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

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION, ACLU FOUNDATION OF NORTHERN CALIFORNIA, ACLU FOUNDATION OF SOUTHERN CALIFORNIA, AND ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Amici curiae American Civil Liberties Union Foundation, American Civil Liberties Union Foundation of Northern California, American Civil Liberties Union Foundation of Southern California, and American Civil Liberties Union Foundation of San Diego are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in amici curiae.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI

Amici curiae are civil rights organizations dedicated to defending the constitutional and legal rights of noncitizens. Amici respectfully submit this brief to address the government's arguments concerning the district court's jurisdiction under the Immigration and Nationality Act ("INA") and the Administrative Procedure Act ("APA"), as well as its arguments concerning the appropriateness of the scope of the nationwide injunction. *Amici* write to provide further support for affirming the district court's judgment.

The American Civil Liberties Union ("ACLU") Foundation is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU Foundation's Immigrants' Rights Project engages in a nationwide litigation and advocacy program to enforce and protect the constitutional and civil rights of immigrants. The ACLU Foundations of Northern California, Southern California, and San Diego and Imperial Counties are the ACLU's California affiliates, and have also litigated numerous cases involving immigrants' rights. In particular, the ACLU Foundation has served as counsel in several cases on behalf of recipients of the Deferred Action for Childhood Arrivals ("DACA") program. *See, e.g.*, *Arizona Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014); *Inland Empire-*

Immigrant Youth Collective et al. v. Nielsen, No. EDCV 17–2048, 2018 WL 1061408 (C.D. Cal Feb. 26, 2018); *Inland Empire-Immigrant Youth Collective et al. v. Duke*, No. EDCV 17–2048, 2017 WL 5900061 (C.D. Cal Nov. 20, 2017); *Colotl v. Kelly*, 261 F. Supp. 3d 1328 (N.D. Ga. 2017). The ACLU Foundation has also litigated numerous cases involving immigration jurisdiction. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289 (2001); *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007) (amicus); *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007) (per curiam) (amicus); *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998), *as amended*, 159 F.3d 1217 (9th Cir. 1998) (amicus), *cert. granted, judgment vacated on other grounds*, 526 U.S. 1001 (1999).

RULE 29 STATEMENT

This brief is filed with the consent of the parties. Neither party authored this brief in whole or in part. Neither the parties nor any other individual (other than amici and their counsel) contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION

Amici agree with plaintiffs-appellees that the Court should affirm the district court's decision in this case. Amici write to emphasize three specific points. *First*, the district court correctly held that the INA does not preclude jurisdiction of the plaintiffs' legal challenges to the rescission of the DACA program. Specifically, 8

U.S.C. § 1252(g) does not preclude jurisdiction here because the plaintiffs raise legal claims and do not challenge any of the three discrete discretionary actions specified in that provision. *See United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) (holding that § 1252(g) does not bar review of legal claims, even if related to a discretionary judgment); *see also Alcaraz v. INS*, 384 F.3d 1150, 1160-61 (9th Cir. 2004). Neither do § 1252(b)(9) or § 1252(a)(2)(B) apply. *See infra* at Argument, Part I.

Second, amici urge this Court to reserve the question whether the district courts have jurisdiction to review legal challenges to decisions to revoke DACA in *individual* cases, as opposed to challenges to program-level decisions. That issue has arisen recently in multiple district courts, including three in this Circuit. *See Inland Empire-Immigrant Youth Collective et al. v. Nielsen* ("*Inland Empire*"), No. EDCV 17–2048, 2018 WL 1061408 (C.D. Cal Feb. 26, 2018); *Gonzalez Torres v. DHS*, No. 17-cv-1840, 2017 WL 4340385 (S.D. Cal. Sept. 29, 2017); *Ramirez Medina v. DHS*, No. 17-cv-0218, 2017 WL 5176720 (W.D. Wash. Nov. 8, 2017); *Colotl v. Kelly*, 261 F. Supp. 3d 1328 (N.D. Ga. 2017). *Every* district court to address the question has held that the provisions of § 1252 do not bar jurisdiction in such legal challenges to individualized DACA decisions. Likewise, *every* district court to address the question has held that individual DACA termination decisions are not "committed to agency discretion by law" under 5

