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)

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INTRODUCTION

The Government's decision to end DACA was unlawful as a matter of both process and substance. The rescission of a program affecting the lives of nearly 800,000 DACA recipients, their families, their employers, and their communities, all of whom had come to rely on DACA, followed a host of statements evidencing discriminatory intent by senior governmental officials, ignored standard administrative procedures, lacked support in the Administrative Record, and was allegedly justified by inadequate legal reasoning predicated on a fundamental error. As set forth in the Opening Brief of Plaintiffs-Appellants, the District Court misapplied this Circuit's precedents and the established standards for addressing summary judgment under Federal Rule of Civil Procedure 56 for assessing whether an agency action is arbitrary and capricious or requires notice and comment under the Administrative Procedure Act (APA), and for evaluating Plaintiffs' equal protection and due process claims. The District Court did, in the face of an undisputed factual record, properly enter a permanent nationwide injunction prohibiting the Government from sharing DACA applicants' personally identifiable information with enforcement officials.

Rather than defend the District Court's decision, the Government spends the first quarter of its brief urging an alternative basis for affirmance on the ground that the rescission of DACA is non-justiciable—an argument that has been

properly rejected by all four courts that have ruled on challenges to the rescission, and which the Government concedes is inapplicable to Plaintiffs' constitutional claims. *See* Opening and Response Brief for Appellees ("Gov. Br.") 22 n.1. Even more telling are the Government's: (i) failure to discuss the three other court decisions that squarely rejected the arguments advanced in its brief; (ii) failure to discuss Rule 56 or this Circuit's key precedents for how a court is supposed to address a movants' failure to propound a Rule 56(c) statement or an opponents' request for discovery under Rule 56(d); (iii) acknowledgment that the District Court applied the wrong standard of review in evaluating the equal protection claim, Gov. Br. 54; and (iv) reliance on arguments against the nationwide injunction that were not made below and not supported by evidence in the Joint Appendix. In sum, the Government's brief confirms the legal defects of the DACA rescission.

This Court should sustain the District Court's injunction, reverse the District Court's grant of summary judgment, and remand for further proceedings.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE GOVERNMENT ON PLAINTIFFS' CONSTITUTIONAL AND APA CLAIMS

As the Government acknowledges, review of the District Court's grant of summary judgment is *de novo*. Government Brief ("Gov. Br.") 16. This Court can and should correct the legal errors made below. The District Court failed to

properly apply Federal Rule of Civil Procedure 56, and it made errors of law in its evaluation of each of Plaintiffs' constitutional claims. Each of these errors warrants reversal.

A. The District Court Failed to Properly Apply the Summary Judgment Standard for Plaintiffs' Constitutional and APA Claims

In the Opening Brief, Plaintiffs demonstrated that the District Court failed to properly apply Federal Rule of Civil Procedure 56. *See* Opening Brief of Plaintiffs-Appellants ("Pl. Br.") 15-23. In particular, the District Court failed to address Plaintiffs' Rule 56(d) affidavit or related draft discovery, (J.A. 1094-1105), as well as the Government's failure to provide a statement of undisputed material facts or respond to Plaintiffs' Rule 56(c) statement of material facts as to which there is a genuine dispute (J.A. 473-78). The District Court also failed to view the "facts and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Scinto v. Stansberry*, 841 F.3d 219, 227 (4th Cir. 2016) *cert. denied*, 138 S. Ct. 447 (2017). These failures warrant reversal. *See Balt. Ctr. for Pregnancy Concerns v. Mayor*, 721 F.3d 264, 280 (4th Cir. 2013) (en banc) (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."); *Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.*, 673 F.3d 294, 299 (4th Cir. 2012) ("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.") (emphasis added).

The Government does not address *Baltimore Center* or *Scinto*, and its efforts to distinguish *Ray Communications* on the grounds that it "did not involve an APA claim" is cursory, cites no precedent, and lacks merit. Gov. Br. 61. This Circuit has not established a different set of procedures to govern summary judgment in APA cases. Nor should it; unlike other Federal Rules of Civil Procedure, Rule 56 does not exempt APA claims from its requirements. *Compare* Rule 26(a)(2)(B)(i) (exempting administrative review actions from initial disclosure requirements), *with* Rule 56 (no such exemption). Rather, these cases, which note that "the summary judgment process presupposes the existence of an adequate record" —are equally relevant to an APA action. *Baltimore Center*, 721 F.3d at 280. *Compare Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971) (judicial review under the APA is required to be conducted based on the "whole record").

For similar reasons, the Government's assertion that the "district court did not err in granting judgment for the government without discovery in this case," Gov. Br. 61, ignores the fact that Plaintiffs brought non-APA claims, which clearly

entitles Plaintiffs to discovery. Pl. Br. 44 (collecting cases).[1] Moreover, to meet its burden under Rule 56, the Government should have preserved its position below by filing an opposition to Plaintiffs' Rule 56(c) proffer, which it failed to do. (J.A. 121).

The Government also contends that the District Court "did not fail . . . to view the facts in the light most favorable to the plaintiffs' claims." Gov. Br. 62. The Government both misstates the standard (which requires the District Court to view both "facts and the *reasonable inferences therefrom* in the light most favorable to the nonmoving party," *Scinto*, 841 F.3d at 227) (emphasis added) and ignores material facts that Plaintiffs cited and the District Court failed to address, including:

(i) the fact that the Government rescinded DACA (which was 93 percent Latino) but left in place numerous other deferred action programs that did not impact predominantly Latino populations (J.A. 40-41, 46, 58-59, 90, 475, 1095, 1363-70, 1438-41);

(ii) 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

[1] The Government's effort to distinguish *Webster v. Doe*, 486 U.S. 592 (1988), cited by Plaintiffs, misstates the relevance of that decision: that a plaintiff who brings both APA and constitutional claims against the federal government has the right to conduct discovery even if it "will entail extensive 'rummaging around."' Id. at 604."

(iii) the Government's repeated promotion and representation 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).

Pl. Br. 17. Nor did the Government address the reasonable inference from the 22 public statements from senior Government officials revealing racial animus against Latinos (J.A. 46, 69-72, 76-79, 83-84, 1096) that discovery would have revealed more incendiary anti-Latino statements made in private, including with respect to the rationale for DACA's rescission. Pl. Br. 18-19.

The Government has not argued, much less met its burden to show, that these points are immaterial as a matter of law. *See, e.g., Ross v. Comm'ns Satellite Corp.*, 759 F.2d 355, 364-65 (4th Cir. 1985) ("The burden is on defendant, as the moving party, to demonstrate the absence of any genuine issue of material fact."). Nor could it. These facts and the additional discovery Plaintiffs sought on these issues, are relevant to all of Plaintiffs' claims. (J.A. 1094-1105 & Pl. Br. 18-20, 29-30, 39-41, 48-51). Nor did the District Court engage in any of the requisite evaluation of the factual record to conclude immateriality. *See generally Ross,* 759 F.2d at 364 ("[T]he district court must perform a dual inquiry into the *genuineness* and *materiality* of any purported factual issues. Whether an issue is *genuine calls* for an examination of the entire record then before the court . . . .") (emphasis in original). These failures demonstrate why "[c]are is required in deciding whether

the evidence presents a genuine issue of motive," and "summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of [a] claim or defense." *Id.* The District Court failed to apply this standard in evaluating Plaintiffs' evidence that bad faith and impermissible animus permeated the administrative process.

The District Court's misapplication of Rule 56 requires reversal.

B. The District Court Erred in Dismissing the APA Claims

In the Opening Brief, Plaintiffs demonstrated that the District Court erred in granting summary judgment on the APA claims for three reasons: (1) it failed to address the incompleteness of the Administrative Record; (2) the Administrative Record, as it stands, does not support the Government's purported rationale for ending DACA; and (3) DHS promulgated the September 5 memorandum rescinding DACA (the "Rescission Memorandum") without notice-and-comment rulemaking. Pl. Br. 20-37. Plaintiffs' Opening Brief noted numerous instances where the District Court diverged on these key issues from the three other Courts to consider these questions. The Government fails to address any of these other decisions in its brief, and its arguments are otherwise unavailing.

1. The Administrative Record Is Incomplete and Therefore Cannot Sustain DHS's Rescission of DACA

Under the APA, judicial review is required to be conducted based on the "whole record." *Overton Park*, 401 U.S. at 419. The Government disputes that the

District Court erred by conducting its review of the APA claims on an incomplete Administrative Record. *See* Gov. Br. 43-48. But as Plaintiffs' proffer below showed, the Administrative Record was incomplete on its face and lacked any written communication among the relevant personnel involved in the recommendation and decision to rescind DACA. (J.A. 498, 1094-1105). Moreover, the District Court at no point made a finding that the Administrative Record submitted was in fact complete. Indeed, the District Court acknowledged that two other district courts had declared the Administrative Record incomplete and ordered supplementation. (J.A. 1099). Without a predicate finding that the Administrative Record was complete, it was improper for the District Court to rule on whether the Administrative Record as presented fully supported the agency action. Pl. Br. 20 (collecting cases).

The Government's argument that the Administrative Record is complete, because the agency selected only the materials Acting Secretary Duke actually considered (Gov. Br. 44-46, J.A. 127,) is contrary to law. Agencies are required to submit the "whole record" including all of the materials before the agency, not merely a subset actually considered by a decision-maker, and not merely the subset that purportedly support the ultimate decision. *See* Pl. Br. 20-22 (citing cases); *Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)

("To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case.").

