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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA and JANET NAPOLITANO, *in her*
17 *official capacity as President of the University of*
California,

18 Plaintiffs,

19 v.

20 U.S. DEPARTMENT OF HOMELAND
SECURITY; ELAINE C. DUKE, in her official
21 capacity as Acting Secretary of Homeland Security;
and the United States of America,
22

23 Defendants.
24

25 AND ADDITIONAL CASES.
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27
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Case No. 17-CV-05211-WHA
Case No. 17-CV-05235-WHA
Case No. 17-CV-05329-WHA
Case No. 17-CV-05380-WHA
Case No. 17-CV-05813-WHA

Hon. William Alsup

**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF OF
LATINOJUSTICE PRLDEF, ET AL.
IN SUPPORT OF PLAINTIFFS'
MOTION FOR INJUNCTIVE AND
DECLARATORY RELIEF**

1 **MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

2 LatinoJustice PRLDEF (“LatinoJustice”) and the organizations listed in **Exhibit 1** to this
3 Motion, respectfully move for leave to file an *Amicus Curiae* brief in support of Plaintiffs’ motion
4 for preliminary injunction. A copy of the proposed brief is attached as **Exhibit 2** to this Motion.

5 **I. STATEMENT OF IDENTITY OF *AMICUS CURIAE* BRIEF**

6 LatinoJustice is a nonprofit, legal defense fund based in New York, New York, with
7 additional offices in Orlando, Florida and Long Island, New York. LatinoJustice is joined by
8 eighteen additional *Amici*: Alianza Americas, the Arab American Institute, the Asian American
9 Legal Defense and Education Fund, Asian Americans Advancing Justice - AAJC, AAJC - Asian
10 Law Caucus, AAJC – Los Angeles, ASPIRA, the Council on American-Islamic Relations, CUNY
11 DREAMers, Dream Action Coalition, the Hispanic Association of Colleges and Universities, the
12 Hispanic National Bar Association, the Hispanic Federation, Inc., Long Island Immigrants
13 Students Advocates, The New York State Youth Leader Council, Presente.org, RU Dreamers, and
14 Unidos US. The description of each *Amici* is included in Exhibit 1 to this Motion. Generally,
15 *Amici* are a collection of civil rights defense funds, immigrant rights groups, policy, advocacy and
16 community service organizations, and student groups, who represent the interests of DACA
17 recipients and in many cases are comprised of leaders and members who are themselves DACA
18 recipients.

19 **II. MOVANTS’ INTEREST**

20 LatinoJustice was founded in 1972 as the Puerto Rican Legal Defense and Education Fund
21 and is one of the nation’s leading civil rights public interest law offices that represents Latinas
22 and Latinos throughout the country. Its continuing mission is to protect the civil rights of all
23 Latinos and to promote justice for the pan-Latino community.

24 Over the past decade, LatinoJustice has been particularly active in immigrants’ rights and
25 immigration reform through a combination of impact litigation, advocacy, community organizing
26 and education. LatinoJustice has been at the forefront of combatting the proliferation of local and
27 statewide, anti-immigrant ordinances and laws that flourished in the absence of federal
28 immigration reform. In recent years, the status of the Deferred Action for Childhood Arrivals

1 (“DACA”) has become a focal point for immigration policy. LatinoJustice has not only supported
2 the program’s expansion and preservation, but has also served as counsel to DACA grantees in
3 legal proceedings. By way of example, in 2015 LatinoJustice represented Cesar Vargas, a DACA
4 grantee, in his landmark case where an appellate panel of the State Supreme Court of New York
5 approved Mr. Vargas’ application for a law license, recognizing him as the first undocumented
6 attorney to publicly seek bar admission in New York. Exhibit 1 to this Motion describes the
7 interest of the additional eighteen *Amici*.

8 The DACA Rescission Memorandum, at issue in this case, will not only roll back
9 protections for undocumented immigrants that LatinoJustice and *Amici* have historically
10 championed, but is particularly flawed in that it does not offer adequate assurance that the
11 information DACA grantees provided to DHS will not be used against them in removal
12 proceedings. When applying to DACA, grantees relied on repeated promises from DHS that the
13 extensive personal and biometric information they disclosed would not in turn be used against
14 them for immigration enforcement purposes. After announcing the program’s rescission, DHS
15 updated “Frequently Asked Questions” (“FAQs”) on USCIS’s website. The revised FAQs
16 threaten that DACA grantees’ sensitive information is now available to U.S. Immigration and
17 Customs Enforcement (“ICE”) for previously prohibited purposes, including immigration
18 enforcement.

19 As *Amici Curiae*, we contend that the DACA Rescission Memorandum and potential
20 sharing of applicant information not only violate the Administrative Procedure Act, but also
21 fundamental privacy law rooted in equity and fairness. In particular, our brief sets forth two
22 arguments: First, privacy principles provide that the government is limited to using personal
23 information for the purpose represented in the collection of that personal information; and second,
24 DHS’s material change in policy to disclose the personal information of DACA applicants’ to
25 ICE for removal purposes is arbitrary and capricious.

26 LatinoJustice and other *Amici* have a profound interest in this litigation because of the
27 impact that the DACA Rescission Memorandum will have on their clients, affiliates and
28

1 respective memberships, some of whom include current DACA grantees, and by extension, their
2 families.

3 **III. REASONS FOR AND RELEVANCE OF AMICUS CURIAE BRIEF**

4 As described above, LatinoJustice and the eighteen other *Amici* described in Exhibit 1 are
5 active in immigrants' rights and immigration reform issues, and are supporters of progressive
6 policies that promote equality and justice for all immigrants. As civil rights organizations, bar
7 associations and student groups, whose clients, members and community constituencies include
8 DACA grantees, *Amicus Curiae* LatinoJustice *et al.* have a valuable perspective of the practical
9 consequences that follow the DACA Rescission Memorandum. The proposed *Amicus Curiae*
10 brief of LatinoJustice *et al.* is relevant to this litigation because it will permit *Amici* to share with
11 the Court the privacy implications of the DACA Rescission Memorandum, the privacy concerns
12 of DACA grantees and the privacy protections afforded to DACA grantees by longstanding
13 privacy policies and principles.

14 **IV. CONCLUSION**

15 For the foregoing reasons, *Amicus Curiae* LatinoJustice *et al.* request the Court to grant
16 leave to file the attached *Amicus Curiae* brief in support of the Plaintiffs' motion for preliminary
17 injunction.

18 Dated: November 1, 2017

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20 By: /s/ Blythe G. Kochsiek
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she served a copy of the foregoing on all counsel of record via the Court’s CM/ECF system.