U.S.C. § 701(a)(2) of the Administrative Procedure Act ("APA"), concluding that the detailed rules of the DACA program provide law to apply. As amici explain below, regardless of whether the legal challenge arises in the context of a programmatic decision or an individual one, the district courts maintain jurisdiction under the INA and APA. Because the jurisdictional question concerning individual challenges to DACA revocations is not presented in the instant case, the Court need not and should not reach it here. *See infra* at Argument, Part II.

Third, amici write to emphasize that the nationwide scope of the injunction in this case is appropriate and necessary because the decision to rescind the DACA program is invalid in all its applications, and a narrower injunction cannot provide complete relief to the plaintiffs. *See infra* at Argument, Part III.

BACKGROUND

The DACA Program

As the appellees and the district court have explained in detail, deferred action is a longstanding form of administrative action by which the federal Executive Branch decides, for humanitarian or other reasons, to refrain from seeking a noncitizen's removal and to authorize his continued presence in the United States. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999). DACA is a deferred action program specifically for young immigrants

who came to the United States as children and are present in the country without formal immigration status. Under DACA, young immigrants who entered the United States as children who meet specified eligibility criteria (including educational and residency requirements), and who pass extensive criminal background checks, are eligible to receive deferred action. Janet Napolitano, Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, (June 15, 2012) ("Napolitano Memo") at 1-2.[1]

United States Citizenship and Immigration Services ("USCIS") is the division of DHS responsible for evaluating requests for DACA. DHS' DACA Standard Operating Procedures ("DACA SOPs") set forth hundreds of pages of procedures that the agency must follow in adjudicating and granting DACA applications, as well as in terminating DACA grants. *See, e.g.*, *Inland Empire*, 2018 WL 1061408, at *2; *Colotl*, 261 F. Supp. 3d at 1334; *Gonzalez Torres*, 2017 WL 4340385, at *3.

The rules for the DACA program make clear that it operates separately and independently from removal proceedings. The fact that a noncitizen is in or will be in removal proceedings, or has a final removal order, does not disqualify the individual from DACA. *See* Napolitano Memo at 2; *see also Inland Empire*, 2018

[1] https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

WL 1061408, at *2 (C.D. Cal. Feb. 26, 2018) (describing DACA Standard Operating Procedures). A noncitizen who is in removal proceedings can apply for DACA separately and simultaneously, and a noncitizen with a final removal order may apply for DACA without seeking to reopen his or her removal proceedings. Napolitano Memo at 2. Further, "neither the immigration judge nor the Board may grant [deferred action] status or review a decision of the [immigration authorities] to deny it." *Matter of Quintero*, 18 I. & N. Dec. 348, 350 (BIA 1982). *See also, e.g.*, *Gonzalez Torres*, 2017 WL 4340385, at *6 (noting that the government asserted in that case that "an immigration judge has no jurisdiction to reinstate DACA status, or to authorize an application for renewal of DACA status"); *Inland Empire*, 2018 WL 1061408, at *16 (C.D. Cal. Feb. 26, 2018) (similar).

On September 5, 2017, DHS announced that it was rescinding the DACA program and winding it down.[2]

Procedural History

The plaintiffs, who are individuals and entities harmed by the rescission of the DACA program, brought suit challenging the rescission in the district court for the Northern District of California, asserting claims under the APA and the Constitution. With respect to jurisdiction, the district court concluded that the INA does not bar review of the plaintiffs' claims. The court held that those claims do

[2] Although the program was ending, DHS officials confirmed that the same program rules would continue to apply until it ended. *See, e.g.*, *Inland Empire*, 2018 WL 1061408, at *2.

not challenge a decision to commence removal proceedings, adjudicate cases, or execute removal orders. ER 21-22; *see* 8 U.S.C. § 1252(g). The court noted that the plaintiffs do not challenge any removal order and or any decision to institute removal proceedings, and that challenges to actions prior to the commencement of removal proceedings are not barred by § 1252(g). ER 22.

