Nos. 18-1521 (L), 18-1522

In the United States Court of Appeals for the Fourth Circuit

CASA DE MARYLAND, *et al.*,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland, Greenbelt Division
Case No. 8:17-cv-02942 (Hon. Roger W. Titus)

OPENING BRIEF OF APPELLANTS

Elizabeth J. Bower
Kevin B. Clark
Priya R. Aiyar
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006
(202) 303-1000
(202) 303-2252 (fax)
ebower@willkie.com

Additional counsel listed on inside cover

John A. Freedman
Emily Newhouse Dillingham
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
(202) 942-5999 (fax)
john.freedman@arnoldporter.com
emily.dillingham@arnoldporter.com

Counsel for Plaintiffs-Appellants

July 2, 2018

Dennis A. Corkery
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS
11 Dupont Circle, NW
Suite 400
Washington, DC 20036
(202) 319-1000
(202) 319-1010 (fax)
dennis_corkery@washlaw.org

Ajmel A. Quereshi
HOWARD UNIVERSITY SCHOOL OF LAW
2900 Van Ness Street, NW
Washington, DC 20008
(202) 216-5574
(202) 682-1312 (fax)
aquereshi@naacpldf.org

Counsel for Plaintiffs-Appellants

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-1521 Caption: Casa De Maryland v. DHS

Pursuant to FRAP 26.1 and Local Rule 26.1,

Arkansas United Community Coalition
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ John A. Freedman Date: July 2, 2018

Counsel for: Appellants

CERTIFICATE OF SERVICE

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I certify that on July 2, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ John A. Freedman (signature) July 2, 2018 (date)

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No. 18-1521 Caption: Casa De Maryland v. DHS

Pursuant to FRAP 26.1 and Local Rule 26.1,

Casa de Maryland
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ John A. Freedman Date: July 2, 2018

Counsel for: Appellants

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No. 18-1521 Caption: Casa De Maryland v. DHS

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Coalition for Humane Immigrant Rights
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ John A. Freedman Date: July 2, 2018

Counsel for: Appellants

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No. 18-1521 Caption: Casa De Maryland v. DHS

Pursuant to FRAP 26.1 and Local Rule 26.1,

Fair Immigration Movement
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ John A. Freedman Date: July 2, 2018

Counsel for: Appellants

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No. 18-1521 Caption: Casa De Maryland v. DHS

Pursuant to FRAP 26.1 and Local Rule 26.1,

Junta for Progressive Action, Inc.
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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If yes, identify entity and nature of interest:

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ John A. Freedman Date: July 2, 2018

Counsel for: Appellants

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No. 18-1521 Caption: Casa De Maryland v. DHS

Pursuant to FRAP 26.1 and Local Rule 26.1,

Make the Road Pennsylvania
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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Signature: s/ John A. Freedman Date: July 2, 2018

Counsel for: Appellants

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No. 18-1521 Caption: Casa De Maryland v. DHS

Pursuant to FRAP 26.1 and Local Rule 26.1,

Michigan United
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ John A. Freedman Date: July 2, 2018

Counsel for: Appellants

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No. 18-1521 Caption: Casa De Maryland v. DHS

Pursuant to FRAP 26.1 and Local Rule 26.1,

One America
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ John A. Freedman Date: July 2, 2018

Counsel for: Appellants

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No. 18-1521 Caption: Casa De Maryland v. DHS

Pursuant to FRAP 26.1 and Local Rule 26.1,

Promise Arizona Clinic and UnidosUS
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Signature: s/ John A. Freedman Date: July 2, 2018

Counsel for: Appellants

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No. 18-1521 Caption: Casa De Maryland v. DHS

Pursuant to FRAP 26.1 and Local Rule 26.1,

See attached list
(name of party/amicus)

who is Appellant, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: s/ John A. Freedman Date: July 2, 2018

Counsel for: Appellants

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Attachment

List of Individual Appellants for Disclosure of Corporate Affiliations and Other Interests

The following natural persons are appellants in this matter:

MARICRUZ ABARCA
LUIS AGUILAR
ANGEL AGUILUZ
JOSE AGUILUZ
JOSUE AGUILUZ
MARIA JOSELINE CUELLAR BALDELOMAR
MISSAEL GARCIA
ANNABELLE MARTINES HERRA
ELISEO MAGES
HEYMI ELVIR MALDONADO
BRENDA MORENO MARTINEZ
JESUS EUSEBIO PEREZ
NATHALY URIBE ROBLEDO
ESTEFANY RODRGIUEZ
J.M.O., a minor child,
ADRIANA GONZALES MAGOS, next of friend to J.M.O.
A.M., a minor child,
ISABEL CRISTINA AGUILAR ARCE, next of friend to A.M.

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INTRODUCTION

On September 5, 2017, the Government announced the rescission of the Deferred Action for Childhood Arrivals ("DACA") program. Established in 2012, DACA allowed individuals who were brought to the United States as children to apply for legal status, providing critical stability by allowing them to work, study, travel internationally, and live free from the risk of deportation. DACA was similar to a long line of other deferred action programs, and the Government continuously had defended its legality. The Government's change of position announced on September 5 upended the lives of the 800,000 individuals granted DACA, as well their families and their communities.

The circumstances of the September 5 decision leave no doubt that it rested on invidious racial discrimination. The decision followed repeated statements from senior Government officials, including the President, expressing anti-Latino animus and threatening Latino immigrants with expulsion. The rescission of DACA was consistent with those statements. Ninety-three percent of DACA recipients were Latino. And while rescinding DACA, the Government continued other deferred action programs with higher proportions of non-Latino beneficiaries.

Procedural irregularities also signaled invidious purposes at work. Having continuously defended DACA as legal, the Government abruptly changed its

position on September 5 with no prior notice, no opportunity to comment, and no mechanism for individual recipients to be heard before losing their benefits. The Government's approach was harmful and unfair.

Indeed, the Government flouted the most fundamental attribute of a fair administrative process: the requirement of a reasoned explanation for its decisions. In rescinding DACA, the Government offered only the most threadbare justification—a one-page letter from Attorney General Jefferson Sessions (the "Sessions Letter") announcing without elaboration that DACA had unspecified "legal and constitutional defects" and a five-page memorandum from Acting U.S. Department of Homeland Security ("DHS") Secretary Elaine Duke (the "Rescission Memo") citing the same amorphous "legal and constitutional defects." The Administrative Record subsequently produced to support the decision consisted of 14 documents totaling 256 pages, almost all of which were either copies of court decisions concerning a challenge to a different deferred action program or an Office of Legal Counsel opinion that DACA was legal. Despite the requirement that the Government carefully assess the impact of the change in position, neither the Sessions Letter nor the Rescission Memo nor the Administrative Record mentioned the impact of the rescission on the 800,000 DACA recipients and their families, communities, and employers, much less a reasoned explanation for its sudden reversal of position.

Ten lawsuits were filed across the country challenging the DACA rescission. Faced with the same Sessions Letter, Rescission Memo, and Administrative Record, the judges in nine of those suits (consolidated before three other courts) concluded that the DACA rescission was illegal and unsupported by the Administrative Record, and they ordered appropriate relief, including the entry of nationwide injunctions.

The District Court here was the lone outlier, not only finding that the DACA rescission was "valid and constitutional in all respects," J.A. 1520, but also giving short shrift to problems other courts had found were substantial violations of the Administrative Procedure Act ("APA"). The other courts:

- concluded the Administrative Record was incomplete and insufficient to support the decision, J.A. 1377-79, 1453-54;
- ordered discovery to proceed, given the inadequate Administrative Record, J.A. 1377;
- recognized that the "arbitrary and capricious" standard required an analysis of whether the decision was "in accordance of the law," J.A. 1390, 1454. Those courts found the rescission was based on a "flawed legal premise" (J.A. 1390, 1454) and reflected an "obvious factual mistake," J.A. 1465, 1395-96;
- noted the disparate impact of terminating a program that was 93 percent Latino, J.A. 1420; and
- noted the legal significance of the expressions of "racial animus towards Latinos" by the President. J.A. 1420.

The District Court discounted, ignored, or quarreled with each and every one of these points. A review of the District Court's treatment of Rule 56, the APA, and the applicable Equal Protection and Due Process precedent confirm that this Court should reverse and remand this case.

JURISDICTIONAL STATEMENT

The District Court's jurisdiction was invoked under 28 U.S.C. §§ 1331 and 2201(a). J.A. 47. This Court has jurisdiction under 28 U.S.C. § 1291. On March 5, 2018, the District Court entered its order granting in part and denying in part the Appellees' motion for summary judgment and granting in part Appellants' request for injunctive relief. J.A. 1519-20. On March 15, the District Court entered an order modifying the scope of that injunctive relief. J.A. 1531. The District Court entered an amended order later that day, reiterating its ruling on summary judgment and injunctive relief, declaring that the DACA rescission was "valid and constitutional in all respects," and directing the Clerk of Court to close the case. J.A. 1532-33. Appellants filed a timely notice of appeal on April 27, 2018, J.A. 1534-36, and the Appellees filed a notice of appeal on May 4, 2018, J.A. 1537-38.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in granting summary judgment (a) where the Administrative Record produced by Appellees was facially incomplete;

(b) without permitting Appellants to conduct any discovery; and (c) where there were material facts in dispute.

