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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

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

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND  
SECURITY and ELAINE DUKE, in her official capacity  
as Acting Secretary of the Department of Homeland  
Security,

Defendants.

CASE NO. 17-CV-05211-WHA

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO  
DISMISS**

Judge: Honorable William Alsup  
Hearing: December 20, 2017, 8:00 a.m.  
Courtroom: 8, 19th Floor

STATE OF CALIFORNIA, STATE OF MAINE,  
STATE OF MARYLAND, STATE OF MINNESOTA,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY,  
ELAINE DUKE, in her official capacity as Acting  
Secretary of the Department of Homeland Security, and  
the UNITED STATES OF AMERICA,

Defendants.

CASE NO. 17-CV-05235-WHA

CITY OF SAN JOSE, a municipal corporation,

Plaintiff,

v.

DONALD J. TRUMP, President of the United States, in  
his official capacity, ELAINE C. DUKE, in her official  
capacity, and the UNITED STATES OF AMERICA,

Defendants.

CASE NO. 17-CV-05329-WHA

DULCE GARCIA, MIRIAM GONZALEZ AVILA,  
SAUL JIMENEZ SUAREZ, VIRIDIANA CHABOLLA  
MENDOZA, NORMA RAMIREZ, and JIRAYUT  
LATTHIVONGSKORN,

Plaintiffs,

v.

UNITED STATES OF AMERICA, DONALD J.  
TRUMP, in his official capacity as President of the  
United States, U.S. DEPARTMENT OF HOMELAND  
SECURITY, and ELAINE DUKE, in her official  
capacity as Acting Secretary of Homeland Security,

Defendants.

CASE NO. 17-CV-05380-WHA

COUNTY OF SANTA CLARA and SERVICE  
EMPLOYEES INTERNATIONAL UNION LOCAL  
521,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States, JEFFERSON  
BEAUREGARD SESSIONS, in his official capacity as  
Attorney General of the United States; ELAINE DUKE,  
in her official capacity as Acting Secretary of the  
Department of Homeland Security; and U.S.  
DEPARTMENT OF HOMELAND SECURITY,

Defendants.

CASE NO. 17-CV-05813-WHA

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## INTRODUCTION

1  
2 The rescission of the DACA program breaks the promises that the federal government made to  
3 hundreds of thousands of young Americans who were brought to this country as children and who have,  
4 for the last five years, built their lives in reliance on DACA. The record reflects that the government  
5 rescinded the program without the slightest consideration of the devastating consequences it would have  
6 for DACA recipients, their families, employers, schools, and communities.

7 The government's arbitrary action is illegal and unconstitutional. The plaintiffs' complaints  
8 collectively allege that the Rescission violated (1) the Administrative Procedure Act's requirements that  
9 agency action not be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance  
10 with the law; (2) the APA's notice-and-comment procedural requirements; (3) the Equal Protection  
11 component of the Fifth Amendment; (4) the Due Process Clause of the Fifth Amendment; and (5) the  
12 principles of equitable estoppel.

13 The government contends that these actions are non-justiciable, that this Court lacks jurisdiction,  
14 and that certain parties lack standing. The government advanced identical arguments in related actions  
15 in the Eastern District of New York—unsuccessfully. *See Batalla Vidal v. Duke*, Nos. 16-4756, 16-  
16 5228, 2017 WL 5201116 (E.D.N.Y. Nov. 9, 2017). This Court should reject those same arguments here.

17 The government also contends that the plaintiffs' complaints should be dismissed for failure to  
18 state legally viable claims. To the contrary, and as set forth below, the complaints state well-supported  
19 statutory and constitutional claims. Both the APA and the Constitution limit the government's ability to  
20 inflict arbitrary and massive harm for no supportable reason, and each renders the Rescission unlawful.

## BACKGROUND

21  
22 On June 15, 2012, the Department of Homeland Security created DACA through a memorandum  
23 from then-Secretary Janet Napolitano (the "DACA Memorandum"). AR 1-3.<sup>1</sup> Individuals who were  
24 brought to the United States as children and who met certain criteria could apply for deferred action,  
25 renewable every two years. *Id.* Deferred action under DACA, in addition to providing protection from  
26

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27 <sup>1</sup> "AR" refers to the Administrative Record, Dkt. No. 64-1.  
28

1 arrest, detention, and removal, led directly to the ability to obtain work authorization and the ability to  
2 apply for “advance parole” to travel overseas and lawfully return to the United States. *See* App. at 1787-  
3 88 (USCIS Toolkit), App. at 1758-59 (USCIS FAQs).<sup>2</sup> The government encouraged eligible individuals  
4 to apply for DACA, and, once approved, to renew every two years thereafter. App. at 1756-57. The  
5 government promised applicants that the information they provided as part of the DACA application  
6 process would be “protected” from use for immigration enforcement purposes. App. at 1747, 1764,  
7 1772.

8 In December 2016, then-Secretary of Homeland Security Jeh Johnson publicly stated that  
9 “representations made by the U.S. government, upon which DACA applicants most assuredly relied,  
10 must continue to be honored.” App. at 1822. Even after the change in administrations, former Secretary  
11 of Homeland Security John Kelly in February 2017 specifically exempted DACA from the  
12 administration’s broad repeal of other immigration directives and characterized DACA as a  
13 “commitment . . . by the government towards the DACA person.” App. at 1841.

14 One day prior to the Rescission, Attorney General Jefferson Sessions sent a one-page letter to  
15 Acting Secretary of Homeland Security Elaine Duke asserting that DACA “was effectuated . . . without  
16 proper statutory authority” and “was an unconstitutional exercise of authority by the Executive Branch,”  
17 citing litigation surrounding another deferred action program, Deferred Action for Parents of Americans  
18 and Lawful Permanent Residents (“DAPA”). AR 251. The Attorney General’s letter concluded that  
19 DACA was vulnerable “to the same legal and constitutional defects” as DAPA, and without further  
20 analysis said that “potentially imminent litigation would yield similar results with respect to DACA.”  
21 *Id.* No court has ever held DACA to be illegal, and the Department of Justice had vigorously  
22 maintained the opposite in court. Yet, on September 5, 2017, Acting Secretary Duke rescinded DACA  
23 based on a conclusory two-sentence paragraph stating:

24 Taking into consideration the Supreme Court’s and the Fifth Circuit’s rulings in the  
25 ongoing [DAPA] litigation, and the September 4, 2017 letter from the Attorney General, it  
26 is clear that the June 15, 2012 DACA program should be terminated. In the exercise of my

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27 <sup>2</sup> “App.” refers to the Appendix of Exhibits submitted with the plaintiffs’ motion for provisional  
28 relief, Dkt. No. 113, 117-19, 121, 124.

1 authority in establishing national immigration policies and priorities, except for the  
2 purposes explicitly identified below, I hereby rescind the June 15, 2012 memorandum.

