18-15068 (consol. w/ 18-15069, 18-15070, 18-15071, 18-15072, 18-15128, 18-15133, 18-15134)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
Plaintiffs-Appellees

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the Northern District of California,
Nos. 17-cv-05211, 17-cv-05235, 17-cv-05329, 17-cv-05380, & 17-cv-05813
Honorable William H. Alsup

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STATEMENT OF INTEREST AND CONSENT TO FILE

Amici Curiae[1] are located across the United States and include 40 cities and counties, the National League of Cities and the United States Conference of Mayors.[2] The full list of *Amici* is attached as Exhibit A.

This litigation is of momentous interest to *Amici*, since 49.9**%** – nearly 1 in 2 – of all currently active recipients of the Deferred Action for Childhood Arrivals (DACA) program – 340,540 individuals – live in the metropolitan areas of the *Amici* cities and counties.[3]

The Los Angeles, New York, Dallas, Chicago, and Houston metro regions have the five largest DACA populations in the United States. According to the

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a), *Amici* obtained the consent of all parties before filing this brief. Counsel for *Amici* authored this brief in whole, and no party, no party's counsel, nor any other person has contributed money intended to fund preparation of this brief. *See* Fed. R. App. P. 29(a)(4).

[2] The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans. The United States Conference of Mayors is the official non-partisan organization of cities with populations of 30,000 or more. There are 1,408 such cities in the country today. Cities are represented in the Conference by their chief elected official, the mayor.

[3] United States Citizen and Immigration Service (USCIS) data show that approximately 807,000 applicants have qualified for DACA since the start of the program. Approximately 682,750 DACA recipients currently have active DACA status. For purposes of this brief, residency in a "metropolitan area" is defined as residency in a Core Based Statistical Area (CBSA) at the time of the DACA recipient's most recent application. CBSAs are defined by the United States Office of Management and Budget. *See* U.S. Citizenship and Immigration Services DACA Data dated "As of January 31, 2018" (USCIS Data). Available at: https://tinyurl.com/USCIS2018data

USCIS, as of January 31, 2018, approximately 13% of all active DACA recipients reside in the Los Angeles metro area. Another 22% of active recipients reside in either the New York, Dallas, Chicago, or Houston metro regions, while Atlanta, the San Francisco Bay Area, Denver, Austin, Seattle and Washington D.C. together account for an additional 10% of the active DACA population. Collectively, more active DACA recipients reside in *Amici*'s metro areas than the combined active DACA populations of **46** states.[4]

Since obtaining deferred action, these DACA recipients – our employees and residents – have made substantial contributions to our communities as business owners, educators, researchers, artists, journalists, and civic leaders. Tens of thousands DACA enrollees are attending our local schools, studying to become our newest doctors and nurses, lawyers and entrepreneurs. Many DACA recipients work directly for *Amici*, and play critical roles in our daily government operations. No matter how DACA recipients choose to contribute, all of *Amici* are stronger and safer because of the DACA program. Therefore, *Amici* profoundly object to Appellants' actions to eliminate DACA. These actions are harmful and unlawful.

Since its inception more than two centuries ago, our nation has served as an adopted home for generations of migrant children. Welcoming and protecting young immigrants is part and parcel of our DNA. More than a century ago, in 1904, the

[4] *Id.*

Washington Post profiled eleven "matrons" whose job was to care for minor children arriving in the United States through New York Harbor and Ellis Island. The head matron, Regina Stucklen, noted that the children under her care were "the sweetest things that grow."[5]

More than one million children passed through Ellis Island in its 62 years as an immigration station. Some of those "sweetest things" grew to become laborers in our factories, warehouses, and mills, driving our engines of economic growth. Others chose lives in public service, becoming members of our military, teachers, social workers, firefighters, and police officers. Some of those immigrant children who entered via Ellis Island grew up to become renowned artists, athletes, musicians, and authors, like Irving Berlin, Bob Hope, Claudette Colbert, Knute Rockne, and Frank Capra, and institutional leaders, like Los Angeles Archbishop Timothy Manning, San Francisco Mayor George Christopher, and Supreme Court Justice Felix Frankfurter.[6]

However immigrants came to our country, those who arrived here as children helped to build the foundation of *Amici*'s economic prosperity, military security, cultural artistry, and civic society. *Amici* now look to a new generation of child

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[5] Special Correspondence, *Tots at Ellis Island*, THE WASHINGTON POST (June 5, 1904), available at: https://secure.pqarchiver.com/washingtonpost_historical/doc/144543811.html.

[6] Moreno, Barry, *Children of Ellis Island*, ARCADIA PUBLISHING (2005).

migrants, especially those eligible for the DACA program, to help guide our financial and cultural success into the future.