The district court also concluded that the APA did not bar plaintiffs' claims, and that the plaintiffs were likely to succeed on the merits. The court issued a nationwide injunction, finding that no narrower injunction could provide complete relief to the plaintiffs and maintain uniformity in national immigration policy. ER 47-48 & n. 21. Although the scope of the injunction is nationwide, the district court limited its effect to DACA renewals and also specifically noted that "[n]othing in [the] order prohibits the agency 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." ER 46.

ARGUMENT

I. The District Court Correctly Held that the INA Does Not Preclude Jurisdiction to Review a Challenge to the Rescission of DACA.

In determining whether a suit can be brought under the APA, courts must "begin with the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Academy of Family Physicians*, 476 U.S.

667, 670 (1986). *See also, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (applying "the strong presumption in favor of judicial review of administrative action"). This presumption requires that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review [of administrative action]." *Bowen*, 476 U.S. at 671 (citation and internal quotation marks omitted). Here, there is no clear showing of intent to preclude plaintiffs' challenge to the rescission of the DACA program, a matter entirely independent of and collateral to any removal proceedings.

The government contends that 8 U.S.C. § 1252(g), which purports to limit jurisdiction over certain challenges relating to removal proceedings, bars the district court from exercising jurisdiction over a challenge to the rescission of the DACA program. Gov't Br. at 25-28. Yet, as the district court correctly held, § 1252(g) does not bar review of claims that the government's rescission of the program was unlawful. Critically, the plaintiffs raise *legal* claims, whereas § 1252(g) only precludes review of claims that challenge the exercise of discretion. *See United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc). Moreover, none of the plaintiffs' claims challenges the validity of any removal order, the adequacy of any removal proceedings, or the initiation of any such proceedings. Further, although the government in passing attempts to draw support from 8 U.S.C. §§ 1252(b)(9) and 1252(a)(2)(B), Gov't Br. at 26-27,

neither provision is even remotely implicated here.

A. Section 1252(g) Does Not Bar Plaintiffs' Claims.

As the Supreme Court explained in *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*"), 525 U.S. 471 (1999), "what § 1252(g) says is" quite "narrow[]." *Id.* at 482. "The provision applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *AADC*, 525 U.S. at 482. Section 1252(g) does not preclude review in this case for at least two separate reasons.

First, plaintiffs' claims are not barred by § 1252(g) because they do not challenge the agency's ultimate exercise of discretion, but rather assert legal errors; they allege that the rescission of the DACA program was unlawful for multiple reasons, including that it violated the APA and the Fifth Amendment (due process and equal protection). This Court has held that while § 1252(g) precludes jurisdiction to review challenges to the three *discretionary* decisions the statute specifically enumerates, it does *not* bar review of legal questions, even if related to those discretionary decisions. In *United States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004) (en banc), the Court explained that under 8 U.S.C. § 1252(g), "[t]he district court may consider a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal

question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority." *Id.* at 1155. *Accord, e.g.*, *Madu v. Attorney General*, 470 F.3d 1362, 1368 (11th Cir. 2006) (explaining that § 1252(g) "does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions"). *Cf. St. Cyr*, 533 U.S. at 307 (emphasizing that in the immigration context, courts "regularly" review "questions of law that arose in the context of discretionary relief"). Thus, although *AADC* indicated that § 1252(g) was "designed to give some measure of protection to 'no deferred action' decisions and similar *discretionary* determinations," 525 U.S. at 485 (emphasis added), plaintiffs' case does not challenge any discretionary decision not to defer action. *See also Texas v. United States*, 787 F.3d 733, 755-56 (5th Cir. 2015) (holding that § 1252(g) was inapplicable to states' APA challenge to 2014 deferred action program). Thus, *even* were it the case that the plaintiffs' claims implicated the three specified actions in § 1252(g), the provision would still not bar jurisdiction because the nature of the plaintiffs' claims is legal, and not discretionary.

