No. 18-587

IN THE

# Morris Tyler Moot Court of Appeals at Yale

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**

## BRIEF FOR RESPONDENTS

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## QUESTIONS PRESENTED

Since 2012, the Deferred Action for Childhood Arrivals (DACA) program has instructed immigration officials to consider exercising prosecutorial discretion for undocumented individuals who arrived in the United States before the age of sixteen. The government promised DACA recipients that identifying information provided in their applications would not be shared with law enforcement agencies for removal purposes. On September 5, 2017, Acting Secretary of Homeland Security Elaine Duke issued a memorandum rescinding DACA based solely on the Administration's legal determination that DACA was unlawful and unconstitutional. The questions presented are:

1. Whether the Ninth Circuit correctly decided that judicial review of DACA is not barred by the Immigration and Nationality Act or Administrative Procedure Act.

2. Whether petitioners' decision to rescind DACA was unlawful for any reason, including: the decision (1) was arbitrary and capricious; (2) bypassed required notice-and-comment procedures; (3) deprived DACA recipients of liberty or property without due process; or (4) deprived recipients of equal protection.

## PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows:

Petitioners are the United States Department of Homeland Security; the United States; Donald J. Trump, President of the United States; Kirstjen Nielsen, Secretary of Homeland Security; and William Barr, Attorney General of the United States

Respondents are the Regents of the University of California; Janet Napolitano, President of the University of California; the State of California; the State of Maine; the State of Minnesota; the State of Maryland; the City of San Jose; the County of Santa Clara; Dulce Garcia; Miriam Gonzalez Avila; Saul Jimenez Suarez; Viridiana Chabolla Mendoza; Jirayut Latthivongskorn; Norma Ramirez; and Service Employees International Union Local 521.

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## OPINIONS BELOW

The Ninth Circuit's opinion, upholding the preliminary injunction, is reported at 908 F.3d 476. The district court's order granting in part and denying in part petitioners' motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and granting respondents' motion for preliminary injunction is reported at 279 F. Supp. 3d 1011. The district court's order granting in part and denying in part petitioners' motion to dismiss under Rule 12(b)(6) is reported at 298 F. Supp. 3d 1304.

## JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on November 8, 2018. The petition for a writ of certiorari was timely filed on November 5, 2018. This court has jurisdiction under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in the Appendix, app. 1a-36a.

## STATEMENT

### A. History of Deferred Action

1. For more than half a century, the U.S. government has engaged in programmatic exercises of executive discretion by deferring action in immigration removal cases. These programs acknowledge the practical reality that under scarce agency resources, the "government can remove only a small percentage of [ ] undocumented noncitizens." *Regents of the Univ. of Cal.* v. *U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 510 (9th Cir. 2018). According to the Office of Legal Counsel (OLC), the Department of Homeland Security (DHS) has enough resources to remove only 3.5 percent of the undocumented immigrants in the country each year. See The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. at 9 (2014) (Op. O.L.C.).

Deferred action has become a "regular practice" within the Executive Branch for "exercising discretion" against an individual or a class of individuals "simply for its own convenience." *Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-484 (1999) (*AADC*). Although deferred action arises under the Executive's inherent authority to allocate resources and prioritize cases, Congress has consistently recognized this practice by name. See, *e.g.*, 8 U.S.C. 1227(d)(2); REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2), 119 Stat. 231, 313.

2. Programmatic, discretionary relief for entire classes of low-priority noncitizens has been a feature of Executive Branch policy since the Eisenhower

Administration. *Regents,* 908 F.3d at 488-489. More than twenty-one administrative directives on categorical deferred action have been issued since 1976, *ibid.*, including: In 1997, for self-petitioners for lawful permanent residency under the Violence Against Women Act of 1994; in 2002 and 2003, for T and U visa applicants; in 2005, for foreign students who could not satisfy their student visa requirements; and in 2009, for widowed spouses who had been married to American citizens for less than two years. See *Regents of the Univ. of Cal.* v. *U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1021 (N.D. Cal. 2018). None of these programs were expressly authorized by statute at the time. *Ibid.*

Congress has long been aware of the practice of granting deferred action, including in its programmatic variety, and "has never acted to disapprove or limit the practice." Op. O.L.C. at 18.

**B. Adoption of DACA**

1. On June 15, 2012, Secretary of Homeland Security Janet Napolitano issued a memorandum establishing "Deferred Action for Childhood Arrivals" (DACA), under which individuals who were brought to the United States as children could apply for deferred action for renewable two-year periods. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012) (App. 27a-29a). The DACA Memorandum stated that because "these young people have already contributed to our country in significant ways" and "lacked the intent to violate the law," the exercise of "[p]rosecutorial discretion, which is used in so many other areas, is especially justified here." App. 28a.

An individual is eligible to be considered for DACA if he or she: (1) came to the United States before the age of sixteen; (2) was not above the age of thirty on June 15, 2012; (3) had continuously resided in the United States for at least five years preceding June 15, 2012; (4) has been enrolled in school, graduated from high school, obtained a GED, or was honorably discharged from the U.S. Armed Forces or Coast Guard; and (5) has not been convicted of a felony, significant misdemeanor, or multiple misdemeanors, nor poses a threat to national security or public safety. App. 27a. DACA applicants are required to submit extensive identifying information to DHS. *Ibid.*

2. In recognition that DACA requires applicants to provide the very information that could lead to their removal, the government repeatedly promised that applicants' "[i]nformation * * * is protected from disclosure to ICE and U.S. Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings," except for specific, narrow exceptions. See *Regents*, 908 F.3d at 516.

3. The DACA Memo requires that applications be "decided on a case by case basis." App. 28a. If accepted, a recipient is granted a two-year deferral of removal action, subject to renewal. A DACA recipient is eligible for renewal if he or she has not left the United States without advance parole; has continuously resided in the United States after submitting their DACA application; and has not been convicted of a felony, significant misdemeanor, multiple misdemeanors, nor poses a threat to national security or public safety. See *Regents*, 908 F.3d at 515 n.27.

DHS can terminate an individual recipient's deferred action at any time at the agency's discretion. App. 29a. As the Executive Branch has previously agreed, see Op. O.L.C. at 13, DACA does not "confer[] [any] substantive right, immigration status or pathway to citizenship," but merely "set[s] forth policy for the exercise of discretion within the framework of the existing law" as the government has done many times before. App. 29a.

4. DACA provides significant benefits to recipients under pre-existing regulations. *First*, during the deferred action, DACA recipients do not accrue "unlawful presence" under the Immigration and Nationality Act (INA). 8 U.S.C. 1182(a)(9)(B)(ii). *Second*, DACA recipients can apply for employment authorization to work legally and pay taxes. 8 U.S.C. 1324a(h)(3); 8 C.F.R. 274a.12(c)(14). *Third*, DACA recipients can apply for "advance parole" to travel abroad and be lawfully paroled back into the United States. 8 C.F.R. 212.5(f).

Since its adoption in 2012, approximately 700,000 people have relied on DACA "to enroll in colleges and universities, complete their education, start businesses that help improve our economy, and give back to our communities as teachers, medical professionals, engineers, and entrepreneurs." Letter from Jeh Johnson, Sec'y, Dep't of Homeland Sec. to Rep. Judy Chu (Dec. 30, 2016) (Johnson Letter).

**C. Termination of DACA**

1. In 2014, the Secretary of Homeland Security requested legal advice from OLC regarding the scope of DHS's immigration enforcement discretion. OLC's opinion, spanning thirty-three pages, affirmed its

earlier guidance that DACA is within DHS's enforcement discretion under the INA and that DACA preserved individualized decisionmaking. Op. O.L.C. at 17-18, 23. It also concluded that the INA's specific deferred action provisions do not preclude DACA. *Ibid*. OLC further concluded that deferred action programs expanding DACA and extending programmatic deferred action to undocumented parents of U.S. citizens and lawful permanent residents (LPRs) are permissible. Op. O.L.C. at 2, 17, 18 n.8.

2. On November 20, 2014, DHS announced a new discretionary program, "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA), which allowed deferred action for undocumented parents of U.S. citizens and LPRs. *Regents*, 908 F.3d at 491. The DAPA Memo also modified DACA in three minor ways: (1) removing the age cap; (2) extending the renewal period to three years; and (3) relaxing the date of entry requirement. *Ibid*. The DAPA program was immediately challenged and preliminarily enjoined from going into effect on the basis that DHS had failed to comply with the APA's notice-and-comment procedures. *Texas* v. *United States*, 86 F. Supp. 3d 591, 671 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015).

The district court's order enjoined the entirety of the 2014 DAPA Memo but left DACA in place. *Texas*, 86 F. Supp. 3d at 606. In a split decision, the Fifth Circuit affirmed and additionally held that DAPA was substantively foreclosed by the INA, which already contained "an intricate process for" parents to "derive a lawful immigration classification from their children's immigration status." *Texas* v. *United*

*States*, 809 F.3d 134, 179-180, 186 n.202 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). However, the Fifth Circuit explicitly found that "DACA and DAPA are not identical." *Id.* at 174.

3. Throughout this litigation and after, DHS continued to reassure DACA recipients, Congress, and the public that "representations made by the U.S. government, upon which DACA applicants most assuredly relied, must continue to be honored." Johnson Letter. In February 2017, then-Secretary of Homeland Security John Kelly laid out the new administration's enforcement priorities, explicitly leaving DACA in place. See *Regents*, 908 F.3d at 491. In June 2017, Secretary Kelly rescinded the DAPA program as an "exercise of [his] discretion" and, again, explicitly left DACA in place. *Ibid*.

4. On June 29, 2017, several state attorneys general sent a letter to then-Attorney General Jeff Sessions advising that if DACA were not terminated by September 5, 2017, they would pursue litigation to challenge it. *Regents*, 908 F.3d at 491.

The day before that deadline, Attorney General Sessions wrote a one-page letter to then-Acting Secretary of Homeland Security Elaine Duke "advis[ing] that the Department of Homeland Security * * * should rescind" DACA. Letter from Jefferson B. Sessions III, Attorney General, Dep't of Justice, to Elaine C. Duke, Acting Sec'y of Homeland Sec., Dep't of Homeland Sec. (Sept. 5, 2017) (App. 30a). The letter stated his legal opinion that DACA had been created "without proper statutory authority" and that therefore DACA was an "unconstitutional exercise of authority by the Executive Branch." *Ibid*.

He further opined that "[b]ecause the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA." *Ibid.*

5. The next day, without prior notice, the Acting Secretary terminated DACA based on the Attorney General's legal judgment. In a memorandum totaling just six pages, the Acting Secretary provided a one-sentence statement of reasoning for terminating a program that 689,800 individuals relied on: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017, letter from the Attorney General, it is clear that the June 15, 2012, DACA program should be terminated." Memorandum from Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Serv. (Sept. 5, 2017) (App. 31a-36a). Respondents filed suit, seeking a preliminary injunction of the rescission.

**D. Prior Proceedings**

1. The district court granted respondents' request for a nationwide preliminary injunction, requiring DHS to adjudicate renewal applications. *Regents*, 279 F. Supp. 3d at 1018. The district court found that neither the INA nor the Administrative Procedure Act (APA) precluded judicial review, *id.* at 1031, and granted respondents' motion, *id.* at 1037.

In a separate order, the court granted the government's Federal Rule of Civil Procedure 12(b)(6) motion to dismiss respondents' claim that the rescission required notice and comment; claim that

rescission failed the requirements of the Regulatory Flexibility Act; a due process claim premised on an entitlement to deferred action; and an equitable estoppel claim. The court denied the government's Rule 12(b)(6) motion to dismiss respondents' claim that rescission violated their equal protection rights and claim that an alleged change in DHS's information-sharing policy violated respondents' due process rights. *Regents of the Univ. of Cal.* v. *U.S. Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304, 1308 (N.D. Cal. 2018). The petitioners appealed and respondents cross-appealed.