TERMINATING DACA WILL HARM *AMICI CURIAE*

Stated in more detail, the DACA program is vitally important to *Amici* for several reasons. First, the DACA program promotes economic prosperity and benefits taxpayers, which means that *Amici* will suffer direct economic harm if DACA is rescinded. *Amici* rely heavily upon the economic contributions of foreign-born residents and DACA recipients make up a statistically significant portion of *Amici*'s foreign-born labor force. Collectively, the DACA recipients living in *Amici* cities and counties openly earn billions of dollars in taxable income because of the work authorization benefit provided by the DACA program.[7]

A 2017 study by the Institute on Taxation and Economic Policy found DACA recipients pay an estimated $1.6 billion in state and local taxes annually, giving them a higher effective tax rate than the average state and local tax rate paid by the top 1% of U.S. taxpayers.[8] Because USCIS Data show that DACA recipients are

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[7] USCIS DACA Frequently Asked Questions (USCIS DACA FAQ), at Question 1, available at: https://www.uscis.gov/archive/frequently-asked-questions (stating that "an individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate 'an economic necessity for employment.'")

[8] Institute on Taxation and Economic Policy, *State & Local Tax Contributions of Young Undocumented Immigrants* (2017) (Washington D.C.), available at: http://tinyurl.com/ITEPDACAstudy

concentrated in *Amici*'s metro areas, those with deferred action are an important subset of the foreign-born populations critical to the economy of *Amici* cities. This arbitrary and capricious action by Appellants to eliminate DACA will negatively impact *Amici* by removing hundreds of thousands of workers, business owners, and taxpayers from our respective economies.

On a micro-economic level, the benefits gained through the DACA program have given recipients of deferred action the encouragement and comfort to openly enter the work force, take on student loans, sign mortgages, and start businesses. Studies show that DACA recipients have made profound economic gains *because of* receiving deferred action. In a representative survey, the Center for American Progress found that, after receiving deferred action, 69% of employed DACA recipients moved to a higher-paying job and 5% of recipients started a new business, which is a rate of business creation greater than among the general public.[9]

The Center's study also found that the hourly wages of surveyed DACA recipients increased by an average of 42%; that 60% of those with increased earnings have become financially independent; and that 61% have started to contribute to their family's finances. At least half of all DACA recipients surveyed by the Center reported that they have bought a car since receiving deferred action, 12% have

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[9] Center for American Progress, *DACA Recipients' Economic and Educational Gains Continue to Grow* (2017) (CAP Study) Washington, D.C. The CAP Study is available at: http://tinyurl.com/CAPDACAstudy.

bought their first home, and 25% have a child who is an American citizen.

Terminating this program will not only roll back these financial and familial gains earned by DACA recipients, it will harm *Amici,* in that cities and counties operate – and our taxpayers fund – the social safety net that will be required to catch these families if the DACA recipients' work authorization is taken away, families are forced apart by removals, and homes fall into foreclosure.

Second, DACA promotes public safety and public welfare by bringing hundreds of thousands of young immigrants out of the shadows. *Amici's* law enforcement agencies know firsthand that, as immigration enforcement and the threat of deportation increase, undocumented immigrants are substantially less likely to report crimes by others, including violent crimes.[10] And studies estimate that granting legal status – such as the deferred action conferred by DACA – to only 1% of undocumented immigrants in the United States can lower crime rates by 2 to 6%.[11]

Similarly, a study from the CATO Institute concluded that native-born Americans are 14% more likely than DACA-eligible immigrants with the same age

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[10] Burnett, John, *New Immigration Crackdowns Creating 'Chilling Effect' on Crime Reporting*, National Public Radio (May 25, 2017), available at https://tinyurl.com/NPRchillingeffect.

[11] Baker, Scott R., *Effects of Immigrant Legalization on Crime: The 1986 Immigration Reform and Control Act*, Stanford Law and Econ. Olin Working Paper, at 25 (July 28, 2014) available at https://tinyurl.com/Stanfordcrimestudy.

and education to be incarcerated.[12] To even qualify for deferred action, DACA applicants must submit detailed personal histories and pass a rigorous background check. And, if they are arrested after obtaining deferred action, they can lose their DACA status. Indeed, very few DACA recipients – only 0.25% – have been expelled from the program for criminal activity or other public safety concerns, which is a rate substantially lower than the general rate of criminality in American society.[13]

What's more, DACA recipients – free to contribute openly to their communities – have been hailed as heroes. Houston-area paramedic Jesus Contreras is a DACA recipient. He worked six straight days after Hurricane Harvey hit southeast Texas, rescuing people from floodwaters and putting his own life in danger. News reports show that had Mr. Contreras' DACA status been rescinded during those six days, he could have immediately been pulled from his ambulance for losing his work authorization, reducing the number of available first responders.[14] Similarly, many have praised the efforts of the countless volunteers who used their own boats, at their own peril, to rescue their neighbors during

