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-Cross-Appellants,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Defendants-Appellants-Cross-Appellees.

On Appeal From The United States District Court
For The Northern District Of California

REPLY BRIEF FOR THE *GARCIA* AND *COUNTY OF SANTA CLARA* PLAINTIFFS

NICOLE A. SAHARSKY
MATTHEW S. ROZEN
HALEY S. MORRISSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

MARK D. ROSENBAUM
JUDY LONDON
MALHAR SHAH
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, CA 90005
(213) 385-2977

THEODORE J. BOUTROUS, JR.
ETHAN D. DETTMER
KIRSTEN GALLER
JONATHAN N. SOLEIMANI
KELSEY J. HELLAND
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Counsel for Plaintiffs Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

(Additional Parties and Counsel Listed on Next Page)

LUIS CORTES ROMERO
BARRERA LEGAL GROUP, PLLC
19309 68th Avenue South, Suite R102
Kent, WA 98032
(253) 872-4730

LAURENCE H. TRIBE
HARVARD LAW SCHOOL*
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-1767

ERWIN CHEMERINSKY
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW*
215 Boalt Hall
Berkeley, CA 94720
(510) 642-6483

LEAH M. LITMAN
UNIVERSITY OF CALIFORNIA,
IRVINE SCHOOL OF LAW*
401 East Peltason Drive
Irvine, CA 92697
(949) 824-7722

Additional Counsel for Plaintiffs Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

**Affiliation for identification purposes only*

STACEY M. LEYTON
ERIC P. BROWN
ANDREW KUSHNER
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Counsel for Plaintiffs County of Santa Clara and Service Employees International Union Local 521

JAMES R. WILLIAMS
GRETA S. HANSEN
LAURA S. TRICE
MARCELO QUIÑONES
OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
70 West Hedding Street
East Wing, Ninth Floor
San Jose, CA 95110
(408) 299-5900

Counsel for Plaintiff County of Santa Clara

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (*continued*)

Page(s)

TABLE OF AUTHORITIES (*continued*)

Page(s)

Statutes

INTRODUCTION

The government's brief completely ignores the profound human and social consequences of its decision to rescind the Deferred Action for Childhood Arrivals (DACA) program. For most of the Dreamers, the United States is the only country they have ever known. Before DACA, these individuals lived their lives in the shadows—they could not pursue their careers, attend many educational institutions, or lawfully work in the United States. In short, they could not pursue normal, productive lives. And worse yet, they faced the constant threat of deportation.

DACA changed all of that. In exchange for coming forward and identifying themselves to the government, undergoing a thorough background check, and paying a considerable fee, the government granted DACA recipients presumptively renewable two-year periods of deferred action and work authorization. So long as they continued to satisfy the program's criteria, the Dreamers could live and work in this country without fear of deportation. And so, relying on DACA, the Dreamers were able to enroll in colleges, start businesses and families, and plan for the future—basic aspects of life that most of us take for granted. They identified themselves to the government because they were told that, once granted, DACA would be presumptively renewable—and so they would no longer live under the constant fear of deportation.

For years, the government repeatedly promised the Dreamers that they could rely on DACA. For example, former Secretary of Homeland Security Jeh Johnson said that the government "must continue to … honor[]" certain "representations" it made regarding the program. ER.208. In March 2017, then-Secretary of Homeland Security John Kelly said that "DACA status" is a "commitment ... by the government towards the DACA person, or the so-called Dreamer." ER.209. And as recently as April 2017, President Trump said that his Administration is "not after the dreamers" and that "[t]he dreamers should rest easy." ER.209. When asked if "the policy of [his] administration [is] to allow the dreamers to stay," President Trump answered, "Yes." ER.209.

But in September 2017, the federal government abruptly announced that it was ending the DACA program. Without warning, the Dreamers' lives in the United States—their families, their jobs, their relationships, their property, and their futures—were once again in jeopardy. The effects have been acute for the individual plaintiffs in this case. They have spent years pursuing careers in medicine, education, and the law, and establishing deep roots while serving their patients, their students, their clients, and their communities. Now their plans and their dreams may all be destroyed, because they once again face the looming threat of deportation.

Plaintiffs brought these suits alleging that, as relevant here, the government's decision to rescind DACA violated their rights under the Due Process Clause and

violated the procedural requirements of the Administrative Procedure Act (APA). The district court dismissed these claims. But the district court did not sufficiently grapple with DACA recipients' protected liberty interests, or credit—as it must at the pleading stage—plaintiffs' allegations that they and the government shared a mutual understanding about the ability to renew their DACA status that gave rise to a constitutionally protected property interest. And the district court's analysis misunderstands the nature of the rescission decision for purposes of the notice-and-comment claim. This was a substantive decision—a decision to bind the Department of Homeland Security (DHS) and to restrict its officers' discretion—and so the government was required to follow notice-and-comment procedures.

