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

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

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INTRODUCTION

In order to ensure transparency and rationality in administrative decision-making, government agencies enacting substantive rules must first provide public notice and receive and consider public comments. *See* 5 U.S.C. § 553. Here, defendants imposed a substantive rule by (1) rescinding DACA and instructing DHS officers to reject all applications for deferred action pursuant to the DACA eligibility criteria; and (2) making a legal determination that the type of deferred action authorized by DACA was no longer permissible. Accordingly, DHS was required to comply with the Administrative Procedure Act's notice-and-comment requirements.

The government asserts that the rescission is a non-binding "general statement of policy"—a type of administrative decision that simply announces "the agency's tentative intentions for the future," and is more akin to a "press release" than a binding rule. *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). But the rescission of DACA is binding, not tentative. Before the rescission, DHS was exercising its discretion to grant deferred action to DACA applicants. After the rescission, DHS personnel were instructed to deny DACA applications without exception, which would in turn suspend the employment authorizations of hundreds of thousands of people, eliminate their access to advance parole, and expose

them to arrest and deportation. Before the rescission, DACA was regarded as a lawful exercise of the executive's enforcement discretion. Yet in rescinding DACA, the government reversed that legal conclusion. An administrative action with binding effect based on a binding determination of law is plainly substantive.

The government also asserts that because DACA did not go through notice and comment when it was introduced, it could be repealed without notice and comment. But the two actions are not parallel: DACA permitted case-by-case discretion and therefore was not subject to notice and comment, whereas the rescission abolished agency discretion. Moreover, even if DACA required notice and comment when it was introduced, the APA forecloses the government's "two wrongs make a right" logic. The plain text of the APA requires the government to undertake notice-and-comment procedures when "repealing" a substantive rule, 5 U.S.C. § 551(5), without regard to whether that rule was properly issued. Because the rescission failed to comply with the APA's requirements, it must be set aside.

This Court should reverse the district court's dismissal of plaintiffs' notice-and-comment claim, and affirm the preliminary injunction on the additional ground that plaintiffs are likely to prevail on that claim.

ARGUMENT

I. The Rescission Is A Substantive Rule Subject To Notice And Comment.

The Administrative Procedure Act requires notice-and-comment rulemaking for all "substantive rules." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301, 315 (1979); *see* 5 U.S.C. § 553(b). These procedures ensure adherence to the democratic values of "public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies," as well as the technocratic imperative that the decision-maker receive "the facts and information relevant to a particular administrative problem." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (citations and internal quotation marks omitted); *see also Alcaraz v. Block*, 746 F.2d 593, 610 (9th Cir. 1984) ("notice-and-comment rulemaking reflect[s] a judgment by Congress that the public interest is served by a careful and open review of proposed administrative rules and regulations").

Agency action is deemed to be a substantive rule when it "narrowly limits" agency discretion or "effect[s] a change in existing law." *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009). The rescission of DACA is substantive: it narrowly limits DHS's discretion by terminating the DACA program, and it displaces fifty years of settled law by

adopting a construction of the INA that forecloses deferred action programs like DACA. The APA requires that the public be afforded notice of, and the opportunity to comment on, rules of such significance and binding effect.

A. The Rescission Narrowly Limits DHS's Discretion.

As explained in plaintiffs' opening brief, agency directives that "narrowly limit[] administrative discretion," *Colwell*, 558 F.3d at 1124, and contain "mandatory language cabining . . . enforcement discretion," *Alaska v. DOT*, 868 F.2d 441, 447 (D.C. Cir. 1989), are substantive rules. Here, the rescission prohibits DHS agents from (1) accepting new DACA or advance parole applications as of September 5, 2017; and (2) accepting DACA renewal applications after October 5, 2017. It instructs that the agency "[w]ill" "immediately" reject all pending advance parole requests by DACA recipients; "[w]ill not approve" any such requests based on DACA going forward; "[w]ill reject all DACA initial requests"; and "[w]ill reject" all renewal requests after the applicable deadline. ER130-31.

