Nos. 18-587, 18-588, 18-589

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL., PETITIONERS,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS,
v.
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS,
v.
MARTIN JONATHAN BATALLA VIDAL, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* FORMER NATIONAL SECURITY OFFICIALS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici curiae are former national security, foreign policy, homeland security, intelligence, and other public officials who have worked on security matters at the senior-most levels of the U.S. government.[2] Amici have held the highest security clearances in the U.S. government and have served in leadership roles in presidential administrations of both major political parties. Amici have collectively devoted their careers to combatting the security threats that the United States faces in an interconnected and dynamic world. A number of amici were serving in the U.S. government in June 2012, when the now-rescinded Deferred Action for Childhood Arrivals ("DACA") program was created. Amici write respectfully to offer the Court their perspective on the national security and foreign policy issues implicated by this case.

SUMMARY OF ARGUMENT

Petitioners' original September 2017 decision to rescind DACA did not include a policy rationale based on immigration enforcement priorities, or foreign policy or national security objectives. Not until nine months later, far into the present litigation, did Petitioners offer such a rationale, in a single sentence near the end of then-Secretary Nielsen's June 2018

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[1] No counsel for a party to this case authored this brief in whole or in part, and no such counsel or party contributed monetarily to the preparation or submission of any portion of this brief. Yale Law School's Peter Gruber Rule of Law Clinic operates as a public interest law firm separate and independent from the school's Jerome N. Frank Legal Services Organization, one of the counsel for Respondents in one of the consolidated matters in this case. Petitioners and Respondents provided blanket consent to file *amicus curiae* briefs.

[2] A complete list of signatories can be found in the Appendix.

memorandum ("Nielsen Memo"). That sentence suggested a "cause and deter" explanation for the rescission: DACA *causes* illegal border crossings, so DACA rescission is needed to *deter* such crossings. The Nielsen Memo offered this *post hoc* rationale in passing, without citations or factual support. Petitioners' brief to this Court now tries to breathe life into this empty rationale.

The "cause and deter" rationale bears no connection to the facts, record, or stated motivation for the decision under review. This rationale not only lacks an evidentiary basis, but is at odds with the overwhelming weight of available evidence. It also fails to account for the many ways in which—in amici's experience—DACA rescission would harm the national security and foreign policy interests of the United States. Accordingly, this Court owes this unsupported policy claim no "national security" deference. In amici's judgment, this claim and the defective process that gave rise to it bear no resemblance to the considered and reasoned professional judgments in which amici participated, and that have supported bona fide claims to national security deference in the past.

ARGUMENT

I. Petitioners' Rescission of DACA Does Not Serve a "Cause and Deter" Rationale, and in Fact Would Do Serious Harm to U.S. National Security and Foreign Policy Interests.

Many months after their decision to rescind DACA, Petitioners introduced, in passing and without evidence, an unsubstantiated *post hoc* rationale: that because DACA causes illegal border crossings, rescission of DACA is needed to deter such crossings. This unsupported claim does not approach the reasoned evaluation of the facts that this Court has required to uphold agency action. It ignores the many ways in which DACA rescission in fact would do grave harm to U.S. security and foreign policy concerns.

A. Rescission does not serve a "cause and deter" rationale.

Under section 706(2)(a) of the Administrative Procedure Act ("APA"), a reviewing court must set aside agency actions, findings, or conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." The court must assess whether the agency policy resulted from "reasoned decisionmaking"[3] and whether, at the time "it took the action,"[4] the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[5] When an agency

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[3] *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 520 (2009).

[4] A court "may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan* v. *EPA*, 135 S. Ct. 2699, 2710 (2015).

[5] *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

reverses an earlier position, it must "provide a reasoned explanation for the change."[6] These principles apply with special force when, as here, hundreds of thousands have come to rely on the policy to conduct their daily lives.[7] In such cases, an agency must identify, with more than mere "conclusory statements," the "facts and circumstances that underlay or were engendered by the prior policy."[8]

The "cause and deter" rationale for Petitioners' decision to rescind DACA falls well short of this standard.

Petitioners' original decision to rescind DACA made no mention of an immigration enforcement rationale or any security or foreign policy need for the change. In her September 5, 2017 memorandum rescinding DACA ("Duke Memo"), then-Acting Secretary of Homeland Security Elaine Duke did not suggest that DACA rescission was necessary to deter migrants, to address a security risk, or to protect the homeland in any respect. The sole reason she articulated for the decision concerned the legality of DACA.[9]

More than nine months later—after the U.S. District Court for the District of Columbia rejected the

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[6] *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016).