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[12] *The DREAMer Incarceration Rate* (2017), CATO Institute, Washington, D.C. available at: https://www.cato.org/publications/immigration-research-policy-brief/dreamer-incarceration-rate

[13] *Id.*

[14] Flores, Adolfo, *This Paramedic Who Rescued Harvey Victims May Be Deported If Trump Ends DACA*, BUZZFEED (September 1, 2017) available at: http://tinyurl.com/paramedicstory

Hurricane Harvey. One such Good Samaritan, Alonso Guillen, was a 31-year-old DACA recipient who, according to reports, drowned while trying to save others from the deadly floodwaters that inundated the Houston area.[15]

In addition, applicants who pass DACA's strict vetting process have been allowed to sign up for U.S. military service as part of a Pentagon program called Military Accessions Vital to the National Interest, or MAVNI. The day after Appellants moved to terminate DACA, the Pentagon announced that 900 DACA recipients are actively serving or have signed recruitment contracts to serve in the military. This service to our country and our communities, along with others whose service stories have yet to be told, makes *Amici* safer.

Thus, and thirdly, DACA recipients bring many tangible and intangible benefits to *Amici* cities and counties. Much like those children who passed through Ellis Island decades ago went on to become acclaimed actors, athletes, artists and leaders, today's DACA recipients are helping to weave our modern-day social fabric. Active DACA recipients are employed by at least 72% of the top 25 "Fortune 500" companies, many of which are headquartered in *Amici*. There are 250 DACA

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[15] Carroll, Susan and Kriel, Lomi *Lost in Cypress Creek* HOUSTON CHRONICLE (September 9, 2017), available at: http://tinyurl.com/lost-in-cypress-creek

beneficiaries alone working at Apple Inc., the world's most valuable company.[16]

Among the individual recipients of deferred action living in *Amici* cities and counties are a public school teacher in Austin, Texas with a master's degree in education focusing on hearing-impaired students; a Los Angeles-based graphic designer who has worked on marketing campaigns for *Star Wars: Rogue One* and *Game of Thrones*; a political organizer based in Washington D.C., who recently served as a press secretary for a 2016 presidential candidate; a producer for MSNBC's *Morning Joe* who helps shape the network's morning programming and, separately, a licensed attorney and the first member of the New York State Bar with DACA status, both of whom live in New York City.

Ultimately, this litigation is about protecting these young people who were brought here by their parents, often as infants. These children typically know no country besides the United States and may speak no language besides English. They study in our schools, work in our economy, and pledge allegiance to our flag. As President Obama stated the day the program was created, they "are Americans in their hearts, in their minds, in every single way but one: on paper."[17] Turning our back on DACA recipients is turning our back on the future.

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[16] Shaban, Hamza, *CEO Tim Cook says he stands by Apple's 250 DACA-status employees*, THE WASHINGTON POST (September 3, 2017), available at: http://tinyurl.com/DACAFortune500

[17] Remarks by President Obama. June 15, 2012. http://tinyurl.com/Obama-6-15-12

ARGUMENT

I. The DHS action to terminate DACA implicate "broad" changes to agency policy that are disconnected from any individual enforcement action and are, therefore, subject to judicial review.

Appellants contend that the DHS action to rescind DACA (Rescission Policy) is entirely beyond judicial review. It is not. As Appellees correctly assert and as the district court correctly ruled, neither the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.,* nor the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.,* prohibit judicial review of broad-based revisions of immigration policy, such as the Rescission Policy, as distinguished from decisions in individual immigration proceedings.[18]

A. Appellants' actions in this matter are judicially reviewable under Section 701(a)(2) of the APA.

The district court correctly ruled that Section 701(a)(2) of the APA does not preclude judicial review of the Rescission Policy. *Id.* This exception to APA review for actions committed to an agency's discretion by law is very narrow, is rarely applicable, and in particular does not apply to "broad" changes to agency policy that are disconnected from enforcement action against particular individuals (i.e. when there is no "law to apply"). *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citations omitted), *abrogated on other grounds by Califano v.*

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[18] *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, No. 17-cv-05211 (WHA) (SK), 2018 U.S. Dist. LEXIS 4036 at *48-49 (N.D. Cal. Jan. 9, 2018).

Sanders, 430 U.S. 99 (1977). This holds true even in the arena of federal immigration enforcement. *See, e.g.*, *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 483-84 (1991).

Even assuming the ultimate decision to exercise prosecutorial discretion to defer action against any one individual were unreviewable by a court, the indiscriminate revocation of deferred action for all DACA recipients based upon a misguided legal determination that DACA was unlawful is, and ought to be, reviewable.[19]

For all intents and purposes, the Rescission Memo takes deferred action off the table for an entire class of persons, and impacts an entire class of persons, demonstrating that the Rescission Policy is the poster child for a justiciable agency action.

