Consolidated Case Nos. 18-15068, 18-15069, 18-15070, 18-15071, 18-15072, 18-15128, 18-15133, 18-15134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Plaintiffs/Appellees

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants/Appellants

On Appeal from the United States District Court
for the Northern District of California,
Honorable William H. Alsup, Presiding

PRINCIPAL AND RESPONSE BRIEF OF APPELLEES THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, JANET NAPOLITANO, AND CITY OF SAN JOSÉ

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INTRODUCTION

The Deferred Action for Childhood Arrivals program was created in 2012 to provide young immigrants who were brought to the United States as children with the opportunity to live and work openly in this country without fear of arrest, detention, and deportation. Like the prior deferred action programs created by each presidential administration over the last 60 years, DACA stems from a determination that its beneficiaries are making valuable contributions to American society and should not be priorities for deportation. The program has profoundly improved the lives of hundreds of thousands of DACA recipients—who have relied on its protections to form families, start careers, and pursue degree programs—and has benefitted the communities in which they live, work, and study. Yet on September 5, 2017, the Department of Homeland Security suddenly terminated DACA, telling its beneficiaries that they should "prepare for and arrange their departure from the United States."

The Administrative Procedure Act requires agency actions like the rescission of DACA to be substantively reasonable and reasonably explained. So long as there is "law to apply," the APA empowers the courts to set aside actions that are "arbitrary, capricious, or otherwise not in

accordance with law." Substantive rules must also comply with notice-and-comment procedures designed to ensure reasonable deliberation.

The rescission of DACA is arbitrary and legally indefensible. It immediately plunged 690,000 young immigrants into confusion and fear, and threatens the estimated 200,000 U.S.-citizen children of DACA recipients with the terrifying prospect of their parents' deportation. If allowed to take effect, the rescission would strip tens of thousands of DACA recipients each month of the right to lawfully work in the United States, forcing them to abandon promising careers as teachers, doctors, and soldiers. Schools such as the University of California would lose prized students, researchers, and teachers, and employers across the country would lose valued employees. The broader economy and the tax base would also suffer.

The government has not defended the rescission on policy grounds, nor does it deny its profoundly harmful consequences. Instead, it rests the rescission of DACA on a half-page letter from the Attorney General asserting that DACA "was effectuated . . . without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." But this statement lacks legal support and conflicts with the government's own prior legal opinions and positions, as well as the consensus of the last eleven presidential administrations, Congress, and the

Supreme Court that deferred action programs are lawful exercises of enforcement discretion.

Thus, as the district court carefully and correctly held, the rescission was based on a mistake of law. Moreover, the government failed to consider factors essential to any rational decision to rescind a policy like DACA—namely, the consequences of the rescission, such as its effects on the hundreds of thousands of young people who have built their lives in reliance on its protections.

The government's failure to provide a defensible rationale for its action suggests that it did not rescind DACA based on a good-faith determination that the program was unlawful. Instead, the evidence shows that the rescission of DACA was (1) based on demonstrably false assumptions about DACA's effects on jobs, crime, and terrorism; and (2) implemented in order to use DACA recipients as human bargaining chips to trade for the administration's immigration agenda, including a border wall and restrictions on legal immigration. But false assumptions and political hostage-taking do not satisfy the legal requirement that administrative action be "rational, neutral, and in accord with the agency's proper understanding of its authority." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536

(2009) (Kennedy, J., concurring). The district court's rulings should be affirmed.

STATEMENT OF THE ISSUES

1. Whether 8 U.S.C. § 1252(g) or 5 U.S.C. § 701(a)(2) strips the courts of jurisdiction to review the rescission of DACA.

2. Whether the district court acted within its discretion in partially enjoining the rescission based on its findings that (a) plaintiffs would likely succeed in demonstrating that the rescission of DACA was substantively unreasonable under the Administrative Procedure Act, and (b) the irreparable harm, balance of equities, and public interest factors all favored an injunction.

3. Whether the rescission of DACA was a substantive rule required to undergo notice-and-comment rulemaking procedures.

STATEMENT OF THE CASE

A. Overview And History Of DACA.

1. History of deferred action.

There are approximately 11 million undocumented immigrants in the United States potentially subject to removal, but "[t]here simply are not enough resources to enforce all of the rules and regulations presently on the books." SER1215. Moreover, in some circumstances, "application of the literal letter of the law would simply be unconscionable and would serve no

useful purpose." *Id.* Accordingly, using their statutory authority to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), DHS and its predecessor agency have frequently exercised discretion not to remove otherwise removable immigrants. SER1330.

The need for consistency and administrative efficiency has led every presidential administration since 1956 to exercise this discretion *programmatically*—by identifying *categories* of immigrants as low priorities for removal. Beginning in 1956, President Eisenhower paroled into the United States foreign-born orphans who had been adopted by American citizens overseas, SER1224, as well as tens of thousands of Hungarian refugees after the unsuccessful Hungarian revolution, SER1226. The Eisenhower, Kennedy, Johnson, and Nixon Administrations paroled more than 600,000 Cubans into the United States through a series of discretionary programs. SER265. The Reagan and George H.W. Bush Administrations instituted, then expanded, the Family Fairness Program, which provided extended voluntary departure to approximately 1.5 million family members of immigrants who were in the process of legalizing their immigration status under the Immigration Reform and Control Act. SER239, 1228. The Clinton Administration established a deferred action program for individuals self-petitioning for relief under the Violence Against Women Act of 1994.

SER1234. The George W. Bush Administration established a deferred action program in 2005 to grant temporary relief to thousands of foreign students who, because of Hurricane Katrina, could not satisfy the requirements of their student visas. SER1248. The history of these and many other deferred action programs is set out in more detail at SER265-66.

For decades, the legality of deferred action programs was commonly accepted, none were challenged in court, and Congress recognized and incorporated several of these deferred action programs in amendments to the Immigration and Nationality Act (INA).[1] Virtually all of the prior programs ended either because their protections were codified by statute or regulation, or because the program was designed from the outset to address a temporary disruption (e.g., the program for foreign students affected by Hurricane Katrina). SER265-66. The rescission of DACA is the first time that the government has terminated a deferred action program and subjected long-term United States residents to deportation.

[1] *See, e.g.*, 8 U.S.C. § 1227(d)(2) (U visa and T visa applicants are eligible for "deferred action"); 8 U.S.C. § 1154(a)(1)(D)(i)(II) (petitioners under the Violence Against Women Act were eligible for "deferred action and work authorization"); 8 U.S.C. § 1151 note (certain immediate family members of certain U.S. citizens "shall be eligible for deferred action").

2. The establishment and benefits of DACA.

On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano issued a memorandum establishing DACA (the "2012 DACA Memorandum"). ER140. Under DACA, "certain young people who were brought to this country as children and know only this country as home" are able to apply for discretionary relief from removal for renewable two-year periods. ER141.

Applicants are eligible for DACA if they (1) came to the United States under the age of sixteen; (2) have continuously resided in the United States since June 15, 2007, and were present in the United States both on June 15, 2012, and on the date they requested DACA; (3) are in school, have graduated from high school, have obtained a GED, or have been honorably discharged from the United States military or Coast Guard; (4) do not have a significant criminal record and are not a threat to national security or public safety; (5) were under the age of 31 as of June 15, 2012; and (6) do not have lawful immigration status. ER141-43, 145-46.

DACA applicants are required to provide the government with sensitive personal information, submit to a rigorous background check, and pay a substantial application fee. SER1308-14, 1318-25, 1328. The government launched an extensive outreach campaign to promote DACA,

emphasizing that the information DACA applicants provided to the government would not be used in immigration enforcement proceedings absent special circumstances. ER134-36; SER1303, 1330.

Since 2012, nearly 800,000 young people have received deferred action under DACA. SER1480. During the period of their DACA grants, recipients cannot be arrested, detained, or removed solely on the basis of their undocumented status, and they no longer accrue "unlawful presence" for purposes of the INA's bars on re-entry, *see* 8 U.S.C. § 1182(a)(9)(B)-(C). Like all beneficiaries of deferred action, DACA recipients are eligible to obtain employment authorization and social security numbers. *See* 8 C.F.R. § 274a.12(c)(14). The ability to lawfully work allows them to better support their families, pay for their educations, and pursue their chosen careers. SER1074-75. DACA recipients may also obtain "advance parole"—permission to travel abroad for humanitarian, educational, or employment purposes. *See* 8 C.F.R. § 212.5(f); ER161.

In addition to the benefits for its recipients, DACA has also conferred benefits on American society more broadly. DACA recipients have a 91 percent employment rate, and their average hourly wages have increased by 81 percent, often because of professional opportunities that take advantage of their educational achievements. SER1145, 1148. This has led to

corresponding increases in economic output and tax payments. SER449-50, 1150. An estimated 94 percent of DACA recipients report that because of DACA, they pursued educational opportunities previously unavailable to them, and 72 percent are pursuing a bachelor's degree or higher. SER1152. Despite having lived in the United States an average of nearly 19 years, it was only after receiving DACA that 90 percent of recipients were first able to obtain a driver's license. SER1154. Almost half of those who received drivers' licenses volunteered to become organ donors. *Id.*

3. Defendants' maintenance of and support for DACA.

No court has ever held DACA unlawful. Until September 2017, the government consistently maintained that the program was legal. In a 2014 opinion, the Office of Legal Counsel memorialized its advice that DACA "would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis." SER243 n.8. And the government argued in this Court that DACA was "a valid exercise of the Secretary's broad authority and discretion to set policies for enforcing the immigration laws." Br. of United States as Amicus Curiae in Support of Appellees, *Ariz. Dream Act Coal. v. Brewer*, 2015 WL 5120846, at *1 (9th Cir. Aug. 1, 2015).

Even after the change in administrations, Secretary of Homeland Security John Kelly in February 2017 specifically exempted DACA from the administration's broad repeal of other immigration directives, ER168, and characterized "DACA status" as a "commitment . . . by the government towards the DACA person," SER1334. President Trump himself emphasized that "dreamers should rest easy" and said that the "policy of [his] administration [is] to allow the dreamers to stay." SER1346-47. Similarly, the President tweeted on September 14, 2017, "Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really!....." ER45.

4. Defendants' abrupt rescission of DACA.

In June 2017, government officials, including Attorney General Sessions, began communicating with several state attorneys general who had previously challenged a separate deferred action program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). SER1442-43. Those discussions culminated in a June 29, 2017 letter from nine states to Attorney General Sessions, demanding that the government agree to "phase out the DACA program" by September 5, 2017, or else they

would seek to amend their earlier DAPA lawsuit to also challenge DACA. ER275.

On September 4, 2017, Attorney General Sessions sent a half-page letter to Acting Secretary of Homeland Security Elaine Duke advising that DHS "should" rescind DACA because it purportedly "was effectuated by the previous administration through executive action, without proper statutory authority," and constituted an "unconstitutional exercise of authority by the Executive Branch." ER176. The letter also stated summarily that DACA "has the same legal and constitutional defects" as the DAPA program, which had been preliminarily enjoined in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (*Texas II*), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). But the *Texas* opinion addressed only DAPA, not DACA.[2] (Although the Fifth Circuit in *Texas* enjoined certain minor expansions of DACA that had been proposed in connection with DAPA—a slight lengthening of the period of the DACA grant and a relaxation of the eligibility requirements—the court provided no reasoning for that aspect of the injunction.)