[7] Petitioners do not dispute that hundreds of thousands of DACA recipients have come to rely on DACA for the stability of their continued presence in this country, the only home that most recipients have ever known. Pet. Br. at 42-43.

[8] *Encino Motorcars,* 136 S. Ct. at 2126 (internal quotation marks omitted).

[9] Memorandum from Elaine C. Duke, Acting Sec'y of Homeland Sec. to James W. McCament, Acting Dir. of U.S. Citizenship and Immigration Servs., *et al.* (Sept. 5, 2017).

Duke Memo[10]—then-Secretary of Homeland Security Kirstjen Nielsen abruptly introduced a "cause and deter" explanation for the rescission of DACA, in a single sentence near the end of a three-page memorandum.[11] The sentence suggests that, "considering the fact that tens of thousands of minor aliens have illegally crossed or been smuggled across our border in recent years," and that this "pattern continues to occur at unacceptably high levels to the detriment of the immigration system," it is "critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, transparent enforcement of the immigration laws against all classes and categories of aliens."[12] The Nielsen Memo does not cite any evidence either that DACA caused the migration of minors, or that rescinding DACA would deter such migration.

Petitioners' brief to this Court now expands this rationale, asserting that DACA rescission is needed to "discourage illegal immigration," and to prevent the "illegal border crossings" of children "with or without their families."[13] Petitioners further insist that "[a]mnesty-like policies" such as DACA "encourage further illegal conduct" by "creating an expectation of future amnesties."[14] As support, Petitioners cite only a single law review article from fifteen years ago,

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[10] *NAACP* v. *Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018).

[11] Memorandum from Kirstjen M. Nielsen, Sec'y of Homeland Sec. (June 22, 2018) [hereinafter Nielsen Memo].

[12] *Id.* at 3.

[13] Pet. Br. at 11, 40.

[14] *Id.* at 41 (citing Pia Orrenius & Madeline Zavodny, *What Are the Consequences of an Amnesty for Undocumented Immigrants?*, 9 Geo. Pub. Pol'y Rev. 21, 31 (2004)).

which itself cites no evidence for this claim.[15] Later in their brief, Petitioners opaquely refer to unspecified "foreign-policy considerations" as justifying the policy change in this case.[16]

Petitioners' "cause and deter" rationale has no basis in the evidence or record. Even now, nearly two years after the original decision to rescind DACA, and more than a year after the Nielsen Memo introduced the rationale, Petitioners cannot offer a single piece of evidence to support this rationale. They do not point to any information in the administrative record. Indeed, they produced no administrative record for the Nielsen Memo at all. They do not claim to be in possession of supporting classified or sensitive information that they are unable to disclose. They do not offer the declaration of a single national security official who is willing to speak to the process or the facts that yielded this rationale. Their *post hoc* rationale is not just late, but entirely unmoored from fact.

In fact, the overwhelming evidence is to the contrary. Years of data now illuminate the actual impact that DACA has had on migrant flows into the United States. That data confirms that, as the authors of one comprehensive study put it, "DACA did not significantly contribute to the observed increase in unaccompanied minors" apprehended along the U.S.-Mexico border.[17] A separate analysis found that the Border

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[15] *Ibid.*

[16] *Id.* at 53.

[17] Catalina Amuedo-Dorantes & Thitima Puttitanun, *Was DACA Responsible for the Surge in Unaccompanied Minors on the Southern Border?*, 55 Int'l Migration 12, 12 (2017); see also Catalina Amuedo-Dorantes & Thitima Puttitanun, *DACA and the Surge in Unaccompanied Minors at the US-Mexico Border*, 54 Int'l Migration 102 (2016).

Patrol's own figures "show[] unequivocally that all of the increase in children coming to the border in 2012 began *before* the DACA announcement," and that "UAC [unaccompanied alien children] arrivals have fluctuated month-to-month and year-to-year totally without regard to the number of new DACA applications."[18] These results accord not only with amici's experience, but also with the fact that DACA offers no benefits to those migrating today, because its protections are only available to people who entered the United States on or before June 15, 2007, an eligibility that expired more than a decade ago. This robust body of evidence does not support, but rather undermines, Petitioners' "cause and deter" rationale.