2. Whether the District Court erred in granting summary judgment for Appellees with respect to Appellants' Administrative Procedure Act claims by failing to recognize that the rescission of DACA was arbitrary and capricious and that the Government's action constituted a substantive determination requiring notice and comment.

3. Whether the District Court erred in granting summary judgment for Appellees with respect to Appellants' Equal Protection claims by applying an improper and overly deferential standard of review and failing to construe facts in the light most favorable to Plaintiffs.

4. Whether the District Court erred in granting summary judgment on Appellants' Due Process claims by failing to recognize that (a) DACA created constitutionally protected interests, the mass rescission of which violated due process; and (b) the rescission of DACA and changes to DHS's information-sharing policy violated substantive due process rights.

STATEMENT OF THE CASE

Plaintiffs are sixteen individuals who participated in or were eligible for the DACA program, along with nine social service organizations that serve applicants for and recipients of DACA program benefits. J.A. 47-57. The DACA program

allowed immigrants who were brought to the United States as children (known as "Dreamers")—who thus were in no way culpable—to apply for legal status. J.A. 40-41, 58-60. Many of these individuals were brought by parents fleeing violence and horrific circumstances in their countries of origin or economic hardship, and the DACA program gave them the ability to live in the United States free from the risk of deportation. J.A. 40, 44, 50-57.

The Government publicly promoted participation in the DACA program with the promise that it would make recipients eligible for certain rights and privileges associated with lawful presence in the United States, including the right to receive work permits and travel internationally. J.A. 41-42, 60-63. The Government also assured applicants that their personal information would not be used for immigration enforcement. J.A. 42-43, 63-68.

On September 5, 2017, Attorney General Jefferson Sessions announced the rescission of DACA. J.A. 44, 72-73. Hours later, then-Acting Homeland Security Secretary Elaine Duke released the Rescission Memo directing the Government to immediately cease accepting new DACA applications and to stop issuing to Dreamers work permits and permission to travel internationally. J.A. 44-45, 73-75. A few days later, DHS issued guidance hedging its prior commitment to Dreamers to keep their applicant information from enforcement officials. J.A. 45, 75-80. These actions upended the lives of almost 800,000 Dreamers, ending their

ability to remain in the United States legally, to continue working, to enroll in college, and to lead the lives they had established based on DACA's grant of forbearance. J.A. 50-57, 73-75, 1237-39, 1242-45, 1248-51.

On October 5, 2017, Plaintiffs sued DHS, Acting Secretary Duke, Attorney General Sessions, and other Government officials and agencies in the U.S. District Court for the District of Maryland. J.A. 37-97. The Complaint asked the Court to enjoin and declare illegal the termination of the DACA program, as well as the Government's threat to share personal information of DACA applicants and beneficiaries with immigration enforcement authorities, under the APA, the Fifth Amendment's Due Process and Equal Protection guarantees, and common law estoppel. J.A. 85-96. The Complaint:

- Identified the anomaly that DACA program enrollees were 93 percent Latino, while other deferred action programs that were not predominantly Latino continued, J.A. 46, 58-59, 90, 1095;

- Documented a string of 22 public statements by the President, Attorney General, and other senior Government officials prior to the DACA rescission threatening expulsion or otherwise expressing anti-Latino animus. Among other things, the Complaint noted the President's statements that Latino immigrants were "criminals," "rapists," "thugs," "bad hombres," and "true animals," were in conjunction with his threats that "we're going to get them out," "they are finished," and "we're getting them out," J.A. 46, 69-72, 76-79, 83-84, 1096; and

- Identified significant procedural irregularities in the rescission of DACA, including the failure to provide prior notice of the reversal of the Government's long-standing position that DACA was lawful or to

> offer any explanation for the decision beyond the barest of reasoning. J.A. 82-85, 90-93, 1096-99.

See generally J.A. 37-97.

By a letter dated October 10, 2017 and at a hearing on November 1, 2017, Plaintiffs requested leave to commence discovery prior to the Government's response to the Complaint. J.A. 98-99, 100-123. The District Court orally denied that request at the hearing on November 1. J.A. 30, 109-111, 121.

On November 15, 2017, the Government filed the Administrative Record, J.A. 129-384, and certified that it included only "non-privileged documents that were actually considered" by Acting Secretary Duke. J.A. 127. The filed record consisted of 14 documents totaling 256 pages; 217 pages were copies of court decisions concerning a different deferred action program, and 32 pages were a Department of Justice Office of Legal Counsel opinion confirming the legality of the DACA program. J.A. 125-384. The record did not include any materials considered by other participants in the decision-making process; any cost or legal analysis of the impact of the decision on DACA recipients, their families, employers, and communities; or any justification for the change in the Government's longstanding legal positions beyond a few conclusions devoid of any analysis.

That same day, the Government moved to dismiss for lack of jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) and in the

alternative for summary judgment under Rule 56 ("Motion"). J.A. 385-86. Plaintiffs filed an opposition with supporting declarations on November 28. J.A. 461-1252. This filing included a statement of material facts as to which there was a genuine dispute, J.A. 473-476, and public records further substantiating the procedural irregularities, as well as other evidence underpinning the APA, Due Process, and estoppel claims. J.A. 531-1093. The opposition also included a Rule 56(d) declaration explaining the need for discovery on the completeness of the Administrative Record, as well as discovery on the constitutional claims. J.A. 1094-1105. The Rule 56(d) declaration attached draft discovery requests, as well as discovery that had been propounded in parallel proceedings seeking, among other things, discovery relevant to the incompleteness of the Administrative Record; Plaintiffs' intentional discrimination claim (including further evidence of animus by senior Government officials regarding Latinos, evidence regarding the history leading up to the rescission decision, departures from agency practice, and the discriminatory impact of the decision); and Plaintiffs' due process and estoppel claims (concerning the Government's representations regarding benefits and data privacy). J.A. 1106-1234.

On December 11, 2017, the District Court issued an order giving notice "that it may grant summary judgment for the nonmovants (Plaintiffs)." J.A. 1290. Oral argument was held on December 15, 2017. J.A. 32, 1292-1358.

Following oral argument, Plaintiffs submitted notices of supplemental authority noting that two other District Courts considering similar challenges had enjoined the Government's rescission of DACA. J.A. 1359-1424 (*Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018)). J.A. 1429-1485 (*Batalla Vidal v. Nielsen*, 279 F. Supp. 3d. 401 (E.D.N.Y. 2018)). Since then, a third court has also found the DACA rescission to be arbitrary and capricious. *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018).

On March 5, 2018, the District Court granted in part and denied in part the Government's Motions. Specifically, the Court denied the Government's Rule 12(b)(1) motion, finding that Plaintiffs had standing and rejecting the Government's arguments that the claims were not justiciable. The Court then granted summary judgment to the Government on all counts of the Complaint with the exception of Plaintiffs' estoppel claim. The Court granted summary judgment to Plaintiffs on the estoppel claim concerning the sharing of DACA applicant information and it entered an injunction prohibiting the Government from using or sharing applicant-provided information through the DACA program for immigration-enforcement or deportation purposes. J.A. 1489-1520. On March 15, the District Court entered a stipulated order clarifying the scope of the injunctive relief. J.A. 1531-33. Plaintiffs timely filed a notice of appeal on April 27, 2018, and the Government filed a notice of appeal on May 4, 2018. J.A. 1534-38.

SUMMARY OF ARGUMENT

This case is an outlier. Three other courts have considered the issues presented here, and all three reached precisely the opposite conclusion than the District Court reached here. The other courts were right. The District Court's grant of summary judgment for the Government rests on a series of legal errors, each sufficient by itself to require reversal and remand.

First, the District Court misapplied Rule 56. It did so by granting summary judgment without allowing the requested discovery and without requiring the moving party to submit a statement of undisputed facts. And it did so by failing to construe critical facts and inferences in the light most favorable to the Plaintiff. The District Court similarly misapplied the APA judicial review provisions by failing to ensure its review was conducted based on the "whole record," 5 U.S.C. § 706, when the 14-document, 256-page Administrative Record submitted by the Government was glaringly incomplete.

Second, in dismissing the APA claims, the District Court failed to apply the correct standards for assessing whether agency action is arbitrary and capricious. Both the agency and District Court failed to consider important aspects of the problem, including the Government's lack of explanation for its reversal of position and the reliance interests of 800,000 DACA recipients (as well as their families, employers, and communities). The District Court also disregarded this

Court's precedent in excusing the Government's failure to provide notice and an opportunity to comment before rescinding DACA.