The Government raises several arguments that it did not make before the District Court defending the completeness of the Administrative Record. Gov. Br. 44-48. Even if these arguments had not been waived, they are without merit. For example, the Government posits that because the agency decision was an "informal agency action" and because of "the nature of the decision," there should be a lesser standard for assessing the completeness of the record. Gov. Br. 44-45. But none of the cases the Government cites stand for the proposition that judicial review can be conducted on less than the "whole record," as required by the APA. *See* 5 U.S.C. § 706. Similarly, the Government's suggestion that there were no materials "in the possession of subordinates" or materials "indirectly considered by a decisionmaker," Gov. Br. 46, strains credulity, and is inconsistent with the proffers the Government made to the Second and Ninth Circuits about the purported "burden" associated with complying with orders compelling completion of the Administrative Record. *See Battalla Vidal, et al. v. Baran, et al.*, 16-cv-4756, ECF No. 87 at 4 (E.D.N.Y. Oct. 18, 2017) (reporting Defendants collected more than 1.2 million documents from 100 DHS custodians pursuant to the order to supplement the Administrative Record); *Regents of Univ. of California v. U.S. Dep't of Homeland Security*, 3:17-cv-5211, ECF No. 86-1 (N.D. Cal. Oct. 20,

2017) (same). Similarly, the Government's claim that all materials that it withheld are "deliberative" (Gov. Br. 46) is both inconsistent with its representation that there are no such materials, and is unsupported by the record.[2]

The Government's attempt to distinguish *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982) also fails. In *Dopico*, the Second Circuit recognized that effective judicial review requires courts' "independent consideration" of the completeness of the Administrative Record, especially "where there is a strong suggestion that the record before the Court was not complete . . . ." *Id.* at 654. The fact that the documents in *Dopico* came from outside the government was not dispositive; rather, the court focused on the "inconceivab[ility] that such fundamental documents —the very basis for federal decision-making . . . ." would be excluded from the administrative record. *Id.* Similarly, the decision to rescind DACA could not have been reasonably reached without materials analyzing the impact of this decision and the litigation risk of maintaining the program. Materials relating to both topics are conspicuously absent from the Administrative Record. The District Court could not rely on the Government's "assurances" that

[2] The Government's mere assertion that any undisclosed materials are privileged does not meet its burden to sustain such a privilege. The Federal Rules of Civil Procedure require a litigant to substantiate the basis for a purported privilege by "describ[ing] the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that . . . will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A)(ii). In other words, the Government cannot evade effective review with a blanket assertion.

the record was complete, especially when the Government's "certification" made clear that the Administrative Record had been compiled using an erroneous legal standard. *Compare* J.A. 127 (materials directly relied upon by Acting Secretary Duke) *with Walter O. Boswell*, 749 F.2d at 793 (the "whole record before the agency at the time of its decision"). The District Court should have undertaken its own review to ensure that it had a complete Administrative Record against which to evaluate Plaintiffs' APA claims.

Finally, the Government's cited cases do not support its arguments. In *United States v. Nova Scotia Food Prods. Corp.*, the plaintiffs attempted to introduce evidence into the Administrative Record that had never been presented to the agency in its decision-making process. 568 F.2d 240, 249-50 (2d Cir. 1977). Here, Plaintiffs are not seeking to introduce *new* evidence by *supplementing* the record, but rather noting that the Administrative Record in this case is incomplete. In *Bar MK Raches v. Yuetter*, which the Government also cites, the plaintiffs attempted to *remove* documents from the Administrative Record. 994 F.2d 735, 739-40 (10th Cir. 1993). Neither of these cases limits the ability of a court to require completion of the Administrative Record.

The Government also argues that Plaintiffs were not entitled to extra-record discovery. Gov. Br. 48. Again, the District Court did not make any finding whether or not the Plaintiffs had met the standard for such discovery. *See Overton*

Park, 401 U.S. at 420 (extra record discovery permitted where there is a "strong showing of bad faith or improper behavior"); *Nat'l Audubon Soc. v. Hoofman*, 132 F.3d 7, 14 (2d Cir. 1997) (same); *Air Transport Ass'n of America, Inc. v. National Mediation Bd.*, 663 F.3d 476, 487-88 (D.C. Cir. 2011) (a district court should grant limited discovery in APA cases if a party can show "that it will find material in the agency's possession indicative of bad faith or *an incomplete record* . . . .") (emphasis added). Plaintiffs proffered strong evidence, based on the public record, of bad faith and improper behavior by the Government in rescinding DACA, including the 22 statements of anti-Latino animus (J.A. 69-72), the decision to rescind a deferred action program whose beneficiaries were predominantly Latino while maintaining other deferred action programs (J.A. 474-75), the procedural irregularities that preceded the rescission of DACA (J.A. 81-82, 502), and the infirmities in the cited rationale for terminating DACA (J.A. 82-85). That two federal district courts reviewed the same facts and found that extra-record discovery was appropriate demonstrates that this standard is easily satisfied.[3] *See* Pl. Br. 23. The District Court's failure to evaluate Plaintiffs' evidence was error.

[3] Both the Ninth Circuit and Second Circuit upheld district court orders to supplement the Administrative Record in ruling on the Government's mandamus petitions. *In re United States*, 875 F.3d 1200, 1205-06 (9th Cir. 2017) *rev'd on other grounds* 138 S. Ct. 443 (2017) (delaying discovery proceedings until the District Court ruled on the Government's 12(b)(1) jurisdictional motion); *In re Nielsen*, No. 17-3345, 2017 U.S. App. LEXIS 27681, at *13-14 (2d Cir. Dec. 27, 2017).

2. The DACA Rescission Was Arbitrary and Capricious

In the Opening Brief, Plaintiffs demonstrated that there was extensive public record evidence that the Government's decision to rescind DACA was motivated by anti-Latino animus, and that agency action motivated by animus constituted arbitrary and capricious action. *See* Op. Br. 29-30. The Government's conclusory response, Gov. Br. 43, does not address the merits of this point, and the failure to dispute this argument warrants reversal.[4]

In the Opening Brief, Plaintiffs also demonstrated that the rescission of DACA was arbitrary and capricious because DHS failed to consider an "important aspect of the problem"—reliance interests—and "offered an explanation for its decision that runs counter to the evidence . . . ." Pl. Br. 27-29. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983). Plaintiffs also showed that the Government's rescission of DACA was arbitrary

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[4] The Government's contention that Plaintiffs failed to cite evidence of animus "in the administrative record" or that "Secretary Duke [personally] acted with animus" is not the relevant inquiry. Plaintiffs cited to ample evidence in the Joint Appendix that other senior government officials involved in the decision including the President, made anti-Latino statements contemporaneous with the decision, and that DHS (directed by Duke) engaged in procedural irregularities and other misconduct leading up to the decision. Where there is bad faith or misconduct, it is appropriate to consider evidence outside of the Administrative Record itself, particularly where it is clear that the Government has selectively cherry-picked documents and excluded unfavorable materials. *See Latecoere Int'l, Inc. v. U.S. Dep't of Navy*, 19 F.3d 1342, 1365-66 (11th Cir. 1994); *Tummino v. Torti*, 603 F. Supp. 2d 519, 542-44 (E.D.N.Y. 2009); *see generally Overton Park*, 401 U.S. 402.

and capricious because it was unsupported by the Administrative Record. Pl. Br. 30-33.

a. DHS Failed to Consider an Important Aspect of the Problem: The Significant Reliance Interests Engendered by DACA

Where, as here, an agency program has been in place for a significant period of time and individuals, including those directly regulated, have structured activities based on that program, an agency must consider reliance interests before it undertakes a change or rescission of that program. Pl. Br. 27 (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). When an agency does not explicitly account for such interests, the new policy must be set aside. *Id*. (citing *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 299-300 (4th Cir. 2018)).

The Government contends, without citing any authority, that a "discretionary policy . . . cannot create legally cognizable reliance interests." Gov. Br. 40. This contention is directly contrary to *Encino Motorcars*, where the Supreme Court recognized that "[a]gencies are free to change their existing policies" when implementing statutes and acting in areas where Congress is silent or ambiguous, but that "reliance interests . . . must be taken into account" when such changes occur and that "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." 136 S. Ct. at 2125-26 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)). The Government's attempt to distinguish *Encino Motorcars*, Gov. Br. 41,

misses the Court's core point: the *Encino Motorcar* plaintiffs—like the DACA recipients, their employers, their schools, and their communities—had all "structured" themselves around the guidance the agency provided. 136 S. Ct. at 2126. These reliance interests are quintessentially what *Encino Motorcars* requires courts to consider in reviewing an agency action. Rescission of a long-standing discretionary program *requires* an agency to consider and analyze the reliance interests at play. DHS did not do so in rescinding DACA.

In addition to being an incorrect statement of law, the Government fundamentally misconstrues the nature of DACA. Once the Government exercised its discretion to implement the DACA program, DACA recipients—as well as their families, employers, schools, and communities—were entitled to and did rely on the many benefits that the program bestowed on them. In addition to DACA status ensuring that the recipient would not be deported from the United States, recipients enjoyed the ability to pursue employment, education, travel internationally, and receive public benefits. When the Government rescinded DACA, it failed to consider those reliance interests as required by law. It also did far more than just end renewals and new applications; it immediately ended certain of these benefits for *current* DACA recipients, regardless of the expiration of their DACA status, without any analysis as to the rationale for or impact of each revocation. (J.A. 383). It bears emphasis that every court that has considered the issue has found

that individual DACA recipients, community organizations, employers, and educational institutions have interests implicated by DACA sufficient to establish standing to challenge its rescission, and thus the Government's position that the DACA program created no interests lacks merit.[5]

The Government's attempt to remedy this fatal flaw in the rescission process by citing to a June 22, 2018 memorandum issued by Secretary of Homeland Security Kirstjen Nielsen, Gov. Br. 41-42, also lacks merit. This memorandum was not and could not have been considered by the District Court, is not in the Joint Appendix, and has no weight here.[6] In any event, post-hoc rationalizations cannot sustain DHS's decision. *See Overton Park*, 401 U.S. at 419. In sum, the Government has failed entirely to consider an important part of the problem -- the reliance interests engendered by the DACA program.

[5] *See* J.A. 1384-89 (*Regents*, 279 F. Supp. 3d at 1033-39) (finding that the State and University plaintiffs had standing based on the enrollment and hiring of DACA recipients relying on representations of the DACA program); J.A. 550-56 (*Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 154-62 (E.D.N.Y. 2017)) (same); *Texas v. United States*, No. 18-CV-68 (S.D. Tex. June 25, 2018) (permitting New Jersey to intervene to defend DACA on the same basis).