The policy rationale for DACA rescission that Petitioners now offer arose at least nine months after the actual rescission decision, cites no evidence, relies on no evidence of which we are aware, and runs counter to the available empirical evidence. This passing justification was not made at the time the agency "took the action."[19] And it reflected no examination of "relevant data," offered no "connection" between the facts and the choices made, and gave no explanation of any "facts and circumstances" that might be engendered by the rescinded policy.[20] Petitioners' "cause and deter" rationale represents the antithesis of the "reasoned decisionmaking" that the law requires, and instead resembles the kind of "conclusory statement"

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[18] David Bier, *DACA Definitely Did Not Cause the Child Migrant Crisis*, Cato Inst. (Jan. 9, 2017) (emphasis added).

[19] *Michigan*, 135 S. Ct. at 2710 (2015).

[20] *Michigan*, 135 S. Ct. at 2710; *State Farm*, 463 U.S. at 43.

that has been held insufficient under this Court's precedent.[21]

B. Rescission would do serious harm to U.S. security and foreign policy interests.

Petitioners' "cause and deter" rationale not only is unsupported by the available evidence, but also fails to account for the many ways in which—in amici's experience—the rescission of DACA would do grave harm to the security and foreign policy interests of the United States.

First, rescission would have a devastating humanitarian impact on DACA recipients and their families and communities. On average, DACA recipients arrived in the United States at the age of six.[22] Deporting them to places that are unsafe, unfamiliar, and unable to support them would gravely harm these individuals and signal a deep contempt for human rights.[23] In amici's experience, this move would

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[21] See *Fox Television*, 556 U.S. at 520; *Encino Motorcars*, 136 S. Ct. at 2127.

[22] Alan Gomez, *Who are the DACA DREAMers and how many are here?*, USA Today (Feb. 13, 2018); Alicia Parlapiano & Karen Yourish, *A Typical 'Dreamer' Lives in Los Angeles, Is From Mexico and Came to the U.S. at 6 Years Old*, N.Y. Times (Jan. 23, 2018).

[23] Rescission would place DACA recipients at a genuine risk of deportation from the only home that they have known. The Administration's stated enforcement policy has sharply narrowed discretion to exempt any removable aliens from enforcement. See Memorandum from John Kelly, Sec'y of Homeland Sec. to Kevin McAleenan, Acting Comm'r of U.S. Customs & Border Prot., *et al.* (Feb. 20, 2017). Administration officials have declared that those without legal status "should be concerned" and "need to be worried." Geneva Sands, *ICE Director: If You Entered the US Illegally, You 'Should be Concerned'*, ABC News (June 16, 2017);

embolden other countries to mistreat their own migrants. And it would deeply tarnish our image throughout the world as a country of promise and tolerance, threatening our influence as a global leader on human rights issues, and eroding our capacity to hold other governments accountable to their human rights obligations.

Second, rescission would have a damaging impact on the stability of our hemisphere. The countries to which DACA recipients would be deported are already struggling with deep poverty, crime, and overwhelmed and under-resourced social services. The countries of the Northern Triangle lack the capacity or services to absorb the potential inflow of tens of thousands of young people in need of jobs and schooling and lacking familiarity with the region. Even Mexico, larger and at least somewhat more prosperous, would have enormous capacity issues were it to receive so many individuals.[24] In addition, rescission

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Stephen Dinan, *No Apologies: ICE Chief Says Illegal Immigrants Should Live in Fear of Deportation*, Wash. Times (June 13, 2017).

[24] The majority of the roughly 700,000 DACA recipients are from Mexico (561,420 recipients); the next most common countries of origin are El Salvador (26,630), Guatemala (18,220), and Honduras (16,730). *Approximate Active DACA Recipients: Country of Birth as of July 31, 2018*, U.S. Citizenship & Immigration Servs. Over forty percent of the population of Mexico lives in poverty, the nation is grappling with widespread crime and corruption, and its infrastructure is already overwhelmed by the tens of thousands of migrants from other countries who are newly in the country due to the Trump Administration's Migrant Protection Protocols and related policies. See World Bank, *Poverty & Equity Brief: Mexico* (Oct. 2019); U.S. Dep't of State, *Country Reports on Human Rights Practices for 2018: Mexico* (2019); Kevin Sieff, *Mexico's Migration Crackdown Overwhelms its Shelters, Antagonizes its Neighbors,* Wash. Post (July 1, 2019); Kirk Semple, *Overflowing Toilets, Bedbugs and High Heat: Inside Mexico's*

would narrow the flow of remittances into these countries, which are critical to many Central American economies.[25] Depletion of these sources of revenue would only further destabilize countries already straining to produce enough tax revenues to fund security, governance, and anti-poverty programs.