Although the district court thoroughly addressed and appropriately resolved the other issues in this case, it missed the mark on these two claims. And rather than review the plaintiffs' allegations for whether they state a claim, the government diverts the Court with cases and theories that have no application to the actual claims presented. But the government cannot overcome the simple fact that the plaintiffs' well-pleaded allegations, combined with this Court's precedents, more than adequately support their due process and notice-and-comment claims.

The district court's order dismissing these claims should be reversed.

ARGUMENT

I. PLAINTIFFS HAVE STATED A PLAUSIBLE SUBSTANTIVE DUE PROCESS CLAIM

DACA was based on a promise—mutually understood by the government and by the hundreds of thousands of young people who relied on it—that individuals who came forward and complied with the program's terms could presumptively renew their protection and benefits as long as they continued to meet the program's criteria. Although the decision whether to initially grant DACA protection was at the government's discretion, all understood that the government was implementing—and beneficiaries were relying on—a structured program with presumptive renewal, thereby implicating constitutionally protected interests. The government actively encouraged young people to identify themselves to the government in exchange for valuable benefits. ER.206-09, 243, 249-50. And it made DACA status presumptively renewable—through the text of the 2012 DACA memo, the nondiscretionary renewal criteria, and its practice of approving virtually all qualifying renewal applications—because it understood that no reasonable person would identify himself to the government and risk deportation if benefits expired after two years. ER.204, 243, 249-50.

DACA fundamentally transformed recipients' lives, while also providing many benefits to the government. ER.198, 203, 250-60. The program worked because everyone understood that DACA recipients would be able to make long-

term decisions based on the government's promise that its protection and benefits (including work authorization) could be continually renewed so long as recipients met the program's criteria. ER.198, 206-07, 243, 249-51. Because the government's decision to rescind DACA broke this commitment to hundreds of thousands of Dreamers, without any legitimate basis for doing so, it violates the substantive protection of the Due Process Clause. ER.230 (citing, *e.g.*, *Raley v. Ohio*, 360 U.S. 423, 438-39 (1959)).

The district court dismissed the plaintiffs' substantive due process claims because it concluded that DACA recipients have no constitutionally protected interests in the benefits they receive under the program. In particular, the court failed to recognize that there was a mutual understanding that DACA status would presumptively be renewed if DACA recipients played by the rules. Plaintiffs have plausibly alleged that they and the government made this bargain, and that they and other Dreamers relied on it. The government's arguments to the contrary are unpersuasive.

Liberty Interests. The government does not dispute that rescinding DACA implicates profound liberty interests protected under the Due Process Clause. As plaintiffs alleged (ER.229-30, 262-63) and have explained (Garcia Br. 59), rescinding DACA would drive hundreds of thousands of individuals back into the shadows, forcing them to live under the constant threat of government detention and

removal, taking away their ability to work and breaking apart countless families and communities. For this reason, the district court was wrong to limit its analysis of the liberty interest to DACA recipients' interest in the confidentiality of their information. DACA's presumptive right of renewal—on which the Dreamers relied—cannot be eliminated without violating protected liberty interests including the freedom from custody, the freedom to pursue a profession and travel, and the freedom to have and enjoy relationships with family members. *See*, *e.g.*, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (en banc); *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 997-98 (9th Cir. 2007); *Wallis v. Spencer*, 202 F.3d 1126, 1136, 1141 (9th Cir. 2000); *DeNieva v. Reyes*, 966 F.2d 480, 485 (9th Cir. 1992).

Those well-established and constitutionally protected interests are core expressions of the liberty protected by the Due Process Clause. "The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights," and also "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015). Plaintiffs here—like hundreds of thousands of other Dreamers—relied on their mutual understanding with the government in order to make "choices central to [their] individual dignity and autonomy" (*id.*) and thereby shape their lives in accordance with the liberty

protected by the Constitution. By reneging on that understanding, the government has violated those protected liberty interests.

"The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.… [I]t requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Obergefell*, 135 S. Ct. at 2598. DACA has allowed recipients, for the first time, to live their lives with the same dignity and liberty that others have: to "be gainfully employed and [] free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *see also Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009) (noting that a "state-created right, can, in some circumstances, beget yet other rights"); *Sessions v. Dimaya*, No. 15-1498, slip op. at 13 (U.S. Apr. 17, 2018) (Gorsuch, J., concurring in part and concurring in the judgment) (the government "is surely free to extend existing forms of liberty to new classes of persons—liberty that the government may then take only after affording due process").[1] The government's rescission of DACA violates plaintiffs'

[1] Plaintiffs' liberty interests are even stronger than those of the parolees in *Morrissey* because the government has not just made an "implicit promise" to Dreamers, 408 U.S. at 482; it has explicitly and repeatedly affirmed that DACA is subject to renewal. In addition, the parolees in *Morrissey* had nothing to lose by accepting the offer of conditioned parole, whereas DACA recipients had much to lose by applying for DACA.

constitutionally protected liberty interest in continued renewal of their status, which permitted them to live without fear of deportation from the only country most of them have ever known.