[2] The Supreme Court's divided affirmance carried no precedential weight. *See Neil v. Biggers*, 409 U.S. 188, 192 (1972).

The morning after sending his letter to the Acting Secretary, Attorney General Sessions held a press conference announcing the rescission of DACA. He asserted that the program "is vulnerable to the same legal and constitutional challenges that the courts recognized with respect to the DAPA program." SER1353-55. In his press conference, Attorney General Sessions also stated, without support, that DACA had "denied jobs to hundreds of thousands of Americans" and increased the "risk of crime, violence and even terrorism." SER1354. He also claimed that DACA "contributed to a surge of unaccompanied minors on the southern border that yielded terrible humanitarian consequences." SER1353. These claims were all false. The undisputed economic evidence shows that DACA has expanded the economy, and many DACA recipients have started businesses employing U.S. citizens. SER1463. The DACA population is defined to include only immigrants without significant criminal records who have been assessed not to pose a risk to public safety. SER223. And DACA by its terms is open only to a fixed group of individuals who had arrived in the United States prior to June 15, 2007—five years before the program was announced—and could not have been the cause of unaccompanied minors arriving at the southern border between 2012 and 2017.

After the Attorney General's press conference, Acting Secretary Duke issued a memorandum formally rescinding DACA. ER125. The four-page memorandum summarizes the history of DAPA and DACA, briefly describes the *Texas* litigation, and mentions the Attorney General's half-page letter. The memorandum then provides just two sentences describing why the DACA program, benefiting 690,000 people, was being rescinded:

> 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.

ER130. The rescission memorandum instructed DHS to immediately stop accepting new DACA applications; to accept renewal applications only from individuals whose current deferred action would expire before March 5, 2018, and to accept such renewals only through October 5, 2017; and to immediately deny all pending and future advance parole applications. *Id.* These steps would cause DACA grants to expire on a rolling basis beginning on March 5, 2018. *Id.*

5. The consequences of the rescission.

The rescission memorandum does not acknowledge or consider the benefits of DACA or the harm that the rescission will inflict on DACA's

recipients, their families, schools, employers, and communities. ER125. In support of their motion for a preliminary injunction, plaintiffs made an overwhelming showing of these facts, *see* SER267-1202, which is summarized only briefly below.

Consequences for DACA recipients. Hundreds of thousands of DACA recipients face personal, professional, and economic losses as a result of the rescission. Without injunctive relief, each day beginning March 5, 2018, an average of more than one thousand individuals would begin to lose their DACA grants, ER45, and immediately become vulnerable to arrest, detention, and removal from the United States. If removed from the United States, many would be subject to a 10-year or permanent bar on re-entry because they accrued periods of "unlawful presence" prior to the creation of DACA. *See* 8 U.S.C. § 1182(a)(9)(B)-(C).

If their work authorizations were permitted to expire, DACA recipients would no longer be legally employable in the United States. They would lose the jobs that support their families. *See, e.g.*, SER546, 1068, 1112, 1150. They, and their families, would lose their employer-sponsored healthcare. SER714, 1087. The rescission already has damaged the health of DACA recipients by causing anxiety, depression, and fear. SER1476. The

University of California has observed an increase in demand for mental health services, which it cannot fully meet. SER611-12, 894.

The rescission of DACA will inflict grave harm on recipients like Mitchell Santos-Toledo. Mitchell arrived in the United States from Mexico when he was two years old. SER1002. Mitchell's DACA grant and work authorization enabled him to attend college and support himself and his family by working multiple jobs. SER1006. DACA also gave Mitchell the ability to obtain health insurance and a driver's license, and to travel on an airplane for the first time using his new identification. SER1005-06. Mitchell graduated from the University of California, Berkeley, as his class commencement speaker with Highest Distinction, and is currently a first-year student at Harvard Law School. SER1007. The rescission was announced just days after he took on large law school loans with the expectation that he could repay them by practicing law in the United States. SER1007-08. Without DACA, Mitchell will be unable to work as a lawyer in the United States, and he faces constant fear that the rescission of DACA will force him to leave the only country he knows. SER1002, 1008.

Consequences for families of DACA recipients. Approximately 26 percent of the 690,000 current DACA recipients have U.S.-citizen children, 17 percent have a U.S.-citizen spouse, and nearly 60 percent have a U.S.-

citizen sibling. SER1155. Over 70 percent of DACA recipients support their families financially. SER1150. DHS's statement that DACA recipients should "prepare for and arrange their departure from the United States," SER1468, therefore presents DACA recipients with the decision whether to uproot their loved ones from their country of citizenship, where DACA recipients can no longer legally work to support them, or to leave them behind.

Consequences for employers and schools. Employers of DACA recipients, including the University of California and the City of San José, would lose skilled employees as a result of the rescission. The University faces the loss of research expertise, exchange of ideas, and cultural vitality that are central to their academic missions. *See, e.g.*, SER290-91, 610, 614, 832-33, 1102. If DACA were rescinded, they would also lose their investments in time, financial aid, research funding, housing benefits, and other support for DACA students who can no longer continue their education. *See, e.g.*, SER365, 832. Some DACA recipients have already decided to cancel their enrollment at the University of California because the rescission would foreclose their ability to work during and after their education. SER612-13.

Consequences for the economy. DACA has benefited the economy by increasing DACA recipients' earnings and growing the tax base. ER1454; SER359, 426, 449-51, 1149. As entrepreneurs and employees, DACA recipients have been achieving financial independence and purchasing cars and homes, creating additional economic activity and tax revenue for state and local governments. SER535, 1150, 1454. Over a ten-year period, it is estimated that the rescission will cost the country $215 *billion* in lost GDP and $60 *billion* in lost federal tax revenue. SER359.

B. Procedural History.

1. The district court proceedings.

The University of California, the City of San José, four states, a group of DACA recipients, and other plaintiffs brought actions in the Northern District of California alleging that the decision to rescind DACA was unlawful. ER69-268. Plaintiffs brought claims under the Administrative Procedure Act, alleging that the rescission was arbitrary and capricious and failed to follow the APA's notice-and-comment rulemaking procedures. Certain plaintiffs also alleged that DACA's rescission violated their substantive and procedural due process rights, the Equal Protection Clause, and principles of equitable estoppel. ER121-23, 192, 265-67. Similar challenges are now pending in the Eastern District of New York, the District

of Maryland, and the District Court for the District of Columbia. *See Batalla Vidal v. Nielson*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018) (enjoining rescission of DACA); *Casa De Maryland v. DHS*, 2018 WL 1156769, at *1-2 (D. Md. Mar. 5, 2018) (denying injunction); *NAACP v. Trump*, No. 17-cv-2325 (D.D.C.).

The parties agreed that the government would quickly produce the administrative record, which is the foundation of an APA case. SER20. Yet the government produced only 14 publicly-available documents totaling 256 pages. *See* SER2. This Court, and every court to review the administrative record, has concluded that it is incomplete. *See, e.g.*, SER12-14; *In re United States*, 875 F.3d 1200, 1205-07 (9th Cir. 2017), *cert. granted*, *judgment vacated*, 138 S. Ct. 443 (2017); *In re Nielsen*, No. 17-3345, slip op. at 1 (2d Cir. Dec. 27, 2017); *Batalla Vidal v. Duke*, 2017 WL 4737280, at *1-5 (E.D.N.Y. Oct. 19, 2017). The record has not yet been completed because, on review of an earlier mandamus petition, the Supreme Court ordered the record issues to be deferred while the district court resolved the government's threshold justiciability arguments, which are at issue in this appeal. *See In re United States*, 138 S. Ct. at 445.

Plaintiffs sought a preliminary injunction, and defendants moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

On January 9, 2018, the district court granted plaintiffs' motion for a preliminary injunction and denied the government's Rule 12(b)(1) motion, finding that it possessed jurisdiction to decide plaintiffs' APA claims. ER46-49.

The court found that it had jurisdiction. It held that 8 U.S.C. § 1252(g), which bars judicial review of "the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders," does not apply here, as "plaintiffs do not challenge any particular removal but, rather, challenge the abrupt end to a nationwide deferred-action and work-authorization program." ER21. The court likewise found that, with the exception of two of the plaintiff states, all plaintiffs had standing to sue. ER23-28.

The court further held that the rescission did not implicate 5 U.S.C. § 701(a)(2), which exempts decisions "committed to agency discretion by law" from APA review. The court observed that the section 701(a)(2) exemption is "very narrow" and applies only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." ER18 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). The court found that there is "law to apply" here because the "main, if not exclusive" rationale for ending DACA was its

alleged illegality. ER21. The court also explained that "major policy decisions" like DACA are not akin to the "day-to-day agency nonenforcement decisions" that might be immune from review. ER19 (quoting *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988)).

Having confirmed its jurisdiction, the court granted plaintiffs' motion for preliminary injunction. It held that plaintiffs had demonstrated a likelihood of success on the merits of their claim that the rescission was arbitrary and capricious, because the agency's decision rested on the flawed legal premise that DACA was unlawful. ER29-43. The court found that DACA was within DHS's authority to set enforcement priorities, reasoning that each element of the program is grounded in authority granted or recognized by Congress or the Supreme Court. ER29-33. The court explained that the government's contrary conclusion relied on an untenable analogy to the separate DAPA program. ER33-37. Because the rescission of DACA was based on a flawed legal premise, the district court held that the rescission was likely arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706. Further, the court found that the government's alternative rationale for the rescission—that DACA posed a risk of future litigation by certain state attorneys general—

was an improper post hoc rationalization that in any event was substantively unreasonable under the APA. ER43.

The district court also held that plaintiffs had satisfied the remaining factors for injunctive relief, including that they would suffer irreparable harm absent the court's intervention. ER43-45. It found that the government had identified no significant equities or public interest in opposition. Indeed, the President purports to support the DACA program. ER45.

The court issued a carefully tailored injunction, ordering the government to "allow[] DACA enrollees to renew their enrollments" under the terms applicable prior to the rescission. ER46-48. For each renewal application, the district court permitted the government to "take administrative steps to make sure fair discretion is exercised on an individualized basis." ER46. The district court made clear that nothing in its order prohibited DHS "from proceeding to remove any individual, including any DACA enrollee, who it determines poses a risk to national security or public safety, or otherwise deserves, in its judgment, to be removed." *Id*. The court did not require DHS to process DACA applications from individuals who had not previously received deferred action. *Id*. Nor did it require DHS to permit DACA recipients to apply for advance parole. ER47. Although the court recognized that the issues it decided under Rule 12(b)(1) are

reviewable on appeal of its preliminary injunction, it certified those issues for interlocutory appeal under 28 U.S.C. § 1292(b) "to avoid any problem concerning scope of review." ER49.

On January 12, 2018, the district court issued a separate order granting in part and denying in part the government's motion to dismiss under Rule 12(b)(6). ER50-63. That order sustained plaintiffs' substantive APA and equal protection claims, but dismissed plaintiffs' notice-and-comment APA claims among others. *Id*. On the notice-and-comment claims, the court reasoned that even though the rescission appeared to be substantive and thereby subject to notice and comment, because the original promulgation of DACA had not undergone notice-and-comment rulemaking, the rescission could not be subject to those procedures. ER53. The court again certified its rulings for interlocutory appeal under 28 U.S.C. § 1292(b). ER62-63.