Dated: November 1, 2017

/s/ Blythe G. Kochsiek
Blythe G. Kochsiek

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EXHIBIT 1

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List of Amicus Curiae

Identity of Amici	Description of Organization and Interest
LatinoJustice PRLDEF	LatinoJustice PRLDEF is a national nonprofit civil rights legal defense fund that has engaged in impact law reform litigation, advocacy, and education to defend the civil and constitutional rights of Latinos since 1972. We champion an equitable society through advancing Latino civil engagement, developing new leaders, and protecting the civil rights and equal protection of the greater pan-latino community in immigrants’ rights, education, and employment. LatinoJustice opposes the federal government’s recent administrative action rescinding deferred action for childhood arrivals that had provided relief from fear of deportations for thousands of Latino students and DREAMers, which had also allowed them the opportunity to pursue higher education and licensed professional careers, and other employment.
Alianza Americas	Alianza Americas is a national network of Latin American immigrant-led and immigrant serving organizations working to bring about a more inclusive, equitable and sustainable way of life for Latino immigrant communities living in the United States and across the Americas. Its forty-five organizational members represent more than 100,000 families across 12 US states. Many of those families include individuals who are beneficiaries of the Deferred Action for Childhood Arrivals (DACA) program as well as Temporary Protected Status, and who have become deeply integrated into the economic and social fabric of our nation. Since its founding in 2004, Alianza Americas has advocated for systemic solutions to our obsolete, inhumane and dysfunctional Immigration policy. As a part of this work, we have lifted up the cases of groups of immigrants who live and work in the US, often over many years, without the benefit of immigrant visas. The case of young immigrants, who were brought to the US as children, and who have grown up here without immigration status, is a particularly meritorious case. Alianza Americas emphasizes the urgent need to keep in place the DACA program, as well as in the need for a legislative solution that will allow these young immigrants to apply for immigrant visas in order to formalize their condition as valued and permanent residents of our communities.

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Identity of <i>Amici</i>	Description of Organization and Interest
Arab American Institute	Established in 1985, the Arab American Institute (AAI) is a non-profit, nonpartisan national leadership organization. AAI represents the policy and community interests of Arab Americans and encourages the direct participation of Arab Americans in political and civic life in the United States. AAI strives to serve as a central resource to government officials, the media, political leaders, and community groups on a variety of public policy issues that concern Arab Americans and U.S.–Arab relations.
The Asian American Legal Defense and Education Fund	The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF advocates for fair immigration policies that recognize the human rights of undocumented immigrants in the United States, promote family reunification, enforce worker protections for all, eliminate racial and ethnic profiling, and end other discriminatory practices that violate due process. Since 2012, we have provided legal assistance to undocumented Asian immigrants who are or may be eligible for the Deferred Action for Childhood Arrivals (DACA) program. These individuals and many other Asian immigrants will be adversely impacted by the termination of DACA.
Submitting Jointly: Asian Americans Advancing Justice; Asian Americans Advancing Justice-Asian Law Caucus; Asian Americans Advancing Justice-Los Angeles	Asian Americans Advancing Justice, Asian Americans Advancing Justice-Asian Law Caucus, and Asian Americans Advancing Justice-Los Angeles are part of a national affiliation of five nonprofit, nonpartisan civil rights. Members of Advancing Justice routinely file amicus curiae briefs in cases in the Supreme Court and other courts nationwide. Through direct services, impact litigation, policy advocacy, leadership development, and capacity building, the Advancing Justice affiliates advocate for marginalized members of the Asian American, Native Hawaiian, Pacific Islander and other underserved communities, including immigrant members of those communities. The aforementioned Advancing Justice affiliates have engaged in direct legal services as well as policy advocacy for individuals eligible for DACA since the inception of the program.

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Identity of <i>Amici</i>	Description of Organization and Interest
ASPIRA	<p>ASPIRA is the only national organization dedicated exclusively to the education of Latino youth. Its mission is to promote the development of the Latino community through advocacy and the education and leadership development of its youth. ASPIRA has ASPIRA Associates and Affiliates in seven states (Delaware, Illinois, Florida, Massachusetts, New Jersey, New York, Pennsylvania) and Puerto Rico, as well as formal partnerships with over 30 regional and local organizations across the country. Founded in 1961, ASPIRA serves over 45,000 students each year in after-school academic enrichment, tutoring, mentoring, career and college counseling, SAT/ACT Prep, and leadership development programs geared at reducing the exceedingly high Latino drop-out rate and motivating and assisting students to enter higher in after-school academic enrichment, tutoring, mentoring, career and college counseling, SAT/ACT Prep, and leadership development programs geared at reducing the exceedingly high Latino drop-out rate and motivating and assisting students to enter higher education. It also reaches over 5,000 parents and young adults with a host of programs, including GED, parental engagement, and financial literacy programs. Through its signature program, the ASPIRA Leadership Development Clubs, ASPIRA reaches young Latinos in over 200 high schools in low-income inner-city schools in 76 communities around the country. ASPIRA operates thirteen charter schools in Delaware, Florida, Illinois, and Pennsylvania with over 10,000 elementary, middle, and high school students. Over 95% of Aspirantes (ASPIRA youth) complete high school and 90% go on to college, and it has an alumni base of over 500,000 Latinos.</p>
Council on American-Islamic Relations	<p>The Council on American-Islamic Relations (CAIR) is the largest American Muslim civil liberties nonprofit organization in the nation. CAIR’s mission is to enhance understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding. CAIR is a leading expert on issues of importance to the American Muslim community, including issues of civil and immigrants’ rights. The organization is headquartered in Washington, D.C. and has 30 chapters in 22 states across the nation.</p>

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Identity of <i>Amici</i>	Description of Organization and Interest
CUNY DREAMers	<p>CUNY DREAMers, is a student-led organization representing the needs and aspirations of over 6000 immigrant students in the City University of New York community. Founded by undocumented students, we organize, advocate and support all progressive policies that protect and provide opportunities to undocumented Americans. We believe that by making higher education more accessible, we will advance the cause of equality for all undocumented Americans. CUNY DREAMers’ mission is to build a network of support that will help with the college retention and successful graduation of undocumented students. We have organized and advocated for equal access to higher education since 2013. Under the leadership of immigrant youth, we’ve been able to conduct various constructive workshops, public forums, leadership and advocacy training and annual conferences in order to further our mission.</p>
Dream Action Coalition	<p>The Dream Action Coalition’s (DRM) mission is to advocate for just immigration policies by confronting decision-makers and empowering and educating our immigrant communities and allies across the country. We seek to change policies that affect the lives of immigrant families using our understanding of the legislative, regulatory, and political process; combining traditional and social media technology with advocacy for rapid response communications; building partnerships that enable us to mobilize across the country; building leadership in local communities; promoting civic engagement and bring awareness to the American public by telling the stories of our community. As an undocumented led organization and one of the key organizations who initially pressed the White House to take executive action on immigration, the efforts to continue the deportation relief is imperative both to the co-founders of DRM who are also DACA recipients as well as our constituency of supporters who are also undocumented or DACA recipients. DRM has organized forums to educate immigrant communities on the new policies as well as continuing our work to reform immigration laws and regulations.</p>