Third, in dismissing the Equal Protection claim, the District Court applied the wrong standard of review, holding incorrectly that this Court's decision in *International Refugee Assistance Project (IRAP) v. Trump*, 883 F.3d 233 (4th Cir. 2018) ("*IRAP*"), *cert. granted, vacated on other grounds*, No. 17-1270, 2018 WL 1256938 (Sup. Ct. June 28, 2018) (overturning the judgment of the Fourth Circuit while limiting the analysis to individuals yet to be admitted into the United States), mandated deferential review under *Kleindienst v. Mandel*, 408 U.S. 753 (1972). As the Supreme Court has now reiterated, the *Mandel* standard is predicated on the Government's national security powers and it applies when individuals are seeking entry into the United States. *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337 (S. Ct. Jun. 26, 2018). The *Mandel* standard is not the right one here because (i) the Government raised no national security interests in rescinding DACA, and (ii) the Plaintiffs are claiming intentional discrimination against persons already in the United States, dictating more rigorous standards of review for Government action. The District Court also failed to construe in the light most favorable to non-movant Plaintiffs significant evidence of animus, the events leading to the termination, the Government's departures from normal agency procedures, the discriminatory

impact of the rescission on DACA recipients, and the striking coalescence of all these factors at the same time for the same decision.

Fourth, in dismissing the Due Process claim, the District Court overstepped its role in deciding a summary judgment motion and failed to credit Plaintiffs' allegations and evidence regarding each of the rights and benefits that the Government had conferred on DACA recipients, and it misapplied precedent in concluding that the Due Process clause did not apply to the stripping of these rights *en masse*. The District Court also failed to construe in the light most favorable to the non-movant Plaintiffs the evidence of a substantive Due Process violation (the overtly anti-Latino statements by senior Government officials). And the District Court dismissed without analysis the Plaintiffs' claim that the threat to use applicant information in immigration enforcement proceedings violated substantive Due Process.

For each of these reasons, and all of them together, this Court should reverse and remand this matter.

STANDARD OF REVIEW

An appellate court reviews *de novo* district court orders granting summary judgment. *Roland v. United States Citizen and Immigration Servs.*, 850 F.3d 625, 628 (4th Cir. 2017). Summary judgment is appropriate only when the record shows there is no genuine issue of material fact. Fed. R. Civ. P. 56. The Court

must determine "whether the evidence presents a sufficient disagreement to require submission to a [factfinder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

In making this determination, this Court must view the evidence, and all justifiable inferences from the evidence, in the light most favorable to the non-moving party. *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 196 (4th Cir. 1997). It must also draw all inferences in favor of the non-movant. *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991). Particularly where motive and intent play "leading roles," summary judgment should be granted "sparingly." *Poller v. CBS*, 368 U.S. 464, 491 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255. Failure to credit plausible evidence offered by a party, or the failure to draw inferences in favor of the non-movant, requires reversal.

ARGUMENT

I. The District Court Misapplied Federal Rule of Civil Procedure 56 and the APA in Prematurely Granting Summary Judgment

Notwithstanding the momentous issues at stake in this litigation, the District Court made some very basic procedural errors. The District Court erred in granting summary judgment on an incomplete Administrative Record and without

any opportunity for discovery. First, the District Court misapplied Rule 56 with respect to all claims by refusing to afford Plaintiffs the opportunity to conduct discovery, by failing to consider material facts in dispute, and by failing to construe certain key facts and reasonable inferences therefrom in the light most favorable to the non-moving Plaintiffs. Second, the District Court ruled on Plaintiffs' APA claims without establishing that the entire record was before it, in violation of the APA. For each of these reasons, the Court should reverse and remand.

A. The District Court's Summary Judgment Ruling Failed To Meet The Requirements of Rule 56

The District Court misapplied Rule 56 in three ways: (1) it failed to afford Plaintiffs a reasonable opportunity for discovery; (2) it failed to consider Plaintiffs' statement of material facts in dispute; and (3) it failed to construe facts in the light most favorable to Plaintiffs.

First, the District Court improperly adjudicated the Government's alternative Rule 56 motion without affording Plaintiffs "a reasonable opportunity for discovery." *Baltimore Ctr. for Pregnancy Concerns v. Mayor*, 721 F.3d 264, 281 (4th Cir. 2013) (en banc) (citations and internal punctuation omitted). This failure amounts to clear error: a district court "must refuse summary judgment where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition.'" *Baltimore Ctr.*, 721 F.3d at 280 (citation omitted).

From the outset and throughout the course of the litigation, Plaintiffs requested discovery on their claims. J.A. 32, 98-99, 106, 115-16, 120, 477-78, 1094-1105, 1106-1234. To this end, Plaintiffs drafted and included with their Rule 56(d) affidavit model discovery that had been propounded in parallel proceedings, as well as draft supplemental discovery requests. J.A. 1106-1234.

It is axiomatic that "the summary judgment process presupposes the existence of an adequate record." *Baltimore Ctr.*, 721 F.3d at 280 (citation omitted). Yet in its decision, the District Court failed to address Plaintiffs' Rule 56(d) affidavit or their proposed discovery. J.A. 1094-1105. The District Court further failed to explain why it thought discovery was unnecessary prior to granting summary judgment on Plaintiffs' claims.

Second, the District Court failed to consider or address Plaintiffs' statement of material facts as to which there is a genuine dispute, J.A. 473-78, or the Government's failure to provide the required statement of undisputed material facts. Fed. R. Civ. P. 56(c). Such failure also required the District Court to deny the Government's motion: "where the movant fails to fulfill its initial burden of providing admissible evidence of the material facts entitling it to summary judgment, summary judgment *must* be denied even if *no* opposing evidentiary matter is presented, for the non-movant is not required to rebut an insufficient

showing." *Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.*, 673 F.3d 294, 299 (4th Cir. 2012) (emphasis added and citation omitted).

The District Court wholly failed to address Plaintiffs' statement of material facts in dispute. J.A. 473-476. Among other things, Plaintiffs' statement contained evidence of material facts (disputed by the Government) that:

(i) the decision to rescind DACA followed a long series of threats and derogatory statements by senior Government officials against Latinos, J.A. 46, 69-72, 76-79, 474;

(ii) 93 percent of DACA beneficiaries were Latino, J.A. 46, 90, 474;

(iii) at the same time the Government rescinded DACA, it left in place numerous other deferred action programs that did not impact predominantly Latino populations, J.A. 40-41, 58-59, 90, 475, 1363-70, 1438-41;

(iv) there were procedural irregularities leading up to the DACA rescission, including suspension of renewal notices, failure to abide by the DACA program Standard Operating Procedures ("SOPs"), failure to use notice and comment procedures, offering only the barest of reasons for the decision, and the reversal of long-standing Government positions that DACA was lawful, J.A. 72-75, 81-82, 85-87, 91-93, 474-76; 588-95; and

(v) the Government repeatedly promoted and represented to DACA recipients prior to the rescission that they would be allowed to work, study, travel internationally, live free from the fear of deportation, and their application information would not be shared with immigration enforcement officials, J.A. 42, 60-63, 86-87, 473.

This evidence, at a minimum, raised issues of material disputed facts that should have precluded the District Court from granting summary judgment in favor of the Government.

Third, at three critical points in its analysis, the District Court failed to view "the facts and the reasonable inferences therefrom in the light most favorable to the nonmoving party." *Scinto v. Stansberry*, 841 F.3d 219, 227 (4th Cir. 2016) (citation omitted); *cert. denied, sub nom, Phillip v. Scinto*, 138 S. Ct. 447 (2017).

a. An agency action is arbitrary and capricious if based on invidious criteria. *See, e.g.*, *Latecoere Int'l, Inc. v. U.S. Dept. of Navy*, 19 F.3d 1342, 1356 (11th Cir.1994); *Tummino v. Torti*, 603 F. Supp. 2d 519, 542 (E.D.N.Y. 2009). Evidence of invidious intent is also relevant to establishing a Fifth Amendment violation. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263-64 (1977). The Complaint cites 22 separate statements by senior Administration officials, including the President, threatening or otherwise revealing racial animus against Latinos in the period preceding the decision to rescind DACA. J.A. 46, 69-72, 76-79. All 22 statements are public statements and were gathered without the benefit of discovery; Plaintiffs requested the opportunity to conduct discovery regarding non-public evidence of animus. J.A. 32, 98-99, 106, 115-16, 120, 477-78, 1094-1105, 1106-1234.