2. The Ninth Circuit panel unanimously affirmed the preliminary injunction. The court found that neither the APA nor the INA barred judicial review and that respondents were likely to succeed on their claim that the rescission was arbitrary and capricious—the only element of the preliminary injunction ruling the government appealed—"because the Acting Secretary was [ ] incorrect in her belief that DACA was illegal." *Regents*, 908 F.3d at 510.

The court affirmed the district court's dismissal of respondents' APA notice-and-comment claim and the due process claim premised on an entitlement to deferred action. *Id.* at 514-515. However, the court found respondents had stated plausible claims on equal protection and due process respecting information-sharing. *Id.* at 520. The government appealed and respondents cross-appealed the dismissal of the APA notice-and-comment claim.

## SUMMARY OF ARGUMENT

**I.** Nothing in the INA nor the APA overcomes this Court's "strong presumption" of judicial review. *Mach Mining, L.L.C.* v. *E.E.O.C*, 135 S. Ct. 1645, 1653 (2015). This Court has repeatedly held that the INA's specific provisions limiting judicial review cover decisions in individualized cases, not programmatic policies like DACA's rescission. This Court has held that the only provision remotely on point, Section 1252(g), both applies only in individual cases and only to decisions to commence proceedings, adjudicate cases, or execute removal orders. *AADC*, 471 U.S. at 482. This is not one of them.

The APA similarly does not bar review. The exception to judicial review for non-enforcement decisions committed to agency discretion under *Heckler* v. *Chaney* is inapplicable. 470 U.S. 821 (1985). DACA is a programmatic policy, not an individual non-enforcement decision.

And there plainly is law to apply. The rescission memorandum relied on the decision of the Fifth Circuit that DAPA was unlawful and the letter from Attorney General Sessions concluding the same. The law to apply inheres in the rescission's legal rationale. Further, courts of appeals have repeatedly held that general enforcement policies that articulate an agency's "universal policy," especially where they cabin discretion, are subject to judicial review.

And irrespective of reviewability on procedural grounds, this Court's firm rule that it will read statutes to preserve review of constitutional claims applies. Respondents' due process and equal protection claims are clearly reviewable.

**II.** Petitioners' decision to rescind DACA was also unlawful.

*First*, it was arbitrary and capricious. The legal conclusion that DACA required notice and comment and was *ultra vires* is incorrect. DACA's lifetime 8.8 percent denial rate, which has varied substantially year-to-year, demonstrates the program was discretionary and did not require notice and comment. The Fifth Circuit also erred in its conclusion that the INA precludes deferred action for those outside its provisions; this Court has affirmed officials' wide discretion under the INA.

Further, no court has ever found the constitutional defects to which the rescission memorandum refers. The government also failed to account for all available data, including nearly three years of data that postdate the Fifth Circuit's decision. Moreover, the record shows none of the consideration required for DACA recipients' significant reliance interests.

Finally, petitioners' "litigation risk" rationale is post hoc and inadmissible. Even if it were before this Court, it is so one-sided and cursory that it would still be arbitrary and capricious.

*Second*, DACA's rescission failed to go through required notice-and-comment procedures. Unlike DACA itself, the rescission speaks in mandatory language that cabins agency discretion. It is a substantive rule and procedurally defective without notice and comment. While the data show DACA was discretionary in practice, the text of the rescission ensures it will not be.

*Third*, petitioners' change in their information-sharing policy violated respondents' due process rights. DACA applicants had a mutually explicit understanding—sufficient to create an interest protected by constitutional due process—with DHS that their application information would not be shared for removal purposes. Applicants relied on petitioners' repeated and strong commitment to safeguard their information. Petitioners' new policy is only that this information will not be *proactively* shared, rather than affirmatively protected. These false promises induced applicants to share information that will aid in their arrest and removal, violating respondents' due process rights.

*Fourth*, the rescission violates respondents' right to equal protection because it has a disparate racial impact and was motivated by racial animus. Ninety-three percent of DACA recipients are Latino and nearly eighty percent are Mexican. These are the same groups President Trump called "criminals," "rapists," and "animals" in the leadup to the rescission. Together, this disparate impact and obvious racial animus constitute a violation of respondents' right against racial discrimination.

## ARGUMENT

### I. DACA's rescission is subject to judicial review.

It is axiomatic that "the Administrative Procedure Act * * * embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.'" *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140

(1967). That presumption is essential to the separation of powers. It ensures the appendages of the administrative state—insulated from the political process—are restrained against "infringement of individual rights * * * by the exertion of unauthorized administrative power." *Stark* v. *Wickard*, 321 U.S. 288, 310 (1944).

This Court has recognized that the APA itself was written, in part, to ensure "broad" and "generous" judicial review of agency action. *Abbott Labs.*, 387 U.S. at 140-141. So long as that action is final, which petitioners did not contest in the proceedings below, *Regents*, 908 F.3d, the APA provides for judicial review unless "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. 701(a). Neither applies here.

**A. The Immigration and Nationality Act does not preclude review.**

In *Mach Mining*, this Court reiterated its longstanding view that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies * * * . [T]he agency bears a 'heavy burden' in attempting to show that Congress 'prohibit[ed] all judicial review'" in drafting an agency's substantive statute. 135 S. Ct. at 1651 (citation omitted). The INA's judicial review provisions fail to overcome the "long applied [and] strong presumption favoring judicial review of administrative action." *Id.* at 1653.

**1. The INA's explicit limitations on judicial review do not apply.**

The INA specifies, in unambiguous terms the instances, where Congress intended to limit judicial

review. As pertains to the instant case, the INA explicitly curtails review of decisions concerning:

- Inspection of aliens for admission to the United States under 8 U.S.C. 1225(b)(1). 8 U.S.C. 1252(a)(2)(A);
- Denials of discretionary relief concerning waivers of inadmissibility, provision of counsel, service by mail for removal proceedings, and adjustment of status to admission for permanent residence. 8 U.S.C. 1252(a)(2)(B);
- Removal based on an alien's criminal offense. 8 U.S.C. 1252(a)(2)(C); and
- "Any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. 1252(g).

DACA falls under none of these explicitly delineated categories. It does not address initial admissibility; the recipients are already here. It does not afford the specific forms of relief covered by 8 U.S.C. 1252(a)(2)B); on its own terms, it does not afford any relief at all. And it does not entail final orders of removal against criminal aliens.

Moreover, this Court has interpreted the fourth area—Section 1252(g) and the provision on which petitioners rely—narrowly. It "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *AADC*, 525 U.S. at 482. DACA is a far cry from any of them. It effects a programmatic decision and does not on its

own encompass any of the three individualized actions specified in *AADC*.

**2. Petitioners' interpretation upsets the careful balance struck by Section 1252(g).**

Petitioners' contention that discontinuing deferred action is a precursor to "action by the Attorney General to commence proceedings" within the meaning of Section 1252(g) is precluded by the Court's holding in *AADC*. 8 U.S.C. § 1252(g). The Court in *AADC* was clear that although "many other decisions or actions * * * may be part of the deportation process[,] * * * [i]t is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *AADC*, 525 U.S. at 482.

This construction vindicates the balance between executive discretion and protection of individual rights that Congress struck in enacting Section 1252(g). Prior to its enactment, the "regular practice" of deferred action "opened the door to litigation in instances where the INS chose not to exercise it" on an individual basis. *AADC*, 525 U.S. at 484. Section 1252(g) was "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations" at these three specific stages of the *individual* decisional process. *Id.* at 485.

An essential element of this balance is that it does not preclude judicial review of sweeping immigration policies that go beyond individualized enforcement decisions. In the context of assessing whether a statute withholds judicial review, this Court has frequently looked to whether the statute "disclose[s] a

purpose to 'avoid overloading the courts' with 'trivial matters.'" *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 675 (1986) (quoting *United States* v. *Erika, Inc.*, 456 U.S. 201, 210 n.13 (1982)). This Court has long approved limits on individualized case review while protecting its prerogative to review programmatic action.

Here, Congress's intention for Section 1252(g) was to protect discretion in individual cases without sheltering the litany of broad policy choices delegated to the agency by Congress. This Court has repeatedly recognized this balance in its interpretations of the INA's review provisions. See, *e.g.*, *AADC*, 525 U.S. at 482; *Reno* v. *Catholic Soc. Servs.*, 509 U.S. 43, 55-56 (1993); *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-492 (1991); see also *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018) (narrowly interpreting other provisions of section 1252 limiting review).

Petitioners' reading eviscerates this balance. Their interpretation is "incompatible with the need for precision in legislative drafting" and explains why the *AADC* Court could find "no other instance in the United States Code in which language such as this has been used to impose a general jurisdictional limitation." *AADC*, 525 U.S. at 482. This Court has never read the portions of the INA at issue as petitioners urge.[1]

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[1] *Trump* v. *Hawaii* is not to the contrary. 138 S. Ct. 2392 (2018). That case involved 8 U.S.C. 1182(f) which delegates powers to the President, not an agency. *Id.* at 2403.

**3. Pragmatic immigration policy concerns do not apply here.**

The policy rationales motivating Congress's insulation of individual removal decisions from judicial review do not apply in the instant case. Concerns motivating the insulation of enforcement discretion from judicial review "are greatly magnified in the deportation context" because "the consequence [of delayed enforcement] is to permit and prolong a continuing violation of United States law." *AADC*, 525 U.S. at 490. And, often, immigration policies implicate "relations with foreign powers" and assessments of "changing political and economic circumstances" appropriately committed to executive discretion. *Trump* v. *Hawaii*, 138 S. Ct. at 2418 (citations omitted).

Reviewing DACA's rescission poses none of these difficulties. Its rescission and review do not affect the removal of any individual alien and allow no ongoing violation of the law. And DHS's stated rationale for rescission—its legality—poses an ordinary question of statutory interpretation to which this Court is well-suited, not a complex economic and political calculus.

**4. Petitioners' reading of the INA is contrary to this Court's interpretive rules.**

Ordinarily, the rule of statutory construction *expressio unius est exclusio alterius* suggests that express mention of specific items within a statutory scheme may be read to exclude elements not mentioned. See *Barnhart* v. *Peabody Coal, Co.*, 537 U.S. 149, 168 (2003). That rule applies where "items expressed are members of an 'associated group or series,' justifying the inference that items not

mentioned were excluded by deliberate choice." *Ibid.* (citation omitted). Here, Section 1252's provisions for limited review constitute an associated group: they accomplish the same goal in various contexts. The inference of deliberate choice is supported by the strong background presumption of judicial review of agency action, a presumption well-known to Congress, see *Mich. Acad.*, 476 U.S. at 671-673, and which has previously been applied to the INA by this Court, see *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 298 (2001). But that deliberate choice does not touch actions like DACA's rescission.

This Court has long held that the reviewability of some agency actions and not others within a statutory scheme "should not suffice to support an implication of exclusion * * * . The right to review is too important to be excluded on such slender and indeterminate evidence." *Abbott Labs.*, 387 U.S. at 141 (quoting Louis L. Jaffe, Judicial Control of Administrative Action 357 (1965)). Petitioners' crabbed conception of judicial review flies in the face of these precedents and this Court's traditional interpretive rule.

**B. DACA's rescission is not a non-enforcement decision and is not committed to agency discretion.**

Petitioners attempt to scale steep hill in asserting that DACA's rescission is not reviewable under the APA because it is "committed to agency discretion." 5 U.S.C. 701(a)(2). This Court has long characterized that exception to the general rule of judicial review as "a very narrow exception." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other grounds by Califano* v. *Sanders*,

430 U.S. 99 (1977). It applies in the "rare instances" where there is "no law to apply." *Ibid.* (citation omitted). There must be "no meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830. This is not one of those instances.