In this context, it is significant that the district court upheld plaintiffs' Equal Protection claims, based on the President's many statements disparaging Latino people, as well as the "unusual history behind the rescission" that undercut its legitimacy. ER.59-61. As the Supreme Court recently held: "[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles." *Obergefell*, 135 S. Ct. at 2602-03. "Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other." *Id*. at 2603. Critically, the district court found that plaintiffs' Equal Protection claim met the *Arlington Heights* factors by demonstrating that, among other things, President Trump has made statements expressing a pattern of cultural bias against Mexicans and Latinos including characterizing Mexican immigrants as "rapists," "killers," and criminals. ER.59-61.[2] The liberty interest protected by the Bill of Rights protects DACA

[2] Recent official statements confirm this prejudice. *See*, *e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 1, 2018, 6:56 AM), https://twitter.com/realDonaldTrump/status/980443810529533952 (decrying "Caravans" of people

recipients from having the program terminated based on that plainly insufficient reason.

The government's arguments regarding plaintiffs' liberty interests are unavailing. The government cites *Romeiro de Silva v. Smith*, 773 F.2d 1021 (9th Cir. 1985), in arguing there is "no protectable liberty interest in deferred action." U.S. Response Br. 58. But that case is inapposite because, unlike current DACA recipients, the plaintiff in *Romeiro de Silva* had not been granted any kind of deferred action and thus could claim no entitlement arising from it. Garcia Br. 65 n.10; *see also Kelch v. Dir., Nev. Dep't of Prisons*, 10 F.3d 684, 688 (9th Cir. 1993) (recognizing the liberty interest "created" by the grant of parole, and explaining that "[a]n individual's liberty encompasses the ability to pursue interests of choice, to move from place to place unhindered by the government and to choose freely any lawful way of living").

The rescission of DACA is far more analogous to the situation in *Ixcot v. Holder*, 646 F.3d 1202, 1213 (9th Cir. 2011), where this Court held that new restrictions on asylum applications were impermissible under the Due Process

---

fleeing violence in Central America); Christiano Lima, *Trump Ditches 'Boring' Tax Script for Mexican Rapists, Illegal Voting Claims*, Politico (Apr. 5, 2018), https://www.politico.com/story/2018/04/05/trump-west-virginia-tax-roundtable-remarks-504565 (discussing President's similar statements, including claim that "women" in such "Caravans" "are raped at levels that nobody has ever seen before").

Clause as applied to individuals who had filed for asylum before the change. *See also Arevalo v. Ashcroft*, 344 F.3d 1, 14-15 (1st Cir. 2003) (explaining that "[t]he availability of relief (or, at least, the opportunity to seek it) is properly classified as a substantive right," and that "an alien is not precluded from having a vested right in a form of relief merely because the relief itself is ultimately at the discretion of the Executive Branch"). In other words, due process may protect an individual's interest in the government programs she relied on, even though the government can change its policies as to new applicants going forward. *See Ixcot*, 646 F.3d at 1208.

Here, the DACA bargain, and its presumptive renewal for those who followed the program's rules, gave Dreamers like the plaintiffs the right to enjoy the liberty and dignity of being able to live their lives without the constant fear of deportation.

Property Interests. The government's decision to rescind DACA also infringes on DACA recipients' constitutionally protected property interests. As the government acknowledges, the key question is whether plaintiffs have plausibly alleged that they and the government "mutually" understood that DACA recipients would be able to renew their benefits and protection on an ongoing basis so long as they fulfilled the program's criteria. *See* U.S. Response Br. 58; *see also* Garcia Br. 65-66. There is no doubt that the plaintiffs have done so, and so they were entitled to rely on presumptive renewal of DACA benefits.