Second, and in any event, § 1252(g) does not apply because the plaintiffs are not challenging any decision to "commence" or "adjudicate" removal proceedings, or to execute removal orders. This Court has instructed that § 1252(g) "applies only to the three specific discretionary actions mentioned in its text, not to all

claims relating in any way to deportation proceedings." *Catholic Soc. Servs., Inc. v. I.N.S.*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc). As *AADC* emphasized, § 1252(g) does *not* preclude review of "many other decisions or actions that may be part of the deportation process—such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order." 525 U.S. at 482.

Consistent with the Supreme Court's guidance in *AADC*, this Court has narrowly construed § 1252(g). For example, in *Alcaraz v. INS*, 384 F.3d 1150 (9th Cir. 2004), the Court made clear that even claims closely related to the initiation of removal proceedings are not precluded by § 1252(g), so long as the claim does not directly challenge the decision to commence proceedings itself. *Id.* at 1160-61. *Alcaraz* considered whether § 1252(g) precluded jurisdiction over the noncitizens' claim that the BIA should have administratively closed their removal proceedings so they could avail themselves of a process known as "repapering." *Id.* at 1154. Under the "repapering" process, the closure of the noncitizens' cases would have allowed the immigration authorities to reinitiate removal proceedings in which they could apply for a form of relief that would have otherwise been unavailable to them. *Id.* at 1152-53. The Court held that "[w]hile the second step in the repapering process involves a decision to commence (or "reinitiate") proceedings,

. . . [t]he Alcarazes' repapering claim only raises the issue of administrative closure. Therefore, we are not barred from hearing this claim by 8 U.S.C. § 1252(g)." *Id.* at 1161.

Plaintiffs' challenge to the rescission of the DACA program is even further from any decision to initiate removal proceedings than the circumstance in *Alcaraz.* Rescission of the program does not in fact initiate removal proceedings against anyone; the immigration authorities would have to take separate steps to initiate a removal proceeding, adjudicate a case, or execute a removal order. Indeed, at a minimum, pursuant to the rescission, DACA recipients would retain their DACA grants until the original expiration date. Even for those DACA recipients who are or will be in removal proceedings, success on the claims in this case would not (and the injunction issued by the district court does not) affect the immigration court's jurisdiction over such proceedings. Indeed, as Defendants have conceded elsewhere, "an immigration judge has no jurisdiction to reinstate DACA status, or to authorize an application for renewal of DACA status." *Gonzalez Torres*, 2017 WL 4340385, at *6. *See also Matter of Quintero*, 18 I. & N. Dec. 348, 350 (BIA 1982) (explaining that "neither the immigration judge nor the Board may grant [deferred action] status or review a decision of the District

Director to deny it").[3]

B. Sections 1252(b)(9) and 1252(a)(2)(B) Are Inapplicable

Although the government half-heartedly attempts to draw support from 8 U.S.C. §§ 1252(b)(9) and 1252(a)(2)(B), neither provision is relevant here.

First, as the Supreme Court has explained, the purpose of § 1252(b)(9) is "to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals.'" *St. Cyr*, 533 U.S. at 313. Thus, § 1252(b)(9) works to ensure that issues that can be meaningfully reviewed on petitions for review of removal orders are resolved there, rather than in piecemeal, separate litigation. It does not, however, sweep in matters that simply cannot be reviewed in immigration proceedings. *See, e.g.*, *Jennings v. Rodriguez*, 138 S Ct. 830, 840 (2018) (Alito, J.) (reasoning that "cramming judicial review of . . . questions" that could not be adjudicated by the immigration courts "into the review of final removal orders would be absurd").