**1. *Heckler* v. *Chaney*'s exception for non-enforcement decisions does not apply.**

In *Chaney*, this Court recognized a narrow exception to the ordinary presumption of judicial review for "[r]efusals to take enforcement steps." *Chaney*, 470 U.S. at 831. That carve-out was premised on three features of non-enforcement decisions. First, non-enforcement "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise" in determining whether to enforce against "each technical violation." *Ibid.* Second, in non-enforcement an agency "generally does not exercise its *coercive* power over an individual's liberty or property rights." *Id.* at 832. Third, non-enforcement is analogous to "the decision of a prosecutor * * * not to indict" in an individual case. *Ibid.*

These factors are notably absent in the case of DACA's rescission. *First*, the original DACA program was a paradigmatic example of the first factor—it described five considerations in the balancing calculus underlying discretionary deferred action. App. 27a-29a. By contrast, rescission curtails agency officials' exercise of judgment and articulates a single, steadfast policy. See pp. 41-43, *infra*. Moreover, it is addressed not to "each technical violation" but to DACA as a whole. *Chaney*, 470 U.S. at 831.

*Second*, while DACA offered possible grounds on which to withhold the exercise of coercive power, rescission is a precursor to its exercise. The "Frequently Asked Questions" regarding DACA's rescission—posted on DHS's website—state that when the period of deferral expires for current DACA recipients, "their removal *will* no longer be deferred and they *will* no longer be eligible for lawful employment." *Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals (DACA)*, Dep't of Homeland Sec. (Sept. 5, 2017), https://bit.ly/2eBLz2X (*Rescission FAQs*) (emphasis added). The DACA rescission memorandum used similarly mandatory language indicating imminent enforcement. App. 34a-35a.

*Third*, rescission is distinct from a prosecutor's decision *not* to indict. It is, as petitioners admit, "an ingredient to the commencement of enforcement proceedings." *Regents*, 279 F.3d at 1032. DACA's rescission is not an individualized determination, it affects nearly 700,000 people. And it was not premised on discretionary prioritization but on a belief that the INA requires it. App. 31a-36a.

**2. DACA's rescission is not committed to agency discretion because there is law to apply.**

Even if *Chaney*'s prudential rationales were applicable, DACA's rescission fails its most basic requirement. Unlike discretionary non-enforcement, there is "law to apply." *Chaney*, 470 U.S. at 834. The DACA rescission memorandum rests primarily, if not exclusively, on the legal conclusions set forth in "the Fifth Circuit's ruling[] in the ongoing litigation, and the September 4, 2017 letter from the Attorney

General" that DACA was effectuated "without proper statutory authority." App. 34a. The Fifth Circuit's ruling was premised on interpretation of "specific and detailed provisions [of] the INA," from which it determined that DAPA "is not authorized by statute." *Texas*, 809 F.3d at 179, 184. Other courts agree that the rescission was based solely on legal conclusions. See, *e.g.*, *Regents*, 908 F.3d at 500; *Batalla Vidal* v. *Nielsen*, 279 F. Supp. 3d 401, 421-422 (E.D.N.Y. 2018; *NAACP* v. *Trump*, 298 F. Supp. 3d 209, 232 (D.D.C. 2018).

Where agency action rests on binding legal conclusions, there must be law to apply. The legal standard inheres in the rationale itself. "[I]t seems almost ludicrous to suggest that there is 'no law to apply' in reviewing whether an agency has reasonably interpreted a *law*." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Brock*, 783 F.2d 237, 246 (D.C. Cir. 1986).

**3. General enforcement rules like DACA's rescission are not committed to agency discretion.**

The inapplicability of *Chaney*'s reasoning highlights the wisdom of lower courts' rule that while review of "*single-shot* non-enforcement decision[s]" is barred by *Chaney*, "an agency's adoption of a general enforcement policy is subject to review." *OSG Bulk Ships, Inc.* v. *United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (quoting *Crowley Caribbean Transp., Inc.* v. *Pena*, 37 F.3d 671, 674-675 (D.C. Cir. 1994)). Such policies are "universal policy statement[s]" that "do not involve an agency's decision to decline enforcement in the context of an individual case."

*Crowley*, 37 F.3d at 379. It is hard to imagine a more apt description of DACA's rescission.

General enforcement rules are "abstracted from [ ] particular combinations of facts * * * [and] more likely to be direct interpretations of the commands of the substantive statute." *Crowley*, 37 F.3d at 380. And they "generally present a clearer (and more easily reviewable) statement of [the agency's] reasons for acting" than individual non-enforcement decisions. *Ibid.* They are far more akin to legislative rules—which are always reviewable—than individual enforcement decisions.

DACA's rescission is a paradigmatic general enforcement rule. It rejects DACA's discretionary approach based on an interpretation of the agency's substantive statute. It is general, rather than individual. And its rationale, the legality of DACA, is crystal clear and eschews delicate balancing of policy concerns.

Petitioners' claim that, like the original DACA program, the rescission guides the exercise of discretion assumes willful blindness to the text of the rescission memorandum. Secretary Duke directed that DHS "[w]ill reject all DACA initial requests and associated applications for Employment Authorization Documents;" "[w]ill not approve any new Form I-131 applications for advance parole;" and "[w]ill administratively close all pending Form I-131 applications." App. 34a-35a. Petitioners strain to find discretion in unflinching statements that leave room for none. Other courts have agreed. See *NAACP*, 298 F. Supp. 3d at 233 (characterizing rescission as "a legal interpretation phrased as a general enforcement policy"); *Batalla Vidal* v. *Duke*, 295 F. Supp. 3d 127,

150 (E.D.N.Y. 2017) ("The DACA Rescission Memo curtails (if it does not eliminate outright) DHS's ability to exercise prosecutorial discretion.").

*Lincoln* v. *Vigil*, 508 U.S. 182 (1993), is not to the contrary. Although it did not involve individual enforcement, *Vigil* held only that "the decision to allocate funds" is committed to agency discretion. *Id.* at 193. DACA's rescission does not fall within the ambit of the decision because it does not involve funding decisions. The Court's reasoning is similarly inapplicable. Allocation of funds involves "balancing of a number of factors" and assessing "whether a particular program 'best fits the agency's overall policies.'" *Ibid.* (quoting *Chaney*, 470 U.S. at 831).

DACA's rescission did no such thing. It offered a conclusory legal position to explain why the agency's hands were tied. This Court's review is necessary to untie them.

### C. Agency policies are always reviewable if premised on the belief that alternative courses are *ultra vires.*

Even if *Chaney* were otherwise applicable, DACA's rescission is subject to judicial review because it is premised on the agency's legal conclusion that DACA exceeded its statutory authority. *Chaney* itself acknowledged that its holding did not address "refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction." *Chaney*, 470 U.S. at 833 n.4. Since then, lower courts have held that *Chaney*'s presumption "may be overcome if the [action] is based solely upon the erroneous belief that the agency lacks jurisdiction." *Montana Air Chapter No. 29* v. *Fed. Labor Relations Auth.*, 898 F.2d 753,

754 (9th Cir. 1990). Where "a legal challenge focuses on an announcement of a substantive statutory interpretation, courts are emphatically qualified to decide whether an agency has acted outside of the bounds of reason." *Int'l Union*, 783 F.2d at 245. And this Court has been clear that, for administrative agencies, "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage." *City of Arlington* v. *F.C.C.*, 569 U.S. 290, 297 (2013).

Thus, agency action is reviewable if it rests on an interpretation of the agency's statutory authority, however construed. Nothing falls more squarely within the judiciary's expertise than pure questions of statutory interpretation.

And when agency action is premised upon a supposedly binding interpretation, it does "not exercise * * * discretion" because it believes it has none. *Montana Air*, 898 F.3d at 757. It cannot, then, turn around and claim to a court that it is exercising authority committed to its discretion.

DACA's rescission is reviewable because it announces and is premised upon a legal conclusion that DACA was *ultra vires*. Acting Secretary Duke's rescission memorandum does not articulate explicit grounds for the rescission except that it was based on "consideration [of] the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General." App. 34a.

The memorandum's background section notes that the Fifth Circuit concluded that DAPA was contrary to the INA; that several state attorneys general sent a letter to Attorney General Sessions stating that "the

original 2012 DACA memorandum is unlawful for the same reasons stated in the Fifth Circuit and district court opinions regarding DAPA" and threatening litigation if it were not rescinded; and that Attorney General Sessions sent a letter stating that DACA "was effectuated * * * without proper statutory authority" and that because DACA "has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA." App. 32a-34a.

The only fair reading of these statements is that rescission was premised on the conclusion that DACA was unlawful. The reference to the Fifth Circuit and Supreme Court's opinions are merely restatements of legal judgments, not an independent analysis. Attorney General Sessions' letter baldly states this conclusion, and his reference to imminent litigation is only to argue that it will lead to "similar results" as the DAPA litigation: a ruling of unlawfulness. App. 30a.

Nothing in the administrative record suggests a different rationale. The rescission was based on the legal conclusion that DACA was *ultra vires* and is reviewable by this Court.

*I.C.C.* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (*BLE*), does not compel a contrary result. There, the Court rejected "the principle that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Id.* at 283. But petitioners' position merely begs the question of whether DACA's rescission is otherwise unreviewable. In *BLE*, the Court was clear that the antecedent question "*whether agency action is*

*reviewable*" must be answered in the negative before its non-reviewability holding applies. *Ibid.*

But DACA's rescission is not otherwise unreviewable, as lower courts have already concluded. See, *e.g.*, *Regents*, 908 F.3d at 497; *NAACP*, 298 F. Supp. 3d at 228-230. On its own terms, *Chaney* does not address non-enforcement based solely on belief in lack of jurisdiction. 470 U.S. at 833 n.4. *Montana Air* is clear that *Chaney*'s presumption is not categorical and is rebutted where non-enforcement is premised on a jurisdictional interpretation. See 898 F.2d at 755. Other courts have held the same. "'[N]othing in * * * the holding or policy of *Heckler v. Chaney* [ ] precludes review' * * * when that interpretation is advanced in the context of a decision not to take enforcement action." *Edison Elec. Inst.* v. *U.S. E.P.A.*, 996 F.2d 326, 333 (D.C. Cir. 1993). Finally, and most importantly, *Chaney*'s presumption does not apply, anyway, because DACA's rescission is not a non-enforcement decision. See pp. 18-20, *supra*. It is a general enforcement rule of universal applicability.

A "prosecutor's belief * * * that the law will not sustain a conviction" is a discretionary judgment about the prosecutor's likelihood of success in an individual case; they are free to change their mind. *BLE*, 482 U.S. at 283. It is individual, not programmatic, and falls squarely within *Chaney*'s exception. By contrast, DACA's rescission is programmatic and advances an interpretation of DHS's substantive statute that is binding on agency officials. A prosecutor's belief that they will not win is distinct from their belief that they have no authority to prosecute, if they otherwise would. The latter view is not discretionary.

*Crowley*'s dicta construing *BLE* to preclude review is inapposite. The D.C. Circuit said legal conclusions, stated in the context of non-enforcement, remain unreviewable only in "the context of an individual case." *Crowley*, 37 F.3d at 676. If they are part of a "general enforcement policy" or "universal policy statement," they are "reviewable for legal sufficiency." *Ibid.*; pp. 21-23, *supra*. That is the case here.

Petitioners' claim that rescission was instead based on concern with "litigation risk" also fails. It is a post hoc rationalization advanced only for the purposes of this litigation, in violation of the rule of *Chenery I* that agency action may not be upheld "unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *S.E.C.* v. *Chenery, Corp.*, 318 U.S. 80, 95 (1943) (*Chenery I*).