Nothing in the rescission suggests that DHS agents may continue to approve DACA applications. *See Municipality of Anchorage v. United States*, 980 F.2d 1320, 1324 (9th Cir. 1992) (the "critical factor" in determining whether agency action is a rule or policy 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"); *NRDC v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) ("[B]ecause the Guidance binds EPA regional directors, it cannot, as EPA claims, be considered a mere statement of policy."). Instead of allowing DHS officers to evaluate the merits of each individual DACA request, the rescission mandates an across-the-board rejection of all DACA applications.

The government's contrary assertion that "[n]othing in the Rescission Memo evidences an 'inten[t] to be bound,'" Response Br. 54, rests on a mis-citation of the rescission memorandum. The government alleges that enforcement discretion remains intact because the rescission memorandum "describes how pending and future deferred action requests will be 'adjudicate[d]—on an individual, case-by-case basis.'" Response Br. 53 (citing ER130). However, the portion of the memorandum cited by the government allows case-by-case adjudications only for "properly filed *pending* DACA initial requests . . . accepted by the Department as of the date of this memorandum [September 5, 2017]." ER130 (emphasis added). For *future* initial requests, the rescission memorandum states that DHS "*[w]ill reject all* DACA initial requests . . . filed after the date of this memorandum." *Id.* (emphasis added). Similarly, the memorandum instructs that requests for renewal will be adjudicated on a case-by-case basis only if

they were accepted during a limited renewal window ending on October 5, 2017. *Id.* The memorandum orders that after October 5, 2017, DHS "[w]ill reject all DACA renewal requests." *Id.*

Retreating from its position that the rescission affirmatively *authorizes* case-by-case discretion, the government argues that the rescission does not "categorically forbid" DHS from granting deferred action to "particular" DACA recipients in individual cases. Response Br. 54. But the relevant standard is not whether an agency is absolutely forbidden from exercising discretion, but whether the agency's discretion has been "narrowly limit[ed]." *See Colwell*, 558 F.3d at 1124. Here, the rescission forbids DHS from granting deferred action based on a DACA application, regardless of what showing that application might include. And even if the government retains the theoretical power to defer action in an individual case, the rescission dismantles a set of programmatic elements—including the DACA eligibility criteria and process for reviewing applications—that assured that an exercise of enforcement discretion realistically would be available to the DACA population.[1]

[1] The rescission limits DHS's discretion in other ways too. For example, DACA contained a guarantee that applicants' information would not be shared for the purposes of immigration enforcement, ER149, as well as a formal process for appealing a denial of deferred action, ER150-51. Even if

By narrowly restricting if not outright abolishing administrative discretion, DHS promulgated a substantive rule without following the proper procedures, and its action therefore should be set aside. *See Paulsen v. Daniels*, 413 F.3d 999, 1003-04 (9th Cir. 2005) (concluding that the Bureau of Prisons "plainly violated the APA" by promulgating a rule that barred a category of prisoners from relief without notice).

B. The Rescission Effects A Change In Substantive Law.

The rescission is substantive for the independent reason that it "effect[ed] a change in existing law or policy." *See Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 (9th Cir. 2003); *see also Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994) (holding that an agency promulgated substantive rule when it "eliminated [a statutory] right for a class of tenants").

Before the rescission, and consistent with fifty years of administrative precedent, DHS and DOJ took the view that DACA was a permissible form of enforcement discretion. *See* SER243 n.8 (OLC memorandum); Regents Br. 5-6 (history of deferred action). In rescinding DACA, DHS did not simply change its enforcement priorities, but declared DACA unlawful and

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DHS retained some discretion to offer other forms of deferred action to DACA recipients, the rescission strips the DACA population of these protections going forward.

departed from a settled understanding of the INA. The Attorney General's letter to the Acting Secretary of DHS, which formed the legal basis for the rescission, concluded that DACA was a "circumvention of immigration laws" and "an unconstitutional exercise of authority." ER176. In rescinding the program, the Acting Secretary relied on the Attorney General's "legal determination" that DACA "was effectuated . . . without proper statutory authority." ER129; *see* 8 U.S.C. § 1103(a)(1) ("That determination and ruling by the Attorney General with respect to all questions of law [relating to the immigration and naturalization of aliens, subject to exceptions] shall be controlling.").