[6] It is improper for the Court to consider materials not part of the Administrative Record or contained elsewhere in the Joint Appendix. *See United States v. Stone*, 866 F.3d 219, 230 (4th Cir. 2017). For similar reasons, the Court should disregard the Government's citation of remarks from President Obama. Gov. Br. 40.

b. DHS's Decision Is Unsupported By the Administrative Record

The Government argues that the District Court, alone among the courts that have considered the issue, correctly found the rescission of DACA satisfied the APA's substantive requirement that an agency action not be arbitrary and capricious. Gov. Br. 32-39. The Government's arguments ignore the fundamental legal principles that: (i) under the APA, a District Court's review is required to be "searching and careful," *Overton Park*, 401 U.S. at 416, and (ii) agencies are required to justify their decisions on the grounds asserted and explain how their conclusions relate to the facts before them. *See State Farm*, 463 U.S. at 42-43 (emphasizing that an agency must consider all "the relevant factors . . . [including any] important aspect of the problem"). The DACA rescission fails to meet these standards on both counts.

Nowhere in the Administrative Record can the Government find adequate support for its primary asserted rationale for the rescission: litigation risk. Gov. Br. 37-38. Under the APA's requirements, to posit a litigation-based risk for the rescission, DHS would have had to consider all relevant legal arguments, including the merits of any challenge to DACA, critical distinctions between DACA and the previously litigated DAPA program, and potential defenses.[7] Pl. Br. 30-33; *State*

[7] In its Brief, the Government also attempts to support DHS's changed view on the legality of DACA based on the decision in *Texas*, the Attorney General's letter, and the threat of litigation challenging DACA. Gov.Br. 42-43. However, neither

Farm, 463 U.S. at 42-44. But the Administrative Record reveals no such in-depth consideration of litigation risk issues. In the absence of such evidence, the Government responds that it is sufficient for it to assume the conclusion that DACA faced an imminent injunction based on the result of litigation over DAPA in the Fifth Circuit. Gov. Br. 32-34. The APA requires that DHS provide a reasoned, non-arbitrary explanation —rather than an *ipse dixit*—for rescinding the DACA program. And, as every other reviewing court except the District Court below has found, the Government has not done so here. Pl. Br. 10, 30.

There is no analysis of DACA's susceptibility to an injunction in the Rescission Memorandum. Pl. Br. 30-31. A preliminary injunction requires a plaintiff to show "'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017). Other than expressing the view that the DAPA litigation cast doubt on DACA's legality, which is relevant to but not determinative of the likelihood of success analysis, the Administrative Record nowhere indicates that DHS considered the three remaining factors.

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the Fifth Circuit's opinion in *Texas* nor the Attorney General's letter overturned or critiqued the Office of Legal Counsel opinion explaining the legality of the DACA program. In the absence of any explicit response to that opinion, the APA's requirement that such changes in policy be explained has not been met. *See* Pl. Br. 28.

For example, on the equities, the Government cites to nothing in the Administrative Record for the proposition that DACA, as opposed to DAPA, would be enjoined immediately. The pre-implementation challenge to DAPA plainly presented different equitable considerations than would a challenge to the five-year old DACA program, which benefitted roughly 800,000 recipients, each of whom daily relied upon the benefits they expected to maintain during the pendency of their status, including the possibility for renewal. *See* Pl. Br. 32-33; J.A. 253. *See also Texas v. United States*, 86 F. Supp. 3d 591, 674 (S.D. Tex. 2015), *aff'd* 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015)) (recognizing that enjoining DAPA prior to its implementation presented different equities than a situation where "individuals are currently considered 'legally present' and an injunction would remove that benefit . . . .").

On irreparable harm, the Government cites to nothing in the Administrative Record addressing Texas's five-year delay in commencing litigation, or analyzing other potentially applicable defenses such as laches. *See* Pl. Br. 32-33; J.A. 1400-01. *See also White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991) ("[T]he greater the delay" in bringing the challenge, "the less the prejudice required" to successfully plead a laches defense); J.A. 252 (*Texas*, 86 F. Supp. 3d at 674) (noting that enjoining DAPA after its implementation would prove challenging and perhaps "impossible for anyone to 'unscramble the egg"' or

retract "benefits or licenses already provided to . . . beneficiaries")). Although the Government attempts to shift its burden, arguing that Plaintiffs never demonstrated the viability of a laches defense (Gov. Br. 35), its argument misconstrues the relevant inquiry: if DHS purportedly based the DACA rescission on the likelihood of a successful suit, it was arbitrary and capricious for DHS to fail to consider its potential defenses because it did not consider "an important aspect of the problem . . . ." *State Farm*, 463 U.S. at 43.

On the likelihood of success on the merits, the Government's brief relies primarily on the Attorney General's letter, and the threat of litigation challenging DACA. Gov. Br. 42-43. But both the Attorney General's letter and the Government's brief ignore several crucial differences between DACA and DAPA. *See* Pl. Br. 32-33; *NAACP v. Trump*, 298 F. Supp. 3d 209, 239 (D.D.C. 2018); J.A. 1460-65 (*Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 423-29 (E.D.N.Y. 2018)); J.A. 1395-96 (*Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1040-41 (N.D. Cal. 2018)). For example, there is a direct conflict between DAPA and specific sections of the INA. *See Texas v. United States*, 809 F.3d 134, 170-71, 182-83, 190-92 (5th Cir. 2015). In contrast, the INA is silent with respect to DACA. This does not, as the Government contends, mean that Congress effectively prohibited DACA. Gov. Br. 35. Rather, it means that DHS has latitude to promulgate a reasonable interpretation of the law as applied to the

circumstances of DACA recipients. *See* J.A. 132-64; c*f. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a *reasonable interpretation* made by . . . an agency.") (emphasis added); *Sijapati v. Boente*, 848 F.3d 210, 216 (4th Cir. 2017) (applying *Chevron* deference to an agency interpretation of the INA). In addition, because the Government does not contest that DACA lacks an analogue in the INA, the Government cannot rely on the Fifth Circuit's inapposite statutory holdings. *See* Pl. Br. 32; *NAACP*, 298 F. Supp. 3d at 239 (holding DHS's conclusion "based only on an incongruous reference to the Fifth Circuit's decision on DAPA . . . cannot support the program's rescission").

Plaintiffs emphasized that, in relying on the Attorney General's letter, DHS incorporated its factual and legal errors, including the Attorney General's attribution of constitutional holdings to the Fifth Circuit, which did not make any such holdings. Pl. Br. 31-32. Importantly, the Government does not contest that courts never ruled on the constitutionality of DAPA or DACA. Instead, the Government argues that the Attorney General's letter "should not be read to attribute 'constitutional' holdings to . . . *Texas*." But the Attorney General's letter states that rescission is appropriate "[b]ecause the DACA policy has the same legal and *constitutional* defects that the courts recognized as to DAPA." (J.A. 370 (emphasis added)). The Attorney General plainly relied on the misapprehension

that "courts recognized" "constitutional defects as to DAPA" when no court had done so.

The Government also argues that the Rescission Memorandum "described [the DHS Acting Secretary's views on the legality of DACA] in purely statutory terms." Gov. Br. 36. But the sparse analysis (and justification) of the rescission simply states: "Taking into consideration the Supreme Court's and Fifth Circuit's ruling in the ongoing litigation, and *the September 4, 2017 letter from the Attorney General*, it is clear that the . . . DACA program should be terminated. (J.A. 383 (emphasis added)). There is no support in the memo for the Government's contention that the Acting Secretary used "purely statutory terms." Nor is there support for the Government's contentions that the Acting Secretary's conclusions "did not depend *in any way* on whether DACA was unconstitutional, rather [that DACA was] 'merely' contrary to statute[,] and [was] likely to be enjoined regardless." Gov. Br. 36 (emphasis added).

Because DHS did not distinguish between "legal . . . defects" and the "constitutional defects," it is impossible to determine what weight the agency's legal analysis gave to the alleged constitutional defects. Since a court cannot uphold an agency action "if the agency has misconceived the law," *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), this error and omission warrants reversal.

Finally, the Government's attempt to minimize the import of *Organized Village of Kake v. USDA*, 795 F.3d 956 (9th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 159 (2016), is belied by the facts of this case. In *Kake*, the Ninth Circuit made clear that litigation risk *alone* is not a sufficient justification, especially when the agency would just be "deliberately trad[ing] one lawsuit for another," which is exactly what DHS did. *Id.* at 970. Rather than rescinding the program and enjoying the "benefit of mooting a near-certain injunction," as the Government asserts, Gov. Br. 37, DHS now faces three nationwide injunctions resulting from 10 active suits challenging its decision. J.A. 1519 (D. Md. Order); J.A. 1484-85 (*Batalla Vidal*, 279 F. Supp. 3d at 437-38); J.A. 1407-09 (*Regents*, 279 F. Supp. 3d at 1048-49). DHS deliberately traded one lawsuit for several and, in the absence of a supporting rationale, such action illustrates the arbitrary and capricious nature of the agency's decision.

3. In Dismissing the APA Notice and Comment Claim, the District Court Misapplied the Law

The Government's rescission of DACA required notice-and-comment rulemaking because it was a "substantive" rule within the meaning of the APA. *See* 5 U.S.C. § 553(d)(1). In particular, in rescinding DACA, DHS: (1) created an immediately binding norm; (2) narrowly limited the discretion of agency officials; and (3) had a substantial impact on those regulated. Pl. Br. 35-38. The Government's contention that the DACA rescission was exempt from notice-and-

comment because it was a "general statement of policy" about how the agency prospectively intends to exercise its enforcement authority, Gov. Br. 49-52, is wrong as a matter of fact and law.

This Court recently reaffirmed that an agency action constitutes a substantive rule when it "adopts a new position inconsistent with existing regulations, *or otherwise effects a substantive change in existing law or policy.*" *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 620 (4th Cir. 2018) (citing *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (emphasis added). In contrast, an agency action is a general statement of policy if it "does not establish a binding norm and leaves agency officials free to exercise their discretion." *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1341 (4th Cir. 1995).