Third, the rescission of DACA will undercut our military readiness. Hundreds of DACA recipients are currently serving in the U.S. Armed Forces through the Military Accession Vital to National Interest ("MAVNI") program, which recruits immigrants with special, mission-critical skills such as language proficiency and medical expertise that are urgently needed by the military.[26] MAVNI recruits have been especially valuable to Special Operations Forces, who rely heavily on language and cultural competencies to

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Migrant Detention Centers, N.Y. Times (Aug. 3, 2019). Other countries that would receive DACA recipients are struggling with similar issues. The poverty rate in both Guatemala and Honduras, for example, is around sixty percent. See *Poverty & Equity Brief Guatemala* (Oct. 2019); *Poverty & Equity Brief Honduras* (Oct. 2019).

[25] See Protecting Dreamers and TPS Recipients: Hearing Before the H. Comm. on the Judiciary, 116th Cong. 2015 (2019) (statement of the American Friends Service Committee); Arnoldo Lopez Marmolejo & Marta Ruiz Arranz, *The Economic Landscape in Central America and the Dominican Republic: External Challenges and Internal Strengths* 15 (2019). In 2018, remittances constituted 22 percent of El Salvador's GDP, 20 percent of Honduras', and 16 percent of Jamaica's. See Manuel Orozco, *Fact Sheet: Family Remittances to Latin America and the Caribbean in 2018*, The Dialogue: Leadership for the Americas (Feb. 8, 2019).

[26] See Gregory Korte *et al.*, *Trump administration struggles with fate of 900 DREAMers serving in the military*, USA Today (Sept. 7, 2017).

perform their sensitive missions.[27] The United States faces security challenges throughout the globe that require a military force with specialized and diverse skills. The rescission of DACA will harm our military effectiveness at a moment when our Armed Forces are already struggling to attract enough recruits.[28]

Fourth, rescinding DACA will make it more difficult for our law enforcement officials to combat crime at home and across the region. Law enforcement and homeland security professionals agree that DACA vastly improved the safety of American cities by decreasing fear of police officers in immigrant communities and encouraging immigrants to cooperate with law enforcement efforts.[29] Nearly sixty percent of DACA recipients have stated that they would be willing to report a crime that they would not have reported before receiving protected status.[30] By removing protection against deportation, young DACA recipients will be unable to obtain work, hold driver's licenses, or participate in many other aspects of

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[27] See Alex Horton, *How the Pentagon Ending Its Deal with* Immigrant *Recruits Could Hurt the Military*, Wash. Post (July 18, 2017).

[28] See Robert M. Gates, *Robert Gates: Ending DACA Will Hurt Immigrant Troops*, N.Y. Times (Nov. 8, 2017); John Grady, *Panel Says U.S. Military Recruitment Pool Must Broaden*, U.S.N.I. News (June 17, 2019); Meghann Myers, *After 2018's Recruiting Shortfall, It Will Take A Lot Longer to Build the Army to 500K*, Army Times (Mar. 14, 2019).

[29] Brief for Current and Former Prosecutors and Law Enforcement as Amicus Curiae, *Regents of the University of California v. Department of Homeland Security*, 908 F.3d 476 (9th Cir. 2018); see also Roberto G. Gonzales, *Here's How DACA Changed the Lives of Young Immigrants, According to Research*, Vox (Feb. 16, 2018).

[30] Gonzales, *supra* note 29.

American society,[31] pushing immigrants into the shadows and eroding trust in law enforcement. Without the cooperation of immigrant communities, the ability of law enforcement to prevent and disrupt crime will be significantly hampered, threatening local, national, and cross-border security.

Finally, the expense of DACA rescission would divert significant funds from real and urgent national security needs. The cost of deporting all DACA recipients is estimated to be $7.5 billion.[32] This money is urgently needed for other priorities: to combat cross-border and international crime, prevent terrorist attacks, and address other emergent security threats. Redirecting such a substantial sum of money toward the deportation of DACA recipients would undermine these legitimate national security initiatives. Further, by one estimate, DACA recipients contribute nearly $42 billion to the nation's economy each year, money that can directly and indirectly contribute to initiatives to bolster homeland security.[33] Scarce resources should not be diverted toward tearing immigrants away from their families and livelihoods at the

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[31] Nicole Prchal Svajlenka, *Amid Court Challenges, Here's What Will Happen if DACA Ends*, Center for American Progress (Aug. 15, 2018).