As noted in *Amici's* statement of interest, DACA recipients have made profound gains because of receiving deferred action. The hundreds of thousands of DACA enrollees who received deferred action will see these gains uniformly wiped out, not because of any individualized discretionary action, but because Appellants

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[19] *See* DHS Memorandum titled *Memorandum on Rescission of Deferred Action For Childhood Arrivals* (Rescission Memo) (September 5, 2017), http://tinyurl.com/2017Memo (stating that because a Texas district court preliminarily enjoined a DHS program called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), DACA must suffer from "the same legal and constitutional defects.").

formed a legal conclusion that DACA was unlawful, and, with the stroke of a pen, terminated the program. This "application of law" plainly provides justiciability for the lower court to review Appellees' APA claims.

B. Section 1252(g) of the INA does not preclude judicial review.

Section 1252(g) states, in part, that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." Both this Court and the United States Supreme Court have consistently interpreted this provision to apply only to the three narrow categories of decisions or actions Congress specifically identified in the statute. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (AADC)*; Alcaraz v. Immigration & Naturalization Serv.*, 384 F.3d 1150, 1161 (9th Cir. 2004); *Catholic Soc. Servs. v. Immigration & Naturalization Serv.*, 232 F.3d 1139, 1150 (9th Cir. 2000) ("[Section 1252(g)] applies only to the three specific discretionary actions mentioned in its text, not to all claims relating in any way to deportation proceedings.").

In an attempt to squeeze within the narrowly defined scope of the statute, Appellants contend that the Rescission Policy is but "an initial 'action' in the agency's 'commence[ment] [of] proceedings' against aliens who are unlawfully in

the country."[20] Already, however, three district courts, including Judge William Alsup's order in the instant matter, have rejected this self-serving characterization of DACA termination in the past few months. *Regents of the Univ. of Cal.*, 2018 U.S. Dist. LEXIS 4036, at *49; *see also Inland Empire - Immigrant Youth Collective v. Kirstjen Nielsen*, No. 17-cv-02048 (PSG) (SHK), 2018 U.S. Dist. LEXIS 34871, at *46 (C.D. Cal. Feb. 26, 2018) (ruling that that Appellants "interpret § 1252(g) too broadly" and that, because the plaintiffs were challenging not the decision to commence removal proceedings but the "separate and independent decision to revoke DACA," Section 1252(g) did not deprive the court of jurisdiction over plaintiff's claims); *Vidal v. Duke*, No. 16-cv-4756 (NGG) (JO), 2017 U.S. Dist. LEXIS 186349, at *47 (E.D.N.Y. Nov. 9, 2017).

This Court should similarly reject Appellants argument because it would, in effect, remove all such policy changes from judicial review. Indeed, any time the federal government implements a new policy that renders certain individuals removable, that new policy would, by nature, be a necessary step in commencing future enforcement proceedings under the policy. Congress clearly did not intend for Section 1252(g) to serve as the type of general preclusion statute into which Appellants' interpretation would transform it.

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[20] Defs.-Appellants' Opening Br., *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, No. 18-15068 (Dkt. 31) (Feb. 13, 2018) at pg. 26.

II. The district court correctly ruled that DHS acted arbitrarily and capriciously in violation of the APA.

A. DHS's sole stated reason for ending the DACA program was conclusory and relies upon flawed legal analysis.

DHS is an "agency" under the APA, 5 U.S.C. § 551(1), and the September 5, 2017 memorandum from Acting DHS Secretary Elaine Duke rescinding DACA is a "final agency action" subject to judicial review. 5 U.S.C. §§ 551(13), 704. An agency action is final when "rights or obligations have been determined or legal consequences will flow from the agency action." *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Any action taken "without observance of procedure required by law" or that is "arbitrary" or "capricious" is "unlawful" and must be "set aside" by the court. 5 U.S.C. § 706(2)(A)-(D). Accordingly, DHS was required to have employed "reasoned decisionmaking" when it moved to rescind DACA. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

In the DHS memo rescinding DACA, Appellants state in a conclusory manner it was "clear" that DACA "should be terminated."[21] The memo presumes that because a Texas district court preliminarily enjoined a separate DHS program called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)

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[21] DHS Memorandum titled *Memorandum on Rescission of Deferred Action For Childhood Arrivals* (Rescission Memo)(September 5, 2017), available at: http://tinyurl.com/2017Memo.

in 2015, DACA must suffer from "the same legal and constitutional defects."[22] In justifying this legal conclusion, the Rescission Memo leans entirely on a 362-word letter from Attorney General Sessions.

In this short letter, the Attorney General asserts – by fiat – that: (1) DACA is just like DAPA; (2) DAPA was preliminarily enjoined on "multiple legal grounds," and that injunction was affirmed by the Fifth Circuit; therefore, (3) DACA is "likely" to be similarly enjoined, so DHS should rescind the program immediately.[23]

The Attorney General's analysis is wrong and DHS's sudden retreat from DACA was arbitrary and capricious and violates the APA.