2. Proceedings in this Court.

On January 16, the government appealed the district court's preliminary injunction order. ER67-68.[3] The government also petitioned for interlocutory review of certain aspects of the district court's orders granting

[3] On January 18, 2018, the government also filed a petition for a writ of certiorari before judgment in the Supreme Court, asking to skip this Court's review entirely. The petition was denied on February 26, 2018.

in part and denying in part the government's motion to dismiss. Plaintiffs did not oppose the government's petition, and on January 22, 2018, cross-petitioned to certify the district court's dismissal of their notice-and-comment claim. Other plaintiffs petitioned to certify the dismissal of their substantive due process claims. This Court granted all the petitions for interlocutory appeal, consolidated those appeals with the preliminary injunction appeal, and ordered expedited briefing. *See* No. 18-15128, Dkt. 1; No. 18-15133, Dkt. 1; No. 18-15134, Dkt. 1; No. 18-15068, Dkt. 21.

STANDARD OF REVIEW

This Court reviews de novo the district court's orders granting in part and denying in part the government's motion to dismiss. *Fortyune v. City of Lomita*, 766 F.3d 1098, 1101 (9th Cir. 2014). The factual allegations in the complaints are taken as true and all reasonable inferences must be drawn in favor of the party opposing dismissal. *Snyder & Assocs. Acquisitions LLC v. United States*, 859 F.3d 1152, 1156-57 (9th Cir. 2017). A motion to dismiss under Rule 12(b)(6) may be granted only if the complaint lacks a cognizable legal theory or sufficient facts to show that the claim is plausible on its face. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). Where a motion to dismiss challenges subject matter jurisdiction under Rule 12(b)(1), the party invoking the federal court's jurisdiction bears

the burden of establishing jurisdiction. *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1151 (9th Cir. 2017).

This Court conducts only a "limited and deferential" abuse-of-discretion review of the district court's decision to grant a preliminary injunction. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011); *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999). A preliminary injunction is warranted where the plaintiffs establish that (1) they are "likely to succeed on the merits," (2) they are "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities" tips in their favor, and (4) an "injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

SUMMARY OF ARGUMENT

1. The district court correctly rejected the government's threshold defenses. The district court properly held that plaintiffs' claims are justiciable and within the court's subject matter jurisdiction. Contrary to the government's assertions, the jurisdiction-stripping provision in 8 U.S.C. § 1252(g) bars review only of a "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders," and does not preclude review of the wholesale rescission of the DACA program. By its

plain text, the provision does not apply to this case, which involves none of those three "decision[s] or action[s]."

The restriction on review of actions "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), is also inapplicable. The APA strongly favors judicial review of administrative action; the section 701(a)(2) bar applies only in the "rare instances" where there is simply "no law to apply" and thus no basis for judicial review. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Here, the entire foundation for agency action was a purported assessment of the legality of DACA. Moreover, abundant legal sources grounded the district court's decision, including the DACA memorandum, the text of the INA, the precedents of prior deferred action programs, and an OLC legal opinion. In cases like this one involving a "major policy decision," the courts have repeatedly held that judicial review is proper. *Nat'l Treasury*, 854 F.2d at 496-97; *Mont. Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. Fed. Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990).

2. The district court properly exercised its discretion to enjoin the rescission of DACA. The district court's injunction is an appropriate exercise of discretion. The government does not dispute that the equities overwhelmingly favor the injunction and that the rescission will cause

catastrophic and irreparable harm to DACA recipients, their families, employers, schools, and communities.

The district court also correctly found that plaintiffs have a strong likelihood of success on the merits of their APA claims. The APA demands that the basis for agency action be adequately disclosed and substantively reasonable. The government's murky and unsupported two-sentence statement of the grounds for its action—that "taking into consideration" the DAPA litigation and the Attorney General's half-page letter, "it is clear" that DACA should be terminated—fails these basic requirements.

To the extent the rescission is premised on a finding that DACA was an unlawful exercise of executive authority, as the Attorney General stated, it is premised on an error of law. As the district court correctly found, DACA is a lawful exercise of DHS's statutory authority to establish national immigration enforcement policies and priorities, and closely resembles a half-century of similar deferred action programs that have been acknowledged by both Congress and the courts.

The government's post hoc "litigation risk" rationale, which would authorize agencies to rescind vital programs based not on an actual judgment about the legal merits, but rather based on an asserted fear of litigation, is equally arbitrary. The government claims that the Texas DAPA litigation

compelled the rescission of DACA, but the record contains no reasonable litigation risk assessment, which would have had to consider the distinctions between DAPA and DACA, the available defenses to any litigation over DACA's legality, and modifications to the program that could have mitigated any litigation risk.

The arbitrariness of the rescission is also apparent from the government's failure to consider, at all, the policy consequences of its actions. The government gave not a word of consideration to the interests of the 690,000 DACA recipients and their families, schools, and employers, who have deeply relied on DACA. It is a minimum requirement of rational decision-making that an agency reversing a well-established policy must at least give "a reasoned explanation . . . for disregarding facts and circumstances . . . engendered by the prior policy." *Fox*, 556 U.S. at 515-16; *see also id.* at 536 (Kennedy, J., concurring); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). The government's failure to consider the consequences of its actions, or ways to mitigate those consequences, renders the rescission unlawful.

The irregularity of the government's decision-making process, the obvious defects in its analysis, and its shifting and contradictory positions suggest that the stated reasons for rescinding DACA are not the true reasons.

The record suggests that two unstated motivations provide the actual basis for the rescission, neither of which can be defended. *First*, in announcing that DACA would be rescinded, Attorney General Sessions asserted that DACA had taken jobs from U.S. citizens and had contributed to crime, violence, and terrorism—specious assertions that were not included in the rescission memorandum. *Second*, it now appears that DHS rescinded DACA as part of a political strategy to hold DACA and its recipients hostage to exchange for legislative concessions such as a border wall and restrictions on legal immigration. These motivations demonstrate that the Acting Secretary's stated reasons for the rescission are pretextual and therefore cannot support the agency's action.

3. The scope of the district court's injunction is reasonable. The district court properly enjoined defendants from proceeding with the rescission. The government claims that this is an improper "nationwide" injunction benefiting non-parties, but the scope of the injunction is appropriate to the violation the district court found. Federal courts undoubtedly may exercise their authority over defendants within their jurisdiction to order them to stop violating federal law, whether or not such an order has consequences for third parties. Moreover, in an APA case, the final remedy, indeed the only remedy, is for agency action to be "set aside."

It is only logical that any provisional remedies match the scope of the final remedies. In addition, under the circumstances of this case, where the University of California draws from a nationwide pool for its student body, and where DACA recipients are mobile, complete relief could not be afforded by a more limited injunction.

4. This Court can affirm on the additional ground that the rescission was procedurally improper. The district court's injunction also can be sustained on the ground that the rescission was announced without undergoing the required notice-and-comment rulemaking procedures. The APA requires notice and comment for all "substantive" rules that bind the agency's future conduct. Here, the rescission is substantive on its face—it requires that DACA applications and renewals be denied across the board, and it instructs that all current and future applications for advance parole be denied. Unlike DACA itself, which provides a framework guiding agency discretion but requires a discretionary judgment to be made in each case, the rescission eliminates agency discretion and mandates specific outcomes in individual cases.

The district court reasoned that the rescission of DACA need not undergo notice-and-comment rulemaking because DACA had been adopted without those procedures. But the adoption and rescission are not

symmetrical. One is a non-binding exercise of discretion; the other is a mandatory abolition of discretion. Moreover, because the rescission of a rule is a new "rulemaking" for purposes of the APA, an arguable procedural defect in adopting DACA would not excuse the government from complying with the proper procedures before rescinding it.

The district court's injunction should be affirmed, and the case remanded for further proceedings.

ARGUMENT

I. Plaintiffs' Claims Are Subject To Judicial Review.

At the threshold, the government contends that the rescission of DACA, no matter how lawless it may be, is immune from judicial review under 8 U.S.C. § 1252(g) and 5 U.S.C. § 701(a)(2). The district court correctly rejected these arguments.

A. Section 1252(g) Does Not Bar Judicial Review.

Section 1252(g) provides that "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*." 8 U.S.C. § 1252(g) (emphasis added). Like other jurisdiction-stripping provisions, section 1252(g) is construed narrowly: "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial

review." *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 718 (9th Cir. 2011) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967)).

The Supreme Court has held that section 1252(g) is strictly limited to a "'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders,'" *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (*AADC*) (quoting 8 U.S.C. § 1252(g)) (emphasis omitted), and has rejected the government's argument that section 1252(g) is "a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review,'" *id.* Instead, the Court held that "[t]he provision applies only to [the] three discrete actions" specifically identified in the text. *Id.* With respect to the "many other decisions or actions that may be part of the deportation process," the Court found that "[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." *Id*; *see also Jennings v. Rodriguez*, No. 15-1204, slip op. at 10 (U.S. Feb. 27, 2018) (op. of Alito, J.) ("[W]e read the language [in section 1252(g)] to refer to just those three specific actions themselves." (citing *AADC*, 525 U.S. at 482-83)).

Under *AADC*, section 1252(g) does not preclude review of even an individual deportation proceeding, other than at the particular procedural

junctures mentioned in the text. Here, section 1252(g) has even less relevance. The parties to this brief are institutional and government plaintiffs that challenge the wholesale rescission of the DACA program, not a decision to "commence proceedings . . . against any alien," as the government asserts. AOB26.

The district court's ruling is thus consistent with an unbroken line of cases rejecting the government's invocation of section 1252(g) to block challenges to enforcement policies. *See, e.g.*, *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (concluding that section 1252(g) does not limit jurisdiction to grant injunctive relief in a class action challenging the INS's advance parole policy).[4] The government identifies no case applying section 1252(g) to bar review of a programmatic immigration policy decision, and this case should not be the first.

[4] *Accord Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998) ("By its terms, [section 1252(g)] does not prevent the district court from exercising jurisdiction over the plaintiffs' due process claims [because such claims] constitute 'general collateral challenges to unconstitutional practices and policies used by the agency.'"); *Ramirez Medina v. DHS*, 2017 WL 5176720, at *8 (W.D. Wash. Nov. 8, 2017) (concluding that section 1252(g) did not strip the court of jurisdiction over claim that defendants did not follow their own policies and procedures). Even the Fifth Circuit in *Texas* found that it had jurisdiction. *See* 809 F.3d at 164 (concluding that section 1252(g) did not apply to a challenge to the DAPA program).

B. The Rescission Of DACA Is Not "Committed To Agency Discretion By Law."

The district court also correctly rejected the government's argument that the rescission is immunized from judicial review as an action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

1. The APA strongly favors judicial review of administrative actions.

The APA, enacted in 1946, is the "bill of rights for the new regulatory state." George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1678 (1996). The APA reconciled the tension between the expanding powers of the administrative state, on one hand, and the rights of those subjected to those powers, on the other, by imposing procedural requirements on agency decision-making and creating a robust process of judicial review. Thus, the APA "manifests a congressional intention that it cover a broad spectrum of administrative actions." *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988) (citation omitted). The APA provides that any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702; *see id.* at § 704. The text and purpose of the APA give rise to a "strong presumption favoring judicial review of administrative

action," which the government "bears a heavy burden" to overcome. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). This presumption applies equally in the immigration context. *See INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001) (applying "strong presumption in favor of judicial review of administration action" in immigration context).