Notwithstanding this evidence, the District Court "reject[ed] Plaintiffs' reliance on the President's . . . comments . . . to establish an ulterior motive," observing the President's views "have moderated since his election," and selectively citing comments made by the President that neither side put into

evidence. J.A. 1508-11. The District Court's selection of extra-record and post-decision statements was not balanced and failed to consider notorious post-decision statements from Government officials that are as incendiary as those cited in the Complaint. And the District Court failed to draw the reasonable inference that given these 22 public statements, discovery would have revealed more incendiary anti-Latino statements made in private.

b. Although the District Court acknowledged Plaintiffs' evidence that DACA beneficiaries were overwhelmingly (93 percent) Latino, J.A. 1508, it ignored Plaintiffs' evidence that the Government allowed other deferred action programs with higher Caucasian or Asian participation to continue. J.A. 40-41, 46, 58-59, 90, 474-75. This evidence was central to Plaintiffs' Equal Protection claim.

c. The District Court failed to acknowledge or otherwise consider Plaintiffs' evidence that there were substantial procedural irregularities in the decision to terminate DACA, including DHS's (i) unannounced decision to suspend mailing of renewal notices to DACA recipients several months before rescission; (ii) changed position from its commitment not to share applicant information for enforcement purposes; (iii) failure to abide by the DACA program SOPs; (iv) offer of only the barest of records to document the basis for the decision; and (v) abandonment of its long-standing position on DACA's legality. J.A. 45-46, 72-75, 81-87, 91-93, 132-

64, 474-76, 588-95, 602, 609, 714-977, 1092-93. This evidence was central to Plaintiffs' APA, Due Process, and estoppel claims.

B. The District Court Misapplied the APA in Granting Summary Judgment on an Incomplete Administrative Record

The District Court granted summary judgment on Plaintiffs' APA claims without addressing Plaintiffs' contention that the Administrative Record was incomplete. The APA requires that reviewing courts examine the "whole record." 5 U.S.C. § 706. A "District Court could not properly grant summary judgment when such a basic factual issue [as to the completeness of the Administrative Record] was in dispute, without at least permitting plaintiffs some limited discovery to explore whether some portions of the full record were not supplied to the Court . . . . This is particularly true in a case like this, where there is a strong suggestion that the record before the Court was not complete . . . ." *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982)*; see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971) (reversing and remanding grant of summary judgment for further proceedings to complete the Administrative Record); *Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (same).

DHS certified that the Administrative Record was limited to only "non-privileged documents that were *actually* considered by Elaine C. Duke . . . ." J.A. 127 (emphasis added). Before the District Court, Plaintiffs noted deficiencies in

the Administrative Record demonstrating it was incomplete. J.A. 531-34, 1094-1105. In failing to address these deficiencies or ensure the record was complete, the District Court misapplied the APA.

First, the District Court misapplied the APA by failing to recognize that when an agency decisionmaker bases her decision "on the work and recommendations of subordinates, those materials should be included [in the Administrative Record] as well." *Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*,143 F. Supp. 2d 7, 12 (D.D.C. 2001) (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)). "[T]he mere fact that [those documents] were not ultimately passed on to the final decisionmaker does not lead to the conclusion that they were not before the agency." *Styrene Info. and Research Center v. Sebelius*, 851 F. Supp. 2d 57, 64 (D.D.C. 2012). Plaintiffs identified nineteen current or former DHS employees and another six individuals from other agencies who were involved in the decision to rescind DACA whose records were not included in the Administrative Record. J.A. 1100. The exclusion of any work or recommendations from other agency officials who were involved in the decision to rescind DACA was enough to indicate that the Administrative Record was incomplete.

Second, the District Court misapplied the APA by failing to recognize that an Administrative Record is not properly limited only to documents "actually

considered" by the decisionmaker: "[A]n agency may not exclude information on the ground that it did not 'rely' on that information in its final decision." *Tafas v. Dudas*, 530 F. Supp. 2d 786, 793 (E.D. Va. 2008) (citation omitted). A contrary rule "might allow a party to withhold evidence unfavorable to its case . . . ." *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792. DHS cannot "skew the record by excluding unfavorable information but must produce the full record that was before the agency at the time the decision was made." *Animal Legal Defense Fund v. Vilsack*, 110 F. Supp. 3d 157, 159-60 (D.D.C. 2015) (citation omitted). Plaintiffs demonstrated that the Administrative Record contained no materials explaining prior decisions to maintain the DACA program or the Government's departure from its prior view that DACA was legal. J.A. 498, 1094-1105.

Third, the District Court misapplied the APA by failing to recognize that evidence of "bad faith or improper behavior by agency decisionmakers serves as a basis for expanding the scope of review, and thereby the scope of discovery . . . ." *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 230 (E.D.N.Y. 2006); *see also Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). In granting summary judgment, the District Court failed to consider evidence of bad faith and improper behavior by Government officials, including evidence of racial animus (*e.g.*, the 22 statements referencing Latino as "criminals," "thugs" and threatening expulsion) and substantial departures from administrative practice (*e.g.*, the

reversal of long standing Government position that DACA was legal with *de minimis* reasoning). J.A. 461-530, 1094-1105.

In declining to permit the limited discovery requested by Plaintiffs to ascertain whether the Administrative Record was complete, the District Court failed to address any of these points. The District Court then proceeded to conduct its review of an Administrative Record that, at the time, had been declared incomplete by two other courts. J.A. 1099.[1]

The APA specifically requires judicial review to be conducted based on the "whole record." 5 U.S.C. § 706. The District Court prematurely granted summary judgment on a demonstrably incomplete Administrative Record.

Accordingly, this court should reverse and remand the case to allow for discovery and further proceedings.

[1] Although the Government sought mandamus, the orders to supplement the record were affirmed by the appellate courts. *See In re Nielsen*, No. 17-3345 (2d Cir. Dec. 27, 2017); *In re United States*, 875 F.3d 1200, 1206 (9th Cir. 2017) ("the notion that the head of a United States agency would decide to terminate a program giving legal protection to roughly 800,000 people based on 256 pages of publicly available documents is not credible") (footnotes omitted), *affirmed sub nom. In re: United States*, 138 S. Ct. 443, 445 (2017) (directing District Court to rule on the Government's 12(b)(1) jurisdictional motion and then to consider whether "amendments to the record are necessary and appropriate").

II. The Court Erred in Granting Summary Judgment on the APA Claims

The District Court erred in granting summary judgment on Plaintiffs' APA claims. First, the District Court failed to recognize that the Government's action was arbitrary and capricious. Second, the District Court failed to conclude that the Government's decision was a substantive determination requiring notice-and-comment.

A. The Rescission of DACA was Arbitrary and Capricious

In assessing the Government's action, the District Court failed to properly analyze whether the DACA rescission was arbitrary and capricious. A reviewing court must set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[2] This Court has emphasized that "the arbitrary-and-capricious standard does not 'reduce judicial review to a rubber stamp of agency action.'" *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581, 586-87 (4th Cir. 2012) (citation omitted). Rather, the court "must 'engage in a 'searching and careful' inquiry of the record,' 'so that we may 'consider whether the agency considered the relevant factors and whether a clear error of judgment was made.'" *Id*. (citation omitted).

[2] As discussed below, Plaintiffs also claim that the DACA rescission violates the Equal Protection and Due Process guarantees of the Fifth Amendment of the Constitution, and accordingly, as an unconstitutional agency action, it would also be contrary to law in violation of 5 U.S.C. § 706(2)(A).

It is axiomatic that "an agency must give adequate reasons for its decisions." *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 297 (4th Cir. 2018). In assessing whether DHS "articulate[d] a satisfactory explanation for its action including . . . [a] rational connection," the District Court should have:

> consider[ed] whether the decision was based on a consideration of the relevant factors . . . [including] on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-44 (1983) ("*State Farm*"). In performing the review function, "reviewing court[s] should not attempt . . . to make up for such deficiencies" by supplying a reasoned basis for an agency action "that the agency itself has not given." *State Farm*, 463 U.S. at 43 (citation omitted). If "an agency's decision [is] unreasonable as a matter of law, it is likely to have been arbitrary and capricious." *Friends of Back Bay*, 681 F.3d at 587 (citation omitted). And when an agency changes its position, it "must 'provide a reasoned explanation for the change . . . display[ing an] awareness that it is changing position and show that there are good reasons for the new policy.'" *Jimenez-Cedillo*, 885 F.3d at 298 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016)). A change in policy further requires the agency to address the "serious reliance interests" "engendered" "[by]

long standing policies." *Encino Motorcars*, 136 S. Ct. at 2126 (internal quotations and citation omitted).

The District Court did not engage in any of this analysis, concluding that its scope of review was "narrow" and limited to determining whether there was a "satisfactory explanation" for the action. J.A. 1505-07.

As the other courts considering the DACA rescission have now concluded, it is clear that the decision to rescind DACA was arbitrary and capricious. The Government: (1) failed entirely to consider important aspects of the problem, including the serious reliance interests created by the five-year old DACA program and the reversal of long-standing positions; (2) acted with improper motive; and (3) asserted a "litigation risk" rationale unsupported by the Administrative Record, including making factual and legal errors in concluding that "the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, [and] it is likely that potentially imminent litigation would yield similar results with respect to DACA."[3] J.A. 379. This Court should reverse and remand.