As a threshold issue, Appellants' embrace of the Fifth Circuit's opinion declaring DAPA subject to judicial review is wholly inconsistent with the position they presented to the district court in their Motion to Dismiss and to this Court in their opening brief – *i.e.* a court may, under no circumstances, review the agency's exercise of prosecutorial discretion.[24] If Appellants believe that no court may review DHS's purported exercise of prosecutorial discretion, or that no one has standing to

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[22] *Id.*, quoting Letter from Attorney General Sessions to DHS Acting Secretary Elaine Duke on the Rescission of DACA (September 4, 2017) (Sessions Letter), available at: http://tinyurl.com/AG-Duke-Letter; *see also Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

[23] Sessions Letter, *supra*, note 23.

[24] Defs.' Mem. In Supp. of Mot. To Dismiss, No. 3:17-cv-05211-WHA (Document 114) (Nov., 1, 2017) at pg. 14; Defs.-Appellants' Opening Br., at pg. 15, *supra*, note 20.

challenge such a decision, they should not have advanced the Fifth Circuit's opinion as the basis for terminating DACA.

An agency rule is arbitrary and capricious "if the agency … offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43. The inherent contradiction between Appellants' justiciability and APA reviewability arguments in seeking to end DACA is just "so implausible."

Next, the Fifth Circuit was mistaken when it suggested, in dictum, that DAPA is contrary to the INA. *Texas v. United States*, 809 F.3d 134, 186, 214-215 (5th Cir. 2015).[25] The dissent's reasoning should instead guide this Court's analysis. *Id.* at 214-218 (King, J., dissenting).

All three branches of the Federal government have long embraced deferred action as a part of the immigration landscape. In fact, "deferred action" is one of the well-established ways in which DHS has historically prioritized enforcement.[26] The Supreme Court has recognized that deferred action is "a regular practice" in which

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[25] *See also Simons v. Bellinger*, 643 F.2d 774, 809, n.48 (1980) (Wilkey, J., dissenting) (a "determination was an alternative basis for dismissal, and to that extent the language may be regarded as dictum").

[26] *Regents of the Univ. of Cal.*, 2018 U.S. Dist. LEXIS 4036, at *15-16; s*ee also* Pls.' Mem. In Supp of Mot. for Provisional Relief, 3:17-cv-05211 (WHA) (Document 111) (Nov. 1, 2017) at pg. 4.

DHS exercises "discretion for humanitarian reasons or simply for its own convenience." *AADC*, 525 U.S. at 483-84.

Congress, meanwhile, has enacted legislation explicitly recognizing the DHS practice of granting deferred action. For example, the REAL ID Act of 2005, Pub. L. No. 109-13, allows states to issue driver's licenses to those undocumented immigrants with "approved deferred action status." Similarly, since 1981, federal regulations allow those "granted deferred action" to "apply for employment authorization." 8 C.F.R. § 274a.12(a)(11). And Congress has yet to disturb this regulation in three-plus decades.

More practically, Congress has never appropriated funding sufficient to remove all undocumented immigrants. This is why DHS, and its predecessors, have implemented more than 20 deferred action policies over the last 50 years.[27] Programs like DAPA and DACA enable DHS to focus limited resources on removing serious criminals by deferring action on low priority immigrants. As the D.C. Circuit Court wrote in *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986), "[t]he power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws." Moreover, "Congress has never prohibited or limited ad hoc deferred action, which

[27] *United States v. Texas*, 2015 U.S. Briefs 674 (Initial Brief of Appellant-Petitioner at pg. 5) (Mar. 1, 2016).

is no different than DAPA other than scale." *Texas*, 809 F.3d at 216 (King, J., dissenting).

Finally, even if DAPA were, as the Fifth Circuit concluded, "contrary" to the INA, *Texas*, 809 F.3d at 179, that rationale is inapplicable to DACA. Despite the Attorney General's assertion, DACA is not just like DAPA. The Fifth Circuit's opinion itself specifically notes "DACA and DAPA are not identical." *Id.* at 174 (finding "eligibility for DACA was restricted to a younger and less numerous population," and DAPA had different "discretionary criteria").

In sum, the only reason DHS gave for rescinding DACA was that the program was "likely" to be unlawful. But DACA is not unlawful,[28] which means that Appellants' actions are in violation of the APA given there is no other proffered agency justification for the rescission by DHS. *See Natural Resources Defense Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 96 (D.D.C. 2017) (stating "suffice it to say, it is arbitrary and capricious for an agency to base its decision on a factual premise that the record plainly showed to be wrong.").