3 AR 255.

4 The rescission of DACA is inflicting immediate and irreparable harm on the nearly 700,000  
5 current DACA recipients, who have been told to “prepare for and arrange their departure from the  
6 United States.” App. at 2199–2200. The far-reaching consequences of the Rescission will also injure  
7 educational institutions and employers, cities, counties, states, and the national economy. *See* App.  
8 2201-10.

### 9 LEGAL STANDARD

10 **Rule 12(b)(1).** When a motion to dismiss challenges subject matter jurisdiction under Rule  
11 12(b)(1), the party invoking the federal court’s jurisdiction bears the burden of establishing jurisdiction.  
12 *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1151 (9th Cir. 2017). The factual allegations in the  
13 complaint are taken as true and all reasonable inferences must be drawn in favor of the party opposing  
14 dismissal. *Snyder & Assocs. Acquisitions LLC v. United States*, 859 F.3d 1152, 1156-57 (9th Cir. 2017).  
15 When standing is challenged, plaintiffs may rely on the allegations in their complaint along with  
16 “whatever other evidence they submitted in support of their . . . motion to meet their burden.”  
17 *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017), *reh’g en banc denied*, 853 F.3d 933 (9th  
18 Cir. 2017), *superseded by* 858 F.3d 1168 (9th Cir. 2017); *see also McCarthy v. United States*, 850 F.2d  
19 558, 560 (9th Cir. 1988) (court may review affidavits and testimony to resolve factual disputes  
20 concerning the existence of jurisdiction).

21 **Rule 12(b)(6).** A motion to dismiss under Rule 12(b)(6) may be granted only if the complaint  
22 lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Shroyer v. New*  
23 *Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). The complaint need only plead  
24 sufficient facts to show that a claim is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).  
25 The factual allegations in the complaint are taken as true and all allegations are viewed in the light most  
26 favorable to the nonmoving party. *Id.*

**ARGUMENT**

**I. Plaintiffs' Claims Are Justiciable.**

The government's threshold justiciability arguments lack merit. First, the government's decision to terminate DACA satisfies the predicates for APA review. Second, section 1252(g) of the Immigration and Nationality Act does not strip this Court of jurisdiction. Third, the states and local government plaintiffs, the University of California, and SEIU Local 521 have standing to challenge the Rescission.

**A. The Rescission Is Not an Unreviewable Act of Agency Discretion.**

The APA exists to ensure that "federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). Consistent with this purpose, the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. There is a "strong presumption favoring judicial review" of agency actions, and the government must carry a "heavy burden" to establish that Congress intended to preclude judicial review. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (internal quotation marks omitted); *see also Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) ("From the beginning our cases have established that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." (quotation marks and brackets omitted)).

Although judicial review is unavailable for agency actions that are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), this "very narrow exception" applies only in "rare instances." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *see also ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1071 (9th Cir. 2015) ("Section 701(a)(2) . . . has never been thought to put all exercises of discretion beyond judicial review.").

Section 701(a)(2) applies only where a court "would have no meaningful standard against which to judge the agency's exercise of discretion," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993), and there is "no law to apply," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Where, by contrast, there are "statutes, regulations, established agency policies, or judicial decisions that provide a meaningful standard against

1 which to assess” agency action, section 701(a)(2) does not bar judicial review. *Mendez-Gutierrez v.*  
2 *Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003).

3 In *Batalla Vidal*, the court considered the government’s section 701(a)(2) argument and rejected  
4 it, finding that “there is ‘law to apply,’ permitting meaningful judicial review of Plaintiffs’ statutory  
5 claims.” 2017 WL 5201116, at \*9. As in *Batalla Vidal*, plaintiffs here assert procedural APA claims for  
6 which “the relevant ‘law to apply’ is found in the APA and Regulatory Flexibility Act themselves, both  
7 of which specify procedures that agencies must follow when engaging in ‘substantive’ or ‘legislative’  
8 rulemaking.” *Id.* (citing 5 U.S.C. §§ 553, 604). After all, the “process by which an agency makes a rule  
9 may be reviewed for compliance with applicable procedural requirements regardless of whether the  
10 substance of the rule is itself reviewable.” *Id.* (citing *Vigil*, 508 U.S. at 195-98; *Am. Med. Ass’n v. Reno*,  
11 57 F.3d 1129, 1134 (D.C. Cir. 1995); *N.Y.C. Emps.’ Ret. Sys. v. SEC*, 45 F.3d 7, 11 (2d Cir. 1995)).

12 There also is “law to apply” to plaintiffs’ substantive APA claims, since the purported  
13 justification for the Rescission was a legal one—the legality of DACA or the “litigation risk” associated  
14 with its continuation. Rescission Memo, AR 254; *see also* Sessions Letter, AR 251. The Court may  
15 assess this justification “in light of, among other sources, the text of the INA and other statutes, the  
16 history of the use of deferred action by immigration authorities, and the OLC Opinion” concluding that  
17 DACA was lawful. *Batalla Vidal*, 2017 WL 5201116, at \*10; *see also Alcaraz v. INS*, 384 F.3d 1150,  
18 1161 (9th Cir. 2004) (concluding that the “various memoranda” used by the Immigration and  
19 Naturalization Service to implement an otherwise discretionary policy provided sufficient “law to  
20 apply”); *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (reviewing  
21 and rejecting agency’s position based on assessment of litigation risk). Moreover, because the  
22 Rescission is an agency’s termination of its own program, the DACA Memorandum itself supplies a  
23 relevant benchmark in the analysis of whether the agency’s reversal of course was reasonable and  
24 reasonably explained. *See Robbins v. Reagan*, 780 F.2d 37, 47 (D.C. Cir. 1985) (distinguishing *Chaney*  
25 and explaining that “[r]escissions of prior obligations [are] clearly” reviewable).

26 Furthermore, where, as here, plaintiffs assert that agency action is “contrary to constitutional  
27 right,” 5 U.S.C. § 706(2)(B), the Constitution itself provides law to apply. *See Grace Towers Tenants*  
28 *Ass’n v. Grace Hous. Dev. Fund Co.*, 538 F.2d 491, 496 (2d Cir. 1976) (commitment to agency

1 discretion does not preclude review of “compliance with constitutional and statutory demands”); *Nat’l*  
2 *Fed’n of Fed. Emps. v. Weinberger*, 818 F.2d 935, 942 n.11 (D.C. Cir. 1987) (“there is ‘clearly law to  
3 apply’—the Constitution”). Indeed, the Supreme Court has recognized that judicial review of  
4 constitutional claims is available even if an agency action is “committed to agency discretion” pursuant  
5 to section 701(a)(2). *See, e.g., Webster v. Doe*, 486 U.S. 592, 601-03 (1988); *Padula v. Webster*, 822  
6 F.2d 97, 101 (D.C. Cir. 1987); *see also Batalla Vidal*, 2017 WL 5201116, at \*11.