[3] "DAPA" refers to the Deferred Action for Parents of Americans and Lawful Permanent Residents program, which was proposed in November 2014 and enjoined in February 2015 before it was implemented. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015).

1. The District Court Failed to Consider DHS's Change in Policy and Failure to Account for the Significant Reliance Interests

The District Court ignored DHS's failure to consider the existing reliance interests affected by the rescission of DACA, contrary to Supreme Court directives. Reliance interests are created where the regulation in question has been in place for more than a *de minimis* period of time and where the regulated population has structured activities "against [the] background understanding" of the regulation. *Encinco Motorcars*, 136 S. Ct. at 2126. Unless the Administrative Record explicitly accounts "for the prospect that its prior policy may have 'engendered serious reliance interests,'" and the impact of the new policy on those interests, the new policy must be set aside as arbitrary and capricious. *See Jimenez-Cedillo*, 885 F.3d at 299-300 (quoting *Encino Motorcars*, 136 S. Ct. at 2126).

In this case, the five-year-old DACA program has engendered serious reliance interests for the 800,000 direct DACA beneficiaries. Since the establishment of the DACA program in 2012, recipients have used their legal status to receive a host of benefits and to enjoy freedom from fear of deportation as a result of their deferred action status. The rescission decision immediately ended some of those protections and benefits, while phasing out the rest, without considering the reliance interests created. Employers, educational institutions,

communities, and family members of DACA recipients similarly relied on the program. *See Regents of the Univ. of Cal.*, 279 F. Supp. 3d at 1045. None of this is discussed in the Administrative Record.

Similarly, the Government had repeatedly affirmed the legality of DACA—in a 2014 Office of Legal Counsel opinion, in litigation in other courts, and in correspondence with Congress. J.A. 132-164, 531-35, 1091-93. At two earlier junctures in 2017, the Government decided to maintain the program. J.A. 531-35, 600-06, 607-10. These actions promoted reliance on the program by DACA recipients and others. In such circumstances, reasoned agency decision-making "demand[s] that [the agency] display awareness that it *is* changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original and internal citation omitted). *See generally Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis . . . .") (footnotes omitted).

Such analysis is entirely lacking from the Administrative Record. Neither the Rescission Memo nor anything else in the Administrative Record cites any facts or changed circumstances that supported the change. Rather, the Administration was faced with exactly the same facts available at the time the

DACA program was established. This is a textbook example of "arbitrary" agency action.

The reliance interests and change from the prior policy were "important aspect(s) of the problem," *State Farm*, 463 U.S. at 43, that the agency and the District Court ignored.

2. The District Court Failed to Consider the Evidence of Bad Faith and Animus Underlying the Decision to Rescind DACA

The District Court failed to consider much of the evidence of anti-Latino animus by senior Administration officials that was presented in the Complaint. This error manifested itself in two ways. First, as discussed above, the District Court refused to compel the Government to produce, *inter alia*, any additional, non-public evidence of animus that may have underlay the decision. *See Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) ("an extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers . . . .").

Second, the District Court failed to evaluate appropriately the significance of the evidence of discriminatory animus to the Government's decision making. For purposes of the APA, "proof of subjective bad faith by [agency decision-makers] . . . generally constitutes arbitrary and capricious action." *Tummino*, 603 F. Supp. 2d at 542 (E.D.N.Y. 2009) (citations omitted) (collecting cases). *See also*

Latecoere Int'l, Inc. v. U.S. Dept. of Navy, 19 F.3d 1342 (11th Cir. 1994) (finding agency action arbitrary when motivated by impermissible bias against a foreign firm). This understanding comports with the Supreme Court's warning that "a bare [] desire to harm a politically unpopular group cannot constitute a legitimate government interest." *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 536 (1973).

3. The District Court Erred in Assessing DHS's Purported Rationale

The District Court erred in finding that the Government's proffered rationale for the rescission of DACA was "satisfactory" under the standard of *State Farm*. This is evident in two aspects of the District Court's reasoning.

First, the District Court cited a rationale for the decision— "litigation risk," J.A. 1506 —that is not fully analyzed in the Administrative Record.

There is no evidence in the Administrative Record that the Government analyzed the litigation risk associated with rescinding DACA. The importance of this missing analysis is underscored by the nine other lawsuits in which courts have found the decision to rescind DACA to be or likely to be arbitrary and capricious. As another reviewing court observed, "it is simply not plausible that DHS reversed policy between February and September because of one threatened lawsuit (never actually filed) without having generated any materials analyzing the lawsuit or other factors militating in favor of and against the switch in policy." *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211, 2017 WL 4642324,

at *4 (N.D. Cal. Oct. 17, 2017). The Government's decision to trade one lawsuit for ten is another textbook example of arbitrariness. *See, e.g., Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015).

Moreover, nothing in the Administrative Record analyzes the factors necessary for an injunction to issue, despite the Government's *post-hoc* assertion that the rescission was warranted by the threat and disorder of an imminent, nationwide injunction. In considering this rationale, the District Court for the District of Columbia properly concluded that "it strains credulity to suggest that [a] court would have enjoined DACA immediately and completely without allowing DHS any opportunity to wind the program down." *NAACP*, 298 F. Supp. 3d at 242. Again, the District Court failed to address the deficient Administrative Record.

Second, the District Court failed to consider that the DHS decision was predicated on a factual error and a series of mistaken legal conclusions. An agency "action . . . may not stand if the agency has misconceived the law." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). As referenced in the Rescission Memo, the only source of legal analysis was the Sessions Letter. J.A. 383. The only guidance from Attorney General Sessions concluded, without further analysis, that "the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA." J.A. 379. But the Attorney General's conclusion is

premised on a factual error: no court ever found "constitutional defects" in DAPA. The Southern District of Texas enjoined DAPA solely based on the procedural APA claims raised by plaintiffs. It explicitly did not address "Plaintiffs' likelihood of success on their *substantive* APA claims or their constitutional claims under the Take Care Clause/separation of powers doctrine." *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015) (emphasis in original). Nor did the Fifth Circuit find any constitutional defect in DAPA. *Texas v. United States*, 809 F.3d 134, 154 (5th Cir. 2015).

The District Court also failed to consider that the Attorney General's conclusions were based on a faulty analogy between DACA and DAPA that would be essential to any analysis of the legality of the DACA. For example, the Fifth Circuit held that DAPA was contrary to the INA. 809 F.3d at 170--71, 182-83, 190-92. But "unlike DAPA, DACA has no analogue in the INA." *NAACP*, 298 F. Supp. 3d at 239 (finding it arbitrary and capricious not to consider distinctions between the programs) (internal quotations omitted). Further, the Administrative Record contains no evidence the Government ever considered that the five-year-old DACA program, unlike the DAPA program (enjoined pre-implementation), is legally defensible on numerous grounds, including laches: any litigant seeking to enjoin DACA would have to explain why they delayed commencing suit for five years. *Cf. Regents of Univ. of Cal. v. Dep't of Homeland Sec.*, 279 F. Supp. 3d

1011, 1044 (N.D. Cal. 2018) (criticizing Administrative Record's lack of analysis of litigation defenses). The Administrative Record is similarly devoid of any evidence the Government analyzed injunction prerequisites, such as how any plaintiff challenging DACA could claim immediate or irreparable harm, or why such harm would outweigh the competing interests of DACA recipients, their employers, educational institutions, and communities. *See, e.g., Real Truth about Obama v. FEC*, 575 F.3d 342, 345-48 (4th Cir. 2009). Yet the District Court ignored these factors and failed to recognize that DHS's "decision [was] unreasonable as a matter of law." *Friends of Back Bay*, 681 F.3d at 587.

B. The DACA Rescission Required Notice and Comment

The District Court improperly granted summary judgment on Plaintiffs' procedural APA claims. The rescission of DACA was a substantive rule requiring notice-and-comment rulemaking under the APA. *See* 5 U.S.C. § 553. The District Court—without analyzing or citing any case law—incorrectly concluded that the DACA rescission was not a substantive rule because it "was not immediately binding, but rather a statement of intended policy beginning March 5, 2018." J.A. 1504. The District Court failed to consider or properly apply the relevant legal standard, concluding that because DACA was not promulgated through notice-and-

comment rulemaking, it could be rescinded.[4] The DACA Rescission *is* a substantive determination subject to the notice-and-comment requirements of the APA because: (1) it established immediately binding norms for DHS; (2) it precluded agency officials from exercising discretion to grant status previously available under DACA; and (3) it had a substantive impact on DACA recipients.

Substantive rules have "the force and effect of law," impose new rights or duties, or have a substantive impact on those the agency seeks to regulate. *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340 (4th Cir. 1995) (citations omitted). By contrast, general statements of policy—which are exempt from notice-and-comment requirements: (1) do not establish a binding norm; (2) leave agency officials the freedom to exercise their own discretion; and (3) do not have a substantive impact on those regulated. *See Chen Zhou Chai*, 48 F.3d at 1341. Importantly, "Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012) (citations omitted).