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Identity of <i>Amici</i>	Description of Organization and Interest
The Hispanic Association of Colleges and Universities	The Hispanic Association of Colleges and Universities (HACU), founded in 1986 and headquartered in San Antonio, TX, represents more than 470 colleges and universities committed to Hispanic higher education success in the U.S. and Puerto Rico. HACU’s member institutions enroll two-thirds of the nation’s Hispanic college students and six million students altogether. Many DACA students attend HACU member colleges and universities. The loss of opportunity to remain in the U.S. without threat of immediate deportation is already proving to be extremely disruptive to their educational pursuits.
The Hispanic National Bar Association	The membership of <i>amicus curiae</i> the Hispanic National Bar Association (the “HNBA”) comprises thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. The HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the more than 54 million people of Hispanic heritage living in the United States. The HNBA regularly participates as <i>amicus</i> in cases concerning immigration matters.
Hispanic Federation, Inc.	<p>The Hispanic Federation, Inc. is a nonprofit membership organization that works to empower and advance the Hispanic community through public policy advocacy, leadership development and community projects.</p> <p>Established in 1990, Hispanic Federation (HF) has grown to become one of the premier Latino organizations in the nation. HF has a great organizational interest in the case, as a large number of HF’s constituents are DACA beneficiaries or family members of DACA beneficiaries. Through its network of service agencies, HF’s programs provide hundreds of individuals with Deferred Action for Childhood Arrivals (DACA) screenings and application assistance every year. HF also provides scholarships for the DACA application fees to financially needy applicants. HF sees the direct impact that legal presence and work authorization has on the lives of individuals with DACA, such as obtaining driver’s licenses, health insurance, and furthering meaningful careers.</p>

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Identity of <i>Amici</i>	Description of Organization and Interest
<p>Long Island Immigrant Student Advocates, Inc.</p>	<p>Long Island Immigrant Student Advocates, Inc., (LIISA) is a not-for-profit organization committed towards equality and the right to a higher education for all students. Our purpose is to Educate, Empower and Engage youth, educators and the community to take action and create a stronger, more diverse leadership movement on Long Island.</p> <p>LIISA has been working closely with immigrant youth on Long island for several years. We see the struggles and challenges immigrant youth face daily. Many of our members and youth on Long Island have been benefited by Deferred Action for Childhood Arrivals (DACA). Many of our youth now have better paying jobs with better working conditions and many other have been able to continue their education. Many of our youth have now gotten their driver silences and are now more independent and able to support and improve the lives of their families. We have seeing how DACA has created a great impact in student' lives, their families and community.</p>
<p>New York State Youth Leadership Council</p>	<p>The New York State Youth Leadership Council (NYSYLC) advances the leadership of undocumented youth in New York. We work to empower immigrant youth through leadership development, grassroots organizing, educational advancement, and self-expression. Our goal is to give undocumented youth the tools and space to create change in our communities.</p> <p>The NYSYLC is an organization largely made up of immigrant people and composed of advocates representing various communities in and outside of high schools and colleges. Our membership represents all aspects of the immigration process, many being recipients of the Deferred Action for Childhood Arrivals (DACA) program. We are committed to promoting the advancement of immigrant youth through leadership development and advocacy. Over the years, we have worked with young immigrants to access equal opportunities for higher education, health care, legal screenings, and other resources. Our priority is to continue to create equal opportunities for all undocumented immigrant youth and to protect the information of DACA recipients.</p>

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Identity of Amici	Description of Organization and Interest
Presente.org	<p>Presente.org’s mission is to advance Latino power and create winning campaigns that amplify Latino voices; expand the political imagination and traditional boundaries; and foster inspiration for freedom, equity, and justice for all. Founded in 2009, Presente’s work was born out of the new context for online activism in the United States and across the world. Presente’s core issue areas of immigrants’ rights, environmental justice, and criminal justice, are topics that greatly affect the Latino community, Presente’s 400,000+ members, and allies. Presente has worked tirelessly for the last 8 years to advocate for robust executive actions that could stem historic levels of deportations and separation of immigrant families. Presente’s interest in the outcome of this case results from the reality that the protection of DACA would protect eligible individuals and their families from deportation and strengthen their ability to further contribute to their communities and the nation’s economy.</p>
RU Dreamers	<p>RU Dreamers, founded in Spring 2016, is a student organization at Rutgers University-Newark that advocates for undocumented and DACAmented students on campus. The club, representing over 60 students, works with the Rutgers administration and staff as well as the student body to advocate for higher education for students without legal status.</p> <p>A number of our students are affected by the Deferred Action for Childhood Arrivals (DACA) program. With authorized work permits and driver's licenses, these students work to afford tuition out of pocket and help pay bills to maintain their family and household. Most of our students drive to commute to school as well. Without DACA, these students are at risk of dropping out of school as they cannot afford tuition, transportation, fees, and/or their family’s financial obligations.</p>
UnidosUS	<p>UnidosUS, formerly National Council of La Raza, is the nation’s largest Hispanic civil rights and advocacy organization. Through its unique combination of expert research, advocacy, programs, and an Affiliate Network of nearly 300 community-based organizations who serve millions of citizens and immigrants annually, UnidosUS simultaneously challenges social, economic, and political barriers at the national and local levels. We support the Deferred Action for Childhood Arrivals (DACA) policy because it provides opportunity for relief for youth brought here as children, and generates economic and social benefit for those individuals and their families, and the country as a whole. Stipulations on the use and confidentiality of information submitted by recipients were an essential feature of this policy, and of the agreement they entered with and trusting in our government. The government must continue to observe that agreement.</p>

EXHIBIT 2

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LATINOJUSTICE PRLDEF, et al.

13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA and JANET NAPOLITANO, *in her*
16 *official capacity as President of the University of*
California,

17 Plaintiffs,

18 v.