Section 701(a)(2) removes jurisdiction over decisions "committed to agency discretion by law," but this "very narrow" exception applies only in "rare instances." *Overton Park*, 401 U.S. at 410. The provision does not imply that agency decisions involving an element of discretion are immune from judicial review, for the APA explicitly contemplates review for "abuse of discretion." 5 U.S.C. § 706; *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1071 (9th Cir. 2015) ("Section 701(a)(2) . . . has never been thought to put all exercises of discretion beyond judicial review."). Rather, the jurisdictional bar applies only where there is absolutely "no law to apply," that is, where a court "would have no meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830; *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993).

Where there *is* any "law to apply"—such as "statutes, regulations, established agency policies, or judicial decisions that provide a meaningful standard against which to assess" agency action, *Mendez-Gutierrez v.*

Ashcroft, 340 F.3d 865, 868 (9th Cir. 2003)—the courts are empowered to review agency action.

2. There is law to apply to plaintiffs' claims challenging the DACA rescission.

The district court correctly concluded that section 701(a)(2) does not strip the courts of jurisdiction to review the rescission of DACA and that there was "law to apply."[5] Because the rescission rests on a legal determination—that DACA exceeded the Executive's authority under the INA and the Constitution—the "law to apply" is the legal sources that purportedly informed the agency's decision. *See, e.g.*, *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) (holding agency's "Enforcement Policy Statement" reviewable because its "interpretation has to do with the substantive requirements of the law"); *Mont. Air*, 898 F.2d at 757 ("Nothing in the Administrative Procedure Act . . . precludes review of a proper plaintiff's timely challenge of an agency's announcement of its interpretation of a statute."). As the district court observed, the government's

[5] We focus here on the substantive APA claim that forms the basis for the injunction. Plaintiffs' notice-and-comment claim, *see* Section III, *infra*, is plainly justiciable, because the relevant "law to apply" is found in the APA itself. *Serrato v. Clark*, 486 F.3d 560, 569 (9th Cir. 2007) ("An agency's obligation to comply with the APA's notice and comment provisions is an administrative requirement that must be fulfilled, notwithstanding whether an agency's action is susceptible to judicial review.").

"main, if not exclusive, rationale for ending DACA was its supposed illegality," the evaluation of which "is a quintessential role of the courts." ER21.

The courts may also evaluate the rescission of DACA by reference to other legal sources, including "other statutes, the history of the use of deferred action by immigration authorities, and the OLC Opinion." *Batalla Vidal*, 2017 WL 5201116, at *10; *see also Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (concluding that the "various memoranda" used by the INS to implement an otherwise discretionary policy provided sufficient "law to apply"). Moreover, because the rescission is an agency's termination of its own program, the DACA memorandum itself supplies a relevant benchmark in the analysis of whether the agency's reversal of course was reasonable and reasonably explained. *See Robbins v. Reagan*, 780 F.2d 37, 47 (D.C. Cir. 1985) ("[r]escissions of prior obligations" are "clearly" reviewable); *id.* at 45 ("Once an agency has declared that a given course is the most effective way of implementing the statutory scheme, the courts are entitled to closely examine agency action that departs from this stated policy.").

The government contends that there is "law to apply" only when statutory standards expressly "circumscrib[e] agency enforcement discretion," AOB23, but this approach inverts the proper legal standard.

There is a strong presumption of reviewability even where the applicable statute "grants broad discretion" and there are no "clear statutory guidelines." *Robbins*, 780 F.2d at 45; *see also Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 892 (9th Cir. 2018) (reviewing Board of Immigration Appeals' action even though "there is no applicable statutory or regulatory language"). It is only where action is affirmatively "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), such that "the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised," *Robbins*, 780 F.2d at 45, that the courts have been displaced.

3. The rescission of DACA is reviewable, programmatic agency action.

Notwithstanding the sources of law that the district court could and did apply, the government insists that the rescission is immune from judicial review—a position rejected by every court to consider the issue. *See Batalla Vidal v. Duke*, 2017 WL 5201116, at *9-10 (E.D.N.Y. Nov. 9, 2017); *Casa De Maryland*, 2018 WL 1156769, at *7. To support its expansive interpretation of section 701(a)(2), the government relies heavily on *Heckler v. Chaney*, in which the Supreme Court concluded that individual agency decisions not to initiate enforcement proceedings are "presumptively

unreviewable." 470 U.S. at 832. But properly understood, *Chaney* demonstrates why section 701(a)(2) does not preclude review in this case.

In *Chaney*, the Supreme Court considered FDA's denial of a request from prison inmates to take enforcement action to preclude the use of certain drugs in human executions. *Id*. at 823-25, 830-33. The Supreme Court concluded that the FDA's non-enforcement decision was non-justiciable, observing that "an agency decision not to enforce" usually is not governed by "judicially manageable standards." *Id.* at 830-31. The Court explained that non-enforcement decisions (1) "often involve[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," *id*. at 831; (2) do not implicate the agency's exercise of "*coercive* power over an individual's liberty or property rights, and thus do[] not infringe upon areas that courts often are called to protect," *id.* at 832; and (3) "share[] to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch," *id.* None of these factors applies here.

First, the rescission did not involve the "complicated balancing of a number of factors" that rendered the non-enforcement decision in *Chaney* unreviewable. Contrary to the government's suggestion, DHS never

considered how its "resources are best spent" or how the rescission "fits [with] the agency's overall policies." AOB17. Instead, the agency's decision appears to rest exclusively on the legal determination that DACA is unlawful, and does not reflect any balancing of any factors—let alone the "mingled assessments of fact, policy, and law that drive an individual enforcement decision." *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676-77 (D.C. Cir. 1994); *Gonzalez-Caraveo*, 882 F.3d at 892 (reviewing agency action that "is not the sort of decision that 'involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise'" (quoting *Chaney*, 470 U.S. at 831)).

Chaney itself acknowledged that review might be available where, as here, the agency's decision was "based solely on the belief that it lacks jurisdiction" to act. 470 U.S. at 833 n.4. *See also Mont. Air*, 898 F.2d at 756 ("agency nonenforcement decisions are reviewable when they are based on a belief that the agency lacks jurisdiction"). Having failed to make any assessment of immigration policy or the effective use of agency resources, the government cannot defend the rescission based on phantom policy judgments that it never made.

Second, while *Chaney* reasoned that decisions declining to take enforcement action do not implicate the exercise of "coercive power over an

individual's liberty or property rights, and thus do[] not infringe upon areas that courts often are called upon to protect," 470 U.S. at 832 (emphasis omitted), the rescission is an affirmative act that *revokes* the availability of prosecutorial discretion and subjects hundreds of thousands of DACA recipients to the prospect of removal—an indisputable exercise of coercive state authority. *See, e.g.*, *Robbins*, 780 F.2d at 47 ("[R]escissions of commitments, whether or not they technically implicate liberty and property interests as defined under the fifth and fourteenth amendments, exert much more direct influence on the individuals or entities to whom the repudiated commitments were made."). As *Chaney* explained, "when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner." 470 U.S. at 832.[6]

[6] The government cites *Alaska Fish & Wildlife Federation & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933 (9th Cir. 1987), in which this Court concluded that a decision not to enforce certain laws with respect to subsistence hunting, like the non-enforcement decision in *Chaney*, was unreviewable. AOB21. *See id.* at 938 ("A decision not to enforce a law is generally committed to an agency's absolute discretion." (citing *Chaney*, 470 U.S. at 831-32)). If the *Alaska Fish* policy had been rescinded because the agency believed its policy was unlawful, that action—like the rescission—would have been subject to judicial review. *Cf. Montana Air*, 898 F.2d at 757.

Third, the rescission is not an individualized enforcement decision that can be analogized to a prosecutor's discretion not to indict. Unlike a one-off decision not to enforce or indict—a choice that has "traditionally been 'committed to agency discretion," *id.*—the rescission abolishes an entire program that will affect hundreds of thousands of individuals, families, and communities. Accordingly, courts applying *Chaney* consistently "distinguish[] between 'an agency's statement of a *general enforcement policy*' and a '*single-shot* nonenforcement decision,' the former being reviewable even though the latter may not be." *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (first emphasis added); *see also Edison Elec.*, 996 F.2d at 333 (reviewing EPA's "Enforcement Policy Statement"). The categorical nature of the rescission—which prohibits all initial requests for DACA received after September 5, 2017, and all requests for DACA renewals received after October 5, 2017—further underscores that the agency's decision was "abstracted from the particular combinations of facts the agency would encounter in individual enforcement proceedings." *Crowley*, 37 F.3d at 677.[7]

[7] The government maintains that if the rescission is reviewable, then a host of criminal charging policies will become reviewable. AOB24-25. But the enforcement of criminal statutes is fundamentally different from civil enforcement actions because criminal prosecutions implicate core functions

The Supreme Court's decisions in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (*BLE*) and *Lincoln v. Vigil*, 508 U.S. at 182, are straightforward applications of *Chaney* that cannot salvage the government's argument. Both cases involved an agency action that had been "traditionally" unreviewable: the denial of a petition to reconsider based on material error in *BLE*, 482 U.S. at 282, 284, and the allocation of a lump sum appropriation in *Lincoln*, 508 U.S. at 192.[8] Here, in contrast, there is no tradition of treating as unreviewable an agency's termination of an entire

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of the Executive Branch governed by Article II of the Constitution, over which Congress and the courts have limited power to intrude. *Cf. United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws." (citation omitted)). Moreover, the government's hypothetical on this point—a chief prosecutor who adopts a policy of non-enforcement of low-level, nonviolent drug crimes, and then is replaced by a new chief prosecutor who revokes that policy and applies the drug laws against all offenders, AOB24-25—is inapposite. Suppose the first prosecutor not only adopted a policy of non-enforcement, but also (1) invited low-level, nonviolent drug offenders to register with her office and to provide sensitive information about their drug trafficking based on a promise that the information would not be used against them, and (2) offered valuable benefits to registrants comparable to the ability to obtain lawful employment. If such a program were revoked by a new prosecutor without a plausible explanation based on an erroneous legal determination, the revocation might well be subject to judicial review.

[8] Similarly, *BLE* and *Lincoln* involved one-time decisions, not broad policy determinations: in *BLE* whether to deny the petition submitted in one case and in *Lincoln* whether to continue funding for a specific region. *See Lincoln*, 508 U.S. at 192; *BLE*, 482 U.S. at 282.

program—particularly when that termination is based on the agency's conclusion that the program exceeds the agency's statutory and constitutional authority. Instead, courts reviewing programmatic decisions like the rescission routinely conclude that there is law to apply and that they have jurisdiction. *See Edison*, 996 F.2d at 333; *Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765, 772-75 (D.C. Cir. 1992) (reviewing "a facial challenge" to enforcement regulations, rather than "a particular enforcement decision"); *Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374, 1378-79 (9th Cir. 1989) (permitting judicial review of advisory opinion and policy statement because they were based on agency's interpretation of its organic statute).