[4] The manner of a policy's promulgation does not determine whether its rescission requires notice-and-comment. *See Consumer Energy Council v. F.E.R.C.*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982) (noting agencies cannot avoid notice-and-comment by "merely by confessing that the regulations were defective . . . .").

1. The Rescission Memo Established an Immediately Binding Norm and Precluded Agency Officials From Exercising Discretion

The District Court incorrectly found that the rescission of DACA "was not immediately binding, but rather a statement of intended policy beginning March 5, 2018." J.A. 1504-05. This analysis failed to address the ways in which the rescission had an immediate impact on both DACA recipients and DACA-eligible individuals beginning September 5, 2017.

The DACA rescission was an immediately binding rule that stripped DHS officials of discretion. A "critical factor" in determining whether an agency action constitutes a substantive rule is the "extent to which the challenged [rule or regulation] leaves the agency, or its implementing official, free to exercise discretion to follow, or not follow, the [announced] policy in an individual case." *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1324 (9th Cir. 1992). A rule "cabining . . . an agency's prosecutorial discretion can in fact rise to the level of a substantive, legislative rule" when it "is in purpose *or likely effect* one that narrowly limits administrative discretion . . . ." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) ("*CNI*") (per curiam) (emphasis added and internal citation omitted); *see also Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 447 (D.C. Cir. 1989) (finding "mandatory language cabining DOT's enforcement discretion" created a substantive rule).

In evaluating whether an agency action is binding or constitutes policy, courts need to carefully scrutinize the language chosen by an agency to determine whether a rule has a present binding effect or conveys an agency's tentative intention for the future, frequently citing the distinction between a "will" directive and a "may" option.[5] The District Court failed to consider that, consistent with a binding norm—and substantive rule—the Rescission Memo contained several non-discretionary mandates and stated that "effective immediately" DHS:

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

[5] *Compare Am. Bus Ass'n v. United States.*, 627 F.2d 525, 532 (D.C. Cir. 1980) (use of "will" indicates statement is binding) *and McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988) ("[t]he use of the word 'will' suggests the rigor of a rule, not the pliancy of a policy") *and CNI*, 818 F.2d at 946 (D.C. Cir. 1987) ("[W]e have . . . found decisive the choice between the words 'will' and 'may'") *with Chen Zhou Chai*, 48 F.3d at 1341 (use of "may" "did not create a binding norm . . . .") *and Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978) (use of "may" indicates "general statement of policy").

- "*Will* administratively close all pending Form I-131 applications for advance parole filed under standards associated with the DACA program . . . ."

J.A. 73-75, 383, 1007. The Rescission Memo mandates how DHS officials *must* act. They are forbidden from approving pending (or new) requests for advance parole from current DACA recipients and from considering case-by-case exceptions to any DACA recipient seeking a renewal. As the D.C. Circuit observed in *CNI*, "[t]his type of mandatory, definitive language is a powerful, even potentially dispositive, factor suggesting that [agency policy statements] are substantive rules." 818 F.2d at 947.

Thus, the Rescission Memo made substantive determination subject to the APA's notice-and-comment requirements.

2. The Rescission of DACA Had a Significant Substantive Impact on DACA Recipients

The District Court failed to analyze that the impact of the rescission on DACA recipients warranted notice and comment. J.A. 1505. Where an agency action "affect[s] individual rights and obligations" or has the "force of law," it requires notice and comment. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *see, e.g.*, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011) (finding a TSA decision to screen airline passengers using "advanced imaging technology" in place of traditional "magnetometers"

implicated passengers' privacy and had the "hallmark of a substantive rule" because it "substantively affect[ed] the public").

The rescission of DACA substantively impacts its recipients and potential recipients, who will no longer be able to travel, work, attend school, and live free from the risk of deportation.[6] For example, the rescission requires that all pending requests for advance parole be rejected, foreclosing the opportunity for any DACA recipient to travel outside the United States.

These impacts confirm that the Rescission Memo constituted a substantive rule subject to the APA's notice-and-comment requirements.

III. The Court Erred in Granting Summary Judgment on the Equal Protection Claim

The District Court erred by granting summary judgment to the Government on Plaintiffs' equal protection claim based on an incorrect and overly deferential standard of review. It compounded that error by limiting its review to the Administrative Record and misapplying the Rule 56 standard.

[6] *See, e.g., Medina v. U.S. Dep't Of Homeland Sec.*, No. C17-0218, 2018 WL 2214085 at *11 (W.D. Wash. May 15, 2018) (DACA recipients "enjoy[] significant liberty and property interests, including the right to obtain lawful employment authorization and the right to be considered lawfully present" and finding the plaintiff would likely prevail on his procedural APA claim) (quoting *Torres v. U.S. Dep't of Homeland Security*, No. 17-cv-1840, 2018 WL 1757668, at *9 (S.D. Cal. Apr. 12, 2018)).

It is well-established that non-citizens, as well as citizens, may bring equal protection claims. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356, 368-69 (1886). The equal protection claim in this case was brought as a claim of intentional discrimination based on race, national origin, and ethnicity. *See* J.A. 90. When "a prima facie case of discriminatory purpose [has been] made out, 'the burden of proof shifts to the [Government] to rebut the presumption of unconstitutional action . . . .'" *Washington v. Davis*, 426 U.S. 229, 241 (1976) (citations omitted).

Building on *Washington*, the framework established by the Supreme Court in *Vill. of Arlington Heights*, 429 U.S. 252, provides clear instructions as to what constitutes evidence of discriminatory purpose. In addition to disparate impact evidence, courts must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id*. at 266. The non-exhaustive list of proper subjects for inquiry include: (1) "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (2) "[t]he . . . sequence of events leading up [to] the challenged decision"; (3) "[d]epartures from the normal procedural sequence"; and (4) "[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand

at trial to testify concerning the purpose of the official action . . . ." *Id*. at 267-68 (citations omitted). And once discriminatory purpose has been established and the burden shifts to the Government, this Court has held, "a classification based on . . . ethnic origin—if established—requires the most rigid scrutiny, demanding a compelling state interest for its justification." *Sylvia Dev. Corp. v. Calvert Cty., Md.*, 48 F.3d 810, 820 (4th Cir. 1995) (discussing application of *Arlington Heights* to treatment of a Czech immigrant). Other circuits have similarly applied the *Arlington Heights* framework to non-citizens. *See, e.g., Spath v. NCAA*, 728 F.2d 25, 28-29 (1st Cir. 1984).

Plaintiffs' allegations and evidence tracked this framework, as demonstrated by the following table:

Subject of Inquiry	**Plaintiffs' Evidence**
The decision was motivated by racial animus. Specifically, "the legislative or administrative history" of the DACA Rescission was littered with "contemporary statements by members of the decision-making body" reflecting racial animus. *Arlington Heights*, 429 U.S. at 268.	Plaintiffs cited the long series of threats and derogatory statements by senior Government officials, including the President, the Attorney General, the President's Senior Advisor for Domestic Affairs, and the Director of Immigrations and Customs Enforcement against Latinos – twenty-two examples of which were cited in the Complaint. J.A. 46, 69-72, 76-79, 474.
"[T]he historical background of the [DACA rescission]. . . reveal[ed] a series of official actions taken for invidious purposes." *Arlington Heights* 429 U.S. at 267.	Plaintiffs cited a series of twelve administration actions or policy statements leading up to the DACA rescission, all of which manifest Administration hostility to DACA recipients or Latino immigrants. J.A. 76-79.

Subject of Inquiry	Plaintiffs' Evidence
"[T]he specific sequence of events leading up [to] the [DACA rescission]. . [including] [d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267.	Plaintiffs cited procedural irregularities leading up to the DACA rescission, including DHS's unannounced decision to suspend the mailing of renewal notices to DACA recipients several months before the termination, the reneging of the Government's commitment not to share DACA applicant information for enforcement purposes, DHS's failure to abide by the DACA program SOPs, and offering only the barest of records to document the basis for the decision. J.A. 45-46, 72-75, 81-87, 91-93, 474-76, 559-99.

By presenting these allegations and evidence, Plaintiffs have met their burden to establish a *prima facie* case of discrimination, and under *Washington* and *Arlington Heights*, the burden of proof then should have shifted to the Government to advance a sufficient non-discriminatory justification for the rescission.

The District Court failed to apply the standard established in *Arlington Heights* and instead improperly evaluated the Rescission Memo under *Kleindienst v. Mandel*, 408 U.S. 753 (1972). According to the District Court, its review was limited to determining whether there was a "facially legitimate and bona fide" reason for Government action absent an "affirmative showing of bad faith." J.A. 1510. That was error. The *Mandel* standard does not apply here: *Mandel* and its progeny are predicated on national security interests (to protect the United States from threats such as communism or terrorism) and involve challenges to denials of

permission to enter the United States. *Id*. at 754. The *Mandel* Court held that, in the special context of "policies and rules for exclusion of aliens," it would not look behind a facially legitimate national security reason offered by the government for its exercise of discretion not to provide a waiver. *Id.* at 769. As the Supreme Court recently emphasized, *Mandel* "constrain[s] . . . inquiry into matters of [alien] entry and national security . . ." *Hawaii*, No. 17-965, 2018 WL 3116337, at *21.