19 U.S. DEPARTMENT OF HOMELAND
20 SECURITY and ELAINE C. DUKE, in her official
capacity as Acting Secretary of Homeland Security,

21 Defendants.
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Case No. 17-CV-05211-WHA
Case No. 17-CV-05235-WHA
Case No. 17-CV-05329-WHA
Case No. 17-CV-05380-WHA
Case No. 17-CV-05813-WHA

Hon. William Alsup

**BRIEF OF AMICUS CURIAE
LATINOJUSTICE PRLDEF, ET AL.
IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

24 AND ADDITIONAL CASES.
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I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

II. ARGUMENT 5

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT¹**

2 This brief presents the legal and policy privacy concerns of *Amici* LatinoJustice PRLDEF,
 3 Alianza Americas, the Arab American Institute, the Asian American Legal Defense and
 4 Education Fund, Asian Americans Advancing Justice - AAJC, AAJC - Asian Law Caucus, AAJC
 5 – Los Angeles, ASPIRA, the Council on American-Islamic Relations, CUNY DREAMers, Dream
 6 Action Coalition, the Hispanic Association of Colleges and Universities, the Hispanic National
 7 Bar Association, the Hispanic Federation, Inc., Long Island Immigrants Students Advocates, The
 8 New York State Youth Leader Council, Presente.org, RU Dreamers, and Unidos US (collectively,
 9 “*Amicus Curiae*”) regarding the September 5, 2017 memorandum, issued by the Department of
 10 Homeland Security of the United States (“DHS”), rescinding the Deferred Action for Childhood
 11 Arrivals (“DACA”) program established by DHS in 2012 (“DACA Rescission Memorandum”).

12 *Amicus Curiae* submit this brief in support of the preliminary injunction motion brought
 13 by all plaintiffs in the consolidated DACA actions in this district (“Consolidated DACA
 14 Actions”). The Consolidated DACA Actions detail at length the constitutional and statutory
 15 violations of the DACA Rescission Memorandum. The Consolidated DACA Actions plaintiffs
 16 have moved for injunctive relief on their collective claims under the Administrative Procedure
 17 Act, 5 U.S.C. § 706 (“APA”) that DHS’s decision to rescind DACA was arbitrary and capricious.
 18 Among other things, the Consolidated DACA Actions allege that without any justification or
 19 reasoned rationale, the DACA Rescission Memorandum and its implementation materially
 20 deviate from DHS’s prior promises concerning the government’s use of personal information
 21 (“PI”) provided by DACA recipients (“Dreamers”) to DHS in their DACA applications. The
 22 Consolidated DACA Actions’ preliminary injunction motion and supporting declarations
 23 establish that (1) Dreamers relied on DHS’s repeated assurances that the PI collected for the
 24 purpose of providing DACA relief would be protected from disclosure to U.S. Immigration and
 25

26 ¹ Per the Court’s October 25, 2017 Order, the *Amicus Curiae*’s Statement of Interest is included
 27 in the *Amicus Curiae*’s Motion for Leave. Generally, *Amici* are a collection of civil rights defense
 28 funds, immigrant rights groups, policy, advocacy and community service organizations, and
 student groups, who represent the interests of DACA recipients and in many cases are comprised
 of leaders and members who are themselves DACA recipients.

1 Customs Enforcement (“ICE”) and not be used for immigration enforcement purposes, absent
 2 exceptional circumstances; and (2) the DACA Rescission Memorandum removes those
 3 protections and now allows Dreamers’ PI to be shared with ICE and used against them for the
 4 purposes of removal—the precise opposite of DHS’s representations to the Dreamers at the time
 5 DHS solicited their PI. As demonstrated below, DHS’s retroactive material change in its data
 6 usage policy concerning the use of Dreamers’ previously collected PI violates long-standing
 7 privacy principles—including the agency’s own policies—and therefore violates the APA.

8 Dreamers—including many of the leaders and members of several *Amici*—provided an
 9 exhaustive list of PI in their DACA applications including, but not limited to, date and place of
 10 birth, alien registration number, U.S. home address, school name and location, a detailed history
 11 of any minor criminal offenses, including arrests or convictions, and biometric information such
 12 as fingerprints and photos. DHS made repeated assurances on its online DACA “Frequently
 13 Asked Questions” (“DACA FAQs”), that PI would “be protected from disclosure to ICE ... for
 14 the purpose of immigration enforcement” with limited exceptions where “the requestor meets the
 15 criteria for the issuance of a Notice To Appear [“NTA”] or a referral to ICE under the [NTA]
 16 criteria.”² The DACA FAQs also represented that, except in limited circumstances, “[i]f you have
 17 submitted a request for consideration of DACA and USCIS decides not to defer your case . . .
 18 your case **will not** be referred to ICE for purposes of removal proceedings.”³ Relying on DHS’s
 19 assurances concerning these data use limitations, Dreamers provided their PI to DHS in their
 20 DACA applications. Additionally, Dreamers provided sensitive arrest and misdemeanor records
 21 only under assurances that DHS did not view such information as a bar to DACA qualification or
 22 as a threat for removal, as they were of the lowest enforcement priority. Importantly, after
 23 DACA’s implementation, and consistent with U.S. government privacy principles, DHS
 24 Secretary Jeh Johnson wrote to Congress that “these representations made by the U.S.
 25 government, upon which DACA applicants most assuredly relied, must continue to be honored.”⁴

26 ² See DHS DACA FAQs, U.S. Citizenship and Immigration Services Q19 (last updated Oct. 6,
 27 2017), <https://www.uscis.gov/archive/frequently-asked-questions>.

28 ³ *Id.* at Q26 (emphasis added).

⁴ See Letter to Judy Chu, U.S. House Representative, from Jeh Johnson, Dept. of Homeland Sec.
 Secretary (Dec. 30, 2016) *available at*

1 On September 5, 2017, DHS rescinded the DACA program without obtaining consent
 2 from, or providing notice and opportunity for comment to Dreamers or the public. *See* Admin. R.
 3 at 252-56. The DACA Rescission Memorandum does not reflect any consideration of the impact
 4 DHS's action may have on the Dreamers' privacy interests, much less reference any privacy
 5 impact assessment or DHS's compliance with any internal privacy policies or practices.⁵ DHS
 6 simultaneously posted revised "Frequently Asked Questions," (the "Rescission FAQs") that
 7 materially changed the prior policy as to the treatment of PI previously provided by Dreamers,
 8 and applied this new policy retroactively.⁶ The Rescission FAQs state: "Generally, information
 9 provided in DACA requests will not be proactively provided to other law enforcement entities
 10 (including ICE and CBP) for the purpose of immigration enforcement proceedings unless the
 11 requestor poses a risk to national security or public safety, or meets the criteria for the issuance of
 12 a Notice To Appear ["NTA"] or a referral to ICE under the [NTA] criteria."⁷ Critically, the
 13 Rescission FAQ's remove DHS's prior express representations that Dreamers' PI would be
 14 explicitly protected from disclosure to ICE for purposes of immigration enforcement and not be
 15 referred to ICE for purposes of removal.