[32] See Ike Brannon & Logan Albright, *The Economic and Fiscal Impact of Repealing DACA*, Cato Inst. (Jan. 18, 2017); see also Ben Gitis, *The Budgetary and Economic Costs of Ending DACA*, American Action Forum (Sept. 7, 2017).

[33] Jacqueline Varas & Usama Zafar, *Estimating the Economic Contributions of DACA Recipients*, Am. Action F. (Dec. 21, 2017); see also Brannon & Albright, *supra* note 32 (estimating the total economic and fiscal cost of immediately eliminating the DACA program and deporting its participants to be $283 billion over 10 years).

expense of critical efforts to address the very real security threats that we face.

II. Petitioners' Unsupported Claims Do Not Warrant National Security Deference.

Before this Court, Petitioners make the passing claim that "courts are also 'ill equipped' to consider the authenticity or the adequacy of the foreign-policy considerations" raised by cases such as this.[34] If this is a veiled request for national security deference, it is unjustified here.

This Court has underscored that national security deference is owed to the "*considered professional judgment*" of national security officials.[35] As the Second Circuit has explained, "[d]eference to the executive's national security and military judgments is

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[34] Pet. Br. at 53.

[35] *Goldman* v. *Weinberger*, 475 U.S. 503, 508-509 (1986) (emphasis added); see also *Winter* v. *Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (affording "great deference to the professional judgment of military authorities" (quoting *Goldman*, 475 U.S. at 507)). Last Term, this Court afforded deference to the judgment of national security officials, but only after finding that "the agencies weighed various indicators of national security risk" and "had collected and evaluated data regarding all foreign governments" for the specific order the Court considered. *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2404-2405 (2018). See *Doe 2* v. *Shanahan*, 917 F.3d 694, 703 (D.C. Cir. 2019) (Wilkins, J., concurring) (mem.) ("Even when dealing with facially neutral policies, Congress and the Executive receive deference only where military policies are based upon the 'considered professional judgment' of 'appropriate military officials' and only after finding that the policies 'reasonably and evenhandedly regulate' the matter at issue." (quoting *Goldman*, 475 U.S. at 509-510)); *Thomasson* v. *Perry*, 80 F.3d 915, 921-923 (4th Cir. 1996) (deferring to the "considered judgment" of coordinate branches of government after an "exhaustive review" by the Department of Defense).

appropriate only where [courts] have sufficient information to evaluate whether those judgments were logical and plausible."[36] Or as another court recently put it after reviewing this Court's jurisprudence on deference, "in the Supreme Court's opinions granting military and national security deference, a precursor to that grant of deference was the finding that *reasoned decision-making* had taken place" and there had been a "*reasonable evaluation*" of the evidence by responsible officials.[37]

The Nielsen Memo's *post hoc* allusion to the "cause and deter" rationale bears no resemblance to the sort of "considered" judgment or "reasonable evaluation" of the evidence that have supported claims to national security deference in the past.

First, as discussed *supra*, Petitioners do not rest their "cause and deter" rationale on any evidence at all. The Nielsen Memo cites no evidence for the rationale. Petitioners have placed no evidence for the rationale in the record. Nor do they point to any actual evidence outside the record. And the overwhelming evidence in fact contradicts the purported rationale. In short, any claim they might make to a security or foreign policy imperative bears no connection to the evidence, or to any "reasonable evaluation" thereof.[38]

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[36] *ACLU* v. *U.S. Dep't of Def.*, 901 F.3d 125, 134 (2d Cir. 2018).

[37] *Doe 2* v. *Esper*, 2019 WL 4394842, at *3 (D.D.C. Sept. 13, 2019) (emphasis added) (internal quotation marks omitted); see also *id.* at *2, *9.

[38] See *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34-36 (2010) (basing the decision to defer to the executive branch's national security claims on "persuasive evidence" and "adequat[e] substantiat[ion]" of those claims); *Rostker* v. *Goldberg*, 453 U.S. 57, 66-68 (1981) (deferring to "reasonable evaluation" of the national security evidence by the legislative branch).

