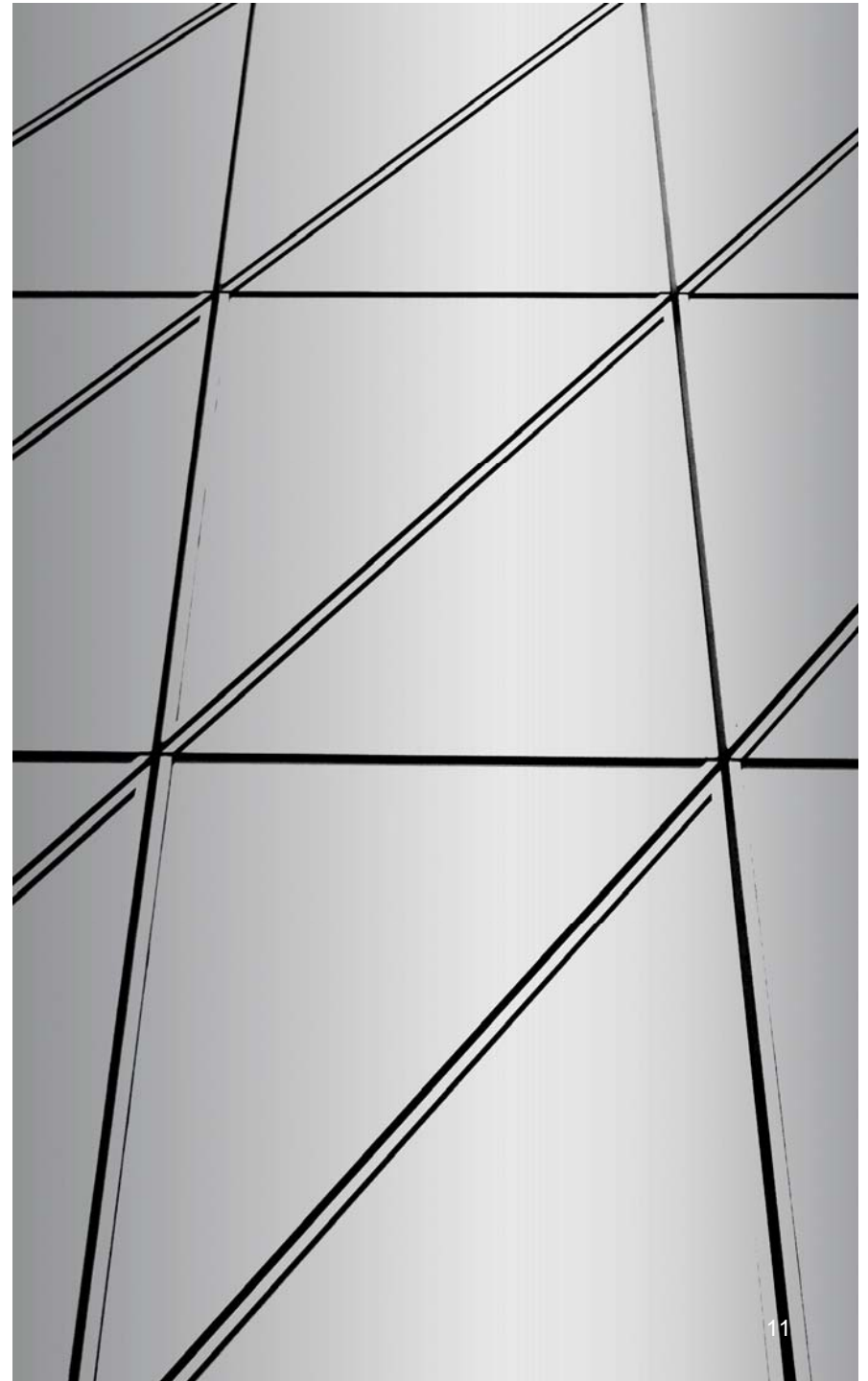
- Attorney-client privilege applies to corporations:
 - Communication concerns a matter within the scope of employee's corporate duties
 - Employee is aware that questioning is being done so that the corporation can obtain legal advice
 - If communication involves company counsel, she must be acting in her capacity as an attorney

- Courts diverge on whether attorney-client privilege protects communications between former employees and corporation's attorney:
 - Courts within the Second Circuit find that such communications are protected if communication relates to former employee's knowledge or duties while an employee

Work Product Doctrine

1. Materials and information;
2. Prepared by or for a party;
3. In anticipation or in connection with; and
4. Litigation or similar adversarial encounter.