[28] *Regents of the Univ. of Cal.*, 2018 U.S. Dist. LEXIS 4036, at *65; *Vidal v. Nielsen*, No. 16-cv-4756 (NGG) (JO), 2018 U.S. Dist. LEXIS 23547, at *51 (E.D.N.Y. Feb. 13, 2018).

B. The district court correctly rejected Appellants' post hoc rationalization for the termination – that it was necessary to ensure an orderly wind down given litigation risks – as arbitrary and capricious and an abuse of discretion.

After the Rescission Policy was challenged, Appellants began to rationalize the DACA termination by arguing that, based on the Acting Secretary's "reasonable evaluation of the litigation risk posed by the imminent lawsuit against the DACA policy, the choice she faced was between a gradual, orderly, administrative wind-down of the policy, and the risk of an immediate, disruptive, court-imposed one."[29]

But, if the Acting Secretary was going to rely upon a public policy rationale for her decision, she should have — but did not — weigh DACA's programmatic objectives as well as the reliance interests of DACA recipients.[30]

As Justice Anthony Kennedy wrote in *Encino Motorcars, LLC v. Navarro*, — U.S. —, 136 S. Ct. 2117, 2126–27 (2016), one of the principal requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. Appellants were, therefore, required to show, not just "that there are good reasons for the new policy," *id.* quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), but that they also considered the fact that longstanding policies may have "engendered serious *reliance interests* that must be taken into account." *Id.* (emphasis added).

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[29] Defs.-Appellants' Opening Br., at pg. 35-36, *supra*, note 20.

[30] *Regents of the Univ. of Cal.*, 2018 U.S. Dist. LEXIS 4036, at *40.

Put plainly, DACA recipients have a strong reliance interest in the program, which was created for the purpose of "lifting the shadow of deportation" and bringing recipients "out of the shadows" so that recipients could live economically stronger and personally safer lives. Former Secretary of Homeland Security Jeh Johnson confirmed as much in his letter to Congresswoman Judy Chu when he wrote, "DACA applicants most assuredly relied" upon the "representations made by the U.S. government."[31]

DACA recipients' self-identification to DHS was likely an *irreversible* action taken at the encouragement of the federal government. DACA applicants would not have taken the risk of sharing intimate details and biometric data about themselves and their families – serving up removal of themselves and their families on a platter – without being able to rely upon the benefits provided by the program created by Appellants.

This is analogous to Supreme Court cases that found reliance interests in the continued receipt of welfare payments or of a public school teaching position despite lack of tenure protections or employment contract because of an "implied promise of continued employment." *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)

[31] Letter by Secretary Jeh Johnson dated December 30, 2016, to U.S. Rep. Judy Chu (Johnson Letter), available at: http://tinyurl.com/JehJohnsonLetter

(citing *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) and *Connell v. Higginbotham*, 403 U.S. 207, 208 (1971)).

Appellants focus on the fact that USCIS retained "discretion" in acting on the DACA program.[32] But the fact that DHS retained "discretion" in a broad sense as it reviewed applications and granted DACA status cannot cure Appellants' post hoc rationalizations.

The federal government has highlighted and *Amici* do not dispute that the original DACA memorandum included a statement that applicants had no right to rely on statements made therein, but such disclaimers do not carry the day when they clash with guidance's broader substance and purpose. *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000). Here, the recipients were highly vulnerable parties whose substantial reliance on the memorandum's assurances was all but certain – and indeed intended – as a practical matter. The federal government persuaded them to "come out of the shadows" and hand over sensitive information to ICE in exchange for DACA status and lawful work authorization.

As this Court reasoned in *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970), good faith actors should not be told "[t]he joke is on you," for trusting the pronouncements of the government. *See also St. Regis Paper Co. v. United States*,

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[32] USCIS DACA FAQ, at Question 51, *supra*, note 7.

368 U.S. 208, 229 (1961) (Black, J., dissenting) ("Our Government should not, by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.").

DACA applicants responded by irrevocably rearranging their lives, funding college educations, signing mortgages, enrolling in the military, and starting families. These acts were not the just the foreseeable effects of the federal government program inducement but rather what the program was at its core designed to induce.

Under these exceptional circumstances, Appellants must have some reasonable purpose for changing a policy to ensure "some minimum standard of decency, honor and reliability in … dealing with the Government." *Heckler v. Community Health Servs.*, 467 U.S. 51, 59-61 (1984). And since they do not, Appellants' "[u]nexplained inconsistency" in agency policy is enough to find the DACA termination "to be an arbitrary and capricious change from agency practice." *Encino Motorcars, LLC,* 136 S. Ct. at 2126, quoting *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981-982 (2005).

III. The district court's issuance of a nationwide injunction was appropriate, as the negative consequences that would flow from a piecemeal application of our nation's immigration law would irreparably harm *Amici*.