7 The government ignores these sources of law and relies on *I.C.C. v. Bhd. of Locomotive Eng’rs*  
8 (*BLE*), 482 U.S. 270, 283 (1987), in which the Court concluded that section 701(a)(2) precludes review  
9 even when “the agency gives a ‘reviewable’ reason for otherwise unreviewable action.” Opening Br.  
10 14, 16-17 (Dkt. No. 114). But *BLE* stands only for the unremarkable proposition that a categorically  
11 unreviewable agency action, such as an individualized non-prosecution decision, does not become  
12 reviewable merely because it rests on a “reviewable” basis, such as a determination that the conduct at  
13 issue might be lawful. 482 U.S. at 282-83. Because the Rescission is a reviewable type of government  
14 action in the first place, *BLE* is inapplicable. *See Batalla Vidal*, 2017 WL 5201116, at \*10 (the  
15 government’s *BLE* argument “simply begs the question . . . of whether the decision to rescind DACA is  
16 actually unreviewable”).<sup>3</sup>

17 The government’s argument that the Rescission is a “classic example of a discretionary  
18 determination that is entrusted to the agency alone,” Opening Br. 16, rests heavily on *Heckler v. Chaney*,  
19 470 U.S. 821, but that case does not govern here. In *Chaney*, plaintiff prison inmates sought to require  
20 the FDA to take enforcement actions to preclude the use of certain drugs in human executions. *Id.* at  
21 823–25, 830–33. The Supreme Court found the FDA’s non-enforcement decision to be non-justiciable,  
22 because decisions *not* to take enforcement actions (1) do not implicate the agency’s exercise of  
23

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24 <sup>3</sup> The government also cites *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987), in which  
25 the court considered whether a set of agency “operating instructions” was properly promulgated. But  
26 the court in that case did not decline jurisdiction under section 701(a)(2); it instead considered a  
27 procedural APA claim on the merits. *See id.* at 1015. *Perales v. Casillas*, 903 F.2d 1043 (5th Cir.  
28 1990), relies on a dated, out-of-circuit rule limiting APA review to cases involving interpretation of  
“statutory or regulatory provisions,” a principle rejected by the Fifth Circuit itself in *Texas v. United*  
*States*, 787 F.3d 733, 761 (5th Cir. 2015).

1 “coercive power of an individual’s liberty or property rights, and thus do[] not infringe upon areas that  
2 courts often are called to protect,” *id.* at 832, and (2) “often involve[] a complicated balancing of a  
3 number of factors which are peculiarly within [the agency’s] expertise,” *id.* at 831. Accordingly, courts  
4 have limited *Chaney* to (3) “individual, case-by-case determinations of when to enforce existing  
5 regulations rather than permanent policies or standards.” *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th  
6 Cir. 1996). None of these factors applies here.

7 *First*, *Chaney* involved a challenge to an “agency’s refusal to take requested enforcement  
8 action.” 470 U.S. at 831. The government’s rescission of DACA, by contrast, is an affirmative act that  
9 *revokes* the availability of prosecutorial discretion and subjects hundreds of thousands of DACA  
10 recipients to the prospect of removal—an indisputable exercise of “coercive state authority.” *See*  
11 *Batalla Vidal*, 2017 WL 5201116, at \*11; *Villa-Anguiano v. Holder*, 727 F.3d 873, 881 n.9 (9th Cir.  
12 2013) (“In contrast [to *Chaney*], where, as here, an agency has taken or is proposing to take action, that  
13 action itself provides a focus for judicial review.”) (internal quotation marks omitted); *Robbins*, 780  
14 F.2d at 47 (“rescissions of commitments, whether or not they technically implicate liberty and property  
15 interests as defined under the fifth and fourteenth amendments, exert much more direct influence on the  
16 individuals or entities to whom the repudiated commitments were made”).

17 *Second*, the Rescission involves none of the “complicated balancing of a number of factors” that  
18 rendered the non-enforcement decision in *Chaney* unreviewable. The Rescission appears to rest only on  
19 a determination that DACA was either unlawful or would result in intolerable litigation risk, with no  
20 assessment of any other factors. As the *Batalla Vidal* court explained, “Defendants stated that they were  
21 required to rescind the DACA program because it was unlawful, which suggests both that Defendants  
22 did not believe that they were exercising discretion when rescinding the program and that their reasons  
23 for doing so are within the competence of this court to review.” 2017 WL 5201116, at \*11.

24 *Third*, the Rescission is not an individualized enforcement decision like in *Chaney*—it is a  
25 decision to rescind an entire program that will affect hundreds of thousands of individuals, families, and  
26 communities. None of the plaintiffs are challenging the government’s decision to grant or deny DACA  
27 to any particular individual. Thus, defendants’ argument that grants or “denials of deferred action  
28 are . . . committed to agency discretion,” Opening Br. 15–16, is inapposite.

1 An agency’s “major policy decision” is “quite different from day-to-day agency nonenforcement  
2 decisions,” and the “appropriate starting point” in such a case is the “APA presumption of  
3 reviewability.” *Nat’l Treasury Emps. Union v. Horner*, 854 F.2d 490, 496-97 (D.C. Cir. 1988).  
4 Because programmatic decisions do not involve “the sort of mingled assessments of fact, policy, and  
5 law that drive an individual enforcement decision,” *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d  
6 671, 676-77 (D.C. Cir. 1994), they do not present *Chaney*’s concern that courts should avoid intrusion  
7 into such decisions.

8 Judged against these standards, the Rescission is unquestionably programmatic and justiciable.  
9 Using categorical terms, the Rescission requires that DHS “reject all DACA initial requests and  
10 associated applications for Employment Authorization Documents filed after [September 5, 2017],” and,  
11 after October 5, 2017, reject all “DACA renewal requests and associated applications for Employment  
12 Authorization Documents.” AR 255. The Rescission also prohibits the approval of “any” applications  
13 for advance parole “under standards associated with the DACA program” and requires DHS to  
14 “administratively close all pending . . . applications.” *Id.* Through these pronouncements, the  
15 Rescission operates as an “affirmative decision to constrain DHS’s prosecutorial discretion,” *Batalla*  
16 *Vidal*, 2017 WL 5201116, at \*11, that does not resemble the individualized, fact-specific exercise of  
17 non-enforcement discretion the Supreme Court found unreviewable in *Chaney*. *See* 470 U.S. at 831-85.  
18 Courts reviewing programmatic decisions like the Rescission routinely find that there is law to apply  
19 and conduct APA review. *See Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) (reviewing  
20 statement of EPA enforcement policy regarding storage of toxic waste); *Nat’l Wildlife Fed’n v. EPA*,  
21 980 F.2d 765, 772–75 (D.C. Cir. 1992) (reviewing “a facial challenge” to enforcement regulations, in  
22 contrast to “a particular enforcement decision”); *Int’l Longshoremen’s & Warehousemen’s Union v.*  
23 *Meese*, 891 F.2d 1374, 1378–79 (9th Cir. 1989) (permitting judicial review of advisory opinion and  
24 policy statement because they were based on agency’s interpretation of its organic statute).