Through these pronouncements, the Attorney General and the Acting Secretary established a new rule of substantive law: that DHS lacks the legal authority to maintain DACA and comparable deferred action programs. This change in law renders the rescission a substantive rule subject to notice-and-comment procedures. *Reno-Sparks*, 336 F.3d at 909; *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.").

The government does not respond to this argument in its brief and cites no authority to the contrary; it thereby concedes the point. *See NLRB v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 433*, 600 F.2d 770, 775 (9th Cir. 1979). Accordingly, the Court should reverse the district court and set aside the rescission because it effected a change in existing law without the required notice-and-comment procedures.

C. The Rescission Is Not A Non-Binding "Statement of Policy."

The government maintains that the rescission is merely a "general statement of policy," exempt from the APA's notice-and-comment requirements under section 553(b)(3)(A). *See* Response Br. 51-56. But the exception for non-binding policy statements, like all exceptions to the APA's procedural requirements, must be "narrowly construed and only reluctantly countenanced." *Alcaraz*, 746 F.2d at 612 (citation omitted); *see also San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966, 969 (9th Cir. 1989) ("Congress was concerned that the exceptions to section 553, though necessary, might be used too broadly.").

Here, because the rescission effected a change in governing law and committed DHS to rejecting all DACA applications, it is not a "general statement of policy." As the cases cited in the government's brief describe, a "general statement of policy" is akin to "a press release"—that is, a non-

binding "announcement to the public of the policy which the agency hopes to implement" that merely indicates "the agency's tentative intentions for the future." *Pac. Gas*, 506 F.2d at 38; *see also Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1012-13 (9th Cir. 1987) (defining general statements of policy as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power" (citation and emphasis omitted)); *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (describing general statements of policy as "musings about . . . the future"). Because statements of mere intention do not definitively foretell agency action, it is logical that they be exempt from notice-and-comment procedures.

The creation of DACA is a straightforward example of a general policy statement. Although DACA sets out a series of eligibility requirements for the program, each DACA application was subject to discretionary case-by-case review. ER142; Regents Br. 50, 76. Although DACA invited applications and set threshold eligibility criteria, it did not dictate agency action in any particular case. Any application could be accepted or denied in the agency's discretion. ER142.

The rescission, however, is quite different. It did not create guidance for case-by-case review, but rather tied the agency's hands and inflicted

immediate consequences on 700,000 people by eliminating the programmatic use of enforcement discretion with respect to the DACA population. The memorandum affords the agency no discretion to continue granting DACA applications; it refers only to DHS's discretion to *terminate*, not continue, grants of deferred action during the period before the rescission was fully implemented. *See* ER131 ("[DHS] [w]ill continue to exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate."). Far from stating the government's "tentative intentions for the future," *Pac. Gas*, 506 F.2d at 38, the rescission ended a program in its entirety, leaving no room for the agency to "change its position . . . in any specific case," *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

Moreover, unlike in the cases cited by the government, the rescission was not a policy decision based solely on the reordering of enforcement priorities. The memorandum is not framed as a discretionary policy judgment. Instead, the rescission abandons a longstanding construction of the underlying statute, incorporating the Attorney General's conclusion that DACA "was effectuated . . . without proper statutory authority." ER129. The rescission is therefore far different from the government's cases that merely

reshuffled enforcement priorities rather than re-evaluating the agency's legal power to act. *See, e.g.*, *Pac. Gas*, 506 F.2d at 41 (order "merely announces the general policy which the Commission hopes to establish in subsequent proceedings"); *Mada-Luna*, 813 F.2d at 1017 (INS changed enforcement priorities but did not construe statute or declare previous policy unlawful); *Morales de Soto v. Lynch*, 824 F.3d 822, 826 (9th Cir. 2016) (similar). By contrast, in an analogous case where the executive branch terminated a deferred action program without providing an opportunity for notice and comment, a court found that the repeal was substantive and had to undergo notice-and-comment rulemaking. *See Parco v. Morris*, 426 F. Supp. 976, 979-81 (E.D. Pa. 1977) (notice and comment required where "[t]he effect of the [revocation] was to remove the discretion of" agency officials, and replace discretion with "a legal rule").