Second, Petitioners first submitted the "cause and deter" rationale more than nine months *after* the decision to rescind. DACA rescission had already gone into effect; had been challenged in multiple courts; had been fully briefed and decided in multiple dispositive motions; and had been enjoined by two courts and vacated by a third—all before Secretary Nielsen first suggested the "cause and deter" rationale for the rescission in her memorandum. An explanation for a policy decision cannot fairly be said to reflect the "considered professional judgment" of national security professionals, without evidence that it was ever "considered" until months after the policy decision in question.[39]

Third, Petitioners did not weigh the security costs against the perceived benefits of their decision. As detailed *supra*, the DACA rescission would do considerable injury to multiple security and foreign policy interests of the United States.[40] Petitioners cannot claim to have undertaken a "considered" exercise of judgment or "reasonable evaluation" of the national security and foreign policy equities, while entirely failing to mention—much less consider—these serious national security and foreign policy considerations.[41]

Fourth, there is no indication that former Secretary Nielsen undertook a considered policy-making

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[39] *Goldman*, 475 U.S. at 508; see *Doe 2*, 917 F.3d at 703-704 (Wilkins, J., concurring) (decision to afford the government deference depends on whether its policy action "was a product of" considered national security judgment, or was "based upon" that judgment).

[40] See *supra* at text accompanying notes 22-33.

[41] *Goldman*, 475 U.S. at 508; *Rostker*, 453 U.S. at 68.

process before concluding that DACA rescission was needed.

Every recent administration to consider an important change to security policy has followed an interagency review process, in which many of the amici have participated. That process allows experienced national security professionals to ensure that all relevant uncertainties are addressed by policy and legal experts, appropriate preparations are made for implementation, and any potential risks are effectively identified and mitigated. Before recommendations are submitted to the President, the National Security Council oversees a policy and legal process that typically includes: a review by the career professionals in those institutions of the U.S. government charged with implementing an order; a review by the career lawyers in those institutions to ensure legality and consistency in interpretation; and a policy review among senior leadership across all relevant agencies, including Deputies and Principals at the cabinet level.

If national security or foreign policy considerations were serious factors motivating a major policy decision affecting more than 700,000 individuals, one would expect to see at least a semblance of such a process. But there is not even a hint of it in this record. To the contrary, all that is known about the decision points in the opposite direction. The earlier memorandum of then-DHS Secretary John Kelly rescinding the Deferred Action for Parents of Americans ("DAPA") program claimed that he made his decision "after consulting with" at least one other agency. But when DACA was later rescinded, the Nielsen Memo simply omitted this claim. Instead, Secretary Nielsen took pains to convey that the decision was hers alone, and that it was based not on an assessment of security facts, but on a consideration of the earlier Duke

Memo, the administrative record for the Duke Memo, and the various other documents that had been submitted to the U.S. District Court for the District of Columbia.[42]

This Court has noted that "[d]epartures from the normal procedural sequence might afford evidence that improper purposes are playing a role" in government action.[43] The process Petitioners followed to conclude that the rescission of DACA was needed to deter migration was such a departure from the norm as to be unrecognizable as a security process. The process followed does not reflect the sort of "considered" homeland security judgment in which amici participated, that is a necessary prerequisite for national security deference.

Finally, Petitioners should not receive national security deference for the simple reason that they have not articulated any national security need for the rescission. To be sure, concerns about immigration enforcement often are connected to national security imperatives. But Secretary Nielsen's stated concerns manifestly were not. While expressing a desire to deter "minor aliens" from crossing the border, at no point does her memorandum cite any security consequence of these child crossings, or claim that DACA or failure to rescind DACA would present any identifiable

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[42] Nielsen Memo, *supra* note 11, at 1 ("Having considered the Duke memorandum and Acting Secretary Duke's accompanying statement, the administrative record for the Duke memorandum that was produced in litigation, and the judicial opinions reviewing the Duke memorandum, I decline to disturb * * *").

[43] *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

national security or foreign policy risk.[44] Petitioners can make no tenable claim to national security deference when they are unable to articulate any actual national security basis for their change in DACA policy.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the District of Columbia, and the orders of the U.S. District Court for the Eastern District of New York.

Respectfully submitted,

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[44] Long after the fact, Petitioners' Brief wrests from the single sentence in the Nielsen Memo an alleged concern about the crossings of the "families" of these children that appears nowhere in the Memo itself. See *supra* text accompanying notes 13-14. But even then, Petitioners do not identify a concrete security or foreign policy harm that would plausibly flow from a court order blocking the rescission of DACA. See *supra* text accompanying note 15.