A challenge to the rescission of DACA is not barred by § 1252(b)(9) because the plaintiffs "are not asking for review of an order of removal; they are

[3] The government has also repeatedly asserted in other federal court cases that "deferred action does not . . . provide any defense to removal" and "[a]n individual with deferred action remains removable at any time." Opp. to Mot. for Class Certification, *Inland Empire*, No. 17-cv-2048 (C.D. Cal. Feb. 1, 2018), Dkt. 53 at 9; *see also* Opp. to Mot. for Temporary Restraining Order and/or Preliminary Injunction, *Colotl v. Kelly*, No. 17-01670 (N.D. Ga. May 31, 2017), Dkt. 18, at 2-3 (same); Opp. to Mot. for Class Preliminary Injunction, *Inland Empire*, No. 17-cv-2048 (C.D. Cal. Feb. 1, 2018, Dkt. 54 at 15 ("A grant of DACA is not protection from removal.").

not challenging the decision . . . to seek removal; and they are not even challenging any part of the process by which their removability will be determined." *Id.* at 841. Indeed, § 1252(b)(9) is not even remotely applicable because the immigration court has no jurisdiction to consider deferred action decisions. It is well established that "neither the immigration judge nor the Board [of Immigration Appeals] may grant [deferred action] status or review a decision of the District Director to deny it." *Matter of Quintero*, 18 I. & N. Dec. at 350. And as noted, the government has conceded this point elsewhere. *See, e.g., Gonzalez Torres*, 2017 WL 4340385, at *6. Because the immigration court has no jurisdiction to consider a challenge to the rescission or termination of DACA, § 1252(b)(9) is wholly inapplicable.[4]

Second, § 1252(a)(2)(B) is similarly irrelevant here. The Supreme Court and this Court have held that § 1252(a)(2)(B) applies only to challenges to *discretionary* judgments, and does not bar review of legal claims even if related to discretionary relief. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (holding that § 1252(a)(2)(B)(ii) did not bar review of a legal claim challenging

[4] Amici note that an additional reason § 1252(b)(9) is inapplicable is that "it applies only 'with respect to review of an order of removal under subsection (a)(1).'" *St. Cyr*, 533 U.S. at 313 (quoting 8 U.S.C. § 1252(b)). *See also Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006) (Section 1252(b)(9) did not apply because "there is no final order of removal."). *But see JEFM v. Lynch*, 837 F.3d 1026, 1033 (9th Cir. 2016) (holding that § 1252(b)(9) barred claims by unrepresented children who were not challenging removal orders, where the Court concluded that a child could theoretically raise the claim in a petition for review).

detention decision); *Zazueta–Carrillo v. Ashcroft*, 322 F.3d 1166, 1169-70 (9th Cir. 2003) (decision that alien was statutorily barred from petitioning for adjustment of status was not discretionary and could be reviewed notwithstanding § 1252(a)(2)(B)). *Zadvydas* made clear that the proper focus under § 1252(a)(2)(B) is on the particular claim asserted by the petitioner, not whether the claim is related to a decision that is ultimately in the discretion of the Attorney General. 533 U.S. at 688. *See also St. Cyr*, 533 U.S. at 307-08. Here, plaintiffs are asserting legal errors, and do not challenge the actual exercise of discretion. Further, the jurisdictional bar in § 1252(a)(2)(B)(ii) applies only where discretion is conferred by statute. *See Kucana v. Holder*, 558 U.S. 233, 246-47 (2010) (holding that in § 1252(a)(2)(B)(ii), "Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General's discretionary authority in the statute"). For these reasons, § 1252(a)(2)(B) does not preclude district court jurisdiction over plaintiffs' legal claims here.

II. The Court Should Reserve the Question Whether the District Courts Have Jurisdiction in Cases Raising Legal Challenges to Individual, Rather than Programmatic, Decisions to Revoke DACA.