Discussion of litigation risk, or even that phrase, appears nowhere in Secretary Duke's rescission memorandum nor in Attorney General Sessions's letter. App. 30a-36a. If that was the agency's motivation, the Secretary should have said so. And further agency communications expressing this rationale are not properly before this Court. See *Regents*, 908 F.3d at 510 n.24. This Court should not rewrite the record and construe the agency's statements to mean what they plainly do not.

Petitioners' attempt to repackage a legal conclusion as concern that the conclusion is incorrect, and thus will spark litigation, is even more pernicious. To permit this sort of interpretive contortion would be to let agencies insulate their erroneous conclusions from judicial preview *precisely because they are likely erroneous*. See *NAACP*, 298 F. Supp. 3d at 233-234.

This Court has long held that "[t]he judiciary is the final authority on issues of statutory construction." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984). It must be so in the instant case.

### D. Irrespective of procedural claims, respondents' constitutional claims are reviewable.

If this Court has been skeptical of limits on judicial review of statutory claims, it has been ironclad in its commitment to judicial review of constitutional ones. A statute must show "'clear and convincing' evidence of congressional intent" to restrict constitutional review. *Johnson* v. *Robison*, 415 U.S. 361, 373 (1947). There is none in the INA—constitutional review is not even mentioned—and petitioners cannot point to any.

Even if such evidence did exist, a "serious constitutional question * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (quotation and citation omitted). Indeed, this Court already has, under the canon of constitutional avoidance, interpreted restrictive judicial review provisions of the INA to preserve constitutional review. See *St. Cyr*, 533 U.S. at 299-300 (preserving habeas review). "[S]ome 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" *Id.* at 300 (quoting *Heikkila* v. *Barber*, 345 U.S. 229, 235 (1953)). This Court has never restricted constitutional review of agency action, especially under the INA. There is no reason for it to do so now.

## II. Petitioners' decision to rescind DACA was arbitrary and capricious, procedurally defective, and unconstitutionally executed.

"[I]f there is a principle in our Constitution * * * more sacred than another, it is that which separates the Legislative, Executive and Judicial powers." 12 The Papers of James Madison 254 (Charles F. Hobson & Robert A. Rutland eds., 1979). The "separation of governmental power into three coordinated Branches is essential to the preservation of liberty." *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989). Executive branch agencies thus present a conundrum: although uniquely adapted to the complexities of modern governance, they exercise both the powers of the Executive Branch and authority delegated to them by Congress. Left unchecked, the confluence of these powers could become a grievous threat to liberty. See *Bowsher* v. *Synar*, 478 U.S. 714, 721-722 (1986).

Without ex ante legislative limits and ex post judicial review of agency action, "the constitutional scheme would have gone seriously awry at the outset * * * [and] undermined * * * the legitimacy of the modern 'administrative state.'" Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 1 (1983).

The APA resolves this conundrum by "set[ting] forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin* v. *Massachusetts*, 505 U.S. 788, 796 (1992). For this reason, "[i]t is axiomatic that an administrative agency's power * * * is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

The APA enacts a scheme of administrative accountability by codifying three primary restrictions on agency action. First, it allows courts to ensure agency decisions are "the product of reasoned decisionmaking" by setting aside those which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. 706(2)(A). *Motor Vehicle Mfrs. Ass'n of U.S.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). Second, 5 U.S.C. 553 requires notice-and-comment procedures for binding, substantive rules to ensure the agency "consider[s] and respond[s] to significant comments" from interested parties. *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Finally, the APA affirms courts' preexisting power to set aside agency action "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. 706(2)(B).

DACA's rescission was in dereliction of all three of these restrictions and manifestly unlawful.

### A. The lower court's preliminary injunction was within its discretion because the rescission was arbitrary, capricious, and not in accordance with law.

This Court has held that agency action is arbitrary and capricious where an agency cannot "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962)). Although this is not an invitation for the court "to substitute its judgment for that of the agency," *ibid.*, this Court has said that review under the arbitrary and capricious standard is "thorough,

probing, [and] in-depth." *Overton Park*, 401 U.S. at 415. That review does not embrace hypothetical or post hoc rationales. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50.

Where agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," the APA instructs that it be set aside. 5 U.S.C. 706(2)(A). The court of appeals, reviewing for abuse of discretion only respondents' likelihood of success on the merits of this claim, upheld the preliminary injunction because DACA's rescission was arbitrary, capricious, and not in accordance with law. See *Regents*, 908 F.3d at 505. For five reasons, this decision should be affirmed.

**1. Rescission was based on the erroneous conclusion that DACA is illegal.**

It is longstanding, black-letter law that "an order may not stand if the agency has misconceived the law." *Chenery I*, 318 U.S. at 94; see also *Massachusetts* v. *E.P.A.*, 549 U.S. 497, 528-532 (2007) (setting aside EPA's erroneous statutory construction under 5 U.S.C. 706(2)(A)). Action premised on false legal judgments cannot possibly be "the product of reasoned decisionmaking." *State Farm*, 463 U.S. at 52.

The rescission memorandum and Sessions Letter make clear that the rescission was premised on the conclusion that DACA was unlawful and *ultra vires*. They merely restate the decisions of the district court and Fifth Circuit in *Texas* v. *United States*. See pp. 23-25, *supra*. This conclusion is false, and action based on it must be set aside.

*First*, the district court and Fifth Circuit decisions addressed DAPA and modifications to DACA. That litigation does not apply to the elements of DACA at issue here. DACA's legality has already been affirmed by an OLC memorandum, the conclusions of which have never been withdrawn nor rebutted by a court of law. See Op. O.L.C. Indeed, the Fifth Circuit went out of its way to note that "any extrapolation from DACA must be done carefully." *Texas*, 809 F.3d at 173. Petitioners begin on weak footing.

*Second*, the Fifth Circuit's conclusion that DAPA required notice and comment because it "would not genuinely leave the agency and its employees free to exercise discretion" was erroneous as applied to DACA. *Id.* at 176. That conclusion, premised on extrapolation from the limited DACA denial statistics available at the time, is contrary to both the facial text of the DACA memo and currently available data on its application. On its face, the memo "confers no substantive right, immigration status or pathway to citizenship," and deferred action can be revoked at any time at the discretion of the agency. App. 29a. Facially, DACA is not a binding rule. See *Vigil*, 508 U.S. at 196.

The DACA memo describes only criteria "to be considered" before "exercising prosecutorial discretion, on an individual basis." App. 28a. It merely "set[s] forth policy for the exercise of discretion within the framework of the existing law." *Id.* at 3. It is a classic example of a general policy statement, which describes "the manner in which the agency proposes to exercise a discretionary power." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979).

Petitioners rely on the Fifth Circuit's finding that despite this language, DACA was not discretionary in practice. *Texas*, 809 F.3d at 171-175. But as the Fifth Circuit noted, "DACA involved issuing benefits to self-selecting applicants, and persons who expected to be denied relief would seem unlikely to apply." *Id.* at 174. A low denial rate is unsurprising and does not indicate a lack of discretion, as other courts have affirmed. See, *e.g.*, *Batalla Vidal*, 279 F. Supp. 3d at 425.

More importantly, the five percent denial rate on which the Fifth Circuit premised its conclusion is outdated and irrelevant. Today, DACA's cumulative denial rate of initial applications stands at 8.8 percent. *Deferred Action for Childhood Arrivals (DACA) Quarterly Report (Fiscal Year 2018, 4th Quarter, July 1-Sept. 30, 2018)*, Dep't of Homeland Sec. (Nov. 14, 2018), https://bit.ly/2GN7ULS (*2018 DACA Report*).[2] Moreover, DACA's denial rate has varied dramatically: it was two percent in 2013, thirteen percent in 2014, seventeen percent in 2015 and 2016, and sixteen percent in 2017. *Ibid.* That variation reflects the exercise of discretion based on various applicant pools, not mechanical administration. That it was lower at the outset is indicative of the exact selection bias the Fifth Circuit noted: the applicants most likely to succeed came forward first.

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[2] Throughout this Brief, respondents calculate the denial rate as a share of the total of the "Approved" and "Denied" columns, for a given time period, under the "Case Review" section of the U.S. Citizenship and Immigration Services' (USCIS) data reports. Because not all "Requests Accepted" are resolved within the period they are accepted, that number is an inappropriate denominator for these calculations.

*Third*, the Fifth Circuit's conclusion that DAPA is contrary to the INA was incorrect and inapplicable to DACA. The court's holding that the "narrow classes of aliens eligible for deferred action" identified by Congress do not include those eligible for DAPA runs contrary to this Court's precedents. *Texas*, 809 F.3d at 179. This Court has recognized that deferred action may be granted "for humanitarian reasons or simply for [the agency's] own convenience." *AADC*, 525 U.S. at 484. *AADC*, which postdates some of the allegedly preclusive provisions cited by the Fifth Circuit, forecloses this reading. This Court's opinion in *Arizona* v. *United States*, which postdates *all* of the provisions cited by the Fifth Circuit, is clear that a "principal feature of the removal system is the broad discretion exercised by immigration officials." 567 U.S. 387, 396 (2012).

Moreover, the Fifth Circuit misread the statutory provisions at issue in deeming them preclusive of other deferred action. For example, the Violence Against Women Act and USA PATRIOT Act simply affirm that certain individuals remain "eligible for deferred action and work authorization." Violence Against Women Act of 1994, 8 U.S.C. 1154(a)(1)(D)(i); USA PATRIOT Act of 2001, Pub. L. No. 107–56, § 423(b), 115 Stat. 272, 361. On their face, these provisions do not read as preclusive. They were enacted piecemeal, not as "members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice." *Barnhart*, 537 U.S. at 168 (citation omitted). The opposite inference is far more reasonable: not that Congress sought to exclude by unstated negative implication over three enactments across ten years but that these provisions do not cut back any of the

broad discretion Congress and this Court have repeatedly recognized.

Nor does the Fifth Circuit's additional implication that the INA precludes DHS from granting work authorization hold water. *Texas*, 809 F.3d at 181. Congress has directly spoken to that question and said the opposite, allowing employment of aliens "authorized to be so employed by this chapter or by the Attorney General." 8 U.S.C. 1324a(h)(3). Pursuant to that power, the Executive Branch has authorized such employment upon a showing of "economic necessity." 8 C.F.R. 274a.12(c)(14).

Finally, the Fifth Circuit's argument that "Congress has enacted an intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status," precluding DAPA, is incorrect and otherwise inapplicable to DACA. *Texas*, 809 F.3d at 179. It is incorrect because DAPA and DACA do not confer lawful immigration status. DACA "confers no * * * immigration status" at all, it simply defers action which may be resumed at any time. App. 29a. The Executive Branch has previously agreed. See Op. O.L.C. at 13.

For this reason, Attorney General Sessions's reasoning that Congress's "repeated rejection" of similar legislation forecloses DACA also fails. App. 30a. The DREAM Act would have provided lawful status and a path to citizenship, exactly the rights the DACA memo disclaims. See *Ariz. Dream Act Coal.* v. *Brewer*, 855 F.3d 957, 976 n.10 (9th Cir. 2017); DREAM Act of 2011, S. 952, 112th Cong. (2011). "In any event, unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broad. Co.* v. *F.C.C.*, 395 U.S. 367, 381 n.11 (1969).

This argument is also inapplicable to DACA because while the INA's provisions explain how parents may derive lawful immigration status from their children, they say nothing about how aliens may derive lawful status from childhood arrival. See *Regents*, 908 F.3d at 508.

None of the legal justifications offered for DACA's alleged illegality withstand scrutiny. Because "agency action, however permissible as an exercise of discretion, cannot be sustained where it is based not on the agency's own judgment but on an erroneous view of the law," DACA's rescission must be set aside as arbitrary, capricious, and not in accordance with law. *Sea-Land Serv., Inc.* v. *Dep't of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998) (quotation and citation omitted).