Appellants assert that the district court's injunction grants "relief to thousands of DACA recipients who are not parties before the court and who do not need to be covered" in order to provide relief in the instant case.[33]

But that argument ignores this Court's recent holdings in *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), that the immigration laws of the United States must be "uniformly" enforced, and in *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (per curiam), that a geographic restriction on the scope of an injunction of an immigration enforcement policy "would run afoul of the constitutional and statutory requirements for uniform immigration law and policy."

Piecemeal injunctive relief for a small subset of DACA recipients would undoubtedly create social upheaval and encourage mass migration of potentially hundreds of thousands of recipients to those areas of the country protected by a narrower injunction, especially when one considers that the March 5, 2018, date set by President Trump and carried out by DHS for the complete termination of the DACA program has already passed. And limiting relief to a discrete set of persons or geographic boundaries would have a substantially negative impact on the

[33] Defs.-Appellants' Opening Br., at pg. 54, *supra*, note 20.

economic welfare and public safety of most, if not all, *Amici* cities and counties.

Foreign-born residents make up almost half of Los Angeles' workforce; they contribute over $3 billion in state and local taxes yearly; they own businesses that generate $3.5 billion in annual income for city residents; and, they have local spending power of almost $30 billion a year.[34] More than 51% of all of New York City's business owners are foreign-born and foreign-born residents are responsible for 32% (*i.e.* $100 billion) of all income earned by New York City residents. New York City families that include immigrant members pay an estimated $8 billion in city and state personal income taxes and approximately $2 billion in city property taxes.[35]

Similarly, 35% of business owners in San Francisco are immigrants, including 12,756 foreign-born entrepreneurs.[36] Entrepreneurs in the Philadelphia metro region, of which 40,171 are foreign-born, are 43.1% more likely to be immigrants

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[34] New American Economy, *New Americans in Los Angeles* (2017) available at: http://www.newamericaneconomy.org/wp-content/uploads/2017/02/LA_Brief_V8.pdf

[35] NYC Comptroller Report, *Our Immigrant Population Helps Power NYC Economy* (January 11, 2017), available at: http://tinyurl.com/NYC-Comptroller-Report

[36] United States Census Bureau. Survey of Business Owners 2007-2012; New American Economy, *Immigrants and the economy in: California District 12* (2017) available at: http://www.newamericaneconomy.org/locations/california/california-district-12/

than native-born.[37] This entrepreneurship creates jobs and increases the tax base.

Comparable statistics can be shown for other *Amici* and these data points cannot be discounted as generalizations of all foreign-born residents. The DACA program has provided deferred action to some 807,000 applicants, 91% of whom are employed, which equates to 3% or 1 in 33 of *all foreign-born persons* in the United States labor force.[38]

Just to highlight one *Amici* city in greater detail, the DACA-eligible population in the City of Dallas – of whom 93.4% were employed – earned nearly $860 million in income in 2016.[39] With this income, Dallas's DACA-eligible residents paid a significant amount in taxes – to the tune of $161 million in 2016 alone – including state and local property, sales, and excise taxes. And that means these residents have some $700 million in annual spending power left after taxes, which further reverberates across the Dallas economy through spending and investments.

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[37] New American Economy, *Immigrants and the economy in: Philadelphia Metro Area* (2017) available at: http://www.newamericaneconomy.org/city/philadelphia/

[38] *See* USCIS Data, *supra*, note 3; CAP Study, *supra*, note 9; US Bureau of Labor Statistics 2016 foreign-born labor force statistics, available at: http://tinyurl.com/BLS-foreignborn

[39] New American Economy, *New Americans in Dallas* (2018) available at: http://research.newamericaneconomy.org/report/12252/

This is why limiting the scope of the injunction will sow a national economic slowdown. Estimates show DACA recipients would otherwise contribute $46 billion to the United States gross domestic product over each of the next few years.[40] DACA recipients across the board obtain higher earnings, have a higher employment rate, and a higher tax compliance rate than similarly-situated undocumented immigrants.[41] In fiscal terms, narrowing the injunction could result $60 billion in lost federal, state and local tax revenues over the next decade.[42]

Narrowly limiting the injunction will also make communities less safe by pushing recipients underground during the pendency of the litigation. That will cause crimes to go unreported and limit the success of police investigations, thereby greatly undermining public safety for all of our residents in each our communities.

Numerous academic studies examining the impact of immigrants on their adopted communities reveal that communities with large immigrant populations, like *Amici*, have often outpaced the nationwide crime drop over the past 30 years.[43]

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[40] Center for American Progress, *A New Threat to DACA Could Cost States Billions of Dollars* (2017) Washington, D.C., available at: http://tinyurl.com/CAPStatesGDP.

[41] CAP Study, *supra*, note 9.