25 Finally, the government contends that the *Chaney* “presumption of nonreviewability applies with  
26 particular force when it comes to immigration.” Opening Br. 15, 17. But “the Supreme Court has  
27 repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over  
28 immigration.” *Washington v. Trump*, 847 F.3d at 1162; *see INS v. St. Cyr*, 533 U.S. 289, 298 (2001)

1 (applying “strong presumption in favor of judicial review of administrative action” in the immigration  
2 context). Although immigration enforcement involves agency discretion, so do many other  
3 administrative actions. Indeed, the mandate of the APA is for courts to overturn actions that are  
4 “arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with law.” 5 U.S.C.  
5 § 706(2)(A) (emphasis added); *see ASSE*, 803 F.3d at 1071 (“The [APA’s] abuse of discretion  
6 standard . . . is a standard of review, not a bar to review.”). Accordingly, courts routinely conduct APA  
7 review in the immigration context. *See Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (reviewing  
8 BIA’s denial of *sua sponte* reopening for legal and substantive error); *Taslimi v. Holder*, 590 F.3d 981,  
9 984 (9th Cir. 2010) (reviewing BIA’s interpretation of regulatory standard in asylum case). Indeed,  
10 courts have on several occasions conducted APA review of decisions to create or abandon immigration  
11 deferred action programs. *See, e.g., Noel v. Chapman*, 508 F.2d 1023, 1030–31 (2d Cir. 1975) (rejecting  
12 application of section 701(a)(2) and considering substantive and procedural APA challenges to  
13 rescission of program permitting immigration officials to suspend indefinitely the voluntary departure  
14 date of certain categories of aliens); *U.S. ex rel. Parco v. Morris*, 426 F. Supp. 976, 983 (E.D. Pa. 1977)  
15 (considering substantive and procedural APA challenges to cancellation of extended voluntary departure  
16 program).<sup>4</sup>

17 **B. Section 1252(g) of the INA Does Not Bar Judicial Review of This Case.**

18 The government also argues that section 1252(g) of the INA, which provides that “no court shall  
19 have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or  
20 action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders,”  
21 strips this Court of jurisdiction to hear this case. Opening Br. 18. As this Court correctly ruled in  
22 denying the government’s stay motion, however, this contention is wholly without merit. *See Order re*  
23 *Mot. to Stay Proceedings*, at 2 (Dkt. No. 85) (“section 1252(g)] has been ‘narrowly construed’ and is  
24 plainly inapplicable to this action”). Judge Garaufis similarly rejected the government’s argument that  
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26 <sup>4</sup> Contrary to the government’s assertion, Opening Br. 38, *Yassini v. Crosland* assumed that group  
27 immigration decisions were subject to APA review, 618 F.2d 1356 (9th Cir. 1980), but found that the  
28 “good cause” and “foreign affairs” exceptions to the APA applied with respect to the particular program  
at issue.

1 section 1252(g) strips the court of jurisdiction to hear a challenge relating to DACA’s rescission.  
2 *Batalla Vidal*, 2017 WL 5201116, at \*12 (“Plaintiffs bring broad, programmatic challenges to  
3 Defendants’ decisions (1) to end the DACA program; (2) to provide limited notice of that decision to  
4 DACA recipients; and (3) to change DHS’s information-use policy. None of those constitutes a  
5 ‘decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders against  
6 any alien.’”).

7 Jurisdiction-stripping provisions like section 1252(g) must be construed narrowly, and “only  
8 upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts  
9 restrict access to judicial review.” *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 718 (9th Cir.  
10 2011) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967)). Section 1252(g) therefore  
11 should be limited to its terms: it applies only to a “‘decision or action’ to ‘commence proceedings,  
12 adjudicate cases, or execute removal orders.’” *Reno v. American-Arab Anti-Discrimination Comm.*, 525  
13 U.S. 471, 482 (1999) (quoting 8 U.S.C. § 1252(g)). This lawsuit involves none of the discrete decisions  
14 addressed by section 1252(g). Plaintiffs do not challenge the government’s decision to commence  
15 proceedings against any individual, to adjudicate a case against any individual, or to execute a removal  
16 order against any individual. Instead, plaintiffs challenge the government’s decision to rescind a  
17 deferred action program.

18 The government attempts to avoid the plain text of section 1252(g) by arguing that the  
19 Rescission is an “ingredient” to the commencement of enforcement proceedings at some future date, and  
20 that plaintiffs cannot “singl[e] out that single step for preemptive challenge.” Opening Br. 19. But that  
21 argument is foreclosed by *AADC*. 525 U.S. at 482. There, the Supreme Court resolved an apparent  
22 conflict between section 1252(g) and another provision of the INA by rejecting the government’s  
23 argument that section 1252(g) was “a sort of ‘zipper’ clause that says ‘no judicial review in deportation  
24 cases unless this section provides judicial review.’” *Id.* Instead, the Court held that “[t]he provision  
25 applies only to [the] three discrete actions” specifically identified in the text. *Id.* While “[t]here are of  
26 course many other decisions or actions that may be part of the deportation process,” the Court found that  
27 “[i]t is implausible that the mention of three discrete events along the road to deportation was a  
28

1 shorthand way of referring to all claims arising from deportation proceedings.” *Id.* The government’s  
2 argument relies on precisely this type of improper “shorthand.”

3 The decision in *Batalla Vidal* is only the latest in a long line of cases rejecting the government’s  
4 invocation of section 1252(g) to block challenges to enforcement policies. *See Catholic Soc. Servs., Inc.*  
5 *v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (concluding that section 1252(g) does not limit jurisdiction  
6 to grant injunctive relief in a class action challenging the INS’s advance parole policy); *Walters v. Reno*,  
7 145 F.3d 1032, 1052 (9th Cir. 1998) (“By its terms, [section 1252(g)] does not prevent the district court  
8 from exercising jurisdiction over plaintiffs’ due process claims [because such claims] constitute ‘general  
9 collateral challenges to unconstitutional practices and policies used by the agency.’”); *Ramirez Medina*  
10 *v. U.S. Dep’t of Homeland Sec.*, No. 17-0218, 2017 WL 5176720, at \*8 (W.D. Wash. Nov. 8, 2017)  
11 (concluding that section 1252(g) does not strip the court of jurisdiction over claim that defendants did  
12 not follow their own policies and procedures).<sup>5</sup> Even the Fifth Circuit in *Texas* found that section  
13 1252(g) did not apply to a challenge to a programmatic decision of DHS, there the DAPA program.  
14 *Texas v. United States (Texas II)*, 809 F.3d 134, 164 (5th Cir. 2015) (although Congress had “expressly  
15 limited or precluded judicial review of many immigration decisions, including some that are made in the  
16 Secretary’s ‘sole and unreviewable discretion,’ [] DAPA is not one of them”). This Court has  
17 jurisdiction to conduct judicial review.