The District Court's reliance on *Mandel* is misplaced: the Government cited no national security rationale for the DACA rescission. Moreover, the *Mandel* Court predicated its decision on the long-recognized distinction between excludable aliens (those seeking entry at the border) and aliens already in the United States—like DACA recipients. Aliens already residing in the United States, even those without legal immigrant status, enjoy greater constitutional protection than those seeking entry. *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[i]t is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"). *See also Hampton v. Mow Sun Wong*, 426 U.S. 88, 115-16 (1976) (exclusion of lawful aliens from civil service positions violated equal protection);

Plyler v. Doe, 457 U.S. 202, 210 (1982) (state may not deny undocumented school-age children free education provided to citizens).

Notably, the Government did not rely in either its briefing or argument on *Mandel*.[7] Nor does this Circuit's decision in *IRAP*, 883 F.3d at 264, require the application of *Mandel*, as the District Court incorrectly concluded. J.A. 1508-09. *IRAP*, like *Mandel*, concerned the Government's invocation of a national security rationale to bar classes of aliens *outside* the United States seeking entry into the United States, not the rights of persons already in the United States when the Government does not invoke national security considerations. The Supreme Court emphasized the importance of this distinction in *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337. The District Court failed to address that critical distinction, and in doing so, failed to apply the correct standard of review.

The District Court also incorrectly concluded that its review of the Equal Protection claim was necessarily limited to the Administrative Record. It stated:

> The Administrative Record—the basis from which the Court must make its judicial review—does not support the notion that [the Government] was targeting a subset

[7] The Government urged the District Court to analyze the matter as a "selective prosecution" claim under *United States v. Armstrong*, 517 U.S. 456 (1996). The District Court properly rejected this argument. As the District Court noted, (i) the decision to rescind DACA was not justified as an exercise in prosecutorial discretion, and (ii) the *Armstrong* court held that "the decision to prosecute may not be based on an unjustifiable standard such as race" and Plaintiffs had averred race discrimination. J.A. 1508.

> of the immigrant population, and it does not support any supposition that the decision was derived on a racial animus. That is where the judicial inquiry should end. The Court rejects Plaintiffs' reliance on the President's misguided, inconsistent, and occasionally irrational comments made to the media to establish an ulterior motive. *See generally Kleindienst* . . .

J.A. 1508-09. The District Court notably failed to cite any authority for the proposition that its consideration of the Equal Protection claim should be limited to the Administrative Record. Nor could it. Plaintiffs' Equal Protection claim was not an APA claim, and it therefore is not subject to the APA's requirement that the District Court consider only the Administrative Record. Consequently, Plaintiffs should have been afforded discovery. *See, e.g., Puerto Rico Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 328 (D. P.R. 1999) ("The Supreme Court has held that a plaintiff who is entitled to judicial review of its constitutional claims under the APA is entitled to discovery in connection with those claims") (citing *Webster v. Doe*, 486 U.S. 592, 604 (1988)); *Rydeen v. Quigg*, 748 F. Supp. 900, 905-06 (D.D.C. 1990) (considering extra-record affidavits because "[w]hen reviewing constitutional challenges to agency decisionmaking, courts make an independent assessment of the facts and the law") (citation omitted); *aff'd*, 937 F.2d 623 (Fed. Cir. 1991), *cert. denied*, 205 U.S. 1075 (1992).

The District Court further erred in holding that under *Mandel* and *IRAP*, Plaintiffs had to meet a "heavy burden" to make an "affirmative showing of bad faith" with "particularity" and "undisputed evidence" before a court could look behind the DACA rescission for "discriminatory motivation." J.A. 1509-10. In so ruling, the District Court concluded that *IRAP* "implicit[ly]" held that *Mandel* could be overcome only on a showing of "a direct nexus between the discriminatory statements and the executive action in question in that case," and that in contrast to *IRAP*, Plaintiffs "cannot here make a similarly substantial showing" because the President's statements "have moderated since his election," citing statements by the President presented in a January 25, 2018 article. J.A. 1510-11. But this Court never held, implicitly or otherwise, that a "direct nexus" was required between discriminatory statements and the challenged action.

Regardless, where the President "regularly and repeatedly disparaged Islam as a religion and repeatedly proposed banning Muslims from the United States," J.A. 1510, here the Plaintiffs documented a series of statements from the President that "regularly and repeatedly disparaged" Latinos in direct connection (often in the same sentence) with statements directly proposing to exclude or remove Latinos from the country. *See* J.A. 46, 69-72 (references to Latinos as "criminals," "rapists," "thugs," "bad hombres," and "true animals" in conjunction with statements "we're going to get them out," "they are finished," and "we're getting

them out"). It is hard to imagine a closer nexus between discriminatory animus and policy.

Moreover, the District Court failed to view "facts and [] reasonable inferences therefrom in the light most favorable to the nonmoving party," *Scinto*, 841 F.3d 227, and it construed allegations and evidence in favor of the Government. This error is clearest in the Court's evaluation of the 22 separate, detailed statements made by senior Administration officials threatening or otherwise revealing racial animus against Latinos leading up to the September 5 decision to rescind DACA. J.A. 46, 69-72, 76-79.[8] Such well-pled factual allegations must be accepted as true. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993), *cert. denied*, 510 U.S. 1197 (1994). These statements make out a prima facie case for an equal protection claim. And what reasonable inferences can be drawn from the fact that senior Administration officials made 22 separate *public* statements of anti-Latino animus? Why is it not reasonable to infer that they made far more incendiary statements outside the public view?

Based on these public statements, Plaintiffs requested the opportunity to conduct discovery regarding non-public evidence of animus, J.A. 98-99, 106, 115-16, 120, 477-78, 1094-1105, 1106-1234, 1334-41. But rather than credit Plaintiffs'

[8] Similarly, the District Court ignored other key facts, including Plaintiffs' evidence that the Government allowed other deferred action programs with higher Caucasian or Asian participation to continue, J.A. 40-41, 46, 58-59, 90, 474-75.

allegations, the District Court—relying on evidence neither of the parties put before it—found the President's views "have moderated since his election." J.A. 1510. In so failing to view all facts in the light most favorable to the Plaintiffs, the District Court plainly misapplied Rule 56.

For these reasons, the District Court erred in granting summary judgment on Plaintiffs' equal protection claim.

IV. The Court Erred in Granting Summary Judgment on the Due Process Claims

The District Court improperly granted summary judgment on Plaintiffs' Due Process claims. Plaintiffs alleged detailed facts establishing violations of procedural and substantive due process. J.A. 85-89. The District Court failed to credit Plaintiffs' allegations and evidence regarding the benefits conferred to DACA recipients, and it misapplied precedent in concluding that due process did not apply to their deprivation. And the facts establish outrageous conduct sufficient to violate substantive due process.

A. The District Court Erred in Dismissing the Procedural Due Process Claims

The District Court erred in in failing to recognize that the Government, through its actions, conferred rights and benefits on DACA recipients. The District Court further erred in concluding that such benefits could be stripped *en masse* without affording any process.

First, the District Court failed to credit Plaintiffs' allegations and evidence—as it must on a dispositive motion—that the Government had conferred on DACA recipients legally protected liberty and property interests.

Such interests protected by the Due Process Clause "are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The source of such rights can be a statute, a regulation, "[e]xplicit contractual provisions," "implied" agreements, or "rules or mutually explicit understandings." *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972); *see also Richardson v. Town of Eastover*, 922 F.2d 1152, 1157 (4th Cir. 1991) (an "entitlement . . . may be implied . . . from policies, practices, and understandings . . . .").

DACA recipients were afforded — and are now being deprived of — the ability to obtain lawful employment authorization, to travel internationally, to pursue education, to pay and receive benefits such as Social Security, to open bank accounts, and to be considered lawfully present. Such benefits, when conferred by the Government, are precisely the types of entitlements covered by Due Process. *Roth*, 408 U.S. at 572 (1972); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) ("Entitlement[s — rights to] other things like high school education,

government employment, and welfare benefits — are grounded in the law and cannot be removed except for cause").

The rules, guidelines, and Government communications created an "explicit understanding" regarding the benefits conferred by DACA. To induce applicants to participate in DACA, the Government promoted the right to work (authorized under 8 C.F.R. § 274a(a)(11) & (c)(14)), to travel internationally (authorized under 8 U.S.C. § 212(d)(5)(A)), and to attend educational institutions and apply for financial assistance (authorized under 42 U.S.C. § 2000d, 28 C.F.R. § 42.104(b)(2), and 34 C.F.R. § 100.3(b)(2)). J.A. 60-68, 86. The Government further promoted the right to participate in Social Security and Medicare (authorized under 8 U.S.C. § 1611(b)(2) & (b)(3) and 8 U.S.C. § 1621(d)) and to be considered "lawfully present" in the United States (authorized under 8 C.F.R. § 109.1). J.A. 62. The Government unequivocally promised not to share sensitive personal information with immigration enforcement authorities. J.A. 63-68.