(Fed. R. Civ. P. 26(b)(3)(A))



Scope of Work Product Doctrine

- Compared to Attorney Client Privilege: Broader but less absolute.
 - Substantial need and undue hardship
 - Opinion v. Fact
- Material should contain or reflect “the thoughts, mental impressions, views, strategies, conclusions, opinions or legal theories and analyses” of an attorney or other representative.
- “Prepared in anticipation of litigation”



Privilege in Internal Investigations

III. Disclosure in Subsequent Civil Litigation

Focal Points

- Purpose of investigation
- Oversight of investigation
- Types of materials sought
- Prior disclosure of investigative material



Representative Cases

- **Purpose**

- *In re: Capital One Consumer Data Security Breach Litigation* (2020)
- *SEC v. RPM International, Inc.* (2020)
- *Cicel (Beijing) Science & Technology Co., Ltd. v. Misonix, Inc.* (2019)
- *In re Target Corp. Customer Data Security Breach Litigation* (2015)
- *Parneros v. Barnes & Noble, Inc.* (2019)
- *In re: Premera Blue Cross Customer Data Security Breach Litigation* (2017) (“*Premera I*”)

- **Oversight**

- *In re Target Corp. Customer Data Security Breach Litigation* (2015)
- *Parneros v. Barnes & Noble, Inc.* (2019)

Representative Cases, *Cont'd*

- **Types of Materials Sought**

- *Parneros v. Barnes & Noble, Inc.* (2019)
- *In re: Premera Blue Cross Customer Data Security Breach Litigation* (2017) (“*Premera I*”)
- *In re: Premera Blue Cross Customer Data Security Breach Litigation* (2019) (“*Premera II*”)

- **Prior Disclosure**

- *In re: Capital One Consumer Data Security Breach Litigation* (2020)
- *SEC v. RPM International, Inc.* (2020)
- *In re: Fluor Intercontinental, Inc.* (2020)

Don't Become a Cautionary Tale

- Document purpose of the internal investigation.
- Document reasons for delays in initiating.
- Document supervision by counsel and active oversight.



Involving Non-Lawyers

- *Kovel* Doctrine
- Non-lawyers should act under supervision of attorneys.
- Communications must be confidential.
- Third parties must be necessary for legal advice
- Retention Strategy

Privilege in Internal Investigations

IV. Anticipating Government Investigations and Enforcement Actions

An Offer You Can't Refuse: Cooperation with the Government

- The Three-Front War
- Individuals
- Waiver – Policy v. Practice



Government's Emphasis on Individuals, No Privilege Waiver

- To be considered as a mitigating factor, the company “must **identify all individuals** involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide the Department all facts relating to that misconduct.” USAM 9-28.700
- The USAM also acknowledges that “[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection” and that DOJ attorneys must afford “due respect for the attorney-client privilege and work product protection.”

(U.S. Attorneys' Manual 9-28.700, 9.28-720, 9-28.750.)



Individuals – The Current “Sliding Scale” Approach



Criminal Investigations:

“[A]ny company seeking cooperation credit in criminal cases must identify every individual who was substantially involved in or responsible for the criminal conduct. . . . however . . . investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted.”

Civil Investigations:

“[A] company must identify all wrongdoing by senior officials, including members of senior management or the board of directors, if it wants to earn any credit for cooperating in a civil case. If a corporation wants to earn maximum credit, it must identify every individual person who was substantially involved in or responsible for the misconduct.”

(Deputy A.G. Rod Rosenstein’s Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018).

SEC and CFTC Have Taken **Similar Positions on Privilege**



- **SEC:** “Voluntary disclosure of information need not include a waiver of privilege to be an effective form of cooperation and **a party’s decision to assert a legitimate claim of privilege will not negatively affect their claim to credit for cooperation.** However...if a party seeks cooperation credit for timely disclosure of relevant facts, the party must disclose all such facts within the party’s knowledge.” (SEC Enforcement Manual 4-3.)