16 To make matters worse, DHS radically broadened the categories of people to be
 17 prioritized for removal in its February 20, 2017 Enforcement Priorities Memorandum. *See*
 18 Admin. R. at 226-34. Previously, DHS prioritized removing individuals who had been convicted
 19 of felonies or serious (or multiple less serious) misdemeanors. The Enforcement Priorities
 20 Memorandum expanded the categories to include those who "(1) have been convicted of **any**
 21 criminal offense; (2) have been **charged** with any criminal offense that has not been resolved;
 22 [and] (3) have **committed acts** which constitute a chargeable criminal offense." *Id.* at 230. In
 23 other words, individuals not convicted of, but only charged with, any criminal offense are now
 24

25 [https://chu.house.gov/sites/chu.house.gov/files/documents/DHS.Signed%20Response%20to%20](https://chu.house.gov/sites/chu.house.gov/files/documents/DHS.Signed%20Response%20to%20Chu%2012.30.16.pdf)
 26 [Chu%2012.30.16.pdf](https://chu.house.gov/sites/chu.house.gov/files/documents/DHS.Signed%20Response%20to%20Chu%2012.30.16.pdf).

27 ⁵ *Id.*

28 ⁶ *See* Frequently Asked Questions: Rescission Of Deferred Action For Childhood Arrivals (DACA), Dept. of Homeland Sec. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca>.

⁷ *Id.* at Q8.

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1 prioritized for immigration enforcement. This includes various lower-level offenses that
2 Dreamers freely disclosed as part of their DACA applications.⁸

3 Given the DACA Rescission Memorandum, the material change in data usage protection
4 afforded DACA PI in the Rescission FAQs, and DHS’s broadened enforcement priorities,
5 Dreamers have a well-founded fear that their PI will be disclosed to ICE and used against them
6 for removal. As demonstrated below, the disclosure of Dreamers’ PI to ICE for deportation
7 purposes contravenes the Fair Information Practice Principles (FIPPs) that the DHS has
8 historically adopted and endorsed as part of its privacy policies and practices. These principles—
9 reflected in DHS privacy policy memoranda, the Privacy Act of 1974, and the privacy policy
10 reports and enforcement actions of the Federal Trade Commission—hold that the government is
11 limited to using PI it collects from individuals for its original purpose, and cannot subsequently
12 use such PI for purposes incompatible with the goals of the initial collection. As applied to
13 DACA, Dreamers provided their PI to DHS for the purposes of obtaining temporary lawful status
14 and work authorization for two years, and DHS promised that such information would not be
15 used to remove them. Yet, that is precisely what DHS threatens to do now. This threat violates the
16 fundamental privacy principle that the government cannot collect information for one purpose
17 and later use it for a materially different one, much less for a purpose it expressly promised that
18 data would not be used for. Accordingly, *Amicus Curiae* respectfully urge the Court to grant
19 plaintiffs’ motion for preliminary injunction on the grounds that the DACA Rescission
20 Memorandum violates the APA as arbitrary and capricious, and enjoin DHS from using PI
21 provided under DACA for immigration enforcement purposes.

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28 ⁸ Although the Enforcement Priorities Memorandum exempted the DACA program, the DACA Rescission Memorandum is silent on whether the exemption applies after DACA ends.

II. ARGUMENT

A. PRIVACY PRINCIPLES PROVIDE THAT THE GOVERNMENT IS LIMITED TO USING PERSONAL INFORMATION FOR THE PURPOSE REPRESENTED AT THE TIME OF COLLECTION OF SUCH PERSONAL INFORMATION.

1. The Fair Information Practice Principles and DHS Endorsement of the Purpose Specification and Use Limitation Principles

DHS has explicitly adopted the long-standing and widely accepted privacy principles known as the Fair Information Practice Principles, or FIPPs, as the framework for its privacy compliance policies and procedures.⁹ The FIPPs form the backbone of privacy and data protection laws in the United States and originate from the Privacy Act of 1974, 5 U.S.C. § 552a (2012) (the “Privacy Act”).¹⁰ The eight principles address the manner in which PI is collected and used, and provide safeguards to assure those practices are fair, non-deceptive, and adequately protect PI. The most relevant FIPPs here, as explained by DHS, are:

Transparency – Transparency should be provided as to how PI is handled via various mechanisms, including general notices, reports, investigations, public meetings, Privacy Impact Assessments (“PIA”), System of Records Notices (“SORN”), and the Freedom of Information Act (“FOIA”).¹¹

Purpose Specification – The purposes for which PI is collected must be clearly specified at the time of collection and the subsequent use of the PI must be compatible with the fulfillment of those purposes.¹²

Use Limitation – PI should only be used for the purposes specified at the time of collection, and not be disclosed, made available, or otherwise used for any other purposes, in accordance with the Purpose Specification Principle.¹³

In January 2009, DHS issued an amended version of its privacy policy guidance memorandum making it clear that any PI “collected, used, maintained, and/or disseminated by DHS” would be “subject to the Privacy Act regardless of whether the information pertain[ed] to a

⁹ See Memorandum from Hugo Teufel III, Chief Privacy Officer, U.S. DEP’T OF HOMELAND SEC., PRIVACY POLICY GUIDANCE MEMORANDUM NO. 2008-01 (December 29, 2008) (“2008 Privacy Policy Memorandum”), available at <https://www.dhs.gov/sites/default/files/publications/privacy-policy-guidance-memorandum-2008-01.pdf>.

¹⁰ See Privacy Act of 1974, 5 U.S.C. § 552a, as amended; Homeland Security Act of 2002, as amended, 6 U.S.C. § 142; see also Memorandum from Jonathan R. Cantor, Acting Chief Privacy Officer, U.S. DEP’T OF HOMELAND SEC., PRIVACY POLICY GUIDANCE MEMORANDUM NO. 2017-01 at *3 (April 25, 2017) (“2017 Privacy Policy Memorandum”), available at https://www.dhs.gov/sites/default/files/publications/PPGM%202017-01%20Signed_0.pdf.

¹¹ 2017 Privacy Policy Memorandum at *3.

¹² *Id.*

¹³ *Id.* at *5-6.