[42] CATO Institute, *The Economic and Fiscal Impact of Repealing DACA* (2017) Washington, D.C, available at: http://tinyurl.com/CATODACAstudy

[43] The Sentencing Project, *Immigration and Public Safety* (2017), Washington, D.C., available at http://www.sentencingproject.org/wp-content/uploads/2017/03/Immigration-and-Public-Safety.pdf

Also, because DACA applicants had to provide personal and biometric data to DHS to qualify for DACA, recipients will fear deportation at any moment, making them statistically less likely to identify themselves to law enforcement, including *Amici's* sheriffs and police departments, to report crimes, or assist in criminal investigations.[44] The same fear can result in unreported code enforcement and wage theft violations, crimes that are enforced by *Amici*. And slum landlords and sweatshop owners are likely to prey upon former DACA recipients if the program is terminated, resulting in unsafe and unhealthy conditions in the workplace and at home.

Amici's law enforcement leadership consistently remind us that all communities are safer when victims and witnesses of crime, irrespective of immigration status, cooperate with law enforcement. For example, Los Angeles Police Department Chief Charlie Beck has routinely stated that his department depends on "immigrant communities, not only to keep them safe but to keep [the public] safe. Without that cooperation we all suffer."[45]

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[44] *See, e.g.*, Theodore, Nik, University of Chicago, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (May 2013), available at: http://tinyurl.com/ChicagoPoliceStudy

[45] Ulloa, Jazmine, *L.A. Police Chief Charlie Beck endorses 'sanctuary state' bill that Eric Holder hails as 'constitutional'*, THE LOS ANGELES TIMES (June 19, 2017), available at: http://tinyurl.com/Beckstory

Likewise, narrowing the scope of the injunction endangers already vulnerable immigrant communities in the wake of natural disasters. After this year's devastating California wildfires, many immigrants avoided applying for aid to which they and their families were entitled because FEMA's form states that application information "may be subject to sharing within the Department of Homeland Security, including but not limited to, the Bureau of Immigration and Customs Enforcement."[46] The federal government's request to limit the scope of the injunction can only exacerbate the fears of those who may need to ask for help in a future disaster.

For these reasons, *Amici* respectfully request this Court to affirm the district court's issuance of a nationwide injunction.

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[46] FEMA Declaration and Release form, available at: https://www.fema.gov/pdf/assistance/process/00903.pdf

CONCLUSION

Amici respectfully urge this Court to uphold decision of the district court and the nationwide scope of the injunction requiring Appellants to maintain DACA. If the federal government is allowed to renege on a promise it made to all DACA recipients and their family members, a damaging message would be delivered that the United States government cannot be trusted to act in a decent, honorable or reliable manner, and it would impose significant adverse consequences on *Amici*.

Dated: March 20, 2018

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

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

Signature of Attorney or Unrepresented Litigant: s/ Michael Dundas

Date: Mar 20, 2018

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

(Rev.12/1/16)

EXHIBIT A

Exhibit A: Complete List of *Amici Curiae*

- The City of Los Angeles, California;
- The County of Alameda, California;
- The City of Atlanta, Georgia;
- The City of Austin, Texas;
- The City of Berkeley, California;
- The City of Boston, Massachusetts;
- The City of Cambridge, Massachusetts;
- The City of Chelsea, Massachusetts;
- The City of Chicago, Illinois;
- Cook County, Illinois;
- The City of Dallas, Texas;
- The City and County of Denver, Colorado;
- The District of Columbia;
- The City and County of Honolulu, Hawaii;
- The City of Houston, Texas;
- The City of Gary, Indiana (joined by its Mayor, Karen Freeman-Wilson);
- The City of Ithaca, New York (joined by its Mayor, Svante L. Myrick);
- The City of Iowa City, Iowa;
- King County, Washington;
- The City of Long Beach, California;
- Los Angeles County, California;
- The City of Madison, Wisconsin;
- The City of Minneapolis, Minnesota;
- The County of Monterey, California;
- The City of New Haven, Connecticut
- The City of New York, New York;
- The City of Oakland, California;
- The City of Philadelphia, Pennsylvania;
- The City of Phoenix, Arizona (as joined by its Mayor, Greg Stanton);
- The City of Portland, Oregon;
- The City of Providence, Rhode Island;
- The City of Rochester, New York;
- The City of Sacramento, California;
- The City and County of San Francisco, California;
- The City of Santa Fe, New Mexico;
- The City of Santa Monica, California;
- The City of Seattle, Washington;
- The City of Somerville, Massachusetts;
- The City of Tucson, Arizona;
- The City of West Hollywood, California;
- The National League of Cities; and
- The United States Conference of Mayors.

9th Circuit Case Number(s) 18-15068 (consol. w/ 18-15069; 18-15070; 18-15071; 18-15072; 18-15133; 18-15134)

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Mar 20, 2018.

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.

Signature (use "s/" format) s/ Michael Dundas

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) _____.

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

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format) _____