**2. Rescission relied on the false assertion that DACA has been found unconstitutional.**

Attorney General Sessions's assertion that DACA "has the same * * * constitutional defects that the courts recognized as to DAPA" is not only legally unfounded, it is factually incorrect. App. 30a. "[A]s all the parties recognize, no court has ever held that DAPA is unconstitutional." *Regents*, 908 F.3d at 506. The Fifth Circuit ruled "without resolving the constitutional claim," *Texas*, 809 F.3d at 154, and observed that the district court "did not rule on the * * * constitutional claims,'" *id.* at 150 (quoting *Texas*, 86 F. Supp. 3d at 677).

Any justification based on constitutional defects must be set aside under this Court's rule that agency action cannot stand on false legal conclusions. And

because no court has recognized any constitutional defects—contrary to Attorney General Sessions's letter—there can be no "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43.

**3. Petitioners failed to account for all relevant arguments, data, and aspects of the problem.**

Even if these legal assertions were not false, the rescission would still be unlawful. Agency action is "arbitrary and capricious if the agency has * * * entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Even assuming petitioners' legal claims were plausible, the Duke Memorandum and Sessions Letter evidence no detailed, independent legal analysis or consideration of alternative arguments (including those in the OLC opinion). See *NAACP*, 298 F. Supp. 3d at 239 n.23 ("[F]ailure to even consider OLC's thorough analysis is arbitrary and capricious," because "'[a] contrary result would permit agencies to toss aside OLC memoranda that contain legal conclusions contrary to the agency's preferred policy choices'" (quoting *Hispanic Affairs Project* v. *Acosta*, 263 F. Supp. 3d 160, 178 (D.D.C. 2017)).

Further, this Court has said that agency action is arbitrary and capricious if it fails to "examine the relevant data and articulate a satisfactory explanation." *State Farm*, 463 U.S. at 43. Here, the agency failed to consider the nearly three years of available DACA data postdating the *Texas* decision that suggest the opposite conclusion.

Nowhere did DHS consider alternative options consistent with the *Texas* decision, like re-promulgating DACA through notice and comment and ensuring discretion in practice. It has failed to articulate a satisfactory explanation of why these arguments, imported from a wholly separate agency action, are sufficient to justify the rescission.

**4. Petitioners failed to consider reliance interests in reversing a longstanding policy.**

Moreover, the rescission memorandum runs afoul of this Court's rule that agencies consider reliance interests in reversing longstanding policies. DACA's rescission disrupts the lives of nearly 700,000 people working and living in the United States. Rescission is a harbinger of family separation. Although DACA's benefits were revocable, DACA recipients built their lives here in reliance on the program over a period of five years. Employers and institutions recruited, hired, and trained DACA recipients in reliance on it. *Regents*, 279 F. Supp. 3d at 1026-1027.

Petitioners' total failure to address these reliance interests makes this action arbitrary and capricious. This Court has recognized that "an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, L.L.C.* v. *Navarro*, 136 S. Ct. 2117, 2126 (2016) (citation omitted). "It would be arbitrary or capricious to ignore such matters." *F.C.C.* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Petitioners did just that. The administrative record shows no consideration for these reliance interests. "The Department's failure to give an adequate explanation of its legal judgment

was particularly egregious here in light of the reliance interests involved [in DACA]." *NAACP*, 298 F. Supp. 3d at 293. Instead, it let a conclusory legal judgment substitute for the considered, rational decisionmaking Congress has required under the APA.

Petitioners cannot overcome the reliance objection by pointing to the revocability of deferred action under DACA. Indeed, this position undercuts their claims of unlawfulness. If DACA was insufficient to engender reliance interests, it cannot have unlawfully conferred rights or created obligations as petitioners claim, nor could it have required notice and comment. If it did create reliance interests, even without rising to the level of creating the legal results petitioners allege, those interests needed to be addressed.

**5. Petitioners' litigation risk rationale is post hoc and unsupported by the record.**

Petitioners last-ditch defense is that rescission was based on "litigation risk." *Regents*, 279 F. Supp. 3d at 1043. It is odd, then, that this term appears nowhere in the administrative record. Instead, the Sessions Letter argues that "potentially imminent litigation would yield similar results" as DAPA litigation: a conclusion of unlawfulness. App. 30a. It beggars belief to claim that the rescission was based on a potential *implication* of the words used to justify it, rather than those words themselves. By contrast, the record is replete with evidence that rescission was based on Attorney General Sessions's legal conclusion. It is a classic post hoc rationale, foreclosed by *Chenery I*. 318 U.S. at 95.

Even if it were identifiable anywhere in the record, this rationale would still fail. Litigation risk is a

double-edge sword: "[t]he rescission of DACA instantly sparked litigation across the country." *Regents*, 908 F.3d at 492. Yet, the risk of litigation contesting rescission also appears nowhere in the record. Petitioners cannot plead ignorance. The day before rescission was announced, attorneys general from New York and Washington threatened to challenge a rescission. John Verhovek, *Attorneys General Plan to Sue Trump if He Ends DACA*, ABC News (Sept. 4, 2017), https://abcn.ws/2UhBNJW. Even taking petitioners at face value, litigation risk is still arbitrary and capricious because the agency "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Moreover, still assuming this rationale has any support in the record, the agency entirely failed to weigh litigation risk against DACA recipients' reliance interests, as required by *Encino Motors*. 136 S. Ct. at 2126. Litigation risk cannot save petitioners.

**B. The rescission unlawfully bypassed the APA's notice-and-comment requirement.**

The APA requires that substantive rules go through notice-and-comment procedures prior to their entry into force. 5 U.S.C. 553. DACA's rescission did not. This requirement, however, does not apply to "general statements of policy." 5 U.S.C. 553(b)(3)(A). If rescission is a substantive rule and not a general policy statement, it was unlawful.

The court of appeals granted petitioners' Rule 12(b)(6) motion to dismiss respondents' notice-and-comment claim on two bases. First, it held that rescission "leaves in place the background principle that deferred action is available on a case-by-case basis." *Regents*, 908 F.3d at 513. Second, the court

held that "because DACA itself was a general statement of policy that did not require notice and comment, it could also be rescinded without those procedures." *Id.* But these judgments were in error. This Court should reverse and deny the motion to dismiss.

**1. DACA's rescission constitutes a substantive rule because it cabins agency discretion.**

Although this Court has never definitively ruled on this question, DACA's rescission bears none of the hallmarks of a general policy statement. Such a statement "does not impose any rights and obligations" and "genuinely leaves the agency and its decisionmakers free to exercise discretion." *Cmty. Nutrition Inst.* v. *Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citation omitted). Their defining feature is that they do not "cabin[] * * * an agency's prosecutorial discretion." *Id.* at 948.

By contrast, the DACA rescission memorandum declares a binding policy and speaks in unambiguous terms. It requires that DHS officials:

- "*Will* reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum;"
- "*Will* reject all DACA renewal requests and associated applications for Employment Authorization Documents filed outside of the parameters specified" in the memo;"
- "*Will* not approve any new Form I-131 applications for advance parole under

standards associated with the DACA program;" and

- "*Will* administratively close all pending Form I-131 applications for advance parole filed under standards associated with the DACA program." App. 34a-35a (emphasis added).

The FAQs on DHS's website are similarly unequivocal that "removal will no longer be deferred." *Rescission FAQs*. It is emblematic of the qualities courts have used to identify substantive rules: it "has binding effects on private parties or on the agency," *Gen. Elec. Co.* v. *E.P.A.*, 290 F.3d 377, 382 (D.C. Cir. 2002) (citation omitted), and "appears on its face to be binding," *id.* at 383. The rescission memorandum "reads like a ukase. It commands, it requires, it orders, it dictates." *Appalachian Power Co.* v. *E.P.A.*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). It bears the obvious markers of a binding substantive rule. If the "mandatory language of a document alone can be sufficient to render it binding," the rescission memorandum certainly is. *Gen. Elec.*, 290 F.3d at 383.

On the other hand, DACA provided guidance affirming the broad discretion DHS officials *already possessed*. It did not impose new rights or obligations. The rescission, while not entirely eviscerating it, certainly "cabin[s] * * * [the] agency's prosecutorial discretion." *Cmty. Nutrition*, 818 F.2d at 948. It leaves officials with *less* latitude than before. And while DACA only affirmed discretion that *might later* confer rights in individual cases, rescission affirmatively revokes recipients' rights to apply for work authorization and advance parole. "If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative

discretion, it will be taken * * * [as] a binding rule of substantive law." *Guardian Fed. Sav. & Loan Ass'n* v. *Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666-667 (D.C. Cir. 1978).

**2. That DACA did not require notice and comment does not compel the same conclusion for its rescission.**

Petitioners assert that if DACA's rescission required notice-and-comment procedures, DACA itself must have, too. Not so. DACA was discretionary in text and fact. The memorandum instituting it specified "criteria * * * to be considered," App. 28a, before an individual is "considered for an exercise of prosecutorial discretion," *id.* at 27a. Textually, it was discretionary all the way down.

Practice under DACA vindicates this discretionary language. It was not a substantive rule because it left the "agency and its decisionmakers free to exercise discretion." *Cmty. Nutrition*, 818 F.2d at 846 (citation omitted). And they have. A declaration submitted by Donald Neufeld, formerly Associate Director for Service Center Operations for USCIS, in *Texas* v. *United States* "pointed to several instances of discretionary denials" under DACA. *Regents*, 279 F. Supp. 3d at 1040. Other courts have found that DACA preserves "meaningful case-by-case review." *Arpaio* v. *Obama*, 27 F. Supp. 3d 185, 209 (D.D.C. 2014). Cumulatively, according to DHS, 79,763 initial DACA applications have been denied. *2018 DACA Report*. Petitioners have "cited no evidence * * * and none is found in the administrative record" to support the contention that DHS could identify no discretionary DACA denials among these tens of thousands. *Regents*, 279 F. Supp. 3d at 1040.

The conclusion that DACA was a general policy statement is compounded by the Trump Administration's experience administering it. According to DHS data, the overall initial denial rate over the lifespan of the DACA program is 8.8 percent. *2018 DACA Report.* For applications resolved in the final three months of the Obama administration, it was 10.3 percent. *Deferred Action for Childhood Arrivals (DACA) Quarterly Report (Fiscal Year 2017, 3rd Quarter, April 1-June 30, 2017)*, Dep't of Homeland Sec. (Sept. 20, 2017), https://bit.ly/2fatKIp. From April to June 2017, the first full reporting period under the Trump Administration, the denial rate jumped to 31.7 percent. *Id.* This rapid shift does not suggest mechanical administration that wrests discretion from agency officials. If anything, it indicates the exercise of discretionary authority that has been part of DACA all along.[3]

Such a stark reversal in practice bears the telltale signs of a binding policy, not an affirmation of discretion. The dramatic shift from wide discretion to a binding policy required opportunity for notice and comment.

### C. Petitioners deprived DACA recipients of constitutionally protected property and liberty interests without due process by changing their information sharing policy.

At the encouragement of the government, DACA recipients relied on petitioners' repeated promises and "strong commitment" to safeguard applicants'

[3] The Fifth Circuit's conclusions otherwise were based on just two years of program data. The court lacked the complete picture of the program before this Court today.

sensitive information from use for immigration enforcement. *Regents*, 908 F.3d at 516. But the same day it announced the rescission, DHS posted new FAQs to its website, altering this policy to state only that this information "*will not be proactively provided* to ICE and CBP for the purpose of immigration enforcement." *Id.* at 517 (quoting *Rescission FAQs*). The Ninth Circuit correctly found that petitioners' significant change to their information-sharing policy constitutes a plausible substantive due process violation.