Application of those standards to the facts of the DACA rescission makes clear that the rescission is a substantive rule requiring notice-and-comment. The implementation of the rescission indisputably effects a "substantive change in existing . . . policy." *Children's Hosp.* at 620. In announcing Secretary Duke's decision, DHS expressly took away the rights of prior and potential DACA recipients to travel internationally, work, attend school, and be free from deportation. *See* Pl. Br. 38 & n.6. The Rescission Memorandum included numerous mandates removing the discretion of agency officials by directing that they "will" —rather than "may" —undertake specified steps to effectuate the

denial of those previous benefits. *See* Pl. Br. 36-37 & n.5. Tellingly, the Government does not address, much less refute, the critical significance of the compulsory "will" language in the Rescission Memorandum as removing the discretion of agency personnel.

Similarly, by its own terms, the Rescission Memorandum was "effective immediately" (J.A. 383), thereby binding agency officials to a new norm on the day it was issued. *Id.* It was not, as the Government contends, a mere "general statement of policy [that] 'advise[s] the public prospectively of the manner in which the agency proposes to exercise discretionary power.'" *See* Gov. Br. 49 (citation omitted). For example, in announcing the rescission, Acting Secretary Duke ordered DHS officials to immediately reject all new work authorizations and all pending and future applications for advance parole for international travel. J.A. 383.

These actions substantively affect the rights and obligations of individuals and the public. *See* Pl. Br. 37-38. The Government failed to address, and cannot dispute, the sweeping impact that the DACA rescission has on recipients, DACA-eligible individuals, their communities, and other parties affected by the DACA program —including employers, schools, and universities.[8] The rescission directly and severely harms roughly 800,000 DACA recipients, who are no longer able to

[8] Indeed, the Government concedes that an injunction of the DACA program would cause an "immediate, disruptive" effect. Gov. Br. 41.

travel, work, attend school, and live free from the risk of deportation. The rescission harms their families, many of which include U.S. citizens. It harms their communities. And it harms numerous other interested parties (many of whom have sued to enjoin the rescission), including employers and universities. *See* J.A. 1402-04 (*Regents*, 279 F. Supp. 3d at 1045). These serious and pervasive impacts reinforce the conclusion that the DACA rescission is a substantive rule, rather than a general statement of policy. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (stating that an agency action "affecting individual rights and obligations" is a substantive rule); s*ee also Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011) (reasoning that an agency regulation had the "hallmark of a substantive rule" because it "substantively affect[ed] the public. . . .").

These facts stand in stark contrast to *Chen Zhou Chai*, where this Court found a regulation that provided "the Attorney General *may* grant asylum" to certain groups to be a general statement of policy. 48 F.3d at 1341 (emphasis in original). By its permissive language, that regulation did not establish a binding norm; rather, it granted agency officials permission to exercise broader discretion. That is not the case here. The Rescission Memorandum, by its own terms, mandated certain Government actions to be taken that have a substantive effect on hundreds of thousands of people to be "effective immediately." (J.A. 383).

For this reason (among others), the Government's argument that, because DACA was implemented without notice and comment, the rescission of DACA cannot be compelled to undergo that process, Gov. Br. 51-52, is wrong as a matter of law. As a matter of policy, the Government can establish enforcement priorities and consider applications for individuals who seek leniency. But having granted such leniency to a broad class of individuals, the APA requires that substantive changes to the rights and obligations of that class of individuals go through the notice-and-comment process. 5 U.S.C. § 553.

The Government is also wrong as a matter of law because the rescission of a substantive rule requires notice and comment regardless of whether the rule was issued through notice and comment. *Consumer Energy Council v. FERC*, 673 F.2d 425, 448 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983) ("The argument that repeal was required because the regulations were defective does not explain why notice and comment could not be provided" on the proposed repeal). Underpinning that holding was the D.C. Circuit's recognition that "[t]he value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal." *Id*. at 446. While the Government argues *Consumer Energy Council* is inapplicable because the regulation there was defective for a "substantive," rather than a "procedural" reason, the APA does not

recognize such a distinction. Whatever the alleged defect, once a substantive rule is in place the agency must, under the statute, to use proper procedures to rescind the rule. Thus, the assertion that DACA initially should have gone through notice and comment does not relieve the Government of its statutory obligation to follow such requirements when it proposes to rescind DACA.

C. The District Court Erred in Granting Summary Judgment on Plaintiffs' Equal Protection Claim By Erroneously Applying a Heightened Standard of Review

Plaintiffs' Opening Brief explained that the District Court applied the wrong standard of review to Plaintiffs' equal protection claim. The complaint, as well as materials submitted with Plaintiffs' Opposition to the Government's Motion to Dismiss or, in the Alternative for Summary Judgment, made out well-pled factual allegations showing the rescission of DACA discriminated against Latinos: (i) key stakeholders involved in the decision to rescind DACA demonstrated discriminatory intent (J.A. 69-72); (ii) DACA recipients are 93 percent Latino, and the Government permitted other, non-predominantly Latino immigration deferred action programs to continue (J.A. 90, 474); and (iii) there were significant procedural irregularities in the termination of DACA (J.A. 501).

Equal protection claims are governed by *Village of Arlington Heights v. Metropolitan Housing Development Corporation.*, 429 U.S. 252 (1977), which establishes that discriminatory intent can be inferred from: (1) the history of a 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." *Id.* at 267-68. Plaintiffs presented ample allegations and evidence under this standard to make out a *prima facie* equal protection claim, and the District Court's grant of summary judgment was in error and should be overturned. At a minimum, Plaintiffs should have been afforded discovery to flesh out their equal protection allegations further before the District Court ruled on the Government's summary judgment motion. *See supra* at I.A.

The District Court incorrectly applied the framework from *Kleindeinst v. Mandel*, 408 U.S. 753 (1972), which is inapposite here, because *Mandel* addresses only the *entry* of aliens not yet present in the United States, rather than the rights of individuals already in the United States. Pl. Br. 12, 41-43; *see also Trump v. Hawaii*,138 S. Ct. 2392, 2419-20 (2018) (applying *Mandel* to an executive order affecting the entry of foreign nationals to the United States because, in part, of "the President's constitutional responsibilities in the area of foreign affairs"). Relying on *Mandel*, the District Court erroneously concluded that the Government merely needed to show a "facially legitimate and bona fide" rationale for the DACA Rescission, Opinion at 21, and therefore failed to consider how Plaintiffs' evidence

met the threshold requirements for stating an equal protection claim under the correct *Arlington Heights* standard.

The Government does not argue that *Mandel* should apply. Instead, it contends that the DACA rescission should be viewed as an exercise of prosecutorial discretion, and that under *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) ("*AADC*"), Plaintiffs failed to make the requisite showing of "outrageous" discrimination for a selective prosecution claim. *See* Gov. Br. 52-62. But, as the District Court correctly concluded, the DACA rescission was not an exercise of prosecutorial discretion. (J.A. 1508). Consequently, *AADC* also is inapplicable here.

Indeed, Plaintiffs here do not claim unconstitutional selective prosecution, but instead that the Government violated the Equal Protection Clause by rescinding the DACA program in order to target a class defined by race and national origin. This contrasts with *AADC*, where *individual* Plaintiffs alleged that they each were targeted for deportation based on their political beliefs. 525 U.S. at 472. Moreover, both *AADC* and *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008) (also cited by the Government), relied on national security and intelligence-gathering concerns which are entirely absent here. *Compare AADC*, 525 U.S. at 490-91 (noting concerns regarding "disclosure of foreign policy objectives and . . . foreign intelligence products and techniques") and *Rajah*, 544 F.3d at 438-39 (noting that

the program that was the basis for the deportations "was designed to monitor more closely aliens from certain countries selected on the basis of national security criteria") with J.A. 379-84 (rescinding DACA because the Attorney General determined that DACA was unlawful). *Arlington Heights* supplies the correct framework, and neither *Mandel* nor *AADC* have any application here.[9]

The Government does not dispute Plaintiffs' factual showings that: (i) only the DACA program, which predominantly benefitted Latinos, was targeted for rescission, whereas numerous other deferred action programs not primarily benefitting Latinos were left in place; and (ii) there were significant procedural irregularities in the termination of DACA. Pl. Br. 1, 7-8, 40-41, J.A. 90. The Government does contend that Plaintiffs' evidence of a pattern of derogatory statements by government officials (Pl. Br. 40-41; J.A. 69-72) is insufficient to state a claim of racial animus. Gov. Br. 57-59. However, as *Arlington Heights* makes clear, that is wrong as a matter of law. Statements of officials demonstrating discriminatory intent *are* evidence of impermissible government action. *Arlington Heights*, 429 U.S. at 268; *see also Centro Presente*, 2018 WL 3543535 at *15 (noting a series of derogatory statements by President Trump were

[9] In a similar equal protection challenge concerning the rescission of a temporary protected status immigration program, a district court rejected the Government's motion to dismiss on the grounds that *AADC* barred the claim. *Centro Presente v. United States Department of Homeland Security*, No. 18-10340, 2018 WL 3543535, at *12-13 (D. Mass. July 23, 2018).

evidence of "statements of animus by people plausibly alleged to be involved in the decision-making process" because a supervisor's influence on a subordinate can be considered in analyzing discriminatory intent).[10] The statements of senior officials, referenced in the Complaint, established a plausible basis for finding discriminatory intent behind the rescission. And here, Plaintiffs presented additional *Arlington Heights* evidence of animus, including the decision to maintain non-predominantly Latino deferred action programs, procedural irregularities in the rescission decision, and the sequence of events leading to the rescission.