In short, the wholesale termination of a program does not fall within the *Chaney* presumption against reviewability.

II. The District Court's Injunction Was Within Its Discretion.

Having properly concluded that plaintiffs' claims are justiciable, the district court acted within its discretion in issuing a preliminary injunction against the rescission of DACA. The government does not dispute that plaintiffs satisfy three of the four preliminary injunction factors: that (1) absent an injunction, the plaintiffs will suffer severe and irreparable harm; (2) the balance of equities favors the plaintiffs; and (3) an injunction is

in the public interest. The only factor the government does contest—the likelihood of success on the merits—likewise weighs strongly in favor of the district court's injunction.

A. Plaintiffs Are Likely To Succeed On Their APA Arbitrary-And-Capricious Claims.

The APA makes "federal agencies . . . accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). As the administrative state expanded after the New Deal, it threatened to create enormous and potentially unchecked executive power. Through the APA, Congress acted to ensure "that agencies follow constraints even as they exercise their powers." *Fox*, 556 U.S. at 537 (Kennedy, J., concurring). Among these constraints "is the duty of agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation." *Id.* To ensure that agencies comply with their duties, the APA empowers the Judiciary to conduct a "thorough, probing, in-depth review" of agency reasoning and a "searching and careful" inquiry into the factual underpinnings of agency decisions. *Overton Park*, 401 U.S. at 415-16. The courts "shall" set aside any agency action that is "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Agency action is arbitrary and capricious if, *inter alia*, it is (1) premised on a factual error, *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *City of Kansas City, Mo. v. HUD*, 923 F.2d 188, 194 (D.C. Cir. 1991); or (2) based upon an erroneous determination of law, *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 86-87 (2d Cir. 2006). In applying these standards, courts must rely solely on the agency's contemporaneous justifications in the record, rather than any "*post hoc* rationalizations" advanced in litigation. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Agency action must also be set aside where the agency fails to consider the relevant factors, including reasonable alternative policies, *State Farm*, 463 U.S. at 48, or where the agency abandons a prior policy without accounting for "serious reliance interests" engendered by that policy, *Fox*, 556 U.S. at 515. Finally, where an agency's stated reasons for acting are not its true reasons, such pretextual decisions are patently arbitrary and capricious. *See New England Coal. on Nuclear Pollution v. NRC*, 727 F.2d

1127, 1130-31 (D.C. Cir. 1984); *Squaw Transit Co. v. United States*, 574 F.2d 492, 496 (10th Cir. 1978).

The rescission of DACA fails each of these requirements.

1. The government's "legality" rationale is arbitrary and capricious.

The Sessions letter states that DACA "should" be rescinded because it has "the same legal and constitutional defects that the courts recognized as to DAPA." ER176. To the extent this is the rationale for rescinding DACA, it is simply incorrect. No court has ever held that any deferred action program, let alone DACA, is "unconstitutional." The *Texas II* case did not address any constitutional arguments. *See* 809 F.3d at 170-86. Because no "courts recognized" any "constitutional defects as to DAPA," the government's factual error is itself a sufficient reason to conclude that plaintiffs are likely to succeed on the merits. *See State Farm*, 463 U.S. at 43 (action is arbitrary and capricious when agency offers "an explanation for its decision that runs counter to the evidence before the agency"); *City of Kansas City, Mo.*, 923 F.2d at 194 ("Agency action based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard.").

The Attorney General's letter is also wrong to assert that DACA is illegal on non-constitutional grounds. DACA was a lawful exercise of DHS's statutory authority to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), to carry out the "administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens," 8 U.S.C. § 1103(a)(1), and to authorize aliens to obtain lawful employment, 8 U.S.C. § 1324a(h)(3). Both the Supreme Court, *see AADC*, 525 U.S. at 483-85, and Congress, *see, e.g.*, 8 U.S.C. §§ 1227(d)(2), 1154(a)(1)(D)(i)(II), have recognized deferred action as a valid fixture of our immigration enforcement system. The Office of Legal Counsel concluded in an opinion binding on the executive branch that DACA is legal, SER243, and the Department of Justice has routinely argued that such deferred action programs are lawful, *see, e.g.*, Br. of United States, *United States v. Texas*, 2016 WL 836758, at *42-64 (U.S. Mar. 1, 2016) ("Executive officials have regularly exercised . . . discretion by issuing policies for deferring action (or exercising similar forms of discretion) on the basis of aliens' membership in defined categories.").

The Fifth Circuit's decision in *Texas II* is not to the contrary. *Texas II* addressed DAPA, not DACA, and the two programs are factually and legally

distinct. *See* 809 F.3d at 146.[9] The Fifth Circuit criticized DAPA, a program authorizing deferred action for parents of U.S. citizens and permanent residents, as offering virtually automatic lawful immigration status to a population of approximately 4 million immigrants, contrary to the INA's established processes for that population to obtain such status. The Fifth Circuit therefore held DAPA was a legislative-type rule that conflicted with congressional policy. *Id.* at 170-86 ("[T]he INA prescribes how parents may derive an immigration classification on the basis of their child's status and which classes of aliens can achieve deferred action and eligibility for work authorization. DAPA is foreclosed by Congress's careful plan . . . ."). The court further held, based on its provisional analysis of the DACA program, that DAPA was not likely to be implemented as a truly discretionary program, and therefore was a substantive rule that must be submitted to notice-and-comment rulemaking. *Id.* at 170.

The Sessions letter does not address crucial distinctions between DAPA and DACA. DAPA was vulnerable to challenge because the DAPA population already had a pathway to lawful immigration status under the INA, and the Fifth Circuit viewed DAPA as unlawfully circumventing the

[9] The Fifth Circuit decision in *Texas* had the effect of enjoining elements of DAPA that incrementally expanded DACA, but the opinion contains no analysis of "expanded DACA" standing alone.

congressionally prescribed procedure. *See* 809 F.3d at 179 (noting the "intricate process for" the DAPA population "to derive a lawful immigration classification from their children's immigration status"). The DACA population, by contrast, consists of individuals who, by definition, were not offered a path to lawful status through the INA.[10] ER33-34. Additionally, the broad sweep of DAPA, reaching nearly 40 percent of undocumented immigrants, heightens the concern that it might supplant congressional policy. DACA, by contrast, is available to less than 10 percent of undocumented immigrants. *See Texas*, 809 F.3d at 174, n.138.

The Fifth Circuit also found that DAPA was not likely to be implemented on a truly discretionary basis, based on a contested and provisional review of statistics related to the DACA program. *Texas II*, 809 F.3d at 211. Its analysis does not withstand scrutiny. DACA is a straightforward exercise of enforcement discretion. ER141-42 (instructing DHS officials to take deferred action under the policy only "on an individual" and "case by case basis," and to give "consideration . . . to the individual circumstances of each case"). A panel of the Fifth Circuit had

[10] The suggestion in the government's brief that congressional silence foreclosed DACA, AOB32, inverts settled administrative law principles, which allow agencies to fill in gaps created by congressional silence. *See Helping Hand Tools v. EPA*, 848 F.3d 1185, 1199 (9th Cir. 2016).

already held that, under DACA, immigration enforcement agents must "exercise their discretion in deciding to grant deferred action, and this judgment should be exercised on a case-by-case basis." *Crane v. Johnson*, 783 F.3d 244, 254-55 (5th Cir. 2015). And the factual record before the *Texas II* court confirmed that "deferred action under DACA is a . . . case-specific process that necessarily involves the exercise of the agency's discretion"; identified "several instances of discretionary denials" proving DACA is no rubber stamp; and noted "that approximately 200,000 requests for additional evidence had been made upon receipt of DACA applications." 809 F.3d at 175.[11]

To be sure, most DACA applications are granted, but that is entirely consistent with the nature of the program, as the Fifth Circuit recognized: "DACA involved issuing benefits to self-selecting applicants, and persons who expected to be denied relief would seem unlikely to apply," and "[e]ligibility for DACA was restricted to a younger and less numerous population, which suggests that DACA applicants are less likely to have

[11] In any hypothetical challenge to DACA, the government would have been able to present a more detailed factual record due to improvements in agency recordkeeping. *See id. at* 211 (King, J., dissenting) ("As stated in the Neufeld Declaration, '[u]ntil very recently, USCIS lacked any ability to automatically track and sort the reasons for DACA denials,' presumably because it had no reason to track such data prior to this litigation.").

backgrounds that would warrant a discretionary denial." *Id.* at 174. The fact that discretion has typically been exercised in favor of DACA applicants does not mean that there is no discretion to exercise.

In short, defendants' decision to rescind DACA was based on an error of law and therefore was "not in accordance with law" for purposes of APA review. 5 U.S.C. § 706(2)(A). Mistakes of law are a classic basis for overturning agency action. *See, e.g.*, *Chenery*, 318 U.S. at 94 ("[I]f the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law."); *Massachusetts*, 549 U.S. at 532-34 (setting aside an EPA decision premised on misinterpretation of its legal authority);[12] *Negusie v. Holder*, 555 U.S. 511, 516 (2009) (remanding for agency to "confront the same question free of [its] mistaken legal premise"); *Safe Air For Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007) (agency action based on "legally erroneous" conclusion is "'arbitrary, capricious, or otherwise not in accordance with law'").

[12] Defendants claim that *Massachusetts* requires that a statute must affirmatively mandate some contrary agency action before an agency action premised on legal error may be set aside. AOB39-40. But *Massachusetts* imposes no such condition; whether or not the EPA was *obligated* to regulate new vehicle emissions, its fundamental mistake was in wrongly concluding that it lacked the *authority* to do so. *Id.* at 528.

2. The government's post hoc "litigation risk" argument cannot support the decision to rescind DACA.

In its brief, the government appears to contend that it rescinded DACA not because of a legal conclusion per se, but rather because DACA presented unacceptable "litigation risk" in light of *United States v. Texas*. AOB29-30. This justification is absent from the Sessions letter, which opines that DACA is unlawful, and absent from the rescission memorandum, which provides no clear rationale at all. *See* ER126-31, 176; *Batalla Vidal*, 279 F. Supp. 3d at 429 ("[T]he Attorney General's statement that . . . 'it is likely that potentially imminent litigation would yield similar results with respect to DACA' . . . is too thin a reed to bear the weight of Defendants' 'litigation risk' argument."). The government's reliance on an unarticulated rationale for the rescission, by itself, renders its action unlawful. *See Chenery*, 318 U.S. at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1050 (9th Cir. 2010) ("post hoc explanations serve only to underscore the absence of an adequate explanation in the administrative record itself").

The government's "litigation risk" rationale also fails on its own terms. Judicial review of agency action—i.e., "litigation risk"—is a fundamental feature of both the APA and the Constitution. To permit

agencies to rest their decisions solely on a concern that someone might bring a court challenge would effectively abolish meaningful judicial review. Consistent with this basic principle, this Court has set aside agency action premised on an assertion of litigation risk where, as here, the agency merely "traded one lawsuit for another." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015). Even the drafter of the rescission memorandum acknowledged in his deposition that because agencies regularly confront litigation, acting solely on the basis of "litigation risk" is the "craziest policy you could ever have." SER1378.