The district court suggested that the fact that plaintiffs are challenging a programmatic decision, and not an *individualized* decision concerning DACA, might be meaningful to the jurisdictional analysis. ER 21-22. However, the question whether the district courts have jurisdiction in cases challenging the legal

validity of individualized decisions to revoke DACA is not before the Court, and the Court therefore should reserve the question for a case in which it is squarely presented. Indeed, that question has been litigated in multiple district courts, including in this Circuit. *Every* district court that has considered the government's jurisdictional arguments in the context of cases challenging the unlawful revocation of individual DACA grants has rejected them, concluding that the district courts retain jurisdiction to review such legal claims in individual cases. *See, e.g.*, *Inland Empire*, 2018 WL 1061408, at *15-17 (C.D. Cal Feb. 26, 2018); *see also Gonzalez Torres*, 2017 WL 4340385, at *4-5; *Ramirez Medina*, 2017 WL 5176720 at *6-8; *Colotl v. Kelly*, 261 F. Supp. 3d at 1338-40. Likewise, each of these courts has held that, based on the particular legal claims raised in these cases, there is law to apply under the APA, 5 U.S.C. § 701(a)(2). *Inland Empire*, 2018 WL 1061408, at *14; *Gonzalez Torres*, 2017 WL 4340385, at *5; *Ramirez Medina*, 2017 WL 5176720, at *8; *Colotl v. Kelly*, 261 F. Supp. 3d at 1340.

For the same reasons given above, when USCIS revokes DACA in an individual case and the individual challenges the lawfulness of that decision, the provisions of § 1252 relied upon by the government are not implicated because such claims are *legal*, not discretionary, *see Hovsepian*, 359 F.3d at 1155, and because decisions concerning DACA are separate and independent from removal proceedings. As noted, immigration courts have no jurisdiction to adjudicate

individualized DACA challenges. *See supra* at Argument, Part I.A. And the rules of the DACA program make clear that many individuals with DACA may have already been placed in removal proceedings, or have prior removal orders. *See*, *e.g.*, Napolitano Memo at 2-3. Further, the government takes the position that "deferred action does not . . . provide any defense to removal." *See*, *e.g.*, Opp. to Mot. for Class Certification, *Inland Empire*, No. 17-cv-2048 (C.D. Cal. Feb. 1, 2018), Dkt. 53 at 9; *see also supra* at n.3. Accordingly, § 1252 does not preclude district court jurisdiction in legal challenges to individual DACA revocation decisions, just as it does not bar review of the challenge to the decision to end the DACA program as a whole.

Notably, the Ninth Circuit has repeatedly held that individual APA challenges to USCIS denials of affirmative benefits that are collateral to a noncitizen's removal proceedings may be brought in district court. For example, in *Mamigonian v. Biggs*, 710 F.3d 936, 945-46 (9th Cir. 2013), the Ninth Circuit considered whether a noncitizen could seek district court review of USCIS' denial of an adjustment of status application, when the noncitizen had also been in removal proceedings. The Court held that "district courts maintain jurisdiction to review challenges to adjustment-of-status denials that were decided on nondiscretionary grounds despite the jurisdiction-stripping provisions of the REAL ID Act." *Id.* at 942. *Mamigonian* reasoned that review was available in district

court where the immigration court lacked jurisdiction over the challenged decision. Because review in the context of removal proceedings "would be unavailable to Ms. Mamigonian," she could bring an affirmative claim in district court notwithstanding the § 1252 jurisdictional bars. *Id.* at 945. *See also, e.g.*, *Ching v. Mayorkas*, 725 F.3d 1149, 1154-59 (9th Cir. 2013) (finding district court jurisdiction over procedural due process challenge to denial of an I-130 petition adjudicated by USCIS, even though the wife's "removal proceedings are currently pending"). *Accord, e.g.*, *Perez v. USCIS*, 774 F.3d 960, 965-67 (11th Cir. 2014) (affirming district court's jurisdiction over an APA challenge to denial of adjustment of status application even though the noncitizen had been placed in removal proceedings); *Mejia Rodriguez v. DHS*, 562 F.3d 1137, 1145 n.15 (11th Cir. 2009) (per curiam) (concluding district court had jurisdiction over noncitizen's APA challenge to denial of Temporary Protected Status ("TPS")). Similarly, the immigration court could not entertain a legal challenge to USCIS's decision to terminate DACA in an individual case, and therefore the district courts retain jurisdiction.