**1. Petitioners' promises created a mutual understanding sufficient to engender a protected due process interest.**

The Due Process Clause protects every person within the nation's borders—"including aliens, whether their presence here is unlawful, temporary, or permanent"—from deprivation of life, liberty or property without due process of law. *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001). An interest is constitutionally protected "for due process purposes" if an individual has a legitimate claim of entitlement, which may arise from "mutually explicit understandings." *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972).

Petitioners' repeated representations to DACA applicants that their extensive, sensitive information would be protected from use for immigration enforcement created a "mutually explicit understanding[]" that the government would honor that promise. *Perry*, 408 U.S. at 601. When DACA was announced in 2012, petitioners explicitly promised that applicants' personal information would affirmatively be "protected from disclosure to ICE and

CBP for the purpose of immigration enforcement proceedings," except in specific, narrow circumstances. See *Instructions for Form I-821D*, U.S. Customs & Immigration Servs., https://bit.ly/2FAM8ID.

The original online DACA FAQs reinforced these assurances. *Regents*, 298 F. Supp. 3d at 1312; see also *Casa de Md.* v. *U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 778 (D. Md. 2018) ("[T]he Government promised not to transfer or use the information gathered from Dreamers for immigration enforcement."). In December of 2016, then-Secretary of DHS Jeh Johnson confirmed the existence of a mutually explicit understanding to Congress: "[T]hese representations made by the U.S. government, upon which DACA applicants most assuredly relied, must continue to be honored." *Regents*, 298 F. Supp. 3d at 1312.

This understanding, on which respondent Garcia and hundreds of thousands of applicants relied in making their sensitive information available to the government, is a protected due process interest. It is not a benefit "government officials may grant or deny [ ] in their discretion." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 756 (2005). It is a repeated commitment and mutually understood as such.

On September 5, 2017, the same day the government announced its decision to terminate DACA, petitioners changed their repeated, affirmative assurances that "[i]nformation provided in this request *is protected from disclosure*," to promise only that such information "will not be *proactively* provided to ICE and CBP." *Regents*, 908 F.3d at 516-517 (quoting *Rescission FAQs*).

This reversal violates respondents' due process rights. The plain inference of this change is that USCIS "*would* now provide information *re*actively" to its "fellow components of the same umbrella agency:" immigration enforcement officials at ICE and CBP. *Regents*, 908 F.3d at 517. For DACA applicants, this change threatens the "particularly severe" sanction of forced removal from the only home they have ever known. *Padilla* v. *Kentucky*, 559 U.S. 356, 365 (2010).

Petitioners attempt to rewrite history by referencing an FAQ—written after litigation commenced—that restates the new information-sharing policy and asserts: "This information-sharing policy has not changed in any way since it was first announced." *Regents*, 908 F.3d at 517. This statement is not part of the record and did not exist until almost three months after litigation in this case began. *Ibid.*

Nor can the thin reed of a general escape clause outweigh the mutually explicit understanding—created by the "promisor's words and conduct in light of the surrounding circumstances"—that DHS would safeguard this information. *Sindermann*, 408 U.S. at 602. As the Ninth Circuit recognized, the escape clause in the DACA FAQs—stating that the "information-sharing policy may be 'modified, superseded, or rescinded at any time'"—indicates that the petitioners may change their policy with respect to *future* applicants. It does not allow them to renege on their promise made to prior applicants. *Regents*, 908 F.3d at 516.

A one sentence boilerplate reservation of the right to modify the policy cannot provide a safe haven from repeated, explicit representations to DACA applicants, Congress, and the public. Agencies cannot

change the meaning of their policies with empty disclaimers. Judicial review cannot be stymied by statements at odds with a policy's practical effect. See *Appalachian Power*, 208 F.3d at 1023-1025.[4]

**2. Petitioners' inducement and reversal violates respondents' due process rights.**

Petitioners' use of a bait-and-switch tactic "shocks the conscience" and "offend[s] the community's sense of fair play and decency." *Rochin* v. *California*, 342 U.S. 165, 172-173 (1952). Petitioners induced DACA applicants to share sensitive information that, if provided to immigration enforcement, would facilitate their detention, arrest, and deportation.

The Due Process Clause forbids the government from making and then breaking promises about the legal consequences of a specific action. See, *e.g.*, *Raley* v. *Ohio*, 360 U.S. 423, 426 (1969) ("convicting a citizen for exercising a privilege which the State clearly had told him was available to him" is "the most indefensible sort of entrapment by the State"); *Cox* v. *Louisiana*, 379 U.S. 559, 571 (1965) ("[T]he Due Process Clause prevent[s] conviction of persons * * * when they relied upon assurances of * * * public officials" that they had a legal privilege). DACA applicants accepted the limited risks explicitly noted in the original information-sharing policy. "[T]hey did not accept the risk that the government would abandon the other assurances," repeated again and again, "that were crucial to inducing them to apply for DACA." *Regents*, 908 F.3d at 518.

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[4] At best, petitioners' reliance on their counterintuitive interpretation of the escape clause is a question of fact that cannot be resolved on the pleadings. *Regents*, 908 F.3d at 516.

The Ninth Circuit correctly held that the change in petitioners' information-sharing policy raises a plausible substantive due process violation.

### D. Petitioners violated DACA recipients' right to equal protection because the rescission was motivated by racial animus.

Petitioners' decision to terminate DACA violated recipients' right to equal protection because it was motivated by racial animus against Latinos, particularly individuals of Mexican heritage, who make up the vast majority of DACA recipients. The Fifth Amendment prohibits racial discrimination and violations of equal protection by the federal government. See U.S. CONST. amend. V; see also *Bolling* v. *Sharpe*, 347 U.S. 397 (1954). This Court has long held that racially neutral government action violates equal protection where "it [is] motivated by discriminatory animus and its application results in a discriminatory effect." *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-265 (1977).

#### 1. Rescission has a racially disparate impact because it falls almost exclusively on Latinos.

The clear disparate "impact of [petitioners'] official action" to terminate DACA "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266. The termination of DACA has a disproportionately adverse effect on Latinos, especially Mexicans nationals. Latinos account for 93 percent of approved DACA applications, and 79.4 percent are of Mexican descent. See *Approximate Active DACA Recipients: Country of Birth*, U.S.

Customs & Immigration Servs. (Sept. 4, 2017), https://bit.ly/2kAjNdy.

Respondents allege facts sufficient to show that "invidious discriminatory purpose was a motivating factor" in the decision to terminate DACA. *Arlington Heights*, 429 U.S. at 265-266 (the Court need not find that the "challenged action rested *solely* on racially discriminatory purposes"). Because cases where discriminatory intent "clear[ly]" attaches to the challenged official action "are rare," a reviewing court should conduct a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including the "historical background of the decision" and "[t]he specific sequence of events leading up to the challenged decision" to determine whether it was covertly motivated by discriminatory purposes. *Arlington Heights*, 429 U.S. at 266-267. "Departures from the normal procedural sequence" also "afford evidence that improper purposes are playing a role." *Id.* at 267.

**2. Procedural irregularities indicate pretext to hide racial animus.**

The rescission's many procedural irregularities suggest petitioners' stated rationale was pretextual. For example, in April of 2017, the President, himself, told "dreamers [to] rest easy." *Regents*, 279 F. Supp. 3d at 1026. Similarly, in June of 2017, Secretary Kelly explicitly affirmed the administration's commitment to continuing the DACA program. *Id.* at 1025. Just three months later, the administration terminated DACA in a lightning *volte-face*. The detailed deliberation that usually precedes such an action was wholly absent.

Moreover, petitioners entirely neglected "factors usually considered important by the decisionmaker" in taking action affecting hundreds of thousands of lives. *Arlington Heights*, 429 U.S. at 267; see also *Batalla Vidal*, 279 F. Supp. 3d at 431-432 (finding that "the record offers absolutely no indication that [DHS] considered the[] impact[]" on beneficiaries from the termination of DACA). These irregularities "afford evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267.

**3. The President's discriminatory rhetoric illustrates clear racial animus.**

President Trump—the ultimate decisionmaker to whom the Secretary of Homeland Security reports[5]—has made a litany of racially discriminatory public comments against Latinos. His racially charged, recurring, and disturbing racial slurs throughout his campaign and presidency raise a plausible inference that DACA's rescission was substantially motivated by discriminatory animus. In his 2015 speech announcing his candidacy, President Trump described Mexican immigrants as "criminals, drug dealers, rapists," and "people that have lots of problems." *Regents*, 298 F. Supp. 3d at 1315. Three days later, he tweeted that "[d]ruggies, drug dealers, rapists and killers are coming across the southern border." *Ibid.* During the first Presidential debate, President Trump claimed the Mexican government "send[s] the bad ones over because they don't want to pay for them." *Ibid.* Just a few weeks before the

[5] The Constitution vests the "executive Power" in the President. U.S. CONST., art. II, § 1, cl. 1. The Secretary of DHS reports to the President and is removable by him at will.

termination of DACA, President Trump called undocumented immigrants "animals." *Ibid.*

Although the use of racially charged language is not a per se violation of equal protection, "officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Arce* v. *Douglas*, 793 F.3d 968, 978 (9th Cir. 2015) (citation omitted). Thus, courts have found racially charged language sufficient to demonstrate that official action was motivated by unlawful purposes. See, *e.g.*, *Williams* v. *Bramer*, 180 F.3d 699, 706 (5th Cir. 1999); *Ali* v. *Connick*, 136 F. Supp. 3d 270, 279-280 (E.D.N.Y. 2015) (collecting cases).

**4. *Trump* v. *Hawaii* does not preclude consideration of the President's statements.**

*Trump* v. *Hawaii* does not preclude review nor tie this Court's hands. There, the Court assumed without deciding that it was proper to review "extrinsic statements" by President Trump, "many of which were made before the President took the oath of office." *Trump* v. *Hawaii*, 138 S. Ct. at 2418.

Although the challenged executive order was upheld, *Trump* v. *Hawaii* is distinguishable from the instant case. First, the plaintiffs in this case are *within* the geographic United States. See *Zadvydas*, 553 U.S. at 693 ("[C]ertain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). Second, the government here has not—and

cannot, post hoc—asserted a national security justification. See *Trump* v. *Hawaii*, 138 S. Ct. at 2421.

Respondents have also demonstrated significantly greater evidence of discriminatory motivation under the *Arlington Heights* standard. *Compare Trump* v. *Hawaii*, 138 S. Ct. at 2409 ("The 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions—is more detailed than any prior order a President has issued."), *with Regents*, 298 F. Supp. 3d at 1315 (noting that a policy "hurriedly cast aside" at "lightning speed" in a "strange about-face" and then scantily explained by a post hoc, "contrived excuse" "suggests that the normal care and consideration within the agency was bypassed").

Petitioners cannot evade review simply by characterizing respondents' challenge as a "selective enforcement" claim, which the *AADC* Court held aliens have "no constitutional right to assert." *AADC*, 525 U.S. at 448. Respondents do not raise a selective enforcement defense and this case does not involve individual deportations, the context at issue in *AADC*.

The Ninth Circuit correctly held that respondents have raised a plausible inference that racial animus towards individuals of Mexican and Latino/a descent was a motivating factor in petitioners' decision to terminate DACA. Thus, the rescission violated recipients' rights to equal protection.

## CONCLUSION

For these reasons, the court of appeals' judgments on reviewability, preliminary relief, and denial of the motions to dismiss respondents' due process and equal protection claims should be affirmed; its dismissal of respondents' notice-and-comment claim should be reversed.

Respectfully submitted,

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March 31, 2019

**APPENDIX TO THE BRIEF FOR RESPONDENTS**

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**1. Article II, section 1, clause 1 of the United States Constitution provides:**

The executive Power shall be vested in a President of the United States of America.

**2. The Fifth Amendment of the United States Constitution provides in relevant part:**

No person shall * * * be deprived of life, liberty, or property, without due process of law.