### 18 C. The Entity Plaintiffs Have Standing.

19 The government does not challenge the standing of the individual plaintiffs, but does challenge  
20 the standing of the states and local governments, the University of California, and SEIU Local 521 (the  
21 “entity plaintiffs”). A party establishes standing by showing “a concrete and particularized injury that is  
22

23 <sup>5</sup> Consistent with the presumption in favor of judicial review, courts have declined to apply section  
24 1252(g) even to many kinds of *individual* determinations. *See Kwai Fun Wong v. United States*, 373  
25 F.3d 952, 963-64 (9th Cir. 2004) (rejecting the government’s argument that section 1252(g) forecloses  
26 the Court’s review of challenges to an individual’s claims arising before a decision to commence  
27 proceedings against the individual); *Gonzales Torres v. U.S. Dep’t of Homeland Sec.*, No. 17-1840,  
28 2017 WL 4340385, at \*4 (S.D. Cal. Sept. 29, 2017) (section 1252(g) does not bar judicial review of  
whether the termination of an individual’s DACA grant complied with the DACA Standard Operating  
Procedures); *Coyotl v. Kelly*, No. 17-1670, 2017 WL 2889681, at \*9 (N.D. Ga. June 12, 2017) (section  
1252(g) does not bar judicial review of whether defendants complied with their own procedures in  
revoking plaintiff’s DACA grant).

1 either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a  
2 favorable decision will redress that injury.” *Washington v. Trump*, 847 F.3d at 1159 (quoting  
3 *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007)). Although standing must be assessed claim by claim,  
4 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), the presence of any plaintiff with standing is  
5 sufficient to confer jurisdiction on this Court. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (standing  
6 of one plaintiff in consolidated cases sufficient to satisfy Article III); *Sec’y. of the Interior v. California*,  
7 464 U.S. 312, 376 (1984) (same); *see also Batalla Vidal*, 2017 WL 5201116, at \*14 (applying the same  
8 rule in related cases). Because the government does not dispute that the individual plaintiffs in the  
9 *Garcia* action have standing to assert all of the claims at issue, the challenge to the standing of the entity  
10 plaintiffs is irrelevant.

11 Moreover, in nearly identical circumstances, the Ninth Circuit has recently affirmed the standing  
12 of government and university entities to challenge federal immigration policy affecting them. *See*  
13 *Washington v. Trump*, 847 F.3d at 1151. As Judge Garaufis found in *Batalla Vidal*, the Rescission’s  
14 “sweeping, adverse effects on states and state-run institutions” supports the standing of these plaintiffs  
15 to sue. 2017 WL 5201116, at \*17. For the reasons set forth below, the government, university, and  
16 union plaintiffs have standing to pursue their claims.

17 **States and local governments.** The states and local governments have clear injury resulting  
18 from the rescission of DACA. First, California, Maryland, San Jose, and the County of Santa Clara—all  
19 of which employ DACA recipients—will be directly injured by the loss of work authorization for their  
20 employees. *States* Compl. ¶¶ 26-27, 32, 53 (Case No. 17-cv-05235); *San Jose* Compl. ¶¶ 49-50 (Case  
21 No. 17-cv-05329); *Cnty. of Santa Clara* Compl. ¶ 32 (Case No. 17-cv-05813); *see also* App. at 0706-07  
22 (Lee Decl. ¶¶ 3-6); App. at 0011 (Aguilar Decl. ¶ 6); App. at 1575-76 (Wells Decl. ¶ 11); App. at 0096-  
23 07 (Oakley Decl. ¶ 8); App. at 0095-97 (Carrizales Decl. ¶¶ 8-11); App. at 0798 (Melvoin Decl. ¶¶ 16-  
24 17). As a direct result of the Rescission, these plaintiffs will be forced to forfeit their investment in  
25 hiring, training, and managing DACA employees (many of whom were hired because of specialized  
26 skills or qualifications) and to expend additional resources to find, hire, and train replacement  
27 employees. *States* Compl. ¶¶ 32, 53; App. at 0706-07 (Lee Decl. ¶¶ 5-6).

1 Second, the states and local government plaintiffs will lose significant tax revenue. *States*  
 2 Compl. ¶¶ 28-30, 37, 49-50, 70-71; *San Jose* Compl. ¶ 51; *Cnty. of Santa Clara* Compl. ¶¶ 43-44. One  
 3 expert projects that California will suffer more than \$71 billion in economic losses and \$19 billion in  
 4 fiscal costs over a 10-year window as a result of the Rescission. App. at 0073 (Brannon Decl. ¶ 14).  
 5 Employers throughout the plaintiff states—including small businesses, nonprofits, public entities, and  
 6 large companies such as Apple and Univision—rely on the contributions of DACA recipients. *States*  
 7 Compl. ¶¶ 31, 39, 72; *San Jose* Compl. ¶¶ 28-29; *of Santa Clara* Compl. ¶ 41; *see also* App. at 1071  
 8 (O’Brien Decl. ¶¶ 5-8); App. at 1334-36 (Schwartz Decl. ¶¶ 4, 7-9); App. at 0706 (Lee Decl. ¶¶ 3-5);  
 9 App. at 1455 (Tellefson Decl. ¶ 11); App. at 0028 (Arevalo Decl. ¶ 11); App. at 1302 (Salas Decl. ¶ 19);  
 10 App. at 1268 (J. Smith Decl. ¶ 8); App. at 1289 (Rosen Decl. ¶ 7); App. at 0060 (Blazar Decl. ¶¶ 3-5);  
 11 App. at 1557-58 (Yaffe Decl. ¶¶ 7-8).<sup>6</sup>

12 Third, the state and local government plaintiffs allege injury to their sovereign and quasi-  
 13 sovereign interests.<sup>7</sup> The state and local governments have an interest in the physical and mental health  
 14

15 <sup>6</sup> Although vague allegations of economic harm do not support standing, *see Wyoming v.*  
 16 *Oklahoma*, 502 U.S. 437, 448 (1992), the specific allegations here, supported by expert evidence, are  
 17 clearly sufficient. *See Alabama v. U.S. Army Corps of Eng’rs*, 424 F.3d 1117, 1130 (11th Cir. 2005)  
 18 (downstream environmental and economic effects of federal mismanagement are sufficient to grant  
 19 states standing against the federal government); App. at 0906-07 (Oakley Decl. ¶¶ 8, 10); App. at 1574-  
 20 76 (Wells Decl. ¶¶ 4, 6, 11).