II. *Mada-Luna* Confirms That The Rescission Is A Substantive Rule.

The government relies heavily on this Court's decision in *Mada-Luna*, but that decision actually underscores that the rescission required notice-and-comment rulemaking procedures.

Mada-Luna addressed the question of which of two versions of an INS Operating Instruction—one from 1978, the other from 1981—applied to an individual's request for deferred action. The two versions of the

instructions identified factors to be considered in the discretionary evaluation of deferred action requests. The 1978 Instruction focused "upon the effect of deportation or exclusion upon the individual alien himself," whereas the 1981 Instruction was concerned "first and foremost with the effect of deporting or excluding a particular alien upon the administration, management, and public image of the INS." 813 F.2d at 1009 n.2. Because the 1981 Instruction superseded the 1978 Instruction, the INS applied the 1981 Instruction in evaluating, and then denying, the deferred action request of the petitioner in that case. The petitioner argued that the agency instead should have applied the 1978 Instruction, both because it had not been properly repealed and because the 1981 Instruction had not undergone notice and comment.

This Court acknowledged that "[w]hen a federal agency issues a directive concerning the future exercise of its discretionary power," such a directive *may*, depending on the circumstances, constitute "a substantive rule, for which notice-and-comment procedure are required." *Id.* at 1013; *see also id.* at 1012 n.6 (cautioning that "not all INS operating instructions would qualify under [the statement-of-policy] exception" and observing that the determination must be done on a case-by-case basis). The "critical factor" was "the extent to which the challenged [directive] leaves the

agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case." *Id.* at 1013.

Mada-Luna thus applied this Court's customary test, whereby an agency action is a rule if it "narrowly limits administrative discretion or establishes a 'binding norm.'" *Id.* at 1014 (emphasis omitted). The analysis "focused upon the effect of the regulation or directive upon *agency decisionmaking*." *Id.* at 1016 (emphasis in original). Under the particular circumstances of *Mada-Luna*, the Court concluded that notice-and-comment procedures were not required either to repeal the 1978 Instruction or to promulgate the 1981 Instruction because, under both sets of instructions, the INS was "free to consider the individual facts in the various cases that arise." *Id.* at 1014.

Mada-Luna's conclusion was "based exclusively upon the language and structure of the directive[s]" at issue, *id.* at 1015, rather than any general principle that enforcement policies are exempt from notice and comment. There, the specific "wording and structure" of the 1981 Instruction "emphasize[d] the broad and unfettered discretion of the district director in making deferred action determinations." *Id.* at 1017. In short, *Mada Luna* involved a non-binding "press release" type of guidance document that did not dictate any particular outcome in any particular case.

Mada-Luna was quick to note, however, that the result would be different for an agency action that "effectively replaces agency discretion with a new binding rule of substantive law." *Id.* at 1014 (citations omitted). This Court reached a similar conclusion in *San Diego Air Sports Center*, 887 F.2d at 970. That case concluded that because a letter from the Federal Aviation Administration "create[d] an immediate, substantive rule, *i.e.*, that no parachuting will be allowed in the San Diego [Traffic Control Area]," it was "*not* comparable to the directive held in *Mada-Luna* to be a general statement of policy." *Id.* Unlike the *Mada-Luna* directive, which "merely provide[d] *guidance* to agency officials in exercising their discretionary powers while preserving their flexibility and their opportunity to make 'individualized determination[s],'" *id.* (quoting 813 F.2d at 1013), the FAA letter under review was mandatory and substantive.

That is exactly the type of action at issue here. Whereas DACA itself permitted the exercise of case-by-case discretion, ER142, the rescission of DACA replaced that discretion with a binding legal determination that DACA "was effectuated . . . without proper statutory authority," ER129. Moreover, unlike the "press release" style of guidance at issue in *Mada-Luna*, the "wording and structure" of the rescission point to a binding rule. *See* 813 F.2d at 1017; *see supra* § I.A. In this case, the answer to the

"critical" question presented by *Mada-Luna*—whether DHS was "free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case," 813 F.2d at 1013—is "no."