Moreover, the administrative record contains no rational assessment of litigation risk, which would have needed to address, among other factors, the likelihood of litigation, the available defenses, the range and severity of possible outcomes, and the alternatives short of rescinding DACA that could have minimized the purported risk.

The administrative record addresses none of these considerations. The government never evaluated, for example, whether the *Texas* plaintiffs would have followed through on their threatened challenge to DACA. Nor did it consider that any challenge to DACA would have faced a powerful laches defense. Laches applies where a plaintiff has "slept upon his rights . . . , and especially if the delay has been prejudicial to the defendant,

or to the rights of other persons." *Chapman v. Cty. of Douglas*, 107 U.S. 348, 355 (1883); *see Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967) (laches as a defense to APA claims). By waiting more than five years to challenge DACA, and pursuing only a challenge to the later-arising DAPA program, the *Texas* plaintiffs slept on any rights they had, to the obvious prejudice of DACA recipients who had relied on the program.[13] Potential deportation, family separation, and job loss—after recipients' lengthy reliance on DACA—are precisely the sorts of circumstances that would have supported an equitable laches defense to a requested injunction.

The government similarly failed to consider the even division on the Fifth Circuit even with respect to the legality of DAPA, diminishing the risk from a hypothetical Fifth Circuit DACA case.[14] Nor did it consider the Fifth Circuit's holding in another case that the DACA program was a (presumptively lawful) program of "discretion in deciding to grant deferred

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[13] Defendants suggest that a laches defense would not be available to the government in a challenge to DACA because the government, as opposed to DACA recipients themselves, could not claim prejudice from Texas's delay. *See* AOB34. But when the government seeks to invoke laches, it may argue prejudice to third parties and the public interest. *See Chapman*, 107 U.S. at 355; *Envtl. Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 480 (5th Cir. 1980).

[14] Of the four Fifth Circuit judges to evaluate the legality of DAPA in the *Texas* litigation, two would have upheld the legality of DAPA. *See Texas II*, 809 F.3d at 188-219 (King, J., dissenting); *Texas v. United States*, 787 F.3d 733, 769-84 (5th Cir. 2015) (*Texas I*) (Higginson, J., dissenting).

action" that would be "exercised on a case-by-case basis." *Crane*, 783 F.3d at 254-55.

Even assuming a degree of "litigation risk" from the *Texas* case, defendants' actions cannot withstand scrutiny. To the extent the government's concern is that the Fifth Circuit might have permanently enjoined DACA after "protracted litigation," AOB29, that outcome could not possibly justify the rescission of the program. How could the *risk* that a court would, eventually, set aside DACA justify a policy choice that would *guarantee* the rescission of DACA? To the extent the government is referring to a supposed risk of an "abrupt, complete, and court-ordered end to DACA," as it did in the district court, Opp. to PI Br. 12 (D. Ct. Dkt. 204 at 22), that concern is even less supportable. The *Texas* plaintiffs had not even threatened such a result. Instead, they requested only that DHS "phase out the DACA program," disclaimed any suggestion that the government should "immediately rescind DACA [ ] permits that have already been issued," and threatened only that the "the complaint in [Texas] will be amended to challenge . . . the DACA program." ER275-76.[15]

[15] Among other errors, the Maryland district court in *Casa de Maryland* erred in failing to conduct a "thorough, probing, in-depth review," *Overton Park*, 401 U.S. at 415-16, of the government's purported "litigation risk"

Furthermore, the injunction against DAPA did not reasonably foretell an injunction against DACA. The *Texas* plaintiffs would not have been able to establish a likelihood of success on the merits because, as set forth above, DACA was a lawful exercise of DHS's prosecutorial discretion. And the irreparable harm, balance of hardships, and public interest factors would have swung decisively against an injunction. Central to the *Texas* court's injunction of the DAPA program was its conclusion that "legalizing the presence of millions of people [through DAPA] is a 'virtually irreversible' action once taken." *Texas v. United States*, 86 F. Supp. 3d 591, 673 (S.D. Tex. 2015). If DAPA were to go into effect, the court reasoned that it would be "difficult or even impossible for anyone to 'unscramble the egg.'" *Id.* Those concerns would point in the opposite direction in a challenge to DACA, where the court would be asked to reverse what it had just deemed "virtually irreversible." *See id.* Unlike DAPA, which was being reviewed prior to implementation, DACA has been in effect for five years and has engendered profound reliance by nearly 700,000 people.

Finally, the rescission cannot be seen as a reasonable response to the "risk" of an injunction. No injunction issued by a court of equity could have

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rationale before granting summary judgment to the government on the plaintiffs' APA claims. *See* 2018 WL 1156769, *8-10.

been more abrupt or cruel than the government's shutdown of DACA, which immediately banned overseas travel, allowed no exceptions or discretion, and instructed DACA recipients to "prepare for and arrange their departure from the United States." SER1468; *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("The essence of equity jurisdiction has been the power of the [court] to do equity and to mould each decree to the necessities of the particular case."); *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (remanding without vacating rule and explaining that "[w]hen determining whether to leave an agency action in place on remand, we weigh the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed").

3. The government failed to consider reliance interests.

The arbitrariness of the rescission is also clear from the government's failure to evaluate the policy consequences of its action. Agency action can withstand judicial review only if the administrative record reflects that the agency considered all "the relevant factors." *State Farm*, 463 U.S. at 42-43. Where the government, rather than creating new policy, is reversing a prior policy that "has engendered serious reliance interests," it must offer an even "more detailed justification than what would suffice for a new policy created on a blank slate." *Fox*, 556 U.S. at 515. In such cases, it is a minimum

requirement of rational decision-making that the agency give "a reasoned explanation . . . for disregarding facts and circumstances . . . engendered by the prior policy." *Id.* at 516; *see also id.* at 536 (Kennedy, J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015); *Encino Motorcars*, 136 S. Ct. at 2126. If the agency does not adequately address its "change in position and the significant reliance interests involved," *id.*, the agency action must be set aside.

As the district court correctly recognized, the government failed to account—at all—for the reliance interests DACA has engendered. Over the last five-and-a-half years, DACA recipients have made profound life choices in reliance on the program. They have chosen careers, enrolled in degree programs, opened businesses, purchased homes, and even started families—all in reliance on the government's promise that they could seek renewals to remain in the United States and work here legally. *See, e.g.*, SER483-84, 1008, 1147-49, 1155. Educational institutions and employers have likewise relied on that promise, admitting, hiring, and training DACA recipients with the understanding those recipients would be allowed to live and work in the United States. SER425, 832.

The government has never contested that DACA has *in fact* engendered profound, widespread reliance. Defendants themselves

encouraged such reliance and have noted that DACA involves "representations made by the U.S. government, upon which DACA applicants most assuredly relied." SER1330-31. Although the government now asserts that "DACA confers no legitimate reliance interests," AOB34, even this administration has referred to the program as a "commitment . . . by the government towards the DACA person." SER1334. The government has further induced reliance by maintaining DACA for more than five years, passing on earlier opportunities to rescind it, *see, e.g.*, SER7, and by making repeated public statements supporting the program and expressing an intention to maintain it, *see, e.g.*, ER45 (quoting statements of President Trump expressing support for DACA).

The government asserts that because DACA was a discretionary program that could be rescinded, the reliance interests of DACA recipients were "too insubstantial to necessitate express consideration." AOB34-35. This assertion—that the government need not consider the lives of 690,000 beneficiaries before exposing them to exile from the United States and separation from their U.S.-citizen spouses and children—is untenable. An agency decision can be revoked if the agency articulates an acceptable basis and follows the appropriate procedure; that does not mean the prior decision did not induce reliance. For example, *Encino Motorcars* involved whether

certain car dealership personnel were subject to the wage-and-hour requirements of the Fair Labor Standards Act. 136 S. Ct. 2124. The agency clearly had discretion to change its legal interpretation of the FLSA, but that discretion did not eliminate the need to account for reliance interests engendered by its prior interpretation. *Id.* at 2126-27 ("it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy"); ER43.

The government seeks to distinguish *Encino Motorcars* on the ground that the prior policy in that case had been in place longer and implicated whether a "substantive" statute would apply to the plaintiffs. AOB35. But these factors were not the basis for the holding. With due respect to the reliance interests of the car dealerships in *Encino Motorcars*, the reliance interests here are among the most vital and deeply-rooted imaginable. The rescission of DACA subverted all of them without any "express consideration," AOB34-35, and is therefore arbitrary and capricious.

4. The government failed to consider alternative policies before rescinding DACA.

As the district court recognized, the rescission was also untenable because it contained no evaluation of alternative policies, short of rescission, that might have mitigated any of the program's alleged infirmities. Rational

decision-making requires that when an agency adopts a policy, it must consider and rule out potential alternative policies. *See State Farm*, 463 U.S. at 48. Here, the government failed to consider alternative implementations of DACA that would have obviated its supposed legal vulnerabilities. The Fifth Circuit in *Texas I* deemed DAPA unlawful because it lacked specific features, including in-person interviews of applicants and consideration of applications at DHS field offices rather than service centers, that would ensure that deferred action was being granted on a truly discretionary—rather than mandatory—basis. *See* 787 F.3d at 765 ("routing DAPA applications through service centers instead of field officers . . . created an application process that bypasses traditional in-person investigatory interviews").

An obvious alternative to rescinding DACA altogether, then, would be to adjust the features the Fifth Circuit had found problematic in the DAPA case. For example, DHS could process applications at DHS field offices rather than service centers, and conduct in-person interviews. If DACA were deemed insufficiently discretionary, officials responsible for processing and evaluating DACA applications could be afforded greater independence, and could be permitted to consider more flexible criteria in choosing to grant or deny an application. *See Texas II*, 809 F.3d at 174-75.

Yet the government failed to consider these obvious alternative policies. For this reason as well, the rescission is arbitrary and capricious. *See State Farm*, 463 U.S. at 48 ("At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment.").

5. The government's proffered rationales for the rescission are pretextual.

Agency action cannot stand if the stated reasons for acting are not the true reasons. *See Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986); *see also New England Coal. on Nuclear Pollution*, 727 F.2d at 1130-31 (agency action arbitrary and capricious where agency's stated reason is inconsistent with action taken). Here, the logical flaws, inconsistencies, and contradictions of the government's position underscore that something else is going on:

- In rescinding DACA, the Acting Secretary relied on the false claim that DAPA had been adjudged unconstitutional. *See supra* Section II.A.1.
- The day of the rescission, the President stated that he would "revisit" the rescission of DACA if Congress did not address it. SER1382. But if the rationale for the rescission were a genuine belief that DACA was unlawful or presented unacceptable "litigation risk," there would be no basis to "revisit" the issue. *See also* January 24 Statement of President Trump ("I certainly have the right to [extend DACA] if I want."), *available at* goo.gl/poYLyJ.

- On October 18, 2017, the Attorney General testified to Congress that DACA could be legal under the *Texas* case if it were implemented "on an individualized basis." SER1387. Yet the administrative record contains no consideration of the policy alternative of implementing DACA on a more individualized basis.

- The Senior Counselor to the Acting Secretary of DHS, who drafted the memorandum rescinding DACA, testified that an agency policy of acting on the basis of litigation threats would be the "craziest policy you could ever have" because "[y]ou could never do anything if you were always worried about being sued." SER1378.