Finally, the Government incorrectly argues that the District Court appropriately granted summary judgment on Plaintiffs' constitutional claim solely on the basis of the Administrative Record and without permitting discovery. This too fails because "the summary judgment process presupposes the existence of an adequate record" and district courts "***must*** refuse summary judgment where the nonmoving party has not had the opportunity to discover information that is

[10] The cases cited by the District Court and the Government do not hold otherwise. In *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005), the Court noted that "examination of purpose is a staple of statutory interpretation" where "an understanding of official objective emerges from readily discoverable fact." *Id.* at 861-862. And in *Hamdan v. Rumsfeld,* 548 U.S. 557, 623-624 n.52 (2006), while the Court declined to substitute statements made by Government officials to the media for the official presidential determination regarding procedures for courts-martial for alien detainees, that case did not suggest such evidence would be irrelevant in an intentional discrimination case.

essential to its opposition." *Baltimore Center*, 721 F.3d at 280-81 (citations and internal punctuation omitted). Contrary to the Defendants' arguments, when a plaintiff asserts *both* APA and constitutional claims, discovery beyond the Administrative Record is permitted on the constitutional claims. *See. e.g., Webster v. Doe*, 486 U.S. 592, 604 (1988) (permitting discovery for constitutional claims); *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990), *aff'd*, 937 F.2d 623 (Fed. Cir. 1991) *cert. denied*, 502 U.S. 1075 (1992) ("When reviewing constitutional challenges to agency decisionmaking, courts make an independent assessment of the facts and the law.").[11]

Here, Plaintiffs correctly pled an equal protection violation, presented evidence of discriminatory intent in targeting the DACA program, and requested limited discovery relating to the decision to rescind DACA. The District Court did not, as it is required to do, "viewing the facts and the reasonable inferences therefrom in the light most favorable to the nonmoving party," *Scinto*, 841 F.3d at 227, and its decision therefore should be reversed.

[11] Similarly, the Government's reliance on *Western Radio Services Co. v. U.S. Forest Services,* 578 F.3d 1116 (9th Cir. 2009), *cert. denied*, 559 U.S. 1106 (2010) is unavailing. This case did not address the appropriate scope of discovery in a case involving both APA and constitutional claims. *Id.* at 1122-23.

D. The District Court Erred in Granting Summary Judgment on Plaintiffs' Due Process Claims Because the Rescission Impacted Significant Protectable Interests

DACA was a promise—made by the Government and relied upon by hundreds of thousands of young people —that if applicants, at the discretion of the Government, were granted DACA status, they could receive the benefits flowing from that status, including the right to work (through a work authorization), the right to travel internationally (through advance parole), and the right to pursue an education. Dreamers also relied on the promise from the Government that they could presumptively renew their legal protection under DACA.

The program created constitutionally protected interests that the Government revoked without affording Plaintiffs the right to be heard, and the Government's position that it is free to breach its promise not to use DACA applicants' personal information for enforcement purposes constitutes a violation of Plaintiffs' substantive due process rights. The District Court incorrectly granted summary judgment for the Government as to Plaintiffs' due process claims. It failed to recognize the rights conferred by DACA and to acknowledge the facts pled by Plaintiffs in establishing such due process violations. The Government's arguments to the contrary are wrong.

1. The Government Extended Constitutionally Protected Interests to DACA Recipients

The District Court and the Government point to the Government's initial DACA guidance in support of their assertion that DACA did not create any

substantive rights or interests. Gov. Br. 63. But the Government's argument, like the District Court's ruling, ignores that following each discretionary decision to grant deferred action under DACA, the Government subsequently conveyed constitutionally protected interests on the recipient by "enabl[ing] [him or her] to do a wide range of things open to [citizens]…[such as] be[ing] gainfully employed and [being] free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

Perhaps more critically, both the District Court and the Government ignore the liberty interests created by DACA's presumptive right of renewal. This Court and others have held that individuals may have constitutionally protected interests in the renewal of government-created benefits, especially where an "entitlement to [such] renewal may be implied…from policies, practices, and understandings . . . ." *Richardson v. Town of Eastover*, 922 F.2d 1152, 1157 (4th Cir. 1991).

There is no doubt that the Government intended DACA to be presumptively renewable. The 2012 DACA Memorandum explicitly directed that DACA be "subject to renewal" (J.A. 131). While the Government enforced age restrictions for initial applications to the program, there were no such restrictions for renewal; instead, DACA recipients could apply to renew as long as they [w]ere under the age of 31 as of June 15, 2012." (J.A. 1008). The Government also used "nondiscretionary criteria for renewal" (J.A. 86, 130-31), and it approved more

than 99% of DACA renewal applications. *See* USCIS, *Form I-821D Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometric and Case Status, Fiscal Year 2012-2017* (Mar. 31, 2017), cited at J.A. 46. Those facts demonstrate more than a plausible inference that the Government knew it was offering DACA recipients the opportunity for renewal; indeed, the Government made repeated statements to that effect, characterizing the program as a "commitment" and telling Dreamers that they should "rest easy." (J.A. 83, 1374). The District Court failed to consider any of these facts in granting summary judgment for the Government.

Both Plaintiffs and the Government understood that DACA status, once granted, was presumptively renewable, and that such renewability and other interests that flowed from the initial grant of DACA status—the ability to work, pursue an education, and to travel internationally—are constitutionally protected. Those interests are at the core of the liberties protected by the Due Process Clause. "The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights," and they "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

The Government "is surely free to extend existing forms of liberty to new classes of persons – liberty that the government may then take only after affording due process." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1230 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). Having extended such liberties to DACA recipients, the Government cannot revoke them without providing procedural or substantive due process as provided by the Constitution.

2. The Government's Rescission of DACA Violated Plaintiffs' Procedural Due Process Rights

The District Court erroneously granted summary judgment as to Plaintiffs' procedural due process claim, stating, without elaboration, that "procedural due process applies only to individualized deprivations, not policy-based deprivations for an entire class." (J.A. 1512). The Government does little more than parrot that language in its opposition. Gov. Br. 63.

Both the District Court and the Government are wrong. In reaching this erroneous conclusion, the District Court failed to address *any* of the evidence Plaintiffs put forth regarding their individualized deprivation of rights, including revocation of permission to travel internationally and loss of employment. Pl. Br. 52 (J.A. 44, 50-57, 73-75, 85-89). That failure alone warrants reversal of summary judgment.

Moreover, the District Court erred in its application of *Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, 239 U.S. 441, 444-45 (1915). As the Government

acknowledges, the *Bi-Metallic* Court found no procedural due process violation in that specific instance because "individuals subject to a general policy may have recourse to political processes." Gov. Br. 64. Here, the Government afforded Plaintiffs no "political process [that] serve[d] as an effective alternative." (J.A. 1512). Indeed, Plaintiffs and other Dreamers were afforded *no alternative or process whatsoever*.

Finally, the Government argues that due process is not required "for the rescission of generally applicable policies." Gov. Br. 64. Both the District Court and the Government assume that because DACA impacted a large number of people, application for and granting of DACA status was not an individualized process. The rescission of DACA did impact a large number of people —the lives of roughly 800,000 people were thrown into chaos—but each one of those 800,000 people individually applied, was individually approved, and individually enrolled in the program. DHS officers denied approximately 8% of initial applications, including on discretionary grounds. *USCIS Form I-821D*, cited at J.A. 46. It was only after this application process, approval, and enrollment in the program that constitutionally-protected benefits were extended to successful applicants. The Individual Plaintiffs cited the specific deprivations of these rights that they suffered without process. (J.A. 50-57, 73-75, 85-89). The District Court erred in not considering those facts.

3. The Government's Change to Its Information-Sharing Policy Violated Plaintiffs' Substantive Due Process Rights

Finally, the District Court erred in granting summary judgment as to Plaintiff's substantive due process claim. In so ruling, it wholly failed to address any facts related to the Government's alteration of its information-sharing policy. As the District Court noted elsewhere in its ruling:

- In introducing DACA, "the Government promised not to transfer or use the information gathered from Dreamers for immigration enforcement" (J.A. 1515);
- After making such a promise, "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
- Any such use potentially would be "affirmative misconduct" (*id*.).

The Government's only mention of the District Court's failure to address the substantive due process violations accompanying changes to the information-sharing policy is to tell this Court that the Government's "information-sharing policy has not changed," Gov. Br. 65, an unsupported assertion that is contrary to the record evidence, untrue, and in direct conflict with the findings of other district courts.

Plaintiffs presented evidence to the District Court that the Government initially told DACA applicants that the information they provided would be "protected from disclosure to ICE and [CBP] for the purpose of immigration enforcement proceedings" with very limited exceptions. (J.A. 1011). Plaintiffs

also presented evidence that in September 2017, the Government amended that information-sharing policy to state, "[g]enerally, information provided in DACA requests will not be proactively provided to other law enforcement entities[.]" (J.A. 1143). And Plaintiffs alleged detailed facts identifying specific actions by Government officials stating their intent to change the policy and other related policies, as well as specific individual DACA recipients who had been targeted by the Government for enforcement proceedings following these announcements. (J.A. 76-78; 475). In evaluating this explicit change to the information-sharing policy, the Northern District of California held that plaintiffs there had plausibly alleged a "broken promise" that "shock[s] the conscience and offend[s] the community's sense of fair play and decency." *Regents of Univ. of California v. U.S. Dep't of Homeland Security*, 298 F. Supp. 3d 1304, 1312 (N.D. Cal. 2018) (internal quotation omitted).

While the Government argues the DACA's information-sharing policy "was always expressly subject to change," Gov. Br. 65, Plaintiffs presented evidence that the Government did not consistently provide this disclaimer. (J.A. 380). And although the Government did state in certain communications that the "information-sharing policy may be 'modified, superseded, or rescinded at any time'" (J.A. 1004), that language "simply allows the government to change its

policy in connection with future applicants" (J.A. 1417-18), not to renege on promises made to prior applicants and DACA enrollees.

At best, the Government's position—that it did not change the DACA information-sharing policy and that any such change could, in any event, apply retroactively to individuals already enrolled in DACA—creates a disputed issue of fact. The District Court therefore erred in granting summary judgment on this issue.