21 <sup>7</sup> The government argues that *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923), and *Snapp*  
 22 *& Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982), prevent states from bringing *parens*  
 23 *patriae* actions against federal defendants. Opening Br. 21 n.6. Plaintiffs need not rely on *parens*  
 24 *patriae* standing where, as here, the government’s conduct imposes direct injury on plaintiffs and their  
 25 employees and students. *Hawaii v. Trump*, 859 F.3d 741, 765 (9th Cir. 2017), *vacated on other grounds*  
 26 *by Trump v. Hawaii*, No. 16-1540, 2017 WL 4782860, at \*1 (S. Ct. Oct. 24, 2017). In any event, the  
 27 Supreme Court has rejected the view that *Mellon* and *Snapp* “cast significant doubt on a State’s standing  
 28 to assert a quasi-sovereign interest . . . against the Federal Government,” *Massachusetts v. EPA*, 549  
 U.S. at 520 n.17, observing that “*Mellon* itself disavowed any such broad reading when it noted that the  
 Court had been ‘called upon to adjudicate, not the rights of person or property, not rights of dominion  
 over physical domain, [and] *not quasi-sovereign rights actually invaded or threatened.*’” *Id.* (quoting  
*Mellon*, 262 U.S. at 484-85) (emphasis original). Moreover, courts have repeatedly held that states may  
 rely on their *parens patriae* standing where, as here, they sue the federal government “to enforce a  
 federal statute and to enjoin agency action allegedly in contravention of that statute.” *Abrams v.*  
*Heckler*, 582 F. Supp. 1155, 1160 (S.D.N.Y. 1984); *see, e.g., Am. Rivers v. FERC*, 201 F.3d 1186, 1205  
 (9th Cir. 1999) (standing to enforce provisions of the Federal Power Act); *Aziz v. Trump*, 231 F. Supp.

1 of their residents, including their access to health care. By providing work authorization, DACA has  
2 improved access to employer-based health care, which helps reduce health costs for the states' residents  
3 as a whole. *States Compl.* ¶¶ 51, 62; *Cnty. of Santa Clara Compl.* ¶¶ 45-46, 50; *see also App.* at 0789-  
4 90 (McLeod Decl. ¶¶ 2, 4). Termination of DACA, including the concern that information supplied to  
5 the government as part of the DACA application will be misused for enforcement purposes, threatens  
6 direct harm to DACA recipients' mental and physical health, with corresponding impacts to plaintiff  
7 states and local governments' public health programs. *States Compl.* ¶¶ 24, 63; *Cnty. of Santa Clara*  
8 *Compl.* ¶ 50; *see also App.* at 0815-16 (Mendoza Decl. ¶¶ 6-8). The Rescission also threatens to erode  
9 the public safety benefits that followed when DACA removed a significant obstacle to immigrants  
10 approaching law enforcement for assistance when they have been victimized by crimes or have  
11 witnessed crimes. Without such protection, victims and witnesses may be dissuaded from reporting,  
12 thereby frustrating the state and local government plaintiffs' ability to enforce their criminal laws.  
13 *States Compl.* ¶ 23; *Cnty. of Santa Clara Compl.* ¶¶ 51-52; *see also App.* at 0343 (Gascón Decl. ¶ 12);  
14 *App.* at 1289 (Rosen Decl. ¶ 8); *App.* at 1119 (O'Malley Decl. ¶¶ 14-15).

15 In addition to their proprietary standing, the states and San Jose also claim third-party standing to  
16 assert the rights of their employees. *San Jose Compl.* ¶ 10; *States Compl.* ¶¶ 32, 53. *See also, e.g.,*  
17 *Clark v. City of Lakewood*, 259 F.3d 996, 1009–1011 (9th Cir. 2001) (employer has third-party standing  
18 to assert employees' constitutional rights where their interests are sufficiently aligned). This Court has  
19 recognized that individual DACA recipients reasonably may be reticent to bring these claims directly for  
20 fear of publicly exposing the details of their immigration status and experience in the immigration  
21 system. Order Re Anonymity, at 2 (Dkt. No. 181). As a result, the states and San Jose bring claims to  
22 effectuate their employees' rights.

23  
24  
25 3d 23, 32-33 (E.D. Va. 2017) (states have sufficiently pleaded both propriety and *parens patriae*  
26 standing to challenge defendants' "travel ban"); *Kansas ex rel. Hayden v. United States*, 748 F. Supp.  
27 797, 802 (D. Kan. 1990) (plaintiffs have standing to enforce provisions of the federal Disaster Relief  
28 Act); *cf. Texas v. United States*, 86 F. Supp. 3d 591, 626 (S.D. Tex. 2015) (observing that states may  
rely on *parens patriae* against the federal government "to enforce the rights guaranteed by a federal  
statute"); *Massachusetts v. EPA*, 549 U.S. at 520 n.17 (observing that a state has standing "to assert its  
rights under federal law").

1 Finally, in *Washington v. Trump*, the Ninth Circuit recognized state government standing where  
 2 there was a “concrete and particularized injury to [] public universities, which the parties do not dispute  
 3 are branches of the States under state law.” 847 F.3d at 1159. Because, as set forth below, the  
 4 University of California also has such injuries here, it follows a fortiori that the state plaintiffs have  
 5 standing as well.

6 **The University of California.** The University of California has both proprietary standing based  
 7 on harm to the University itself, and third-party standing based on harm to its students and faculty.

8 The University of California has established significant proprietary injuries supporting its  
 9 standing. Just like the travel ban at issue in *Washington v. Trump*, the rescission of DACA, including its  
 10 abolition of advance parole, has rendered University students unable to travel internationally for  
 11 research and educational conferences. *UC Compl.* ¶ 38; *see also, e.g.*, App. at 1322-23 (Sati Decl.  
 12 ¶¶ 39-41). Multiple DACA recipients have already decided to cancel their enrollment at the university  
 13 because the Rescission forecloses their ability to work during and after their education. App. at 0512-13  
 14 (Holmes-Sullivan Decl. ¶ 18). Existing DACA students are at risk of dropping out because the  
 15 Rescission will cause them to lose the jobs that fund their education. App. at 0890 (Napolitano Decl. ¶  
 16 15); App. at 0513 (Holmes-Sullivan Decl. ¶ 19). For the University, losing these students also means  
 17 losing research assistants, instructors, and collaborators, which will impair ongoing academic work. *UC*  
 18 *Compl.* ¶ 4, 35; App. at 0006-07 (Abrams Decl. ¶ 13); App. at 0633-34 (Jones Decl. ¶¶ 6-11); App.  
 19 1462-63 (Treseder Decl. ¶ 16); App. at 0066 (Braddock Decl. ¶ 6). This harm to research injures the  
 20 University itself, whose reputation “depend[s] on the success of [its] professors’ research.” *UC Compl.*  
 21 ¶ 34-35; *Washington v. Trump*, 847 F.3d at 1160.<sup>8</sup>

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22  
 23  
 24 <sup>8</sup> The government asserts in a footnote that it is “unclear” whether both the University of  
 25 California and the State of California can sue based on injuries to the University. Opening Br. 21 n.5.  
 26 There is no principle of standing that precludes multiple plaintiffs from suing on related injuries, and in  
 27 any event the states can readily establish standing based on injuries to other state-run educational  
 28 institutions, including the California State University, California Community Colleges, St. Mary’s  
 College of Maryland, the University of Minnesota, and the Minnesota State system. *States Compl.* ¶¶  
 27, 55, 64-66; App. at 1500-01 (Jordan Decl. ¶¶ 7, 10); App. at 0021 (R. Anderson Decl. ¶¶ 5, 7); App.  
 at 0906-07 (Oakley Decl. ¶¶ 8, 10); App. at 1574-76 (Wells Decl. ¶¶ 4, 6, 10).