- The government has asserted a series of defenses in this litigation that, if successful, would have equally applied to eliminate litigation risk from a lawsuit in Texas. For example, the government has asserted in this litigation that: deferred action decisions are exempt from review under 5 U.S.C. § 701(a)(2) and 8 U.S.C. § 1252(g); the APA's notice-and-comment requirements do not apply to deferred action programs; the state plaintiffs do not have standing; and a "nationwide injunction" is not permissible relief. The government cannot plausibly assert, on the one hand, that DACA presented unmanageable litigation risk, while also asserting, on the other, that there are valid defenses to such litigation.

These contradictions indicate that defendants' decision to rescind DACA may not have been based on a view that the program is unlawful or presents untenable litigation risk. *See Pub. Citizen*, 653 F. Supp. at 1237 ("For an agency to say one thing . . . and do another . . . is the essence of arbitrary action. It indicates that the Secretary's stated reason may very well be pretextual.") (citation omitted); *Hernandez v. Hughes Missile Sys. Co.*,

362 F.3d 564, 569 (9th Cir. 2004) (conflicting explanations may serve as evidence of pretext).

The evidence points to what may be the true motivations for the rescission. *First*, the Attorney General stated at his press conference announcing the rescission that DACA had "denied jobs to hundreds of thousands of Americans" and contributed to terrorism, crime, and unaccompanied minors at the southern border. SER1354. These concerns were not mentioned in the Acting Secretary's rescission memorandum and the lack of factual support for them may have caused the government to offer a different formal rationale for the action. SER1354-55.

Second, it appears that the rescission is part of a political strategy to use DACA recipients as a bargaining chip in order to secure support for the administration's priorities—such as a border wall and restrictions on legal immigration—from members of Congress who support DACA and who would not otherwise support the administration's immigration agenda. On October 8, 2017, President Trump sent a letter to Congressional leaders setting forth the "Immigration Principles and Policies" that he said "must be included as part of any legislation addressing the status of [DACA] recipients." SER1417. These "Principles and Policies" included "a long list

of hard-line immigration measures," including funding for a border wall. SER1431.

The President's subsequent statements confirm this legislative strategy. *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (Dec. 29, 2017, 5:16 AM), https://goo.gl/aZ19im ("The Democrats have been told, and fully understand, that there can be no DACA without the desperately needed WALL at the Southern Border and an END to the horrible Chain Migration & ridiculous Lottery System of Immigration etc. We must protect our Country at all cost!"); Donald J. Trump (@realDonaldTrump), Twitter (Jan. 23, 2018, 8:07 PM), https://goo.gl/Zz46iq ("[I]f there is no Wall, there is no DACA."); Donald J. Trump (@realDonaldTrump), Twitter (Feb. 5, 2018, 6:36 AM), https://goo.gl/BpvHV6 ("Any deal on DACA that does not include STRONG border security and the desperately needed WALL is a total waste of time."). These statements were made in the context of recent legislative debates over government spending bills, reflecting that defendants' goal in rescinding DACA was to create a legislative bargaining chip. *See, e.g.*, Louis Nelson, Politico, *Trump to Schumer: 'If there is no wall, there is no DACA'*, Jan. 24, 2018, https://goo.gl/p7gouu.

The government's failure to disclose its true motives for rescinding DACA renders the agency action unlawful.

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For the foregoing reasons, the district court correctly held that plaintiffs have a strong likelihood of success on the merits.

B. The Remaining Factors Overwhelmingly Support The Injunction.

The government does not dispute that without an injunction, plaintiffs will suffer vast and irreparable harm. If the rescission of DACA were allowed to take effect, tens of thousands of DACA recipients each month would immediately become vulnerable to deportation, which, because of the INA's re-entry bars, will in many cases be tantamount to permanent exile from the United States. The collateral consequences for the families of DACA recipients—including their approximately 200,000 U.S.-citizen children—would be equally traumatic. *See, e.g.*, SER576-80, 788-89.

Were DACA grants to expire, recipients would also lose work authorization, stripping them of the ability to provide for themselves and their families. *See, e.g.*, SER1150, 1459, 1112, 1068 ("I still help my mom pay rent and bills. If I lose DACA, I will not be able to have a stable job or a high enough income to support my mom. We will go back to living month to month, struggling to make ends meet."). The loss of work authorization would drive DACA recipients into the underground economy, decimating their earnings and harming the economy and tax base. SER358. Many would

be forced to abandon professional degree programs and lose their ability to practice their chosen professions. *See, e.g.*, SER558, 648, 698, 1008.

The entity plaintiffs, like the University of California, would likewise suffer irreparable harm, losing the extraordinary contributions of their DACA-recipient employees and students, upon whom considerable institutional resources have been spent. *See, e.g.*, SER365, 613, 832. For the University of California, the loss of DACA students would diminish the vibrancy of its classrooms and impair its ability to achieve its core educational mission. SER831 ("[T]he University seeks to 'achieve diversity among its student bodies and among its employees'" and "allows 'students and faculty [to] learn to interact effectively with each other, preparing them to participate in an increasingly complex and pluralistic society.'"). Cities and states would suffer harm to their public health and public safety programs, as DACA recipients and their families lose employer-sponsored healthcare and shy from approaching law enforcement in light of the risk of deportation. SER417, 492-93, 507.

The final two elements of the preliminary injunction test—the balance of the equities and the public interest—are equally compelling. The government does not dispute that the balance of hardships and the public interest weigh in favor of the preliminary injunction ordered by the district

court. Indeed, the government itself has repeatedly expressed support for DACA and indicated that the program is in the public interest. *See, e.g.*, ER45 ("On this point, we seem to be in the unusual position wherein the ultimate authority over the agency, the Chief Executive, publicly favors the very program the agency has ended."). The record overwhelmingly demonstrates that the public interests in economic activity, tax receipts, public health, and education will all be damaged if the rescission is permitted to proceed. *See supra* Statement, section A.5.

By contrast, there is no threat to the public interest from the injunction. The DACA population by definition includes only individuals without significant criminal records who are not a threat to public safety, ER141, and the district court's order provides that the government may still "remove any individual, including any DACA enrollee, who it determines poses a risk to national security or public safety, or otherwise deserves, in its judgment, to be removed." ER46.

C. The District Court Properly Enjoined Defendants From Proceeding With The Rescission.

The government argues that the district court erred in entering a preliminary injunction on a "nationwide" basis, contending that the injunction improperly grants relief to non-parties. AOB50. Because "[a] district court has considerable discretion in fashioning suitable relief and

defining the terms of an injunction," this Court's review of the government's argument "is correspondingly narrow." *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991).

1. The injunction was appropriately tailored.

The government's argument fails at the outset because the district court's preliminary injunction does not provide relief to particular plaintiffs, but rather requires the government defendants—all of them parties properly subject to the district court's jurisdiction—to refrain from an illegal programmatic action. *See De Beers Consol. Mines v. United States*, 325 U.S. 212, 219, 221 (1945) (if "the court has obtained jurisdiction of the persons of the defendants . . . if service of the defendants is properly obtained, and if the complaint states a cause of action, no one questions the jurisdiction of the District Court to enter an appropriate injunction against future conduct violative of the [law]"). This Court and others have repeatedly endorsed the authority of federal courts to issue injunctions preventing federal defendants from violating the law, even when the consequences of such injunctions reach beyond the borders of the forum state. *See, e.g.*, *id.*; *Lamb-Weston*, 941 F.2d at 974; *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (leaving in place injunction applicable nationwide "with respect to respondents and those similarly situated"); *Hawaii v. Trump*, 878 F.3d

662, 701-02 (9th Cir. 2017) (affirming temporary restraining order uniformly applicable to the government, nationwide), *cert. granted*, 2018 WL 324357 (U.S. Jan. 19, 2018).

In an APA case, an injunction preventing an agency from taking unlawful programmatic action is especially appropriate. The ultimate remedy under the APA is for the administrative action to be "set aside." 5 U.S.C. § 706(2)(A); *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); *see also Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) ("The nationwide injunction . . . is compelled by the text of the Administrative Procedure Act"), *rev'd in part on other grounds sub nom. Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). Thus, upon a finding that agency action is unlawful, "the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon*, 878 F.2d at 495 n.21. Because a *final* judgment in an APA case results in the agency action being set aside, it is appropriate for *provisional* relief to match that scope. *See De Beers*, 325 U.S. at 220 ("A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally."); *Texas II*, 809 F.3d at 170-88 (affirming "nationwide" preliminary injunction after holding that plaintiffs were likely to succeed on APA claims).

Furthermore, the injunction issued by the district court was necessary to "provide complete relief to the plaintiff before the court." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 649 (9th Cir. 2011); *see also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (injunction's scope "is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class").[16] For example, the University of California educates individuals from across the United States, and it seeks to recruit the best staff and students from a nationwide, indeed worldwide, talent pool. *See* SER350, 603, 609, 812-813, 831.

The deportation of a prospective student from Texas, a staff member from Florida, or a potential conference participant from Pennsylvania harms the University of California. Moreover, staff and students regularly travel across state lines for both personal and professional purposes; absent a uniform injunction, individuals who rely on DACA protection might become

[16] The unique remedies available under the APA renders inapposite the various cases the government cites suggesting that courts generally may not grant relief to non-parties. *See Zepeda v. INS*, 753 F.2d 719, 722 (9th Cir. 1983) (no APA claims at issue); *McKenzie v. City of Chicago*, 118 F.3d 551, 554 (7th Cir. 1997) (same); *Meinhold v. DOD*, 34 F.3d 1469, 1472 (9th Cir. 1994) (same). In *Haven Hospice*, this Court ruled that a "nationwide injunction" was not appropriate relief for an individual plaintiff challenging the application of a Medicare reimbursement cap, 638 F.3d at 649, but there, the plaintiff conceded it would have obtained complete relief without a "nationwide injunction." *Id.* at 665.

vulnerable to deportation when they leave California (or a University of California campus) to visit family, conduct research, or attend a conference. SER698, 832, 1013, 1112. As in *Overton Park*, where the plaintiffs were harmed by the overall effect of the agency action—the proposed construction of a freeway through a park—complete relief here can only be afforded by an injunction that will also benefit non-parties. By contrast, an injunction that stopped at the California border would not "be tailored to remedy the specific harm alleged" by the University. *Lamb-Weston*, 941 F.2d at 974. Furthermore, much like the injunction at issue in *Hawaii*, the uniform injunction entered by the district court here ensures that "the immigration laws of the United States [will] be enforced vigorously and uniformly." 878 F.3d at 701 (emphasis omitted).

As in other cases, the government "has not proposed a workable alternative" to a uniform injunction "that would protect the proprietary interests" of the University of California. *Washington*, 847 F.3d at 1167. The government's failure to propose any alternative injunction renders it unable to maintain that the district court's injunction was an abuse of discretion.

2. The injunction is consistent with Article III.

The government further suggests that the district court's injunction violates Article III principles because the University of California and the

other entity plaintiffs lack standing to sue in their capacities "as employers." AOB54-56. But the University is not suing solely in its capacity as an employer. It is suing based both on its proprietary interests as an educational institution and on behalf of its students.