E. Challenges to the Rescission of DACA Are Justiciable

The Government spends the first fifteen pages of its argument asserting that federal courts have no jurisdiction to hear a challenge to the DACA rescission. Gov. Br. 15-30. As noted, these arguments properly have been rejected by every court to consider them, including the court below. (J.A. 1501).[12] Contrary to the Government's contention, *id*. at 16-18, the conclusion that there is jurisdiction here is consistent with the strong presumption courts are required to apply supporting judicial review of agency decisions, *see Mach Mining, L.L.C. v. E.E.O.C.*, 135 S. Ct. 1645, 1651 (2015), including in the immigration context, *see, e.g.*, *McNary v.*

[12] *See also* J.A. 547-48 (*Batalla Vidal*, 295 F. Supp. 3d at 147) ("Defendants first argue that these cases are non-justiciable because the decision to end the DACA program was committed to DHS's exclusive discretion by law. The court disagrees.")); J.A. 1382 (*Regents*, 279 F. Supp. 3d at 1029-31) (finding that "there *is* law to apply" and DACA's rescission was not committed to agency discretion by law)) (emphasis in original); *NAACP*, 298 F. Supp. at 234 ("Thus, like every other court that has considered the question thus far, the Court concludes that DACA's rescission was not 'committed to agency discretion by law.'").

Haitian Refugee Ctr., 498 U.S. 479, 483-84 (1991) ("[G]iven the absence of clear congressional language mandating preclusion of federal jurisdiction . . . the District Court had jurisdiction to hear respondents' constitutional and statutory challenges to INS procedures."). Although Congress may overcome the presumption by committing agency action "to agency discretion by law" or by enacting an express jurisdiction-stripping provision, neither of those exceptions applies here. *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 162 (4th Cir. 2009); 5 U.S.C. §§ 701(a)(1)-(2). The Government's arguments to the contrary are unavailing.

1. The Decision to Rescind DACA Was Not Committed to Agency Discretion by Law

Every court that has considered the Government's arguments that the rescission of DACA was committed to agency discretion by law, Gov. Br. 16-18, has rejected that assertion and found that challenges to the rescission of DACA are justiciable. (J.A. 1501). Courts have uniformly ruled this way for a reason: the rescission of DACA is not an enforcement action, discretionary or otherwise. Rather, through the Rescission Memorandum, the Government eliminated a program governing the consideration of deferred action (and related benefits) for a class of individuals meeting specific criteria. This broad directive was not a decision to enforce the nation's immigration laws with respect to any particular individual.

Plaintiffs are not challenging a decision to prosecute but rather the Government's "affirmative decision to eliminate a program by which DHS exercised prosecutorial discretion with respect to a large number of undocumented immigrants." (J.A. 547). The Government's decision regarding that *program*—with its accompanying protections and benefits—is not committed to agency discretion by law and is therefore reviewable. There are two fundamental flaws in the Government's reasoning to the contrary.

First, the rescission of DACA was not "committed to agency discretion by law" as that term is defined in the APA. *See* 5 U.S.C. § 701(a)(2). The APA provides broad jurisdiction, stating that any "person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." *See* 5 U.S.C. § 702. Consistent with this jurisdiction, courts interpret the agency discretion exception "extremely narrowly, applying it only 'in those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Quinteros-Mendoza*, 556 F.3d at 162 (citing *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)).

Here, there is clearly applicable procedural and substantive law and thus a "meaningful standard" for review. The APA provides the relevant procedural law. Courts can—and should—evaluate whether the Rescission Memorandum complies with the procedural requirements of the APA. *See* 5 U.S.C. §§ 553, 604.

Regardless of whether the substance of an agency action is reviewable, the agency's process in making that decision is reviewable for compliance with the procedural requirements (*e.g.*, for notice-and-comment) established by Congress. *See Lincoln*, 508 U.S. at 195-98 (explaining that whether an agency "was required to abide by the familiar notice-and-comment rulemaking provisions of the APA" is a question "quite apart from the matter of substantive reviewability . . . ."). *See also Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1134 (D.C. Cir. 1995) ("under the APA the ultimate availability of substantive judicial review is *distinct* from the question of whether the basic rulemaking strictures of notice and comment and reasoned explanation apply."). Rather than address these precedents that squarely provide a basis for review, the Government urges this Court to adopt a strained reading of *I.C.C. v. Brotherhood Of Locomotive Engineers*, 482 U.S. 270 (1987) ("*BLE*"). Gov. Br. 19-20. But *BLE* stands for the unremarkable proposition that an agency's decisionmaking rationale cannot convert an otherwise unreviewable action into a reviewable one. 482 U.S. at 283. The Government's reliance on *BLE* presumes the answer to the threshold question of whether the action at issue is "otherwise reviewable." Here, the decision to rescind DACA is reviewable and accordingly, *BLE* is not applicable.[13]

[13] *See NAACP*, 298 F. Supp. 3d at 232 (distinguishing *BLE*); J.A. 547 (*Batalla Vidal*, 295 F. Supp. 3d at 149) ("While it may be true that a presumptively unreviewable decision does not become subject to judicial review simply because

The relevant substantive law also provides a reviewable standard. As the Government concedes, the Plaintiffs brought constitutional claims and "constitutional constraints on enforcement discretion are traditionally reviewable and provide meaningful standards to apply . . . [and] review of plaintiffs' constitutional claims is therefore not precluded by § 701(a)(2). . . ." Gov. Br. 22 n.1.

With regard to the APA claims, the Government's suggestion that Plaintiffs were required to cite a provision of the INA, Gov. Br. 22, misconstrues the relevant question under § 701(a)(2) — it is not whether any law constrains the agency's action, but whether that action is expressly committed by statute to agency discretion. As discussed below, the INA contains no such provision. And there are judicially manageable standards here: in claiming that the termination was grounded on DACA's alleged illegality, the Government cited several legal propositions, which a court is well-suited to evaluate. The inclusion of legal analyses in the Administrative Record—reflected in the Office of Legal Counsel's DAPA opinion (J.A. 132-64), court decisions in *Texas v. United States* (J.A. 170-343), and the Attorney General's opinion (J.A. 379) —as the basis of DHS's decision to rescind DACA (J.A. 382-83), confirms that such decision is squarely

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the decisionmaker expresses a 'reviewable rationale' . . . the decision to rescind the DACA program was not inherently such a decision . . . ."); J.A. 1382 (*Regents*, 279 F. Supp. 3d at 1031 n.7) (noting "the rescission of DACA was not such an unreviewable decision").

within the competence of this Court to review. Whether or not the Government's legal conclusions were "not in accordance with the law" provides a judicially manageable standard that allows a reviewing court to evaluate Plaintiffs' APA claims. *See* 5 U.S.C. § 706(2)(A); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Indeed, there is a fundamental inconsistency in the Government simultaneously arguing that DACA was legally infirm and required rescission (J.A. 379), *and* that DACA and its rescission were fully discretionary and thus immune from judicial review, Gov. Br. 16-22. As Judge Bates found: "where an agency asserts that a nonenforcement policy is *unlawful* and then asserts 'litigation risk' as a separate ground for the policy's rescission, there are reasons to be more suspicious." *NAACP*, 298 F. Supp. 3d at 233 (emphasis in original). The District Court below also noted this irreconcilable tension, citing it as further evidence in favor of justiciability: "Furthermore, it is important to note that the Government's explanation for rescinding DACA was the Secretary's belief that the program was unlawful and would face lengthy legal challenges." (J.A. 1501). *See also* J.A. 547 (*Batalla Vidal*, 295 F. Supp. 3d at 150) ("Instead, Defendants stated that they were required to rescind the DACA program because it was unlawful, which suggests both that Defendants did not believe that they were exercising discretion when

rescinding the program and that their reasons for doing so are within the competence of this court to review.")).

Second, the Government's brief fails to address the distinction between a programmatic determination that affected a class of persons and a decision whether to prosecute a particular person – a factor that was critical to the reasoning of all four district courts that have found jurisdiction over the DACA rescission. Where, as here, the Government bases a programmatic decision on its interpretation of the law, the decision is subject to judicial review. *See Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676-77 (D.C. Cir. 1994) (distinguishing individual enforcement proceedings from "an agency's statement of a *general enforcement policy* [which] may be reviewable for legal sufficiency . . . .") (emphasis in original); *NAACP*, 298 F. Supp. 3d at 232 (noting "general enforcement policies are exempt from *Chaney*'s presumption of unreviewability when they are predicated solely on the agency's view of what the law requires").[14]

[14] The Government's proposed distinction between the reviewability of a supporting rationale and the non-reviewability of an enforcement decision is unavailing. *See* Gov. Br. 19-20 (citing *UAW v. Brock*, 783 F.2d 237 (D.C. Cir. 1986) and *Crowley*, 37 F.3d at 675-76). Rather, as Judge Bates recently reaffirmed in this context, when an enforcement policy is predicated on the agency's view of what the law requires, that "agency action is not 'non-reviewable' in the first place if it is 'based *entirely* on its interpretation of the statute.'" *NAACP v. Trump*, No. CV 17-1907 (JDB), 2018 WL 3702588, at *8 n.9 (D.D.C. Aug. 3, 2018) (quoting *CREW v. FEC*, 892 F.3d 434, 441 n. 11) (emphasis added).

For this reason, the Government's reliance on cases involving its exercise of prosecutorial discretion is misplaced. The Government's main case—*Heckler v. Chaney* —involved a challenge by several prison inmates sentenced to death by lethal injection to the FDA's decision not to commence an enforcement action against the drug manufacturers whose drugs were proposed to be used in the executions. 470 U.S. 821, 832 (1985). Similarly, *Speed Mining, Inc. v. Federal Mine Safety and Health Review Commission* involved a challenge to the Labor Department's decision as to which party, among jointly and severally liable persons, to cite for a violation of the Mine Act. 528 F.3d 310, 313 (4th Cir. 2008). Both cases involved specific potential enforcement actions against specific identified entities. *Chaney* is further inapposite because it relied on the fact that plaintiffs in that case were attempting to obtain judicial review of an agency decision *not* to act, which the Supreme Court carefully distinguished from an agency decision to act. 470 U.S. at 832 ("when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights . . . when an agency *does* act to enforce, that action itself provides a focus for judicial review . . . .") (emphasis in original). As the D.C. Circuit held in *Robbins v. Reagan*:

> Decisions not to take enforcement action generally do not involve exercise of *coercive* power over individual's liberty or property rights, and thus do not infringe upon areas that courts are called upon to protect. By contrast, rescissions of commitments, whether or not they

> technically implicate liberty and property interests as defined under the fifth and fourteenth amendments, exert much more direct influence on the individuals or entities to whom the repudiated commitments were made . . . . Rescissions of prior obligations clearly fall into the 'forced action' category [giving courts a] specific affirmative action to be reviewed.