The Court should also reserve the question of whether a challenge to DACA termination in an individual case is "committed to agency discretion by law" under the APA. 5 U.S.C. § 701(a)(2). Every district court to have considered the question has determined that individual DACA termination decisions are subject to

APA review. In each case, the district court concluded that the DACA memorandum and the detailed DACA Standard Operating Procedures provided law to apply in reviewing the affirmative decision to terminate an individual's DACA. *Inland Empire*, 2018 WL 1061408, at *14; *Gonzalez Torres*, 2017 WL 4340385, at *5; *Ramirez Medina*, 2017 WL 5176720, at *8; *Colotl v. Kelly*, 261 F. Supp. 3d at 1341. Those decisions correctly relied on the fact that § 701(a)(2) does not bar review of decisions, whether programmatic or individual, that are subject to a meaningful standard of any kind: "Even where statutory language grants an agency 'unfettered discretion,' its decision may nonetheless be reviewed if regulations or agency practice provide a 'meaningful standard by which this court may review its exercise of discretion.'" *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1069 (9th Cir. 2015) (quoting *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003)).

In sum, the Court should reserve the question whether the district courts retain jurisdiction under the INA and the APA to review legal challenges to individual revocations of DACA. Further, the Court need not rely on the *program-wide* nature of the instant plaintiffs' challenge in its jurisdictional analysis.

III. The Nationwide Scope of the Injunction is Necessary Because No Narrower Injunction Could Provide the Plaintiffs with Complete Relief.

The nationwide injunction is appropriate because it sets aside an

administrative action—the decision to rescind DACA based on a flawed legal premise—that is invalid in all its applications, and no narrower injunction could provide complete relief to the plaintiffs.

The government is simply wrong to suggest that Article III precludes injunctive relief that benefits nonparties. Gov't Br. 49. In fact, such relief is routine. *See, e.g.*, *Util. Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2449 (2014) (invalidating Environmental Protection Agency rule); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (affirming nationwide injunction and holding that the APA "compel[s]" the entry of a nationwide injunction where a regulation is facially invalid);[5] *Int'l Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 550 (9th Cir. 1986) (affirming injunction in "nation-wide enforcement action"); *see also Arizona v. U.S.*, 567 U.S. 387, 416 (2012) (affirming injunction of state statute); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (affirming injunction of state traffic stop policy); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. 2013) (en banc) (affirming injunction against several provisions of local immigration ordinance); *Lozano v. City of Hazleton*, 724 F.3d 297, 323 (3d Cir. 2013) (affirming injunction against several local ordinance provisions). The

[5] This decision was reversed on standing grounds in *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009), but the Supreme Court did not reach the question of the proper scope of injunctive relief and never suggested that, had the plaintiffs had standing, the injunction would not have been appropriate.

government does not explain why the injunction in the present case "contravenes bedrock principles of Article III and equitable discretion," Gov't Br. 48-49, but the injunctions in countless other non-class action cases did not.

Indeed, as Justice Blackmun explained, where "a rule of broad applicability . . . is invalidated . . . , a single plaintiff, so long as he is injured by the rule, may obtain 'programmatic' relief that affects the rights of parties not before the court." *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting); *see also Nat'l Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citation and quotation marks omitted) (noting that Justice Blackmun was "writing in dissent but apparently expressing the view of all nine Justices on this question"). And the Supreme Court reaffirmed the appropriateness of such relief just last year: in *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017), the Court partially left in place an injunction that protected not only the particular plaintiffs challenging the travel ban, but also individuals everywhere who were "similarly situated."

This Court has also acknowledged that "there is no bar against nationwide relief in the district courts or courts of appeal, even if the case was not certified as a class action, if such broad relief is necessary to give prevailing parties the relief to which they are entitled." *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (citing *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th

Cir.1987)). *See also Zepeda v. I.N.S.*, 753 F.2d 719, 728 n.1 (9th Cir. 1983) (narrowing injunction in as-applied constitutional challenge but noting that relief benefiting nonparties is appropriate where "identical relief [is] inevitable to remedy the individual plaintiffs' rights").