APPENDIX

APPENDIX

List of *Amici Curiae*

1. Madeleine K. Albright served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997. She has also been a member of the Central Intelligence Agency External Advisory Board since 2009 and of the Defense Policy Board since 2011, in which capacities she has received assessments of threats facing the United States.

2. Rand Beers served as Deputy Homeland Security Advisor to the President of the United States from 2014 to 2015.

3. John B. Bellinger III served as the Legal Adviser for the U.S. Department of State from 2005 to 2009. He previously served as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001 to 2005.

4. Jarrett Blanc served as State Department Coordinator for Iran Nuclear Implementation from 2015 to 2017. He previously served as Principal Deputy Special Representative for Afghanistan and Pakistan from 2014 to 2015.

5. Antony Blinken served as Deputy Secretary of State from 2015 to 2017. He previously served as Deputy National Security Advisor to the President from 2013 to 2015.

6. John O. Brennan served as Director of the Central Intelligence Agency from 2013 to 2017. He previously served as Deputy National Security Advisor for Homeland Security and Counterterrorism and Assistant to the President from 2009 to 2013.

7. William J. Burns served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.

8. Derek Chollet served as Assistant Secretary of Defense for International Security Affairs from 2012 to 2015.

9. James Clapper served as Director of National Intelligence from 2010 to 2017.

10. Bathsheba N. Crocker served as Assistant Secretary of State for International Organization Affairs from 2014 to 2017.

11. Rudy DeLeon served as Deputy Secretary of Defense from 2000 to 2001.

12. Nancy Ely-Raphel served as Senior Adviser to the Secretary of State and Director of the Office to Monitor and Combat Trafficking in Persons from 2001 to 2003. She previously served as U.S. Ambassador to Slovenia from 1998 to 2001.

13. John D. Feeley served as U.S. Ambassador to Panama from 2015 to 2018. He previously served as Principal Deputy Assistant Secretary for Western Hemisphere Affairs at the U.S. Department of State from 2012 to 2015.

14. Daniel F. Feldman served as U.S. Special Representative for Afghanistan and Pakistan from 2014 to 2015, Deputy U.S. Special Representative for Afghanistan and Pakistan from 2009 to 2014, and previously Director for Multilateral and Humanitarian Affairs at the National Security Council.

15. Jonathan Finer served as Chief of Staff to the Secretary of State from 2015 to 2017, and Director of the Policy Planning Staff at the U.S. Department of State from 2016 to 2017.

16. Lucas Guttentag served as Senior Counselor to the Secretary of Homeland Security and previously as Senior Counselor to the Director of U.S. Citizenship and Immigration Services from 2014 to 2016.

17. Chuck Hagel served as Secretary of Defense from 2013 to 2015, and previously served as Co-Chair of the President's Intelligence Advisory Board. From 1997 to 2009, he served as U.S. Senator for Nebraska, and as a senior member of the Senate Foreign Relations and Intelligence Committees.

18. Avril D. Haines served as Deputy National Security Advisor to the President of the United States from 2015 to 2017. From 2013 to 2015, she served as Deputy Director of the Central Intelligence Agency.

19. General (ret.) Michael V. Hayden, USAF, served as Director of the Central Intelligence Agency from 2006 to 2009. From 1995 to 2005, he served as Director of the National Security Agency.

20. Kathleen H. Hicks served as Principal Deputy Under Secretary of Defense for Policy from 2012 to 2013, and as Deputy Under Secretary of Defense for Strategy, Plans, and Forces from 2009 to 2012.

21. Roberta Jacobson served as U.S. Ambassador to Mexico from 2016 to 2018. She previously served as Assistant Secretary of State for Western Hemisphere Affairs from 2011 to 2016.

22. Nate Jones served as Director of Counterterrorism at the National Security Council from 2009 to 2012.

23. Colin H. Kahl served as Deputy Assistant to the President and National Security Advisor to the Vice President from 2014 to 2017. He previously served as Deputy Assistant Secretary of Defense for the Middle East from 2009 to 2011.

24. John F. Kerry served as Secretary of State from 2013 to 2017.

25. Lawrence J. Korb served as Assistant Secretary of Defense (manpower, reserve affairs, installations, and logistics) from 1981 to 1985.

26. Prem Kumar served as Senior Director for the Middle East and North Africa at the National Security Council from 2013 to 2015.

27. Kelly E. Magsamen served as Principal Deputy Assistant Secretary of Defense for Asian and Pacific Security Affairs from 2014 to 2017.