780 F.2d 37, 47 (D.C. Cir. 1985) (emphasis in original).[15] Here, Plaintiffs seek judicial review of an affirmative agency action rescinding commitments that have been made to DACA recipients, providing a clear focus for judicial review.

Similarly, the Government's analogy of shifting priorities in prosecuting drug crimes is inapt. Gov. Br. 27. The individualized considerations that go into charging decisions are simply not present here with respect to the Government's decision to eliminate an entire program. Unlike a charging decision that necessarily involves a balancing of factors uniquely within the agency's expertise,[16] here the Government concluded that it was without power to continue

[15] The Government disputes the relevance of *Robbins* because it "did not involve an exercise of enforcement discretion." Gov. Br. 26 n.3. That is the point—in rescinding DACA, the Government, as in *Robbins*, refused to abide by a "previously agreed upon" commitment. The Government also contends that this distinction is unavailing because *Speed Mining* involved a decision "to act." Gov. Br. 25. But the Government misconstrues the discretionary act in *Speed Mining*. There, the statute required the Labor Department to issue a citation if it believed that a violation occurred, but was silent as to which party to cite – in other words, the latter decision was within the agency's discretion. 528 F.3d at 317. When an agency does decide to "exercise[] its power in some manner," as DHS did here, *Chaney* instructs that the agency action is reviewable.

[16] Nor is there any evidence in the Administrative Record that the Government undertook such a balancing of factors in rescinding the DACA program.

the DACA program, under which it exercised its discretion, because the program was legally infirm and required rescission. (J.A. 379-84). *See also* J.A. 547 (*Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 150 (E.D.N.Y. 2017) ("This affirmative decision to constrain DHS's prosecutorial discretion cannot be analogized to an exercise of prosecutorial discretion . . . .")).

Moreover, DACA was not merely a decision not to enforce immigration laws, like the decision not to enforce drug laws in the Government's analogy. In promulgating DACA, the Government made affirmative promises and took proactive measures. It actively encouraged individuals not lawfully present to reveal themselves to law enforcement authorities in exchange for select benefits. In other words, the Government did not merely look the other way while a violation of immigration laws occurred, but openly encouraged the ongoing violation. The Government's analogy ignores that DACA is not just a grant of deferred action, but includes this exchange of benefits and burdens.

2. Section 1252(g) Does Not Strip the District Court of Jurisdiction

Every court that has considered the Government's argument that 8 U.S.C. § 1252(g) forecloses judicial review, Gov. Br. 28-31, has properly rejected that proposition. *See* J.A. 1501 ("the notion that 8 U.S.C. § 1252(g) precludes judicial

review has been rejected repeatedly").[17] The unanimous view of these courts is correct, as the Government's position cannot be reconciled with the Supreme Court's interpretation of §1252(g) in *AADC*. There, eight resident aliens challenged their deportation on the grounds that it was politically motivated. 525 U.S. at 472. The Government took the position—similar to the position it takes here—that §1252(g) precludes review of "all deportation-related claims" short of a final order of removal. *Id.* at 506. Based on the plain language of the provision, the Supreme Court held that § 1252(g) "applies only to three discrete actions": the "decision or action" to (1) "*commence* proceedings," (2) "*adjudicate* cases," or (3) "*execute* removal orders." *Id.* at 482 (emphasis in original). The Government concedes that the decision to rescind DACA is not one of these "three discrete actions," instead characterizing the rescission as "an *ingredient* to commencement

[17] *See also* J.A. 549-50 *(Batalla Vidal*, 295 F. Supp. 3d at 152) ("Nor does the INA divest the court of jurisdiction to hear this case. … [8 U.S.C. § 1252(g)] has no bearing on these cases, which do not arise from one of the three specifically enumerated actions by immigration authorities that trigger application of the statute.")); *Regents of Univ. of California*, 279 F. Supp. 3d at 1031–33 ("Nor does Section 1252(g) bar judicial review of the agency action in question."); *NAACP*, 298 F. Supp. 3d at 223–24 ("The government's position contradicts not only the plain language of § 1252(g) but also the Supreme Court's interpretation of that language in *Reno v. American–Arab Anti–Discrimination Committee* . . . . Because the rescission of DACA is neither the commencement of a proceeding, the adjudication of a case, nor the execution of a removal order, § 1252(g) is inapplicable here pursuant to the provision's plain language."). *See also Texas v. United States*, 809 F.3d 134, 156-63 (5th Cir. 2015) (holding Section 1252(g) did not preclude judicial review of DAPA and that such an expansive reading of Section 1252(g) would render numerous other jurisdiction-stripping provisions of the INA "superfluous").

of removal." Gov. Br. 30-31 (emphasis added). But, *AADC* expressly rejected the argument that ancillary "decisions or actions [in the] deportation process" are encompassed by the jurisdiction-stripping provision of § 1252(g). *AADC*, 525 U.S. at 482. The Government again conflates the programmatic determination that affected a class of persons and a decision whether or not to commence proceedings against particular persons. The rescission of DACA is no closer to the commencement of removal proceedings than other ancillary actions, "such as the decisions to open an investigation [or] to surveil that suspected violator," that the Supreme Court found not covered in *AADC*. *Id.*

The Supreme Court's recent decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), likewise rejects the Government's position. The plurality reaffirmed *AADC*'s narrow interpretation of § 1252(g), stating: "We did not interpret this language [in § 1252(g)] to sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves." 138 S. Ct. at 841. Plaintiffs are not challenging a decision to commence proceedings against them, as no such decision has been made. They are challenging the Government's termination of a Government-sponsored program pursuant to which roughly

800,000 people, their families, employers, schools, and communities restructured their activities. Section 1252 simply does not bar such challenges.[18]

The clear command of *AADC* and *Jennings* is that there are three—and only three—circumstances under which § 1252(g) would preclude jurisdiction. None of those circumstances is present here. The Court should affirm the District Court's finding that the Plaintiffs' claims are justiciable.

II. THE DISTRICT COURT CORRECTLY ENJOINED THE GOVERNMENT FROM USING DACA APPLICANTS' PERSONAL INFORMATION FOR ENFORCEMENT PURPOSES

The District Court below properly imposed an injunction to stop the Government from using for enforcement purposes personal information DACA recipients provided during the application process. DHS actively encouraged and induced individuals to apply for DACA and to disclose personally-identifying information about themselves and family members by promising that such information would not be used for immigration enforcement purposes. Since the change in Administration, DHS has foresworn its promise to DACA applicants and signaled its belief that it is free to renege on its representations if it chooses to do so by changing its information-sharing policy. (J.A. 1004). The District Court correctly recognized that the law prohibits the government from doing that.

[18] The Government also argues that 8 U.S.C. § 1252(b)(9) bars Plaintiffs' claims. Gov. Br. 31. This argument was not raised in the District Court, but in any event, it also fails because Section 1252(b) applies only to "review of an order of removal under [§1252(a)(1)]." 8 U.S.C. § 1252(b). No such orders are at issue here.

A. The Undisputed Record Below Demonstrated the Appropriateness for Injunctive Relief

Plaintiffs presented evidence below—in the form of a Rule 56(c) Statement of Material Facts, as well as extensive affidavits and public record evidence—showing that:

- the Government made unqualified representations to DACA applicants that information provided as part of their application would not be used for enforcement purposes. (J.A. 473).
- DACA applicants relied on this information. (J.A. 526).
- the Government changed its information sharing policy. (J.A. 531-1093).
- the Government had used (and could use) personal information in a manner inconsistent with its representations to DACA Applicants. (J.A. 475).
- such use did constitute (and could constitute) irreparable harm to recipients. (J.A. 1516).

At no point did the Government provide its own statement of material facts in dispute under Rule 56(c) to contest Plaintiffs' assertions. Even after the District Court provided notice to the Government that "it may grant summary judgment for the nonmovants" pursuant to FRCP 56(f) (J.A. 1290), the Government still did not provide a statement of material facts in dispute, nor did it contest Plaintiffs' Statement of Material Facts. Indeed, at oral argument, when the District Court asked the Government if it was prepared to state that it had no intention of "changing the information-sharing assurances that were given in connection with DACA," the Government refused to make this commitment, explicitly reserving

the right to use for enforcement purposes the information voluntarily provided by Dreamers. (J.A. 1307-08).

Based on the record before it, the District Court issued an injunction barring the Government from changing its policy on information sharing. In particular, the District Court found the Government "induced these immigrants to share their personal information under the guise of immigration protections" and the "use of that same information to track and remove them . . . potentially would be 'affirmative misconduct' by the [G]overnment." (J.A. 1516). Thus, with the Government's refusal "to provide any assurance that the Government would not make changes [to the information sharing policy]," the District Court enjoined the Government from making any such changes "given the substantial risk for irreparable harm in using Dreamers' DACA-provided information. . . . for enforcement purposes." *Id*. at 1516-17.

This evidence more than satisfies the traditional elements of estoppel: (1) the Government, and not the DACA recipients, "knew the true facts" regarding the Government's intentions with regard to the personal information; (2) the Government intended its promises regarding personal information "to be acted upon or acted in such a way that" the DACA recipients "had a right to believe that it was intended;" (3) the DACA recipients were "ignorant of the true facts" regarding the Government's intention to use their personal information for

enforcement purposes; and (4) the Government's "misconduct was relied upon to the detriment of" the DACA recipients. *Dawkins v. Witt*, 318 F.3d 606, 611 n.6 (4th Cir. 2003), *cert. denied*, 539 U.S. 960 (2003) (noting "affirmative misconduct" must also be found to estop the government).[19] Having failed to contest these facts before the District Court, the Government cannot assert on appeal that the District Court abused its discretion in barring the Government from changing its information sharing policy.