The University's proprietary interests in maintaining enrollment of DACA recipients, retaining and attracting research assistants, instructors, and collaborators, and safeguarding its academic reputation, SER599-601, amply support its standing to sue on its own behalf. *See Washington v. Trump*, 847 F.3d 1151, 1160 (9th Cir. 2017). The University also has third-party standing to assert the interests of its estimated 1700 DACA students. SER366. *See also, e.g.*, *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487-88 (9th Cir. 1995) (college had standing to assert the rights of its students, who were being preventing from attending school); *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 533 (8th Cir. 2005) (school had standing to assert rights of removed students); *Runyon v. McCrary*, 427 U.S. 160, 175 & n.13 (1976); *see also Washington*, 847 F.3d at 1160.[17]

[17] Here, the University's students are hindered in their ability to bring claims on their own behalf because the rescission has placed DACA students in fear of arrest and deportation if they come forward. SER610-11; *see Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976) (allowing physicians to bring suit to assert patients' abortion rights where there was a reasonable concern about the loss of privacy from pursuing litigation).

The district court also correctly concluded that the entity plaintiffs—as employers of DACA recipients who would lose their work authorization—have Article III standing, as they would suffer injuries fairly traceable to the rescission of DACA, including loss of investment in hiring and training, and reduced productivity due to decreased employee morale. ER23-24.

Contrary to the government's footnote suggestion, AOB56 n.8, the University and the City of San José likewise have statutory standing to bring APA claims pursuant to the "zone of interests" test, which forecloses suit only when "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit." *Batalla Vidal*, 2017 WL 5201116, at *20 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)).

The interests that support the University's Article III standing fall comfortably within the zone identified in the INA's education-related provisions. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (student visas). This Court has recognized these provisions as placing universities within the INA's zone of interests. *See Hawaii*, 878 F.3d at 682. The University and City of San José's interests as employers also plainly satisfy the zone of interests

test, as the INA itself contains explicit provisions placing work authorization at the center of relevant interests. *See, e.g.*, ER27-28; *see also* 8 U.S.C. § 1324a(a), (h)(3); 8 C.F.R. § 274a.12(c)(14) (work authorization for deferred action recipients).

III. Plaintiffs' APA Notice-And-Comment Claims Provide An Additional Basis To Affirm.

The Acting Secretary's decision was subject to the APA's notice-and-comment rulemaking requirements. The district court's preliminary injunction can be sustained on this alternative basis, and the district court should not have dismissed plaintiffs' notice-and-comment claim.

A. The Rescission Is A Substantive Rule.

The APA requires agencies seeking to promulgate or repeal a "substantive" rule to engage in notice and comment rulemaking. *San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966, 971 (9th Cir. 1989); *see also* 5 U.S.C. § 551(5). Rules that are promulgated without notice and comment generally are vacated without further inquiry. *See, e.g.*, *Paulsen v. Daniels*, 413 F.3d 999, 1003-04 (9th Cir. 2005) (concluding that agency "plainly violated the APA" by promulgating a rule that barred category of prisoners from relief without notice).

A rule is substantive, and therefore subject to notice and comment, if it "narrowly limits administrative discretion" or establishes a "binding

norm" such that "upon application one need only determine whether a given case is within the rule's criterion." *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009). The "critical factor" in evaluating whether an agency action is substantive is "the extent to which the challenged [action] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case." *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1324 (9th Cir. 1992).

The rescission of DACA is a substantive rule because it binds DHS and limits its discretion. *See Colwell*, 558 F.3d at 1124; *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) ("cabining of an agency's prosecutorial discretion can in fact rise to the level of a substantive, legislative rule"). Prior to the rescission, DHS officials had discretion to grant DACA protection, work authorization, and advance parole to applicants who met the program criteria. *See* ER6-9. But after the rescission, DHS officials were required to reject new DACA applications, applications for advance parole, and renewal applications with expirations outside a specified date range. *See* ER12-13. Unlike DACA, which provided for the exercise of individual discretion in every case, ER141, the rescission makes no exceptions for case-by-case determinations. *See, e.g.*, ER130 (stating that

DHS will "reject all DACA renewal requests and associated applications for Employment Authorization Documents"). By adopting an across-the-board rule barring DACA recipients from renewing their deferred action and precluding new potential DACA recipients from obtaining deferred action, DHS promulgated a substantive rule.

The rescission is couched in unequivocal, mandatory language, requiring that DHS "[w]ill reject" all initial requests for deferred action; "[w]ill reject" all renewal requests received after October 5, 2017; "[w]ill administratively close" pending requests for advance parole by DACA recipients; and "will not approve" any such requests based on DACA going forward. ER131. Though "retain[ed]" enforcement discretion, wholly apart from the DACA program, may still exist to defer action in individual cases, AOB6, the use of discretion within the parameters of the DACA program has been abolished. This sort of "mandatory, definitive language" is a "powerful, even potentially dispositive, factor" in identifying a substantive rule. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988) ("The use of the word 'will' suggests the rigor of a rule, not the pliancy of a policy."); *Alaska v. DOT*, 868 F.2d 441, 447 (D.C. Cir. 1989) (concluding that agency order was a substantive rule in part due to "mandatory language cabining DOT's enforcement discretion").

The rescission is also a substantive rule because it "effect[ed] a change in existing law or policy." *Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 (9th Cir. 2003). DHS has now concluded that it lacks authority to confer a type of deferred action that it had previously found to be permissible. *See Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994) (holding agency promulgated substantive rule when it "eliminated [a statutory] right for a class of tenants"); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) ("If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, . . . the agency . . . must observe the APA's legislative rulemaking procedures."). In abandoning the government's own Office of Legal Counsel opinion and fifty years of precedent in favor of the Attorney General's half-page letter stating that DACA was tainted by "legal and constitutional defects," SER259, the government made a change in law and policy that requires notice and comment.

B. The District Court Erred In Finding That The Rescission Did Not Require Notice-And-Comment Procedures.

The district court acknowledged the rescission's mandatory phrasing and its "categorical[]" elimination of advance parole for DACA recipients, ER53, but nonetheless dismissed plaintiffs' procedural APA claims. Rather than analyzing whether the rescission was "substantive," the court reasoned

instead that because DACA did not go through notice and comment when it was created, it need not undergo notice and comment to be rescinded. This logic is flawed for two reasons.

First, the district court's reasoning rests on a faulty parallelism between the creation of DACA and its rescission. Establishment of DACA—like the establishment of other deferred action programs—was an "exercise of prosecutorial discretion." ER142. DACA was a non-binding policy that allowed the agency discretion to follow its guidelines, or not, in any particular case. It therefore fell within the statutory exemption from the notice and comment requirement for general statements of policy. *See* 5 U.S.C. § 553(b)(3)(A); *Vigil*, 508 U.S. at 197 (general statements of policy include "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power"). Although DACA sets out a series of eligibility criteria, once those criteria are satisfied, DHS retains discretion to grant or deny any particular DACA application. *See* ER142 ("USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, for individuals who meet [the specified criteria]."); *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1017 (9th Cir. 1987) (policies that "allow for great agency latitude and discretion" are general statements of policy).

The rescission of DACA, by contrast, requires a set of mandatory actions that leave no room for officials to exercise discretion: new DACA applications *must* be denied; renewal applications *must* be denied; and advance parole applications *must* be rejected. Thus, in any particular case, the rescission prescribes precisely what must be done. DACA and its rescission are not parallel.[18] Indeed, in very similar circumstances, a court found that a blanket rescission of a deferred action program required notice and comment where "[t]he effect of the [revocation] was to remove the discretion of" agency officials. *See United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 980-81, 983-86 (E.D. Pa. 1977) (Becker, J.).

Second, even if DACA should have undergone notice and comment when it was created, an agency still may not rescind a program merely because of an arguable defect in its promulgation. Under the APA, "repealing a rule" is a "rule making" proceeding, on equal footing with the promulgation of a rule, that must comply with APA procedures. *See* 5 U.S.C. § 551(5). The courts have regularly held that the notice-and-comment requirements apply to terminations of rules, even when the rules "were

[18] The fact that the government may continue to grant deferred action on the basis of *other criteria* in no way renders the rescission exempt from the APA's notice-and-comment procedures, as the agency's discretion to grant deferred action on the basis of the DACA criteria has been eliminated.

defective in some respect" when first announced. *Consumer Energy Council v. FERC*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982); *accord Benten v. Kessler*, 799 F. Supp. 281, 289 (E.D.N.Y. 1992) ("The fact that the inception of a program was procedurally faulty or without specific congressional authorization . . . has no effect on the applicability of the notice and comment requirement to its termination."); *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 26 (D.D.C. 2013) ("[O]rdinarily an agency rule may not be repealed unless certain procedures, including public notice and comment, are followed, and [ ] this is true even where the rule at issue may be defective."). Rightfully so—a rule benefiting hundreds of thousands of people should not be vulnerable to precipitous repeal merely because it contains an arguable procedural defect that went unchallenged when it was first created.

In rejecting plaintiffs' notice-and-comment claim, the district court relied heavily on this Court's decision in *Mada-Luna*, 813 F.2d at 1017 n.12. But that case specifically declined to decide the government's contention that a rule "can always be repealed in the same manner it was promulgated." *Id.* The policy at issue in *Mada-Luna*, a deferred-action "Operating Instruction," was a policy statement that was not subject to notice-and-comment requirements because it, like DACA, unmistakably vested officials

with discretion. *Id*. at 1017 (policy "leaves the [ ] director free to consider the individual facts in each case"). The rescission of DACA is different; it uses mandatory language to establish blanket requirements that leave no room for discretion in evaluating particular deferred action requests.

The district court should have denied the government's motion to dismiss plaintiffs' notice-and-comment claims, and those claims provide an additional basis for upholding the injunction.

CONCLUSION

The Court should affirm the district court's decision to grant a preliminary injunction, affirm the district court's orders to the extent they deny the government's motion to dismiss, and reverse the district court's dismissal of plaintiffs' APA notice-and-comment claims.

Respectfully submitted,

s/ Jeffrey M. Davidson

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STATEMENT OF RELATED CASES

This proceeding is a consolidated case arising out of (a) the government's appeal of the district court's preliminary injunction, *Regents of the University of California v. United States of America, et al.*, Case Nos. 18-15068, 18-15069, 18-15070, 18-15071, 18-15072; (b) plaintiffs' petitions for interlocutory review of elements of the district court's ruling on the government's motion to dismiss, Case Nos. 18-15128, 18-15133, 18-15134; and (c) the government's petition for interlocutory review of different elements of that order, Case No. 18-80004.

This Court also previously heard a petition for writ of mandamus against the district court order regarding the administrative record in this case. *In re United States of America, et al.*, Case No. 17-72917.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Ninth Circuit Rules 28.1-1(c) and 32-2(b), and the requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), because it is filed by separately represented parties, is proportionately spaced serif font, has a typeface of 14 points, and contains 17,746 words.

Dated: March 13, 2018

s/ Jeffrey M. Davidson

CERTIFICATE OF SERVICE

I certify that on March 13, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 13, 2018

s/ Jeffrey M. Davidson

ADDENDUM

5 U.S.C. § 551

For the purpose of this subchapter--

(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;
or except as to the requirements of section 552 of this title--

(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;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) “agency action” includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) “ex parte communication” means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

5 U.S.C. § 553

(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.