The 2012 memorandum creating the DACA program provided that benefits would be "subject to renewal." ER.204. The government used the presumptive right of renewal to "induce Dreamers to step forward" because "the government clearly understood from the very beginning that Dreamers would not apply for DACA, and the program would not be successful, unless they were promised the opportunity to renew their DACA status." ER.204; *see also* ER.243, 249-50. Indeed, it could scarcely be otherwise, given the character of opportunities afforded through achieving DACA status. As the government recognized, individuals would not come out of the shadows, open up businesses, pursue higher education, serve in the military, form professional relationships as attorneys, doctors, therapists, social workers and teachers, take out heavy loans to finance such enterprises, and start families, if the government could deprive them of their benefits at will, leaving them and those dependent on them in the lurch. To pursue their dreams—as the government encouraged them to do—DACA recipients needed much longer than two or even four years.

Several features of the DACA program demonstrate the mutual understanding that DACA was presumptively renewable. First, although there were age restrictions for initial DACA applications, there were no such restrictions for renewals; rather, DACA recipients could apply to renew "as long as [they] were under the age of 31 as of June 15, 2012." ER.160 (FAQs also cited at ER.203-06). Second, the

government used "nondiscretionary criteria for renewal" (ER.229-30; *see also* ER.249-50), and approved more than 99% of adjudicated DACA renewal applications (Garcia Br. 63).[3] Those allegations raise far more than just a plausible inference that the government knew it was offering DACA recipients the ongoing opportunity for renewal, so long as they abided by the rules of the program. And of course, government officials made repeated statements demonstrating their intent to hold up their side of the deal, for example characterizing DACA as a "commitment" and reassuring Dreamers that they "should rest easy." ER.208-09.

There can be no question that DACA recipients have reasonably relied on the government's representations. The government has never disputed that DACA recipients—such as the individual plaintiffs—have built their lives around the program. *See* ER.206, 210-19, 254. For example, DACA gave plaintiff Dulce Garcia, who is a lawyer, "the confidence to hire several employees, build a thriving law practice, and represent dozens of clients in immigration, civil litigation, and

---

[3] *See also* ER.198 ("In creating DACA, the government offered Plaintiffs and other Dreamers a straightforward deal—if they stepped forward, shared sensitive personal information, and passed a background check, they would be granted renewable protection and would be allowed to live and work in the United States provided that they played by the rules."); ER.230 ("The ability to renew DACA status at regular intervals has always been an essential element of the program and part of the deal offered by the government. The prospect of renewal was one of the primary benefits the government used to induce Plaintiffs and other Dreamers to step forward, disclose highly sensitive personal information, and subject themselves to a rigorous background investigation.").

criminal defense cases." ER.211. DACA allowed plaintiff New Latthivongskorn to "enrol[l] at UCSF, one of the most prestigious and selective medical schools in the country," receive a "U.S. Public Health Service Excellence in Public Health Award," and "pursu[e] a Master of Public Health at Harvard University ... so that he can help to end health disparities and increase access to affordable, quality health care, particularly for immigrants and other underserved communities." ER.214-15. And plaintiff Saul Jimenez relied on DACA to pursue his interest in teaching and mentorship and become a special education teacher at a middle school, where he helps students with learning disabilities overcome their challenges. ER.218-19.

Just like DACA recipients more generally, the individual plaintiffs in this case relied on DACA to begin inspirational careers that have created promising foundations for their own lives, and also improved the lives of their students, patients, clients, and many others who rely on them. *See*, *e.g.*, ER.197-98, 205-06, 229-30.[4] And DACA recipients' reasonable expectation of renewal, which is based

---

[4] *See* ER.212 (DACA helped plaintiff Viridiana Chabolla to pursue a career in public service law, "secur[e] a special fellowship from the law firm of Munger, Tolles & Olson LLP, and enrol[l] ... as a Public Interest Scholar at the University of California, Irvine School of Law"); ER.216 (DACA enabled plaintiff Norma Ramirez to "ear[n] her Master's degree in Clinical Psychology in 2017 and ... pursu[e] her Ph.D. in Clinical Psychology," and "pursue her dream of establishing a free clinic that provides mental health services to immigrant youth, Latinos, and their families"); ER.217 (DACA allowed plaintiff Miriam Gonzalez to be "accepted into the selective Teach For America ('TFA') program," where

on their shared understanding with the government, warrants constitutional protection. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once [driver's] licenses are issued, ... their continued possession may become essential in the pursuit of a livelihood.").

In short, plaintiffs' allegations establish a "legitimate," mutually held expectation that DACA recipients could renew their benefits on an ongoing basis so long as they met the renewal criteria. *See Gunasekera v. Irwin*, 551 F.3d 461, 468 (6th Cir. 2009); *Wedges/Ledges of Cal., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 63-64 (9th Cir. 1994).