1 U.S. citizen, legal permanent resident, visitor, or alien.”¹⁴ However, this policy materially
 2 changed on January 25, 2017, when President Donald J. Trump issued an executive order
 3 directing federal agencies “to the extent consistent with applicable law,” to ensure that “their
 4 privacy policies *exclude[d]* persons who are not United States citizens or Lawful Permanent
 5 Residents (“LPRs”) from the protections of the Privacy Act regarding personally identifiable
 6 information.”¹⁵ To that end, then-DHS Secretary John Kelly issued the Enforcement Priorities
 7 Memorandum on February 20, 2017, stating that DHS would no longer extend Privacy Act rights
 8 and protections to individuals who are neither U.S. citizens nor lawful permanent residents while
 9 explicitly excluded DACA recipients. Admin. R. at 229-234. The Enforcement Priorities
 10 Memorandum further directed the DHS Privacy Office to rescind the 2009 Privacy Policy
 11 Memorandum and to develop new guidance on the agency’s collection, use, retention, and
 12 dissemination of PI. *Id.*

13 On April 25, 2017, DHS issued a memorandum updating its PI privacy policies and
 14 procedures (the “2017 Privacy Policy Memorandum”).¹⁶ While the rights and protections of the
 15 Privacy Act were no longer extended to non-citizens other than Dreamers, the 2017 Privacy
 16 Policy Memorandum reiterated DHS’s commitment to the FIPPs, stating that DHS would still
 17 “treat all persons, regardless of immigration status” in a manner “consistent with the [FIPPs] and
 18 applicable law.”¹⁷ As explained in the 2017 Privacy Policy Memorandum, with respect to the
 19 Transparency principle, the agency “must provide transparency for how it handles PI through
 20 various mechanisms, including Privacy Impact Assessments (PIA), Privacy Act Statements, [and]
 21 general notices ...”¹⁸ DHS has held itself to the traditional privacy practice of providing “notice
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24 ¹⁴ See Memorandum from Hugo Teufel III, Chief Privacy Officer, U.S. DEP’T OF HOMELAND
 25 SEC., PRIVACY POLICY GUIDANCE MEMORANDUM NO. 2007-1 at *2 (January 7, 2009) (as
 26 amended from January 19, 2007) (“2009 Privacy Policy Memorandum”), *available at*
 27 https://www.dhs.gov/xlibrary/assets/privacy/privacy_policyguide_2007-1.pdf.

28 ¹⁵ See Executive Order: Enhancing Public Safety in the Interior of the United States, The White
 House Press Secretary (Jan.25, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

¹⁶ See 2017 Privacy Policy Guidance Memorandum at *1.

¹⁷ *Id.*

¹⁸ *Id.* at *3.

1 to [an] individual regarding its collection, use, dissemination, and maintenance of personally
2 identifiable information.”¹⁹

3 Consistent with the principle of “Purpose Specification,” DHS adopted the position that it
4 “must also clearly state the purpose for which information is intended to be used in applicable ...
5 notices [and] [p]lanned uses *must be compatible with the purpose for which the Department*
6 *originally collected the information; the PIA must identify and explain this compatibility.*”²⁰

7 Similarly, when endorsing the “Use Limitation” principle, DHS explained “any sharing of such
8 information outside the agency must be *compatible with the purposes for which the information*
9 *was originally collected.*”²¹ Indeed, “ensur[ing] that such uses are compatible with the purpose
10 for why the Department collected the records,” complies with the “routine use” exception under
11 the Privacy Act.²² Notably, it is DHS policy that “seeking consent is always a preferable privacy
12 practice, and consent should be sought when practical.”²³ The Q & A to the 2017 Privacy Policy
13 Memorandum states that DHS’s privacy policies “permits the sharing of information about
14 immigrants and non-immigrants with federal, state, and local law enforcement,” but require that
15 “such sharing conform to an analysis based upon the [FIPPs] that demonstrates a consistent
16 relationship between the purpose for collection of the information and intended use.”²⁴

17 **2. The Privacy Act’s Routine Use Exception Requires That the Government’s**
18 **Use of Information Be Compatible with the Original Purpose of its Collection**

19 The Privacy Act of 1974 is generally characterized as an omnibus “code of fair
20 information practices” that attempts to regulate the collection, maintenance, use, and

21 ¹⁹ See 2008 Privacy Policy Memorandum at *3. DHS conducts PIAs whenever a program update
22 implicates privacy concerns to identify and mitigate privacy risks and notify the public what PI
23 DHS is collecting, why the PI is being collected, and how the PI will be used, shared, and stored.
24 See Memorandum from Hugo Teufel III, Chief Privacy Officer, U.S. DEP’T OF HOMELAND SEC.,
PRIVACY POLICY GUIDANCE MEMORANDUM NO. 2008-02 (Dec. 30, 2008) *available at*
https://www.dhs.gov/sites/default/files/publications/privacy_policyguide_2008-02_0.pdf.

²⁰ See 2017 Privacy Policy Memorandum at *4 (emphasis added).

²¹ *Id.* at *5.

²² *Id.* at *6 (citing 5 U.S.C. § 552a (a)(7), (e)(4)(D); *Britt v Naval Investigative Service*, 886 F.2d
544 (3rd Cir. 1989)).

²³ See 2017 Privacy Policy Memorandum at *6.

²⁴ See Privacy Policy 2017-01 Questions & Answers, Dept. of Homeland Sec. Q6 (April 27,
2017), *available at*
28 <https://www.dhs.gov/sites/default/files/publications/Privacy%20Policy%20Questions%20%20Answers%2C%2020170427%2C%20Final.pdf>.

1 dissemination of PI by federal executive branch agencies.²⁵ The Privacy Act applies to any
 2 “system of records,” which is defined as “a group of any records under the control of any agency
 3 from which information is retrieved by the name of the individual or by some identifying number,
 4 symbol, or other identifying particular assigned to the individual.”²⁶ The purpose of the Privacy
 5 Act is “to balance the government’s need to maintain information about individuals with the
 6 rights of individuals to be protected against unwarranted invasions of their privacy stemming
 7 from federal agencies’ collection, maintenance, use, and disclosure of personal information about
 8 them.”²⁷ Although the Dreamers as non-citizens do not have a cause of action under the Privacy
 9 Act, the statute regulates the government’s use of PI and therefore provides relevant guideposts in
 10 determining whether DHS’s action here is arbitrary and capricious under the APA.

11 The Privacy Act explicitly prohibits the disclosure of PI collected by a federal agency
 12 without written consent. The Privacy Act provides that “[n]o agency shall disclose any record
 13 which is contained in a system of records by any means of communication to any person, or to
 14 another agency, except pursuant to a written request by, or with the prior written consent of, the
 15 individual to whom the record pertains.”²⁸ The Privacy Act lists twelve exceptions that allow the
 16 disclosure of personal records without an individual’s written consent. Of most relevance here is
 17 the “routine use” exemption, which provides that disclosure may be permitted when “the use of
 18 such record for a purpose which is compatible with the purpose for which it was collected.”²⁹
 19 (emphasis added). It was Congress’s intent that the routine use exception “should serve as a
 20 caution to agencies to think out in advance what uses it (sic) will make of information.”³⁰

21 The courts have rigorously applied the compatibility requirement of the Privacy Act’s
 22 routine use exception. For instance, in *Britt*, the government asserted “disclosure need only be
 23 compatible with [the routine use] purpose” published in the Federal Register, but the Third
 24 Circuit made clear that the statutory requirement of compatibility is a strict one. 886 F.2d 544,

25 ²⁵ See Overview of the Privacy Act of 1974 at *4, U.S. DEP’T OF JUSTICE (2015 Edition),
 26 available at <https://www.justice.gov/opcl/file/793026/download>.