Plaintiffs also cited official statements from senior Government officials that these rights and benefits "upon which DACA applicants most assuredly relied, must continue to be honored." J.A. 68-69, 1091-93. The Complaint further specifically identified individuals who have availed themselves of these benefits, and who have averred that their enjoyment of these benefits was stripped away when DACA was rescinded. J.A. 60-62, 73-75, 1237-39, 1242-45, 1248-49.

Plaintiffs further presented evidence that the conferring of these benefits was non-discretionary. The Complaint cited the eligibility criteria in the 2012 DACA Memorandum, which instructed DHS agents not to apprehend or place eligible persons into removal proceedings. J.A. 59, 63. It averred that DACA required ICE agents to use a checklist to determine whether individuals qualified for DACA; such agents were required to follow the 150-page DACA SOP manual; those guidelines were "applicable to all personnel performing adjudicative functions and the procedures to be followed [were] not discretionary." J.A. 43, 63, 67-68, 714-986. *See also Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 1334 (N.D. Ga. 2017); *Gonzales Torres v. U.S. Dep't of Homeland Sec.*, No. 17-cv-1840, 2017 WL 4340385, at *4 (S.D. Cal. Sept. 29, 2017) (finding that DACA's SOPs are "non-discretionary"). Such "substantive limitation on the discretion" of government officials creates a "protectable property interest." *Wedges/Ledges of Cal., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 64 (9th Cir. 1994). And Plaintiffs sought to bolster this evidence by requesting targeted discovery regarding these benefits. J.A. 1097, 1107-23, 1115-17, 1128-29.

The District Court incorrectly found that "DACA did not create an entitlement" because "the exercise or restraint of prosecutorial discretion is not traditionally the sort of government action that creates substantive rights." J.A. 1512-13. The District Court also cited the disclaimer in the DACA Memo that the

DACA program it "confers no substantive right, immigration status or pathway to citizenship." J.A. 1512.

In adopting the Government's characterization of the benefits, the District Court misapplied the appropriate legal standard: a court must independently review a government program to determine whether a protectable interest exists. *See Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 207 (4th Cir. 1989). Moreover, the District Court failed to consider that, as alleged in the Complaint, Congress and the federal government *did* confer rights of which Plaintiffs were deprived. Nor did it consider Plaintiffs' allegations that, notwithstanding the disclaimer, the Government repeatedly promoted these rights as independent benefits. *See* J.A. 42-43, 60-62, 64-65. In so doing, the District Court improperly failed to consider these "facts and the reasonable inferences therefrom in the light most favorable to the nonmoving party." *Scinto*, 841 F.3d at 227 (internal quotation omitted).

Second, the District Court misconstrued the Complaint and the law when it concluded "procedural due process only applies to individualized deprivations, not policy-based deprivations for an entire class." J.A. 1512 (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915)). The Complaint and declarations submitted in opposition to summary judgment included specific allegations by specific individuals of the benefits they had lost. J.A. 50-57, 73-75,

1237-39, 1242-45, 1248-49. And in holding that *Bi-Metallic* obviated the need for process, the Court disregarded extensive authority holding that Due Process is required for revocation of rights and benefits. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

The District Court failed to address that individual Plaintiffs had been stripped of benefits without notice or any opportunity to be heard, J.A. 50-57, 73-75, 86, in contravention of the DACA SOPs. J.A. 43, 63, 67-68, 86. For example, Plaintiffs Brenda Moreno Martinez and Nathaly Uribe Robdelo had pending applications for permission to travel internationally that were summarily revoked. J.A. 52-53, 55, 73-75. Likewise, Plaintiff Annabelle Martinez Herra was told her work authorization could not be renewed. J.A. 56, 74. In granting summary judgment, the District Court failed to consider any of these individual deprivations, or the other individuals discussed in the record. J.A. 1237-39, 1242-45, 1248-49.

The District Court's reliance on *Bi-Metallic* also was error. By its terms, *Bi-Metallic* applies only when a *legislature*—not an agency—enacts a statute of general application, such that the District Court's observation *Bi-Metallic* means no process is due where "the political process serves as an effective alternative," J.A. 1512, makes no sense as applied to this case. The rescission of DACA was an administrative action, taken without the opportunity for public comment, and there was no "political process that served as an effective alternative."

Moreover, DACA is not a program of general application. It requires individual application, approval, and enrollment, only after which participants are entitled to the rights and benefits conferred by the program. In comparable circumstances, courts have concluded that *en masse* deprivations of rights by an agency are subject to Due Process claims. *See, e.g.*, *Kapps v. Wings*, 404 F.3d 105, 118 (2d Cir. 2005) (finding that where administrator's rules arbitrarily denied group of applicants the right to appeal, applicants were entitled to individualized notice and an opportunity to be heard).

The law is unequivocal: it is unconstitutional to deprive any individual, including the Plaintiffs, of a protected right without due process of law. *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62, 80 (4th Cir. 2016). Such procedural due process "[a]t a minimum . . . requires notice and some opportunity to be heard." *Mallette v. Arlington Cty. Employees' Supplemental Ret. Sys. II*, 91 F.3d 630, 640 (4th Cir. 1996) (citation omitted). The District Court misapplied the law and should be reversed.

B. The District Court Failed to Recognize That the Rescission of DACA and Changes to DHS's Information-Sharing Policy Violated the Substantive Protections of the Due Process Clause

The District Court erred in granting summary judgment on Plaintiffs' substantive due process claim. A denial of fundamental fairness may constitute a violation of substantive due process rights when it is so egregious or so outrageous

as to "shock the contemporary conscience." J.A. 1514. Governmental speech and actions based on animus satisfy this standard. *See generally Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, No. 16-111, __ S.Ct. __, 2018 WL 2465172, at *12 (S. Ct. June 4, 2018) ("official expressions of hostility . . . were inconsistent with what the [Constitution] requires"); *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) ("[D]esire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") (emphasis in original).

As discussed above, the 22 statements of anti-Latino bias cited in the Complaint—threats to expel Latino immigrants because they are "criminals," "thugs," "rapists," and "bad hombres" (J.A. 69-72) that preceded the DACA rescission evidence racial animus—should shock the conscience of any reasonable observer because they are ''intended to injure in some way *unjustifiable* by any government interest." *Hawkins v. Freeman*, 195 F.3d 732, 738, 742 (4th Cir. 1999) (emphasis in original and citation omitted). Taken as true, as they must be on a motion for summary judgment, such conduct is unjustifiable by any legitimate government interest.

The District Court further erred in failing entirely to address Plaintiffs' allegations that the Government's reneging on its promise not to share DACA applicant data with enforcement authorities implicates Due Process. As the District Court found elsewhere in its decision, Plaintiffs provided evidence that

"the Government promised not to transfer or use the information gathered from Dreamers for immigration enforcement," J.A. 713-977, 1028-1093, 1515, and the Government refused to provide any assurance that it would adhere to this promise. The District Court further observed that "the government, having induced these immigrants to share their personal information under the guise of immigration protections, could now use that same information to track and remove them," J.A. 1516, and accurately characterized such action as "affirmative misconduct." The District Court, however, failed to address Plaintiffs' claim that such misconduct violates Plaintiffs' substantive due process rights. *See* J.A. 88-89. To renege on that promise to DACA applicants is egregious, outrageous, and "shock[s] the conscience . . . ." *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304, 1312 (N.D. Cal. 2018) (citation omitted).

CONCLUSION

This Court should reverse the District Court's decision and remand with instructions for discovery to commence.

Dated: July 2, 2018

Respectfully submitted,

/s/ John A. Freedman
John A. Freedman
Emily Newhouse Dillingham
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.freedman@arnoldporter.com
emily.dillingham@arnoldporter.com

Elizabeth J. Bower
Kevin B. Clark
Priya R. Aiyar
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006
(202) 303-1000
ebower@willkie.com
kclark@willkie.com
paiyar@willkie.com

Dennis A. Corkery
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS
11 Dupont Circle, NW
Suite 400
Washington, DC 20036
(202) 319-1000
dennis_corkery@washlaw.org

Ajmel A. Quereshi
HOWARD UNIVERSITY SCHOOL
OF LAW
2900 Van Ness Street, NW
Washington, DC 20008
(202) 216-5574
aquereshi@naacpldf.org

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), that the attached Brief of Appellants contains 12,597 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

The foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2010.

Dated: July 2, 2018

/s/ John A. Freedman
John A. Freedman

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2018, I electronically filed the foregoing document with the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 2, 2018

/s/ John A. Freedman
John A. Freedman