The government argues that, regardless of how readily DACA status was renewed when the program was in place, that practice has no bearing on the reasonableness of plaintiffs' ongoing expectation of renewal because the program has now ended. *See* U.S. Response Br. 59. But the question in this case is whether the government's decision to terminate DACA was lawful; using the fact of termination to justify the decision is circular. In any event, the fact that the government created a streamlined, nearly automatic renewal process for those who played by the rules (and thus fulfilled their end of the DACA bargain) *does* tend to show that DACA holders and the government believed that renewals would be

---

she "teaches Math and Reading Intervention to struggling middle school students at Crown Preparatory Academy in Los Angeles").

readily available on an ongoing basis for Dreamers who adhered to the program's terms.

This Court has recognized—in circumstances vastly less consequential than those presented here—that a detailed application and renewal process like the one at issue here may give rise to property interests protected by the Due Process Clause. In *Wedges/Ledges*, for example, the City of Phoenix "in effect launched a campaign to do away with crane [arcade] games," by denying new game machine licenses and revoking previously issued ones. 24 F.3d at 60. Although the Phoenix City Code required the Treasurer to determine whether arcade games qualified as permissible "games of skill" or impermissible "games of chance," the City decided to ignore the categories and do away with the games altogether. *Id.* at 63. This Court held that the crane machine operators nonetheless had a protected property interest in retaining their game licenses and obtaining new ones, because the City Code "create[d] an expectation in applicants that, as long as their machines qualify as games of skill, they have a right to obtain license tags." *Id.* The same logic applies here, with greater force: DACA's "nondiscretionary criteria for renewal" (ER.230) support DACA recipients' legitimate claim to the opportunity to renew on an ongoing basis after their initial approval for the program.

The Sixth Circuit's decision in *Gunasekera* makes the same point. There, a university professor alleged a protected property interest in his "Graduate Faculty

status so long as he met the stated conditions" when he explained that "[i]n actual practice ... professors retain their appointment so long as they satisfy those criteria." 551 F.3d at 467-68 (internal quotation marks omitted). Although the district court dismissed the professor's claims, the Sixth Circuit reversed, holding these allegations plausibly stated a "legitimate" property interest in retaining his status. *Id.* at 468. That is true, the court explained, even though the protected interest arose as a result of "custom" rather than through the text of the relevant regulations (and in fact that text did not limit officials' discretion). *Id.* at 467.

Similarly here, the government's practice of granting more than 99% of renewal applications for years supports DACA recipients' legitimate claim to renew "so long as [they] met the stated conditions." *Id.* at 468. And because this expectation arose from a concrete course of dealing, rather than merely regulatory words on paper, the government's citation of *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (cited in U.S. Response Br. 57-58), is inapposite—it is "actual practice" that matters. *Gunasekera*, 551 F.3d at 467. For the same reason, the government's reliance on boilerplate statements that DACA status could be terminated at any time cannot overcome plaintiffs' allegations that in practice there was a mutually held understanding that DACA recipients would retain their status so long as they continued to abide by the program's terms. *See*, *e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) ("boilerplate" disclaimer

stating agency action was "not … final" and "cannot be relied upon to create any rights enforceable by any party" did not control whether rule was final); *Whaley v. Cty. of Tuscola*, 58 F.3d 1111, 1116 (6th Cir. 1995) (finding a protected property interest despite the state's "repeated[]" efforts to characterize the interest differently); Garcia Br. 64 (citing cases).

The government's primary response (U.S. Response Br. 57-58) is that DACA did not create any protected property interests because there was no mutual understanding about renewal. But while a unilateral desire for a benefit does not confer a protected benefit, the government's course of conduct can show a mutual understanding that does. Here, the plaintiffs' complaints adequately allege precisely that mutual understanding, including the limited discretion to refuse a proper renewal application, the initial DACA memorandum's promise that benefits would be "subject to renewal," the fact that there was no age limit to applying for renewal, and the many statements of government officials that Dreamers could rely on the government's promises. *See* Garcia Br. 60-63. These allegations must be taken as true at this stage of the litigation. *See Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011) (claim may be dismissed only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

Contrary to the government's claim (U.S. Response Br. 59), there is no "tension" between plaintiffs' allegations about the approval rate of renewal

applications and the argument that DACA is a discretionary program that could be adopted without notice-and-comment rulemaking. The memorandum creating the DACA program is a discretionary policy statement exempt from notice-and-comment rulemaking because it expressly recognizes the agency's discretion to decide individual initial DACA applications on a case-by-case basis. As the district court found, DHS officials actually exercised that discretion (ER.34-35), denying approximately 8% of initial applications, including on discretionary grounds, and granting the remainder. *See also* USCIS, *Form I-821D Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012-2017* (Mar. 31, 2017) (cited at ER.219). In contrast, the renewal statistics show that these benefits, once granted, were presumptively renewable for those who met the program's requirements. But these statistics do not negate the initial exercise of discretion that meant that the notice-and-comment process was not required for adopting DACA. *See* Garcia Br. 37, 64-65.