1 The University also has third-party standing to assert the interests of its more than 1,000 DACA  
2 students, who are clearly injured by the Rescission. Litigants that have suffered injury in fact, as the  
3 University has here, are permitted to bring actions on behalf of third parties when there is a close  
4 relationship with the third party and there is a hindrance to the third party's ability to protect his or her  
5 own interest. *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991); *Sessions v. Morales-Santana*, 137 S. Ct.  
6 1678, 1689 (2017). Schools regularly have been permitted to assert the rights of their students. *Parks*  
7 *Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487–88 (9th Cir. 1995) (college had standing to assert  
8 the rights of its students, who were being prevented from attending school); *Heartland Acad. Cmty.*  
9 *Church v. Waddle*, 427 F.3d 525, 533 (8th Cir. 2005) (school had standing to assert rights of removed  
10 students); *Runyon v. McCrary*, 427 U.S. 160, 175 & n.13 (1976) (“It is clear that the schools have  
11 standing to assert these arguments . . . on behalf of their patrons.”); *Ohio Ass’n of Indep. Sch. v. Goff*, 92  
12 F.3d 419, 422 (6th Cir. 1996) (same).

13 The University plainly has a close relationship with its DACA students sufficient to support  
14 third-party standing. See *Washington v. Trump*, 847 F.3d at 1160 (the “interests of the States’  
15 universities are aligned with their students,” as the educational success of students is “inextricably  
16 bound up” with the universities’ capacity to teach those students). And DACA students are hindered in  
17 their ability to bring suit on their own behalf because of their precarious immigration situations. The  
18 Rescission has placed DACA students in fear of arrest and deportation. App at. 0510 (Holmes-Sullivan  
19 Decl. ¶ 10) (Rescission causing fear among DACA recipients that they will be deported and will be  
20 unable to continue their studies). The parents and family members of DACA students are often  
21 undocumented, creating an even greater impediment to DACA students’ assertion of their rights. App.  
22 at 2206, Topic 11. A reasonable desire to shield private information from the publicity of court  
23 proceedings has been recognized as sufficient justification for third-party standing. See *Singleton v.*  
24 *Wulff*, 428 U.S. 106, 117-18 (1976) (allowing physicians to bring suit to assert patients’ abortion rights).  
25 And in granting a request by a University of California student to participate anonymously in this case,  
26 the Court has already recognized that DACA recipients may be impaired in openly asserting their own  
27 rights. Order Re Anonymity (Dkt. No. 181). That leaves the University as a proper proponent of these  
28 students’ rights. See *Singleton*, 428 U.S. at 115-16.



1 *Indians v. Patchak*, 567 U.S. 209, 224 (2012)). The entity plaintiffs therefore may establish statutory  
2 standing based on a showing that their interests share a “plausible relationship” to the policies  
3 underlying the relevant legislation or Constitutional provision. *Ctr. for Biological Diversity v. Brennan*,  
4 571 F. Supp. 2d 1105, 1120 (N.D. Cal. 2007); *see also Ass’n of Data Processing Serv. Orgs., Inc. v.*  
5 *Camp*, 397 U.S. 150, 156 (1970) (“The question of standing . . . concerns . . . whether the interest sought  
6 to be protected by the complainant is arguably within the zone of interests to be protected or regulated  
7 by the statute or constitutional guarantee in question”); *Ray Charles Found. v. Robinson*, 795 F.3d 1109,  
8 1120 (9th Cir. 2015) (same); *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 861 (9th  
9 Cir. 2005). In applying this test, courts must resolve “any doubt” in the plaintiff’s favor, *id.*, and a  
10 plaintiff “need only be ‘arguably’ within the zone [of interests]” to establish standing. *Chief Prob.*  
11 *Officers of Cal. v. Shalala*, 118 F.3d 1327, 1331 n.2 (9th Cir. 1997). This “lenient approach” preserves  
12 “the APA’s omnibus judicial-review provision, which permits suit for violations of numerous statutes of  
13 varying character that do not themselves include causes of action for judicial review.” *Lexmark Int’l,*  
14 *Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014); *see also Camp*, 397 U.S. at 156  
15 (“we have construed [the APA] not grudgingly but as serving a broadly remedial purpose”).

16 The gravamen of plaintiffs’ statutory claims is whether the Rescission was a substantively or  
17 procedurally valid exercise of DHS’s rulemaking authority under the Immigration and Nationality Act;  
18 the INA is therefore the “relevant statute” within the meaning of 5 U.S.C. § 702. *See* Opening Br. 21.  
19 To the extent the entity plaintiffs rely on third-party standing to assert the rights of their employees and  
20 students who are DACA recipients, they satisfy the zone of interests test just as the individual *Garcia*  
21 plaintiffs do. The same is true of the Union, which stands in the shoes of its members, including  
22 individual DACA recipients and their family members.

23 Furthermore, the interests that support the entity plaintiffs’ Article III standing also satisfy the  
24 zone of interests test. *See Hawaii*, 859 F.3d at 765 (holding that the loss of student enrollment and  
25 research at universities conferred statutory standing on plaintiff states), *vacated on other grounds by*  
26 *Trump v. Hawaii*, 2017 WL 4782860, at \*1 (S. Ct. Oct. 24, 2017) (dismissed as moot); *see also Raduga*  
27 *USA Corp. v. U.S. Dep’t of State*, 440 F. Supp. 2d 1140, 1148 (S.D. Cal. 2005) (statutory standing  
28 granted based on harm to employers from delay in processing employees’ immigration status). These

1 interests are congruent with interests identified in the INA itself in its provisions for work and student  
2 visas. *See* 8 U.S.C. § 1101(a)(15)(J) (identifying students, scholars, trainees, teachers, professors,  
3 research assistants, specialists, or leaders in fields of specialized knowledge or skill); *id.* §  
4 1101(a)(15)(H) (identifying aliens coming to perform services in a specialty occupation); *id.* §  
5 1101(a)(15)(O) (identifying aliens with extraordinary abilities in the sciences, arts, education, business,  
6 or athletics). Similarly, consistent with the federal policy promoting “self-sufficiency” as a component  
7 of immigration policy, 8 U.S.C. § 1601, the INA confirms the states’ prerogative to provide employment  
8 authorization and educational opportunity for undocumented residents. *See Texas II*, 809 F.3d at 163;  
9 *see also* 8 U.S.C. §§ 1621(c), 1641(b)(5). Even the *Texas* court recognized “the importance of  
10 immigration policy to the states” in finding the zone of interests test satisfied there. 809 F.3d at 163.

11 The government’s lone citation to support its contention that the entity plaintiffs in this case do  
12 not fall within the INA zone of interests relates to a completely different type of plaintiff—a private  
13 anti-immigration organization—whose members were not individually affected by the immigration  
14 policy at issue. *See Fed’n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897 (D.C. Cir. 1996).  
15 That case has no bearing on the governmental interests at issue here, nor the interests of the University  
16 of California, the states and local governments, and SEIU Local 521 in asserting the interests of their  
17 affected employees, students, faculty, and union members.