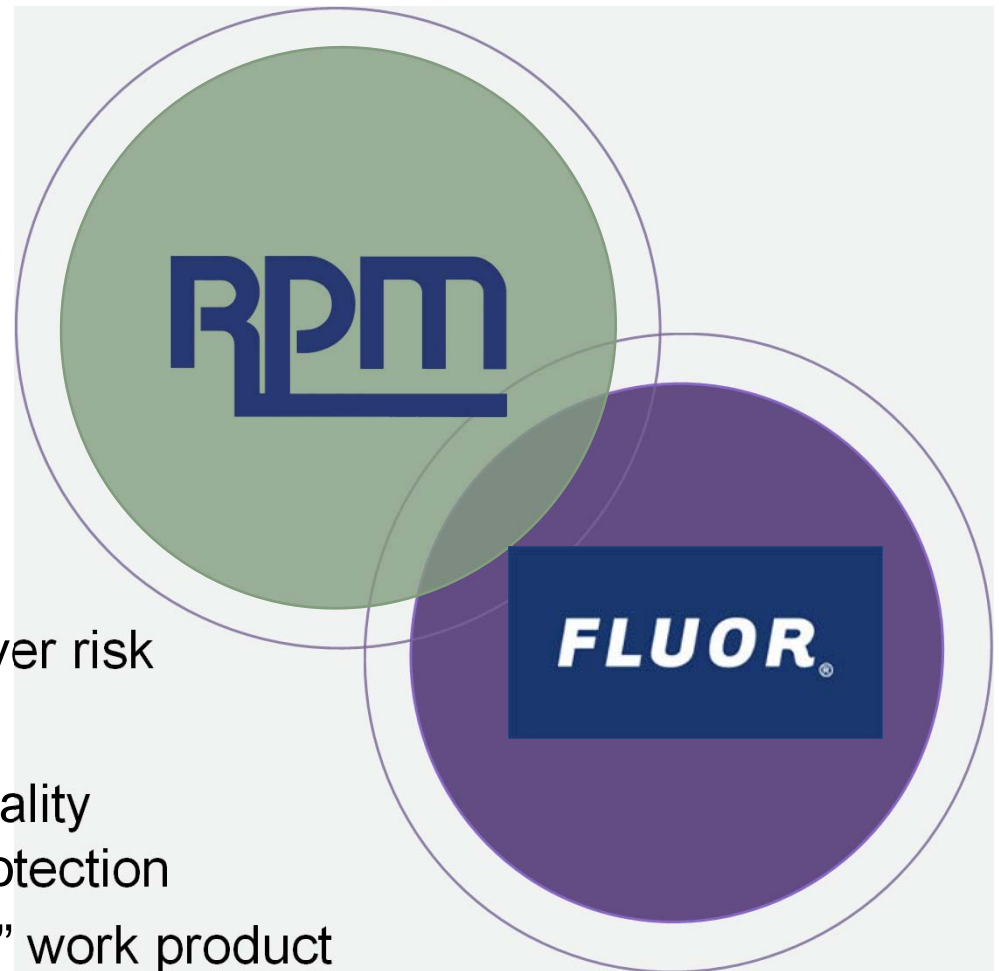
- **CFTC:** “[T]he Division recognizes that the attorney-client privilege and the work product doctrine are fundamental to the American legal system and the administration of justice. These rights are no less important for an organizational entity than for an individual. The Division further recognizes that these protections can promote a client’s communications with counsel and thereby serve to promote the client’s compliance with the law. **These rights are not intended to be eroded or heightened by this advisory. Moreover, actions by an entity recognizing the legal rights of its employees are not inconsistent with these factors.**”

Actions vs. Words

- “Cooperation” = Waiver?
 - Debriefings / Attorney Proffers
 - Select Documents
 - Work Product
- Risks in Self-Reporting
 - Selective Waiver
 - *SEC v. Herrera*
 - Third Parties – Civil Litigation

Current State of Play

- *RPM International*
- *In re Fluor Intercontinental*
- Key Takeaways
 - More detail increases waiver risk
 - “Facts” are not protected
 - Non-waiver and confidentiality agreements afford little protection
 - No such thing as “obvious” work product
 - Manage auditor communications
- What’s Next . . . ?