Because the plaintiffs plausibly alleged that their expectation of renewal was shared with the government, this Court's decision in *Gerhart v. Lake County, Montana*, 637 F.3d 1013 (9th Cir. 2011) (cited at U.S. Response Br. 58), is inapposite. In that case, the Court held that an individual's unilateral belief does not create an entitlement where it is not mutually held by the government. *Id.* at 1020. Although the actual evidence in *Gerhart* may have been insufficient at the summary

judgment stage, the Court reiterated the settled law that mutually shared understandings, based on policies or practices (or both), can establish protected interests. *Id.* That is what plaintiffs have alleged here. *See also Geneva Towers Tenants Org. v. Federated Mortg. Inv'rs*, 504 F.2d 483, 489 (9th Cir. 1974) (finding a protectable property interest where "those seeking the protection of the Fifth Amendment have a legitimate, objectively justifiable claim to the benefits of the government program").

Nor do any of the government's other arguments suggest that plaintiffs failed to state a claim. The government suggests that *other* statements *outside* of plaintiffs' allegations show that the expectation of renewal was not mutual. U.S. Response Br. 58. But such extraneous evidence cannot be considered at the pleading stage, *see Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001), and as plaintiffs have explained, the cited boilerplate statements do not defeat their well-pleaded allegations, Garcia Br. 64.

The government mischaracterizes plaintiffs' claim as an attempt to have the DACA program continue indefinitely. *See* U.S. Response Br. 58-60. Not so. The government need not offer DACA to new applicants going forward. The point is that the government must as a constitutional matter be held to its promise that it would not withdraw DACA's important protections for arbitrary and capricious or constitutionally suspect reasons. This argument should not be interpreted to mean

that DACA recipients claim an entitlement to DACA status in perpetuity—only that the government's action in ending the entitlement it used to entice them into participating must be justified by a sufficiently compelling reason. But that is a far cry from saying that a merely pretextual reason, or a legally flawed reason, or one based on animus, will suffice.

Finally, the government contends (U.S Response Br. 59-60) that recognizing a protected interest in renewal will effectively freeze DACA in place and disincentivize the government from creating other beneficial programs. But this case is at the pleading stage. The narrow question before the Court is whether plaintiffs sufficiently alleged protected interests in the renewal of their DACA benefits. Whether the rescission's intrusion on those interests was permissible as a matter of due process is a question for another day. The answer to that question will turn on the government's motivation for and conduct in terminating DACA. Recognizing that plaintiffs have sufficiently alleged a protected interest says nothing (by itself) about whether the government can stop providing the promised benefits; it simply allows the analysis to proceed to the next step. And the government's argument proves too much, because courts routinely recognize that government benefits qualify for constitutional protection, *see*, *e.g.*, *Nozzi v. Hous. Auth. of L.A.*, 806 F.3d 1178, 1192 (9th Cir. 2015); *Wedges/Ledges*, 24 F.3d at 63-64, and those decisions

have not prevented the government from enacting and administering useful programs.

What is actually at stake in this case, and what follows from the government's argument? Hundreds of thousands of young people have made life-altering, long-term decisions in reliance on DACA. They have pursued advanced degrees, started families, and opened businesses, and they are contributing to their communities in countless ways. ER.198, 206, 211, 254. The government now says it can take all of that away, for any reason whatsoever—even discriminatory reasons. The Constitution does not countenance that result. *See Raley*, 360 U.S. at 439.

II. PLAINTIFFS HAVE STATED A PLAUSIBLE APA NOTICE-AND-COMMENT CLAIM

Plaintiffs have explained that the decision to rescind DACA is procedurally defective under the APA because it was not adopted through notice-and-comment rulemaking. *See* Garcia Br. 66-69.[5] The government's principal response is that the rescission is exempt from notice-and-comment procedures because it is a "general statement of policy." U.S. Response Br. 51-56. But unlike the decision to adopt DACA, the rescission is not a general policy statement—it is a substantive rule that

[5] Because the County of Santa Clara and union plaintiffs did not bring notice-and-comment claims, they do not join in this argument.

must be adopted using notice-and-comment procedures because it binds DHS and strips away its officials' discretion to grant deferred action under DACA.

The government does not dispute that a rule is "substantive"—rather than a "general statement of policy"—if it "'narrowly limits administrative discretion' or establishes a 'binding norm' that 'so fills out the statutory scheme 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). Indeed, the government acknowledges that under "controlling Ninth Circuit precedent"—*Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1014 (9th Cir. 1987)—"a categorical deferred-action directive that deprives officials of individual discretion is a substantive rule." U.S. Response Br. 29 n.5.