Here, a nationwide injunction is required because there is no other way to offer complete relief to the plaintiffs—states and universities who are harmed through the rescission's injuries to DACA recipients as students, employees, and taxpayers. In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), this Court declined to stay temporary nationwide relief because "the Government ha[d] not proposed a workable alternative form of the TRO that . . . would protect the proprietary interests of the [plaintiff] States at issue here while nevertheless applying only within the States' borders." *Id.* at 166-67.

This case presents precisely such a situation. An injunction limited to the plaintiffs would fail to "provide [them] complete relief," *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994) (citation and quotation marks omitted), because such an injunction is fundamentally unworkable. The government proposes an injunction "limited to DACA recipients who are named plaintiffs or validly represented by the union plaintiff, as well as any additional DACA recipients whose loss of DACA would impose cognizable injuries on the various entity plaintiffs." Gov't Br. 54.

The inadequacy of the government's proposed remedy is obvious. For example, as the district court correctly found, California, Maryland, the City of San Jose and the County of Santa Clara all employ individuals who have DACA. ER 23. Even if the court were to go beyond the relief proposed by the government and order it to extend the DACA program specifically for the entities' employees, such an injunction would not fully redress their injuries. The states' large workforces rely on hiring pools that stretch across state lines, and there is no conceivable way to determine which DACA recipients would be unable to apply as a result of the rescission. *See* ER 24 (noting that these plaintiffs have alleged that "they will also need to expend additional resources to hire and train replacements"). The government proposes no method of identifying the individuals whose loss of DACA would cause these injuries, particularly given that individuals can move freely between states.

Practical considerations like these were at the heart of the principal cases on which the government relies, and those cases *support* the granting of a nationwide injunction here. In *Brock*, 843 F.2d 1163, this Court *affirmed* a nationwide injunction requiring the Secretary of Labor to apply a registration statute to forestry workers. In reaching its conclusion, the Court relied on practical concerns strikingly similar to those at issue here. It noted that the "Secretary has not suggested how the injunction to enforce can be limited to any particular group of

forestry labor contractors," and explained that a more limited injunction would be insufficient because the plaintiff laborers might travel to other parts of the country or, conversely, they might deal with contractors based elsewhere. *Id.* at 1171. The Court therefore concluded that the injunction was necessary.

This Court's decision in *Haven Hospice* equally supports the grant of a nationwide injunction in this case, though the particular facts there did not support broad relief. 638 F.3d 644. There, the Court narrowed the injunction only after a careful examination of the likely practical implications. Critically, the Court relied on the fact that the plaintiff had *conceded* at oral argument that a narrower injunction would grant it complete relief, *id.* at 665—a point that the plaintiffs vigorously contest in this case. The Court also relied on the government's claims that "great uncertainty and confusion . . . would likely flow from a nationwide injunction." *Id.* The government has made no such claims here; indeed, it is the government's proposal that would lead to uncertainty and confusion.

The appropriateness of nationwide relief is reinforced by the importance of uniformity in the enforcement of the immigration laws. *Hawai'i v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017) ("[T]he immigration laws of the United States should be enforced vigorously and *uniformly*.") (citation and quotation marks omitted). The government contends that DACA "is itself a departure from vigorous and uniform enforcement of the immigration laws," and that allowing DACA to remain

in place for some individuals who meet the criteria, but not for others, would somehow increase uniformity in immigration enforcement. Gov't Br. 53. But that kind of a patchwork version of DACA would impose the exact opposite of uniformity. More fundamentally, it ignores the original purpose of DACA—"to ensure that our enforcement resources are not expended on these law priority cases but are instead appropriately focused on people who meet our enforcement priorities." Napolitano Memo at 1.

CONCLUSION

For the reasons above, the Court should affirm judgment below.

Dated: March 20, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because it contains 5,871 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f)

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Dated: March 20, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2018, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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