27 ²⁶ See 5 U.S.C. § 552a (a)(5).

28 ²⁷ See Litigation Under the Privacy Act at § 2, 114 AM. JUR. TRIALS 89 (2009).

29 ²⁸ See 5 U.S.C. § 552a (b).

30 ²⁹ See 5 U.S.C. § 552a (a)(7).

³⁰ See *Britt*, 886 F.2d 544, 548 (3rd Cir. 1989) (citations omitted).

1 548-9. Instead, compatibility “requires [] a dual inquiry into the purpose for the collection of the
 2 record in the specific case and the purpose of the disclosure.” *Id.* (finding the collection of
 3 information for purposes of criminal investigation was not compatible with disclosure to
 4 government agency employer, for use by employer in evaluating employee’s integrity).

5 Case law uniformly holds that “[t]here must be a more concrete relationship or similarity,
 6 some meaningful degree of convergence, between the disclosing agency’s purpose in gathering
 7 the information and in its disclosure.” *Id.* at 549-50. The Ninth Circuit’s holding in *Covert v.*
 8 *Harrington* is particularly instructive here, finding that the Department of Energy (“DOE”)’s
 9 disclosure of employee personnel security questions (“PSQs”) to the Department of Justice
 10 (“DOJ”) was unauthorized under the Privacy Act.³¹ 876 F.2d 751, 755 (9th Cir. 1989). In *Covert*,
 11 the DOE had originally collected personal information from employees in the PSQ’s to determine
 12 their eligibility for security clearances. *Id.* at 752-53. The district court found that DOE’s
 13 disclosure to DOJ of the employee’s PSQs for law enforcement purposes was not a routine use, as
 14 it was not compatible with the use for which the information was originally collected. *Id.* at 753.
 15 The Ninth Circuit affirmed, finding the failure of the government to inform employees that their
 16 personal information would be used for purposes other than stated at the time of collection, was a
 17 violation of the Privacy Act. *Id.*

18 **3. Under Long-Standing Federal Trade Commission Policy, Entities Must**
 19 **Provide Consumers with Notice of Data Use Practices and Obtain Consent**
 20 **When Such Use is Materially Different from When Initially Collected**

21 The core privacy tenets of Purpose Specification and Use Limitation applied in the
 22 Privacy Act have been historically extended to other regulatory contexts. Perhaps the most
 23 important is the Federal Trade Commission (“FTC”), which has been the chief federal agency on
 24 consumer privacy policy, protection and enforcement since the 1970s.³² While the FTC’s
 25

26 ³¹ See also *Swenson v. U.S. Postal Serv.*, 890 F.2d 1075, 1078 (9th Cir.1989) (holding that
 27 collection of data for purposes of adjudicating EEOC charges was not compatible with disclosure
 28 to Congress investigating charges brought by an employee who had filed complaint that the U.S.
 Postal Service had undercounted its rural routes).

³² See Protecting Consumer Privacy, Fed. Trade Comm’n (last visited Oct. 27, 2017), available at
<https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy>.

1 jurisdiction is limited to acts affecting commerce, the agency’s interpretation of FIPPs is
 2 persuasive authority for the application of FIPPs generally, as well as applied to the government.
 3 The FTC’s focus on online privacy began in 1998 in its first report to Congress on the issue, in
 4 which the FTC endorsed the widely-accepted FIPPs of Notice, Choice, Access, and Security, as
 5 “essential to ensuring that the collection, use, and dissemination of personal information are
 6 conducted fairly and in a manner consistent with consumer privacy interests.”³³ The 1998 FTC
 7 Report stated that “[t]hese core principles require that consumers be given *notice* of an entity’s
 8 information practices; [and] that consumers be given *choice* with respect to the use and
 9 dissemination of information collected from or about them....”³⁴

10 In its seminal 2000 Privacy Online Report to Congress, the FTC advised that
 11 organizations should provide consumers with “clear and conspicuous notice” of their privacy
 12 practices, including “what information they collect, how they collect it . . . how they use it, how
 13 they provide Choice, Access, and Security to consumers, [and] whether they disclose the
 14 information collected to other entities . . .”³⁵ The FTC has been especially concerned with privacy
 15 policies that “reserve[] the right to make changes to its information practices in the future” and
 16 require consumers to “check the policy often for such changes,” because “[t]he chance that new,
 17 inconsistent policies may be applied to previously collected information is troubling and may
 18 undermine consumer confidence in the rest of the privacy policy.”³⁶ The FTC has made clear that
 19 consumers should be informed of any “material changes” to an organization’s practices as to
 20 information collection, retention, and disclosure, and in some instances, may even require
 21 consumers’ “affirmative” consent to changes.³⁷

22
 23 ³³ See FED. TRADE COMM’N, PRIVACY ONLINE: A REPORT TO CONGRESS, at *ii (June 1998)
 24 (“1998 FTC Report”), available at <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf>.

25 ³⁴ *Id.*

26 ³⁵ See FED. TRADE COMM’N, PRIVACY ONLINE: FAIR INFORMATION IN THE ELECTRONIC
 MARKETPLACE, A REPORT TO CONGRESS, at * 36 (May 2000) (“2000 Online Privacy Report to
 Congress”), available at <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000.pdf>.

27 ³⁶ *Id.* at 26.

28 ³⁷ *Id.*

1 In its 2012 Privacy Report, the FTC highlighted the privacy-related harms that might arise
 2 from unanticipated, unconsented uses of data as “more expansive than economic or physical
 3 harms,” and may include “the unexpected revelation of previously private information, including
 4 both sensitive information (*e.g.*, health information, precise geolocation information) and less
 5 sensitive information (*e.g.*, purchase history, employment history) to unauthorized third
 6 parties.”³⁸ To address these concerns, the FTC stated, in no uncertain terms, that “[c]ompanies
 7 should obtain affirmative, express consent before (1) using consumer data in a *materially*
 8 *different manner* than claimed when the data was collected; or (2) collecting sensitive data for
 9 certain purposes.”³⁹ These concerns are best illustrated in the FTC’s enforcement actions and
 10 settlements against Google and Facebook for retroactive material change in use.⁴⁰ The settlement
 11 agreements require that the companies give their users clear and prominent notice and “obtain
 12 affirmative express consent prior to making certain *material retroactive changes to their privacy*
 13 *practices.*”⁴¹ The FTC has explained that a “material change” means “at a minimum, sharing
 14 consumer information with third parties after committing at the time of collection not to share the
 15 data.”⁴² In the bankruptcy context, the FTC has applied this principle to find that companies’
 16 liquidations cannot transfer personal information, if the company had previously represented to
 17 consumers that such information would not be transferred at the time of collection.⁴³

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 21 ³⁸ See FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE:
 22 RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS, at *8 (March 2012) (“2012 Privacy
 23 Report”), available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

24 ³⁹ *Id.* at viii (emphasis added).