Plaintiffs need only show, therefore, that the rescission removes the discretion that DHS exercised under DACA. Plaintiffs have adequately alleged that it does, which is all that is necessary to defeat the government's motion to dismiss. The Acting Secretary's memorandum rescinding DACA clearly states that DHS "*will* reject *all* DACA initial requests and associated applications for Employment Authorization Documents filed after the date of th[e] memorandum" and "*all* DACA renewal requests and associated applications for Employment Authorization Documents" for individuals whose benefits will expire after March 5, 2018. ER.130 (emphases added). The memorandum further states that DHS "[*w*]*ill not* approve

any new Form I-131 applications for advance parole under standards associated with the DACA program." ER.131 (emphases added).

In other words, the memorandum flatly prohibits new applications, renewals, and advanced parole under DACA, categorically eliminating access to deferred action, work authorization, lawful presence, and international travel for nearly 700,000 current DACA recipients and future applicants. The rescission memorandum leaves no exception for case-by-case determinations. The government's assertion that DHS did not intend to be bound cannot be squared with this "mandatory, definitive language." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 947 (D.C. Cir. 1987).

The government's response is that the rescission does not "categorically forbid DHS from continuing to defer enforcement action against particular DACA recipients." U.S. Response Br. 54. The government claims that DHS officials "retai[n] discretion" under the rescission memorandum to grant deferred action "on an individual, case-by-case basis." *Id.* at 54-55 (citing ER.130).

But the memorandum says the opposite: DHS will process initial DACA applications and renewals "on an individual, case-by-case basis" only before the dates specified in the memorandum. ER.130. After those dates, the memorandum states that DHS "will reject all" such requests. *Id.* Nothing in the rescission memorandum or elsewhere in the administrative record suggests that (absent an

injunction) the government will consider individual applications from DACA recipients for deferred action—let alone any other benefits of DACA—on a case-by-case basis. At the very least, the government has categorically eliminated the discretion to confer and maintain those specific benefits through the standardized channels made available by DACA. Even if the same benefits were available through other channels, notice-and-comment rulemaking would still be required to take away the DACA program.

And the government's argument makes no sense. The DACA program, as originally adopted, gave government officials substantial discretion to grant or deny individual applications. If what the government wanted was to retain discretion to grant or deny deferred action to DACA recipients, it would not have ended the DACA program in such categorical and absolute terms. (And if the government really hoped to retain its existing discretion, then why did it object to the preliminary injunction in this case?)

The government principally relies on this Court's decision in *Mada-Luna*, where the Court held that two deferred action directives were general policy statements exempt from notice-and-comment rulemaking. *See* U.S. Response Br. 52-55. But the reasoning in that decision defeats the government's arguments: The Court deemed the directives general policy statements because they expressly left field agents "free to consider the individual facts in each case." 813 F.2d at 1017

(internal quotation marks omitted). The first directive listed five factors for deciding a deferred action request but then "expressly authorize[d]" immigration agents "to consider [any other] individual facts that [they] may feel appropriate"; the second directive "emphasize[d] [agents'] broad and unfettered discretion … in making deferred action determinations." *Id.* (internal quotation marks omitted). The rescission, by contrast, leaves no room for individualized determinations after the rescission dates specified in the Acting Secretary's memorandum. It is therefore a binding, substantive rule that cannot be adopted without notice-and-comment rulemaking.

The decision in *United States ex rel. Parco v. Morris*, 426 F. Supp. 976 (E.D. Pa. 1977), makes precisely this point. In that case, the district court held that the government was required to use notice-and-comment procedures to rescind a deferred-action program because the rescission left no discretion for the agency to consider requests for deferred action. *Id.* at 984-86; *see* ER.52. The government attempts to distinguish *Parco* from this case by saying that, in *Parco*, the government's rescission of the program left immigration agents no "independent discretion" but instead imposed "a legal rule" denying all requests for relief under the program. U.S. Response Br. 55 n.8. But that is exactly what happened here, and so the result must be the same.

The government falls back on the argument that "if the Acting Secretary's memorandum … is a substantive rule, then *a fortiori* the restriction on discretion imposed by DACA itself was a substantive rule." U.S. Response Br. 55. The government is mistaken. As plaintiffs have explained, this argument conflates the decision to adopt DACA—under which DHS exercised discretion—with the decision to rescind DACA—under which DHS forbids its officials to exercise that discretion. The government's assertion that establishing the DACA program actually restricted discretion cannot be squared with the record, which (as the district court noted) established that agency employees actually exercised discretion in adjudicating DACA applications. ER.34-35. There was thus no need to follow notice-and-comment procedures in adopting DACA; they were required only to take away discretion by rescinding the program.