III. The Rescission Of DACA Requires Notice-And-Comment Rulemaking Regardless Of Whether The Promulgation Of DACA Did.

The government asserts that because DACA did not itself undergo notice and comment, it could be rescinded without notice and comment. Response Br. 56. Not so. As set forth above, DACA itself was not required to go through notice and comment because it was a non-binding policy statement that afforded DHS discretion in each individual case.

Moreover, DACA and the rescission do not, as the government contends, rise and fall together. Sections 553(b) and (c) of the APA require notice and comment for "rule making," defined as the "agency process for formulating, amending, *or repealing a rule*." 5 U.S.C. § 551(5) (emphasis added). Thus, the APA "expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule." *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982). These requirements apply on their face to all repeals of rules and do not contemplate an exception for rules that the government contends were procedurally defective. The government does not deny that there is an

unbroken line of cases holding that a procedural defect in promulgating a rule does not render it vulnerable to repeal without notice and comment. *See, e.g.*, *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 26 (D.D.C. 2013) ("ordinarily 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"), *aff'd*, 601 F. App'x 1 (D.C. Cir. 2015); *Nat'l Treasury Emps. Union v. Cornelius*, 617 F. Supp. 365, 371 (D.D.C. 1985).

The government notes that the procedural defects at issue in these cases were not notice-and-comment defects, Response Br. 56, but does not explain why this is a relevant distinction. *Consumer Energy*, for example, concerned an agency's attempt to precipitously rescind a rule that had not been properly evaluated prior to promulgation. The D.C. Circuit rejected the agency's argument that "notice and comment requirements do not apply to 'defectively promulgated regulations,'" explaining that such an approach "is untenable because it would permit an agency to circumvent the requirements of section 553 merely by confessing that the regulations were defective in some respect and asserting that modification or repeal without notice and comment was necessary to correct the situation." 673 F.2d at 447 n.79. This

logic applies equally where the alleged defect is the absence of notice-and-comment procedures.

The approach advocated by the government would permit an agency to evade the APA's requirements and rescind important rules without process—undermining the core objectives of the APA. *See Int'l Union, UMWA v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) ("Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."). Under 5 U.S.C. § 551(5), these objectives apply to all substantive agency actions, including repeals of rules.

An approach permitting the sudden repeal of rules deemed to have been defectively promulgated would deny interested parties their statutory right to participate in agency decision-making. Here, DACA recipients, who benefited from the program, had no incentive or standing to seek review of the procedures followed when DACA was created. It is unreasonable that a rule so broadly supported that any procedural infirmities went unchallenged, and therefore uncorrected, would be more vulnerable to repeal than a rule

that was litigated at its inception.[2] *See Mada-Luna*, 813 F.2d at 1017 n.12 ("[W]e would question whether private citizens . . . should be estopped from asserting that a regulation being replaced is substantive, simply because they and other parties did not assert such a position at the time the regulation was promulgated—particularly since asserting such a position would have been directly contrary to their interest.").

CONCLUSION

The Court should reverse the district court's dismissal of plaintiffs' APA notice-and-comment claim and affirm the district court's injunction on the additional ground that plaintiffs are likely to succeed on that claim.

[2] The government asserts that subjecting the rescission to notice and comment would result in a pyrrhic victory for the plaintiffs by creating binding precedent allowing "opponents of DACA [to] immediately obtain an injunction against it" for failure to go through notice-and-comment procedures. Response Br. 55-56. That is incorrect. The creation of DACA was a non-binding action that allowed for enforcement discretion in each case; unlike the rescission, it was not required to undergo notice and comment. Additionally, courts have the power to order remand without vacatur, allowing rules to remain in place while procedural defects are corrected. *See, e.g.*, *Elec. Privacy Info. Ctr. v. U.S. DHS*, 653 F.3d 1, 8 (D.C. Cir. 2011); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("when equity demands, the regulation can be left in place while the agency follows the necessary procedures").

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Ninth Circuit Rules 28.1-1(d) 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 4,046 words.

Dated: April 17, 2018

s/ Jeffrey M. Davidson

CERTIFICATE OF SERVICE

I certify that on April 17, 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: April 17, 2018

s/ Jeffrey M. Davidson