Indeed, the Government challenges only one element of estoppel, asserting that the claim fails because, in the absence of a finding that the information policy *has* changed, the "district court's speculation fails to satisfy the requirement of 'affirmative misconduct,'" and relatedly that Plaintiffs have not shown irreparable harm. Gov. Br. 67. The Government's arguments are wrong.

The District Court, "based on the evidence before it," correctly found the Government's retention of DACA applicants' personal information, combined with its refusal to commit to not using that information for enforcement purposes, presented "substantial risk for irreparable harm" and constituted "affirmative misconduct" sufficient to satisfy even the heightened requirements for finding

[19] The District Court, citing *Chawla v. Transamerica Occidental Life Ins. Co.*, 440 F.3d 639, 646 (4th Cir. 2006), described equitable estoppel as comprising "three basic elements: (1) a voluntary misrepresentation of one party, (2) that is relied on by the other party, (3) to the other party's detriment." J.A. 1514-15. While *Chawla* applied Maryland's equitable estoppel law, it presents no meaningful distinction from the Fourth Circuit's familiar test espoused in *Dawkins*.

estoppel against the Government. (J.A. 1515-16). This easily comports with the Supreme Court's determination that "[a]n allegation of future injury may suffice [for Article III standing] if . . . there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014); *see also N.C. State Conference of NAACP v. N.C. State Bd. of Elections*, 283 F. Supp. 3d 393, 399 (M.D.N.C. 2017) ("When a plaintiff seeks redress for a prospective harm, the plaintiff can demonstrate that an alleged injury is sufficiently imminent for standing purposes by showing . . . that the plaintiff faces a 'substantial risk' of its occurrence."). The District Court made this finding.

This Court has recently recognized that "fear and risk of future arrest" based on "a credible threat of prosecution" satisfies "the injury-in-fact requirement for prospective relief." *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018); *see also Capital Associated Indus. v. Stein*, 283 F. Supp. 3d 374, 380 (M.D.N.C. 2017), *appeal filed*, 17-2218 (4th Cir. Oct. 18, 2017) (recognizing that plaintiffs bringing a "'pre-enforcement challenge"' "'need not . . . be proactively threatened with prosecution"' when "'the State has not disclaimed any intention of enforcing the challenged statute"'). Here, the Government affirmatively maintains that the rescission of DACA is "an ingredient to the commencement of removal." Gov. Br. 30-31. Thus, the Government cannot now assert that Plaintiffs do not face a credible threat of being subject to an immigration enforcement action.

The District Court likewise recognized that the "use [of DACA applicants' personal information] to track and remove them would result in irreparable harm to those deported. (J.A. 1516). It is "self-evident" both that removal constitutes irreparable harm and that detrimental reliance on the Government's representations —that information provided would not be used for such enforcement purposes— constitutes affirmative misconduct. *Id*. In fact, the Government does not contest either proposition. Nor could it. This Court has found sufficient affirmative misconduct to justify estoppel against the Government on arguably far less egregious facts. *See U.S. v. Cox,* 964 F.2d 1431, 1434-35 (4th Cir. 1992) (finding that the Government was estopped from reneging on a commitment to pay the costs of a psychiatric examination of an inmate in a federal prison).

The Government's efforts to raise for the first time before this Court arguments it did not present to the District Court that past statements regarding the information-sharing policy "be converted into 'misrepresentation[s] for purposes of equitable estoppel" (Gov. Br. 68) are, of course, too little, too late. But even if the Government's arguments were not procedurally barred, they are without merit. The Government's suggestion that the potential modification language gives it the right years later to go back on its word to those who relied on it makes no sense when considered in the context in which the DACA policy was promulgated. The Government encouraged DACA-eligible candidates to apply for that program's

benefits, and its success in getting hundreds of thousands of individuals to apply would not have been possible without its promise not to use their personal identifying information for enforcement purposes. It makes no sense for the Government, at the same time, to be telling those applicants that the promise was worthless, and may be broken at any time.

The Government's argument is also inconsistent with the underlying factual record, which contains documents made available to the public, including DACA applicants and enrollees, lacking the disclaimer that the Government could share information proactively or change its policy at any time. (J.A. 1090). Moreover, as the Northern District of California found, to the extent the Government actually provided the "disclaimer," at most it preserved the Government's ability to change its policy prospectively after providing adequate notice—*not* to do so retroactively. *See* J.A. 1417-18 (*Regents*, 298 F. Supp. 3d at 1312) (potential modification language "simply allows the government to change its policy in connection with future applicants.")

Finally, the Supreme Court has rejected the Government's argument that there is a *per se* rule barring estoppel against the Government. *Compare* Gov. Br. 68 *with Office of Personnel Management v. Richmond*, 496 U.S. 414, 423 (1990) (declining to adopt a "sweeping rule" establishing that "no estoppel [claim could ever succeed] against the Government"). Contrary to the Government's view, it

can be estopped where, as here, the Government acts in a manner that violates "the interest of citizens in some minimum standard of decency, honor, and reliability in their dealing with the Government," *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60-61 (1984), or where "justice and fair play require it . . . ." *Watkins v. U.S. Army*, 875 F.2d 699, 706 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990) (citations omitted); *Cox*, 964 F.2d at 1435.

The District Court correctly recognized that DACA applicants gave the Government their personal information for a *specific* use, and estoppel was appropriate to ensure the government *only* uses their information for its authorized use.

B. The District Court Acted Within its Discretion in Enjoining the Government From Changing Its Information-Sharing Policy With Respect to All DACA Applicants

As a threshold matter, the Government does not contend that the District Court erred in finding that the requisite elements for an injunction are present here; rather, it only argues that the *scope* of the District Court's injunction is overbroad. *Id*. at 69-73.[20] Specifically, the Government contends that the nationwide scope of

[20] The factors for a permanent injunction are: "(1) that [a plaintiff] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007). Except as addressed above in its estoppel arguments, the Government does not contest that these factors have been met.

the injunction "violate[s] the requirements of Article III and equity" because the relief granted is not plaintiff-specific. Gov. Br. 69. This argument is unavailing.

The District Court enjoys "broad discretion when fashioning injunctive relief," *Ostergren v. Cuccinelli*, 615 F.3d 263, 268 (4th Cir. 2010), and is vested with "the judicial Power of the United States" which applies to the Government and extends nationwide. U.S. CONST. art. III, § 1; *see also City of Chicago v. Sessions*, 888 F.3d 272, 289-90 (7th Cir. 2018) (upholding a nationwide injunction and recognizing "the district court had the authority to fashion the terms of that injunction as it determined necessary for the public interest . . . .").

The District Court was well within its discretion in granting a nationwide injunction in light of the facts of this case. Plaintiffs reside throughout the United States and include organizations that serve communities in the Second, Third, Fourth, Sixth, Eighth, Ninth, and D.C. Circuits and that had organizational and associational standing to pursue this litigation. (J.A. 1503). Accordingly, nationwide relief is well within the power of the District Court. *See Richmond Tenants Org. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992); *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (where plaintiffs reside throughout the country, only a nationwide injunction can provide "complete relief to the plaintiffs"). "[F]or issues of widespread national impact, a nationwide injunction" can "be beneficial in terms of . . . avoidance of irreparable harm and in

furtherance of the public interest." *City of Chicago*, 888 F.3d at 288. For this reason, the Government's reliance on *Gill v. Whitford*, 138 S. Ct. 1916 (2018), Gov. Br. 70, is inapt —a broader injunction was unnecessary to ensure the plaintiffs relief in that case; however, here to ensure adequate protection a broader remedy is required.

The need for national uniformity in the application of immigration laws also favors a nationwide injunction. *See Texas v. U.S.*, 809 F. 3d at 187-88 (upholding a nationwide injunction on the DAPA program due to the need for immigration laws to be "enforced vigorously and *uniformly*") (emphasis in original).[21] This case is also well-suited to a nationwide injunction because the Government's misuse of Dreamers' personal information "presents purely a narrow issue of law; it is not fact dependent and will not vary from one locality to another." *City of Chicago*, 888 F.3d at 291-92. Indeed, one of the cases the Government cites supports Plaintiffs' position. In *Virginia Society for Human Life, Inc. v. Federal Election Com'n*, 263 F.3d 379, 392-93 (4th Cir. 2001), this Court found that a nationwide injunction was overly broad because an injunction addressing the sole plaintiff in the case "adequately protects it." But the Court contrasted that situation

[21] Moreover, DHS has not demonstrated that it has the capacity to ensure that prior to using DACA applicant's information for enforcement purposes, it "would inquire . . . into whether [an applicant] was among the named plaintiffs or a member of" one of the organizational plaintiffs. *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1502 (9th Cir. 1996).

to a circumstance where plaintiffs were seeking relief "from across the country," where a nationwide injunction "was appropriate." *Id.*, citing *Richmond Tenants Org.*, 956 F.2d at 1302. Those are precisely the facts here: Plaintiffs include individual members and organizations throughout the country who can obtain relief only through a nationwide injunction. Accordingly, the District Court did not abuse its discretion in issuing a nationwide injunction.

CONCLUSION

For the reasons discussed in this brief and in Plaintiffs' Opening Brief, this Court should reverse the District Court's decision with respect to Plaintiffs' APA and constitutional claims, remand with instructions for discovery to commence and the Government to complete the Administrative Record, and affirm the District Court's permanent, nationwide injunction on Plaintiffs' estoppel claim.

Dated: August 31, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), that the foregoing Response and Reply Brief of Appellants contains 15,279 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

The foregoing Response and Reply Brief of Appellants 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: August 31, 2018

/s/ John A. Freedman
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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, I electronically filed the foregoing Response and Reply Brief of Appellants 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: August 31, 2018

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