The government asserts that "it would make no sense" to require notice-and-comment procedures to rescind a rule that was adopted without formal rulemaking. U.S. Response Br. 56. But there are good reasons for requiring that formal process when the government makes such a substantive policy decision—especially one that deprives hundreds of thousands of people of their constitutionally protected rights, breaks the deal they struck with their government, and fails to consider the significant changes they made to their lives in reliance on that deal.

Indeed, if the adoption of DACA were a substantive rule requiring notice-and-comment procedures, that would be all the more reason to require notice-and-comment procedures to rescind the program. The "repea[l]" of a substantive rule is a substantive rule, 5 U.S.C. §§ 551(5), 553, so a rule that "repudiates or is irreconcilable with a prior legislative rule" must comply with the "APA notice-and-comment requirements." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108-09 (D.C. Cir. 1993) (brackets omitted). Even a "defective" substantive rule cannot be repealed without notice-and-comment rulemaking. *Consumer Energy Council v. FERC*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982). The government says that a defective rule can be challenged (U.S. Response Br. 56), but a challenge here would have to overcome serious obstacles, including the significant reliance interests in DACA, Garcia Br. 36; the doctrine of laches, *id*.; and the APA's six-year statute of limitations for challenges to DACA, *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712-14 (9th Cir. 1991) (citing 28 U.S.C. § 2401(a)). In the absence of an order permanently enjoining the DACA program in full, the government cannot unilaterally rescind DACA without complying with the APA.

DACA has been in place for nearly six years, and during that time, nearly 700,000 DACA recipients have relied on it to shape the course of their lives, and so have their families, employers, employees, clients, patients, and educational institutions. Garcia Br. 41-42. The government should not be permitted to upset

those profound reliance interests without providing (at least) an opportunity for public comment. *See Nat'l Treasury Emps. Union v. Cornelius*, 617 F. Supp. 365, 371 (D.D.C. 1985) (reliance interests by federal employees on longstanding rule warranted notice-and-comment procedures to repeal rule despite alleged procedural defects). And that would be true even if DACA should have been adopted using notice-and-comment procedures in the first place: The antidote for insufficient public involvement in the rulemaking process is more public engagement, not less.

CONCLUSION

This is no ordinary immigration case. The interests at stake are undeniably fundamental to the hundreds of thousands of Dreamers who have relied on DACA's protection. And those interests are a result of the government offering a deal to the Dreamers and actively encouraging them to build their lives around DACA. The Due Process Clause does not look the other way when such important promises are broken and such critical interests are arbitrarily taken away. Further, the APA requires that the government engage in the notice-and-comment process where, as here, the government has forbidden the exercise of its discretionary authority with respect to DACA renewals. The district court's order dismissing plaintiffs' substantive due process and notice-and-comment claims therefore should be reversed.

Dated: April 17, 2018

Respectfully submitted,

s/ Theodore J. Boutrous, Jr.

THEODORE J. BOUTROUS, JR.
ETHAN D. DETTMER
KIRSTEN GALLER
JONATHAN N. SOLEIMANI
KELSEY J. HELLAND
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

NICOLE A. SAHARSKY
MATTHEW S. ROZEN
HALEY S. MORRISSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

MARK D. ROSENBAUM
JUDY LONDON
MALHAR SHAH
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, CA 90005
(213) 385-2977

LAURENCE H. TRIBE
HARVARD LAW SCHOOL*
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-1767

LUIS CORTES ROMERO
BARRERA LEGAL GROUP, PLLC
19309 68th Avenue South, Suite R102
Kent, WA 98032
(253) 872-4730

LEAH M. LITMAN
UNIVERSITY OF CALIFORNIA,
IRVINE SCHOOL OF LAW*
401 E. Peltason Drive
Irvine, CA 92697
(949) 824-7722

ERWIN CHEMERINSKY
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW*
215 Boalt Hall
Berkeley, CA 94720
(510) 642-6483

Attorneys for Plaintiffs Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

**Affiliation for identification purposes only*

STACEY M. LEYTON
ERIC P. BROWN
ANDREW KUSHNER
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Counsel for Plaintiffs County of Santa Clara and Service Employees International Union Local 521

JAMES R. WILLIAMS
GRETA S. HANSEN
LAURA S. TRICE
MARCELO QUIÑONES
OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
70 West Hedding Street
East Wing, Ninth Floor
San Jose, CA 95110
(408) 299-5900

Counsel for Plaintiff County of Santa Clara

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 17, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-15068

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is 6474 words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ Theodore J. Boutrous, Jr.

Date: Apr 17, 2018

("s/" plus typed name is acceptable for electronically-filed documents)