28. David A. Martin served as Principal Deputy General Counsel of the U.S. Department of Homeland Security from 2009 through 2010, including four months as Acting General Counsel, and as General Counsel of the Immigration and Naturalization Service from 1995 to 1998.

29. Denis McDonough served as the Chief of Staff to the President from 2013 to 2017. He previously served as Deputy National Security Advisor to the President from 2010 to 2013.

30. Nancy McEldowney served as Principal Deputy Assistant Secretary of State for European Affairs from 2009 to 2011. She previously served as U.S. Ambassador to Bulgaria from 2008 to 2009.

31. Brett H. McGurk served as Special Presidential Envoy for the Global Coalition to Counter the Islamic State of Iraq and the Levant from 2015 to 2018. Previously, he served as the Deputy Assistant Secretary of State for Near Eastern Affairs from 2013 to 2015, and as Special Assistant to the President and Senior Director for Iraq and Afghanistan from 2007 to 2009.

32. Cecilia Muñoz served as Director of the White House Domestic Policy Council from 2012 to 2017, and as the White House Director of Intergovernmental Affairs from 2009 to 2012.

33. James C. O'Brien served as Special Presidential Envoy for Hostage Affairs from 2015 to 2017. He served in the U.S. Department of State from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

34. Matthew G. Olsen served as Director of the National Counterterrorism Center from 2011 to 2014.

35. Leon E. Panetta served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.

36. Anne W. Patterson served as Assistant Secretary of State for Near Eastern Affairs from 2013 to 2017. She previously served as U.S. Ambassador to Egypt from 2011 to 2013, U.S. Ambassador to Pakistan from 2007 to 2010, U.S. Ambassador to Colombia from 2000 to 2003, and U.S. Ambassador to El Salvador from 1997 to 2000.

37. Thomas R. Pickering served as Under Secretary of State for Political Affairs from 1997 to 2000. He previously served as U.S. Ambassador to El Salvador from 1983 to 1985, and U.S. Permanent Representative to the United Nations from 1989 to 1992.

38. Samantha J. Power served as U.S. Permanent Representative to the United Nations from 2013 to 2017. From 2009 to 2013, she served as Senior Director for Multilateral Affairs and Human Rights at the National Security Council.

39. Jeffrey Prescott served as Deputy National Security Advisor to the Vice President from 2013 to 2015, and as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017.

40. Ned Price served as Special Assistant to President for National Security Affairs from 2016 to 2017 and as the National Security Council Spokesperson from 2015 to 2017.

41. Susan E. Rice served as U.S. Permanent Representative to the United Nations from 2009 to 2013 and as National Security Advisor to the President from 2013 to 2017.

42. Eric P. Schwartz served as Assistant Secretary of State for Population, Refugees, and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues at the National Security Council, ultimately serving as Special Assistant to the President for National Security Affairs and Senior Director for Multilateral and Humanitarian Affairs.

43. Nick Shapiro served as Deputy Chief of Staff and Senior Advisor to the Director of the Central Intelligence Agency from 2013 to 2015. He previously served as a senior White House counterterrorism and homeland security aide to the President of the United States from 2009 to 2013.

44. Wendy R. Sherman served as Under Secretary of State for Political Affairs from 2011 to 2015.

45. Anne-Marie Slaughter served as the Director of Policy Planning at the U.S. Department of State from 2009 to 2011.

46. Dana Shell Smith served as U.S. Ambassador to Qatar from 2014 to 2017. She previously served as Principal Deputy Assistant Secretary of Public Affairs.

47. Jake Sullivan served as National Security Advisor to the Vice President from 2013 to 2014. He previously served as Director of Policy Planning at the U.S. Department of State from 2011 to 2013.

48. Strobe Talbott served as Deputy Secretary of State from 1994 to 2001.

49. Arturo A. Valenzuela served as Assistant Secretary of State for Western Hemisphere Affairs from 2009 to 2011. He previously served as Special Assistant to the President and Senior Director for Inter-American Affairs at the National Security Council from 1999 to 2000, and as Deputy Assistant Secretary of State for Mexican Affairs from 1994 to 1996.

50. Douglas Wilson served as Assistant Secretary of Defense for Public Affairs from 2010 to 2012.

51. Samuel M. Witten served as Principal Deputy Assistant Secretary of State for Population, Refugees, and Migration from 2010 to 2017. He previously served as Deputy Legal Adviser of the U.S. Department of State from 2001 to 2007.