**3. 5 U.S.C. 553 provides:**

**(a)** This section applies, according to the provisions thereof, except to the extent that there is involved-

**(1)** a military or foreign affairs function of the United States; or

**(2)** a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

**(b)** General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-

**(1)** a statement of the time, place, and nature of public rule making proceedings;

**(2)** reference to the legal authority under which the rule is proposed; and

**(3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply-

**(A)** to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

**(B)** when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

**(c)** After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

**(d)** The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except-

**(1)** a substantive rule which grants or recognizes an exemption or relieves a restriction;

**(2)** interpretative rules and statements of policy; or

**(3)** as otherwise provided by the agency for good cause found and published with the rule.

**(e)** Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

**4. 5 U.S.C. 701 provides:**

**(a)** This chapter applies, according to the provisions thereof, except to the extent that-

**(1)** statutes preclude judicial review; or

**(2)** agency action is committed to agency discretion by law.

**(b)** For the purpose of this chapter-

**(1)** "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-

**(A)** the Congress;

**(B)** the courts of the United States;

**(C)** the governments of the territories or possessions of the United States;

**(D)** the government of the District of Columbia;

**(E)** agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

**(F)** courts martial and military commissions;

**(G)** military authority exercised in the field in time of war or in occupied territory; or

**(H)** functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; [1] and

**(2)** "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

**5. 5 U.S.C. 706 provides:**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

**(1)** compel agency action unlawfully withheld or unreasonably delayed; and

**(2)** hold unlawful and set aside agency action, findings, and conclusions found to be-

**(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

**(B)** contrary to constitutional right, power, privilege, or immunity;

**(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

**(D)** without observance of procedure required by law;

**(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

**(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**6. 6 U.S.C. 202(5) provides in relevant part:**

The Secretary shall be responsible for the following:

* * *

**(5)** Establishing national immigration enforcement policies and priorities.

**7. 8 U.S.C. 1103(a) provides:**

**(a) Secretary of Homeland Security**

**(1)** The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

**(2)** He shall have control, direction, and supervision of all employees and of all the files and records of the Service.

**(3)** He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his

authority under the provisions of this chapter.

**(4)** He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service.

**(5)** He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper.

**(6)** He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

**(7)** He may, with the concurrence of the Secretary of State, establish offices of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the

purposes of this chapter, detail employees of the Service for duty in foreign countries.

**(8)** After consultation with the Secretary of State, the Attorney General may authorize officers of a foreign country to be stationed at preclearance facilities in the United States for the purpose of ensuring that persons traveling from or through the United States to that foreign country comply with that country's immigration and related laws.

**(9)** Those officers may exercise such authority and perform such duties as United States immigration officers are authorized to exercise and perform in that foreign country under reciprocal agreement, and they shall enjoy such reasonable privileges and immunities necessary for the performance of their duties as the government of their country extends to United States immigration officers.

**(10)** In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or

regulations issued thereunder upon officers or employees of the Service.

**(11)** The Attorney General, in support of persons in administrative detention in non-Federal institutions, is authorized-

**(A)** to make payments from funds appropriated for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service pursuant to Federal law under an agreement with a State or political subdivision of a State; and

**(B)** to enter into a cooperative agreement with any State, territory, or political subdivision thereof, for the necessary construction, physical renovation, acquisition of equipment, supplies or materials required to establish acceptable conditions of confinement and detention services in any State or unit of local government which agrees to provide guaranteed bed space for persons detained by the Service.

**8. 8 U.S.C. 1154(a)(1)(D) provides:**
**(D)**

**(i)**

**(I)** Any child who attains 21 years of age who has filed a petition under clause (iv) of subsection (a)(1)(A) or subsection (a)(1)(B)(iii) that was filed or approved before the date on which the child attained 21 years of age shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a petitioner for preference status under paragraph (1), (2), or (3) of section 1153(a) of this title, whichever paragraph is applicable, with the same priority date assigned to the self-petition filed under clause (iv) of subsection (a)(1)(A) or subsection (a)(1)(B)(iii). No new petition shall be required to be filed.

**(II)** Any individual described in subclause (I) is eligible for deferred action and work authorization.

**(III)** Any derivative child who attains 21 years of age who is included in a petition described in clause (ii) that was filed or approved before the date on which the child attained 21 years of age shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a VAWA self-petitioner with the same priority date as that assigned to the petitioner in any petition described in clause (ii). No new petition shall be required to be filed.

**(IV)** Any individual described in subclause (III) and any derivative child of a petition described in clause (ii) is eligible for deferred action and work authorization.

**(ii)** The petition referred to in clause (i)(III) is a petition filed by an alien under subparagraph (A)(iii), (A)(iv), (B)(ii) or (B)(iii) in which the child is included as a derivative beneficiary.

**(iii)** Nothing in the amendments made by the Child Status Protection Act shall be construed to limit or deny any right or benefit provided under this subparagraph.

**(iv)** Any alien who benefits from this subparagraph may adjust status in accordance with subsections (a) and (c) of section 1255 of this title as an alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii).

**(v)** For purposes of this paragraph, an individual who is not less than 21 years of age, who qualified to file a petition under subparagraph (A)(iv) or (B)(iii) as of the day before the date on which the individual attained 21 years of age, and who did not file such a petition before such day, shall be treated as having filed a petition under such subparagraph as of such day if a petition is filed for the status described in such subparagraph before the individual attains 25 years of age and the individual shows that the abuse was at least one central reason for the filing delay. Clauses (i)

through (iv) of this subparagraph shall apply to an individual described in this clause in the same manner as an individual filing a petition under subparagraph (A)(iv) or (B)(iii).

**9. 8 U.S.C. 1182 provides in relevant part:**

**(a) Classes of aliens ineligible for visas or admission.**

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

**(9) Aliens previously removed**

**(B) Aliens unlawfully present**

**(i) In general** Any alien (other than an alien lawfully admitted for permanent residence) who—

**(I)** was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e) [3] of this title) prior to the commencement of proceedings under section 1225(b)(1) of this title or section 1229a of this title,

and again seeks admission within 3 years of the date of such alien's departure or removal, or

**(II)** has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

**(ii) Construction of unlawful presence**

For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

* * *

**(f) Suspension of entry or imposition of restrictions by the President**

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation,

and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

**10. 8 U.S.C. 1227(d) provides:**

**(d) Administrative stay**

**(1)** If the Secretary of Homeland Security determines that an application for nonimmigrant status under subparagraph (T) or (U) of section 1101(a)(15) of this title filed for an alien in the United States sets forth a prima facie case for approval, the Secretary may grant the alien an administrative stay of a final order of removal under section 1231(c)(2) of this title until—

**(A)** the application for nonimmigrant status under such subparagraph (T) or (U) is approved; or

**(B)** there is a final administrative denial of the application for such nonimmigrant status after the exhaustion of administrative appeals.

**(2)** The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.

**(3)** During any period in which the administrative stay of removal is in effect, the alien shall not be removed.

**(4)** Nothing in this subsection may be construed to limit the authority of the Secretary of Homeland Security or the Attorney General to grant a stay of removal or deportation in any case not described in this subsection.

**11. 8 U.S.C. 1252(a)(2) provides in relevant part:**

**(a) Applicable provisions**

* * *

**(2) Matters not subject to judicial review**

**(A) Review relating to section 1225(b)(1)**

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review-

**(i)** except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

**(ii)** except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

**(iii)** the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

**(iv)** except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

**(B) Denials of discretionary relief**

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review-

> **(i)** any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> **(ii)** any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

**(C) Orders against criminal aliens**

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review

any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

**(D) Judicial review of certain legal claims**

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

**12. 8 U.S.C. 1252(g) provides:**

**(g) Exclusive jurisdiction**

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the

decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

**13. 8 U.S.C. 1324a provides in relevant part:**

**(a) Making employment of unauthorized aliens unlawful**

**(1) In general** It is unlawful for a person or other entity—

**(A)** to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, or

**(B)**

**(i)** to hire for employment in the United States an individual without complying with the requirements of subsection (b) or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b).

**(2) Continuing employment**

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has

become) an unauthorized alien with respect to such employment.

* * *

**(h) Miscellaneous provisions**

* * *

**(3) Definition of unauthorized alien**

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

**14. The USA PATRIOT Act of 2001, Pub. L. No. 107–56, § 423(b), 115 Stat. 361, provides in relevant part:**

**(b) Spouses, Children, Unmarried Sons and Daughters of Lawful Permanent Resident Aliens.—**

**(1) In General.**—Any spouse, child, or unmarried son or daughter of an alien described in paragraph (3) who is included in a petition for classification as a family-sponsored immigrant under section 203(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(2)) that was filed by such alien before September 11, 2001, shall be considered (if the spouse, child, son, or daughter has not been admitted or approved for lawful permanent residence by such date) a valid petitioner for preference status under such section

with the same priority date as that assigned prior to the death described in paragraph (3)(A). No new petition shall be required to be filed. Such spouse, child, son, or daughter may be eligible for deferred action and work authorization.

**(2) Self-Petitions.**—Any spouse, child, or unmarried son or daughter of an alien described in paragraph (3) who is not a beneficiary of a petition for classification as a familysponsored immigrant under section 203(a)(2) of the Immigration and Nationality Act may file a petition for such classification with the Attorney General, if the spouse, child, son, or daughter was present in the United States on September 11, 2001. Such spouse, child, son, or daughter may be eligible for deferred action and work authorization.

**15. The National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703 provides in relevant part:**

**(c) Spouses and Children of Lawful Permanent Resident Aliens.—**

**(1) Treatment as immediate relatives.—**

**(A) In general.**—A spouse or child of an alien described in paragraph (3) who is included in a petition for classification as a family-sponsored immigrant under section 203(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(2)) that was filed by such alien, shall be considered (if the spouse or child has not

been admitted or approved for lawful permanent residence by such date) a valid petitioner for immediate relative status under section 201(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i)). Such spouse or child shall be eligible for deferred action, advance parole, and work authorization.

**(B) Petitions.**—An alien spouse or child described in subparagraph (A) may file a petition with the Secretary of Homeland Security for classification of the alien under section 201(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i)). For purposes of such Act, such a petition shall be considered a petition filed under section 204(a)(1)(A) of such Act (8 U.S.C. 1154(a)(1)(A)).

**(2) Self-Petitions.**—Any spouse or child of an alien described in paragraph (3) who is not a beneficiary of a petition for classification as a family-sponsored immigrant may file a petition for such classification under section 201(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i)) with the Secretary of Homeland Security, but only if the spouse or child files a petition within 2 years after such date. Such spouse or child shall be eligible for deferred action, advance parole, and work authorization.

**(3) Alien described**.—An alien is described in this paragraph if the alien—

**(A)** served honorably in an active duty status in the military, air, or naval forces of the United States;

**(B)** died as a result of injury or disease incurred in or aggravated by combat; and

**(C)** was granted posthumous citizenship under section 329A of the Immigration and Nationality Act (8 U.S.C. 1440–1).

**(d) Parents of Lawful Permanent Resident Aliens**.—

**(1) Self-Petitions**.—Any parent of an alien described in paragraph (2) may file a petition for classification under section 201(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i)), but only if the parent files a petition within 2 years after such date. For purposes of such Act, such petition shall be considered a petition filed under section 204(a)(1)(A) of such Act (8 U.S.C. 1154(a)(1)(A)). Such parent shall be eligible for deferred action, advance parole, and work authorization.

**16. The REAL ID Act of 2005, Pub. L. No. 109-13, 202, 119 Stat. 312 provides in relevant part:**

**(a) Minimum Standards for Federal Use.—**

> **(1) In general**—Beginning 3 years after the date of the enactment of this division [May 11, 2005], a Federal agency may not accept, for any official purpose, a driver's license or identification card issued by a State to any person unless the State is meeting the requirements of this section.