Cross-Border Issues

- Scope of Privilege and Client Confidentiality
- Location of Investigative Materials
- Where to Conduct Interviews?
- Responding to Foreign Regulators

The New York Times

German Authorities Raid U.S. Law Firm Leading Volkswagen's Emissions Inquiry



Volkswagen cars are lifted inside a delivery tower in Wolfsburg, Germany this week. The carmaker is the subject of a wide-ranging inquiry into an emissions-cheating scheme. Michael Sohn/Associated Press

By Jack Ewing and Bill Vlasic

March 16, 2017



(Sources: [N.Y. Times](#) (Mar. 16, 2017).)

Common Scenarios Posing Waiver Risk

- Common Interest Doctrine
 - Anticipate the Worst: JDAs v. the Yates Memo
- Auditor Updates: Privilege v. Work Product
 - *RPM International* as a Cautionary Tale
- M&A Due Diligence
 - Key Moment – Signing of the Deal
 - Disclosure of Pending Litigation or Legal Issues

Privilege in Internal Investigations

V. Best Practices: Plan for the Challenge

Best Practices: Plan for the Challenge



Document Counsel's Role and Investigation's Purpose

☞ *"In Anticipation of Litigation"*



Interview Tips

☞ *Upjohn and Sensitize Witnesses*

☞ *Opinion Work Product*



Presentations to Third Parties

☞ *"Just the Facts"*

Best Practices: Plan for the Challenge, *Cont'd*



Agreements

- ⌘ *Confidentiality Agreements*
- ⌘ *Clawback Agreements*



Consider Implications of Waiver

- ⌘ *No Selective Waiver*
- ⌘ *Subject Matter Waiver*

Attorney Profiles



William J. Stellmach
Partner

A distinguished former federal prosecutor and regulator, Bill Stellmach previously served as head of the Fraud Section of the U.S. Department of Justice's Criminal Division and is now a partner in the Litigation Department and Co-Chair of the Firm's White-Collar Defense Group. Drawing on a wide range of experience, his practice focuses on white-collar criminal defense, regulatory enforcement and internal investigations. Bill regularly represents a broad range of companies, financial institutions and their executives in matters involving securities fraud, foreign bribery, sanctions, antitrust, cybersecurity, insider trading and money laundering. He also has extensive experience representing corporations and individuals outside the United States in responding to inquiries and investigations.

Bill is also an accomplished courtroom advocate, and has tried numerous white-collar federal cases to verdict. For his role as a prosecutor in winning a landmark \$8 billion fraud trial, the U.S. Justice Department awarded him its prestigious John Marshall Award for Trial of Litigation. He also writes and lectures extensively on issues related to white-collar criminal defense and regulatory enforcement. Most recently Legal 500 2019 recommended Bill in Corporate Investigations and White-Collar Criminal Defense, describing him as "stellar."

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Elizabeth J. Bower is a partner in the Litigation Department. Liz concentrates her practice on multiparty, multiforum, complex, commercial litigation, as well as significant corporate internal investigations. Liz's practice focuses on representations of accounting firms and auditors, insurance companies, insurance brokers, audit committees, and other financial institutions and corporations. Liz's ability to spot and simplify the important issues has enabled her to successfully represent clients across industries in a variety of disputes and board level risks over her nearly twenty year career, including civil securities actions, accounting and other professional liability actions, various contract and business disputes, adversary proceedings in bankruptcies, SEC enforcement actions, PCAOB investigations, FCPA investigations, and data breach and security response.

Liz is Co-Chair of Willkie's Cybersecurity & Privacy Practice Group. She also serves on the Firm's Business, Women's Professional Development, Conflicts & Ethics, and Counsel Compensation Committees.

Liz was highly commended in the category of "Gender Diversity Lawyer of the Year" at the Chambers Diversity and Inclusion Awards: USA 2019. She also leads the Willkie team honored with The Washington Lawyers' Committee for Civil Rights and Urban Affairs Outstanding Achievement Award for its representation of CASA and Deferred Action for Childhood Arrival (DACA) recipients in Casa de Maryland v. U.S. Department of Homeland Security, which struck down the Trump administration's attempted rescission of DACA.

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