25 ⁴⁰ The FTC alleged that Google improperly used the information provided by consumers when
 26 they signed up for Gmail to populate a new social network called “Google Buzz” without notice
 27 or consent. *Id.* at 8, n. 37. The FTC’s complaint against Facebook alleged that the social
 28 network’s sharing of users’ personal information beyond consumer’s initial privacy settings
 29 unfairly exposed potentially sensitive information to third parties. *Id.* at 8.

30 ⁴¹ See 2012 Privacy Report at 58 (emphasis added).

31 ⁴² *Id.*

32 ⁴³ See *e.g.*, Letter from Fed. Trade Comm’n to Cullen and Dykman LLP (July 1, 2010), available
 33 at https://www.ftc.gov/system/files/documents/closing_letters/letter-xy-magazine-xy.com-regarding-use-sale-or-transfer-personal-information-obtained-during-bankruptcy-proceeding/100712xy.pdf.

1 **B. APPLYING PRIVACY PRINCIPLES, DHS'S MATERIAL CHANGE IN POLICY**
 2 **TO DISCLOSE DACA PERSONAL INFORMATION TO ICE FOR REMOVAL**
 3 **PURPOSES IS ARBITRARY AND CAPRICIOUS.**

4 As adopted by DHS itself, the Purpose Specification and Use Limitation FIPPs stand for
 5 the common sense and equitable proposition that DHS is limited to using PI solely for the
 6 purposes specified when first collected, and any PI disclosure to another agency such as ICE,
 7 must be for a use compatible with the originally stated purpose. This basic principle is echoed in
 8 the Privacy Act regulating the government's collection and use of PI, which requires that use of
 9 information must be compatible with the purpose for which it was originally collected. In the
 10 consumer protection context, this privacy tenet has been historically applied by the FTC to find
 11 that companies should provide notice of their information use practices and obtain affirmative
 12 consent when such use is materially different from when the data was first provided by the
 13 consumer.

14 The DACA Rescission Memorandum is a strikingly arbitrary departure from these privacy
 15 principles, including the agency's own practices. As part of the DACA application process,
 16 Dreamers provided DHS sensitive PI, including country of origin, date of entry, current U.S.
 17 home address, school location, misdemeanor and arrest information, and biometric identifiers, for
 18 the limited purposes of obtaining temporary lawful status and work authorization. The DACA
 19 FAQs constituted notice of use limitations at the time of collection and explicitly provided that
 20 Dreamers' PI would not be used for deportation absent extremely limited stated exceptions and
 21 that the PI provided would be used solely for the purpose of obtaining DACA relief. What is
 22 more, the DACA FAQs expressly stated that the PI provided for DACA purposes would not be
 23 shared with ICE for the purposes of removal. In other words, the stated purpose for DHS's
 24 collection of Dreamers' PI at the time of collection was to provide applicants assurances they
 25 would not be deported.

26 Yet, the DACA Rescission Memorandum and the Rescission FAQs on their face allow for
 27 that previously collected information to now be used for the precise opposite use of its original
 28 collection—the arrest and removal of Dreamers. When DHS issued the DACA Rescission
 Memorandum, DHS did *not* affirm that PI provided by Dreamers in their DACA applications

1 would not be used for any other purpose than for which it was originally collected. To the
2 contrary, DHS posted online the Rescission FAQs, which not only failed to provide any
3 assurances to Dreamers that their PI would not be used for immigration enforcement, but can be
4 read to permit such use, especially against Dreamers with minor criminal offenses or even a
5 single misdemeanor arrest.

6 DHS's use of PI for the purpose of removal is fundamentally *not* compatible with the
7 purpose for which the information was originally collected – namely immigration relief – and
8 therefore clearly violates the agency's own Purpose Specification and Use Limitation FIPPs
9 adopted in its 2017 Privacy Memorandum and the APA as arbitrary and capricious. *See e.g.*,
10 *Venetian Casino Resort, L.L.C. v. E.E.O.C.*, 530 F.3d 925, 934–35 (D.C. Cir. 2008) (finding the
11 Equal Employment Opportunity Commission's (EEOC) policy permitting agency employees to
12 disclose employer's confidential information to potential ADEA plaintiffs without first notifying
13 employer/submitter, was arbitrary and capricious under the APA because the policy conflicted
14 with EEOC regulations). It also flies in the face of well-established court precedent interpreting
15 the Privacy Act's routine use exception as requiring that agency use must be compatible with the
16 purpose for which the information was collected. *See*, Part I.B, *supra*.

17 Further, DHS's decision to rescind DACA without any notice, consent, or even the
18 opportunity to comment violates the agency's adopted Transparency FIPP memorialized as
19 recently as the 2017 Privacy Policy Memorandum. Neither the DACA Rescission Memorandum
20 nor anything in the administrative record before the court on this motion, remotely suggests that
21 DHS even considered the impact on Dreamers' privacy interests, much less conduct a PIA on
22 how the Dreamers' privacy rights may be affected. Moreover, DHS materially changed its data
23 use policies to allow for the use of Dreamers' PI for enforcement purposes without notice and
24 without consent from any Dreamers. The FTC, as the government's privacy watchdog, has
25 traditionally held that entities must notify consumers and obtain affirmative consent when making
26 material retroactive changes to their privacy practices. DHS fell far short of meeting that standard
27 here. Indeed, it would not be an overstatement to say that if DHS were a commercial entity, the
28 FTC would find DHS's retroactive material change in use of Dreamers' previously collected PI to

1 be a deceptive trade practice, which must be tantamount to an arbitrary and capricious agency
2 action.

3 **C. CONCLUSION**

4 Accordingly, *Amicus Curiae* respectfully urge the Court to grant plaintiffs’ motion for
5 preliminary injunction on the grounds that the DACA Rescission Memorandum violates the APA
6 as arbitrary and capricious, and enjoin DHS from using PI provided under DACA for immigration
7 enforcement purposes.

8 Dated: November 1, 2017

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he served a copy of the foregoing on all counsel of record via the Court’s CM/ECF system.

Dated: November 1, 2017

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