* * *

**(c) Minimum Issuance Standards—**

* * *

**(2) Special Requirements**

* * *

> **(B) Evidence of lawful status—** A State shall require, before issuing a driver's license or identification card to a person, valid documentary evidence that the person—
>
> * * *
>
> **(viii)** has approved deferred action status

**17. 8 C.F.R. 212.5(f) provides in relevant part:**

**(a)** The authority of the Secretary to continue an alien in custody or grant parole under section

212(d)(5)(A) of the Act shall be exercised by the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing, subject to the parole and detention authority of the Secretary or his designees. The Secretary or his designees may invoke, in the exercise of discretion, the authority under section 212(d)(5)(A) of the Act.

* * *

**(f)** Advance authorization. When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued an appropriate document authorizing travel.

**18. 8 C.F.R. 274a.12(c) provides in relevant part:**

**(c)** ***Aliens who must apply for employment authorization.***

An alien within a class of aliens described in this section must apply for work authorization. If authorized, such an alien may accept employment subject to any restrictions stated in the regulations or cited on the employment authorization document. USCIS, in its discretion, may establish a specific validity period for an employment authorization document, which may include any period when an

administrative appeal or judicial review of an application or petition is pending.

* * *

**(14)** An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment

*Secretary*

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

Homeland Security

June 15, 2012

MEMORANDUM FOR: David V. Aguilar
Acting Commissioner, U.S. Customs and Border Protection

Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

John Morton
Director, U.S. Immigration and Customs Enforcement

FROM: Janet Napolitano
Secretary of Homeland Security

SUBJECT: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children

By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home. As a general matter, these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them. However, additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.

The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.

As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal. No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases.

1. With respect to individuals who are encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or U.S. Citizenship and Immigration Services (USCIS):

- With respect to individuals who meet the above criteria, ICE and CBP should immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.
- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear.

2. With respect to individuals who are **in** removal proceedings but not yet subject to a final order of removal, and who meet the above criteria:

- ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.
- ICE is instructed to use its Office of the Public Advocate to permit individuals who believe they meet the above criteria to identify themselves through a clear and efficient process.
- ICE is directed to begin implementing this process within 60 days of the date of this memorandum.
- ICE is also instructed to immediately begin the process of deferring action against individuals who meet the above criteria whose cases have already been identified through the ongoing review of pending cases before the Executive Office for Immigration Review.

3. With respect to the individuals who are **not** currently in removal proceedings and meet the above criteria, and pass a background check:

- USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action against individuals who meet the

above criteria and are at least 15 years old, for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.

- The USCIS process shall also be available to individuals subject to a final order of removal regardless of their age.
- USCIS is directed to begin implementing this process within 60 days of the date of this memorandum.

For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.

Janet Napolitano

Office of the Attorney General
Washington, D. C. 20530

Dear Acting Secretary Duke,

I write to advise that the Department of Homeland Security (DHS) should rescind the June 15, 2012, DHS Memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," as well as any related memoranda or guidance. This policy, known as "Deferred Action for Childhood Arrivals" (DACA), allows certain individuals who are without lawful status in the United States to request and receive a renewable, two-year presumptive reprieve from removal, and other benefits such as work authorization and participation in the Social Security program.

DACA was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch. The related Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) policy was enjoined on a nationwide basis in a decision affirmed by the Fifth Circuit on the basis of multiple legal grounds and then by the Supreme Court by an equally divided vote. *See Texas v. United States*, 86 F. Supp. 3d 591, 669-70 (S.D. Tex.), *aff'd*, 809 F.3d 134, 171-86 (5th Cir. 2015), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016). Then-Secretary of Homeland Security John Kelly rescinded the DAPA policy in June. Because the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA.

In light of the costs and burdens that will be imposed on DHS associated with rescinding this policy, DHS should consider an orderly and efficient wind-down process.

As Attorney General of the United States, I have a duty to defend the Constitution and to faithfully execute the laws passed by Congress. Proper enforcement of our immigration laws is, as President Trump consistently said, critical to the national interest and to the restoration of the rule of law in our country. The Department of Justice stands ready to assist and to continue to support DHS in these important efforts.

Sincerely,

Jefferson B. Sessions III

## Archived Content

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# Memorandum on Rescission Of Deferred Action For Childhood Arrivals (DACA)

**Release Date:** September 5, 2017

**MEMORANDUM FOR:**

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

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

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

Joseph B. Maher
Acting General Counsel

Ambassador James D. Nealon
Assistant Secretary, International Engagement

Julie M. Kirchner
Citizenship and Immigration Services Ombudsman

**FROM:**

Elaine C. Duke
Acting Secretary

**SUBJECT:**

**Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"**

This memorandum rescinds the June 15, 2012 memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," which established the program known as Deferred Action for Childhood Arrivals ("DACA"). For the reasons and in the manner outlined below, Department of Homeland Security personnel shall take all appropriate actions to execute a wind-down of the program, consistent with the parameters established in this memorandum.

## Background

The Department of Homeland Security established DACA through the issuance of a memorandum on June 15, 2012. The program purported to use deferred action—an act of prosecutorial discretion meant to be applied only on an individualized case-by-case basis—to confer certain benefits to illegal aliens that Congress had not otherwise acted to provide by law.[1] (#_ftn1) Specifically, DACA provided certain illegal aliens who entered the United States before the age of sixteen a period of deferred action and eligibility to request employment authorization.

On November 20, 2014, the Department issued a new memorandum, expanding the parameters of DACA and creating a new policy called Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). Among other things—such as the expansion of the coverage criteria under the 2012 DACA policy to encompass aliens with a wider range of ages and arrival dates, and lengthening the period of deferred action and work authorization from two years to three—the November 20, 2014 memorandum directed USCIS "to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis," to certain aliens who have "a son or daughter who is a U.S. citizen or lawful permanent resident."

Prior to the implementation of DAPA, twenty-six states—led by Texas—challenged the policies announced in the November 20, 2014 memorandum in the U.S. District Court for the Southern District of Texas. In an order issued on February 16, 2015, the district court preliminarily enjoined the policies nationwide.[2] (#_ftn2) The district court held that the plaintiff states were likely to succeed on their claim that the DAPA program did not comply with relevant authorities.

The United States Court of Appeals for the Fifth Circuit affirmed, holding that Texas and the other states had demonstrated a substantial likelihood of success on the merits and satisfied the other requirements for a preliminary injunction.[3] (#_ftn3) The Fifth Circuit concluded that the Department's DAPA policy conflicted with the discretion authorized by Congress. In considering the DAPA program, the court noted that the Immigration and Nationality Act "flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization." According to the court, "DAPA is foreclosed by Congress's careful plan; the program is 'manifestly contrary to the statute' and therefore was properly enjoined."

Although the original DACA policy was not challenged in the lawsuit, both the district and appellate court decisions relied on factual findings about the implementation of the 2012 DACA memorandum. The Fifth Circuit agreed with the lower court that DACA decisions were not truly discretionary,[4] (#_ftn4) and that DAPA and expanded DACA would be substantially similar in execution. Both the district court and the Fifth Circuit concluded that implementation of the program did not comply with the Administrative Procedure Act because the Department did not implement it through notice-and-comment rulemaking.

The Supreme Court affirmed the Fifth Circuit's ruling by equally divided vote (4-4).[5] (#_ftn5) The evenly divided ruling resulted in the Fifth Circuit order being affirmed. The preliminary injunction therefore remains in place today. In October 2016, the Supreme Court denied a request from DHS to rehear the case upon the appointment of a new Justice. After the 2016 election, both parties agreed to a stay in litigation to allow the new administration to review these issues.

On January 25, 2017, President Trump issued Executive Order No. 13,768, "Enhancing Public Safety in the Interior of the United States." In that Order, the President directed federal agencies to "[e]nsure the faithful execution of the immigration laws . . . against all removable aliens," and established new immigration enforcement priorities. On February 20, 2017, then Secretary of Homeland Security John F. Kelly issued an implementing memorandum, stating "the Department no longer will exempt classes or categories of removable aliens from potential enforcement," except as provided in the Department's June 15, 2012 memorandum

establishing DACA,[6] (#_ftn6) and the November 20, 2014 memorandum establishing DAPA and expanding DACA.[7] (#_ftn7)

On June 15, 2017, after consulting with the Attorney General, and considering the likelihood of success on the merits of the ongoing litigation, then Secretary John F. Kelly issued a memorandum rescinding DAPA and the expansion of DACA—but temporarily left in place the June 15, 2012 memorandum that initially created the DACA program.

Then, on June 29, 2017, Texas, along with several other states, sent a letter to Attorney General Sessions asserting that the original 2012 DACA memorandum is unlawful for the same reasons stated in the Fifth Circuit and district court opinions regarding DAPA and expanded DACA. The letter notes that if DHS does not rescind the DACA memo by September 5, 2017, the States will seek to amend the DAPA lawsuit to include a challenge to DACA.

The Attorney General sent a letter to the Department on September 4, 2017, articulating his legal determination that DACA "was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch." The letter further stated that because DACA "has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA." Nevertheless, in light of the administrative complexities associated with ending the program, he recommended that the Department wind it down in an efficient and orderly fashion, and his office has reviewed the terms on which our Department will do so.

## Rescission of the June 15, 2012 DACA Memorandum

Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated. In the exercise of my authority in establishing national immigration policies and priorities, except for the purposes explicitly identified below, I hereby rescind the June 15, 2012 memorandum.

Recognizing the complexities associated with winding down the program, the Department will provide a limited window in which it will adjudicate certain requests for DACA and associated applications meeting certain parameters specified below. Accordingly, effective immediately, the Department:

- Will adjudicate—on an individual, case-by-case basis—properly filed pending DACA initial requests and associated applications for Employment Authorization Documents

that have been accepted by the Department as of the date of this memorandum.

- Will reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum.
- Will adjudicate—on an individual, case by case basis—properly filed pending DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries that have been accepted by the Department as of the date of this memorandum, and from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017.
- Will reject all DACA renewal requests and associated applications for Employment Authorization Documents filed outside of the parameters specified above.
- Will not terminate the grants of previously issued deferred action or revoke Employment Authorization Documents solely based on the directives in this memorandum for the remaining duration of their validity periods.
- Will not approve any new Form I-131 applications for advance parole under standards associated with the DACA program, although it will generally honor the stated validity period for previously approved applications for advance parole. Notwithstanding the continued validity of advance parole approvals previously granted, CBP will—of course—retain the authority it has always had and exercised in determining the admissibility of any person presenting at the border and the eligibility of such persons for parole. Further, USCIS will—of course—retain the authority to revoke or terminate an advance parole document at any time.
- Will administratively close all pending Form I-131 applications for advance parole filed under standards associated with the DACA program, and will refund all associated fees.
- Will continue to exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate.

This document is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.

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[1] (#_ftnref1) Significantly, while the DACA denial notice indicates the decision to deny is made in the unreviewable discretion of USCIS, USCIS has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria as

outlined in the June 15, 2012 memorandum, but still had his or her application denied based solely upon discretion.

[2] (#_ftnref2) *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

[3] (#_ftnref3) *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

[4] (#_ftnref4) *Id.*

[5] (#_ftnref5) *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

[6] (#_ftnref6) Memorandum from Janet Napolitano, Secretary, DHS to David Aguilar, Acting Comm'r, CBP, et al., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (June 15, 2012).

[7] (#_ftnref7) Memorandum from Jeh Johnson, Secretary, DHS, to Leon Rodriguez, Dir., USCIS, et al., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents" (Nov. 20, 2014).

Topics: Border Security (/topics/border-security), Deferred Action (/topics/deferred-action)

Keywords: DACA (/keywords/daca), Deferred Action for Childhood Arrivals (/keywords/deferred-action-childhood-arrivals)

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