18 The government’s argument that plaintiffs lack standing for their RFA claims is similarly  
19 meritless. The *Garcia* plaintiffs allege that Rescission threatens the small law firm Garcia has built,  
20 *Garcia Compl.* ¶¶ 54, 128, 185-191 (Case No. 17-cv-05380); *see also* App. at 0267-68 (Garcia Decl.  
21 ¶ 68). Plaintiff states have standing under the RFA to represent the interests of their political  
22 subdivisions, including school districts and other small government entities. *Cf. U.S. Telecomm. Ass’n*  
23 *v. F.C.C.*, 400 F.3d 29, 43 (D.C. Cir. 2005) (RFA claim brought by national association representing  
24 small carriers); *Michigan v. EPA*, 213 F.3d 663, 688 (D.C. Cir. 2000) (reaching merits of state’s RFA  
25 claim); *Michigan v. Thomas*, 805 F.2d 176, 188 (6th Cir. 1986) (same). Terminating DACA will  
26 adversely affect small governmental jurisdictions in the states, and its impact on small businesses  
27 generally will have a corresponding indirect effect on the states’ economies. *States Compl.* ¶¶ 4, 28, 49,  
28 88, 156-63; *see also* App. at 0267-68 (Garcia Decl. ¶ 68); App. at 0011 (Aguilar Decl. ¶¶ 1-8); App. at

0025-29 (Arevalo Decl. ¶¶ 1-2, 7-8, 11-14); App. at 1455 (Tellefson Decl. ¶ 11); App. at 1502-03 (Wong Decl. ¶ 16) (nearly 8 percent of DACA recipients ages 25 and older have started a business).

## II. Plaintiffs' Claims Are Adequately Pleaded.

### A. Plaintiffs Have Adequately Pleaded APA Claims.

Plaintiffs assert substantive and procedural APA claims. As set forth in plaintiffs' motion for provisional relief, Dkt. No. 111, both are adequately pleaded and likely to succeed on the merits.

#### 1. Plaintiffs Have Adequately Pleaded That the Rescission Was Arbitrary and Capricious Under the APA.

Plaintiffs have adequately pleaded that the Rescission was arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A).<sup>9</sup> The APA requires courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard requires agency action to be both reasonable and reasonably explained. *Robbins*, 780 F.2d at 47. As explained at length in plaintiffs' motion for provisional relief, the Rescission is neither. Dkt. No. 111, at 15-31. The Rescission is arbitrary and capricious and contrary to law because: (1) the government failed to explain the basis for the Rescission; (2) the government failed to consider all relevant factors and articulate a rational connection between the facts found and the decision made; (3) the government failed to offer a reasoned explanation for its reversal of policy; (4) the Rescission relies on a false legal premise; and (5) the announced reason for the Rescission was pretextual. *Id.* The Rescission is also contrary to law, and void under the APA, because it is unconstitutional. *See* Sections II.B-C.

#### 2. Plaintiffs Have Adequately Pleaded That the Rescission Is a Substantive Rule That Did Not Comply with the APA and RFA's Notice and Comment Requirements.

Plaintiffs also have adequately pleaded that the Rescission fails to meet the APA's procedural requirements.<sup>10</sup> As explained in plaintiffs' motion for provisional relief, the Rescission constitutes a substantive rule subject to the APA's notice and comment requirements, 5 U.S.C. § 553. *See* Dkt. No. 111, at 31-34. The Rescission is a substantive rule requiring notice and comment because it (a) binds

<sup>9</sup> This claim is asserted in Case Nos. 17-cv-05211, 17-cv-05235, 17-cv-05813, and 17-cv-05380.

<sup>10</sup> This claim is asserted in Case Nos. 17-cv-05211, 17-cv-05235, 17-cv-05329, and 17-cv-05380.

1 DHS and limits its discretion; (b) categorically bans DACA recipients from applying for and traveling  
2 on advance parole; and (c) appears to rest on a determination of law. *See Municipality of Anchorage v.*  
3 *United States*, 980 F.2d 1320, 1325 (9th Cir. 1992) (the ultimate question in identifying a substantive  
4 rule “is the agency’s intent to be bound”). In its motion to dismiss, the government effectively concedes  
5 that the Rescission is a substantive rule, stating that “[t]he rescission of DACA falls squarely in” the  
6 category of “policy-based deprivations of the interests of a class” because it “applies across-the-board to  
7 a large number of people.” Opening Br. 37-38. Under the APA, substantive rules, or repeals of rules,  
8 must go through notice and comment rulemaking before they become effective. *San Diego Air Sports*  
9 *Ctr., Inc. v. FAA*, 887 F.2d 966, 971 (9th Cir. 1989). The Regulatory Flexibility Act further requires that  
10 notice and comment rulemaking include an assessment of the impact on small entities. 5 U.S.C. §  
11 604(a). Because the Rescission indisputably did not abide by any of these requirements, it must be set  
12 aside.

13 Plaintiffs’ procedural due process claim is an important complement to their procedural APA  
14 claim. As demonstrated in Section II.C.2 below, DACA recipients have constitutionally protected  
15 property and liberty interests, and plaintiffs allege that they have been deprived of these interests without  
16 due process of law.

17 Contrary to the government’s assertions, Opening Br. 37-38, plaintiffs do not contend that each  
18 individual affected by the Rescission has a right to an individualized hearing. However, they do contend  
19 that the notice and comment requirements of the APA provide a measure of due process to parties  
20 affected by the Rescission. As demonstrated above in Section I.A, cancellations of government  
21 programs—including extended voluntary departure programs, *see Parco*, 426 F. Supp. at 983—have  
22 been held to be subject to the APA’s notice and comment requirements. This result is consistent with a  
23 long line of cases holding that when a government agency issues a legislative rule that affects a large  
24 group of people such that individual notice and opportunity to be heard are infeasible, *Bi-Metallic Inv.*  
25 *Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915), procedural due process is satisfied by the  
26 type of notice and comment procedures afforded by section 553 of the APA. *See Nozzi v. Hous. Auth. of*  
27 *L.A.*, 806 F.3d 1178, 1190-98 (9th Cir. 2015) (20,000 recipients of Section 8 vouchers had a protected  
28 property interest in their housing benefits that gave them a procedural due process right to notice prior to

1 a policy change that would require them to pay higher rents); *Geneva Towers Tenants Org. v. Federated*  
 2 *Mortg. Inv'rs*, 504 F.2d 483, 492 (9th Cir. 1974) (tenants entitled to notice and an opportunity to submit  
 3 written comments on proposed rent increase in federally funded housing project); *Pickus v. U.S. Bd. of*  
 4 *Parole*, 543 F.2d 240, 245 (D.C. Cir. 1976) (“The general principle that notice and comment rule  
 5 making is constitutionally sufficient for policy decisions is applicable, at least in the absence of  
 6 extraordinary circumstances.”); *Thompson v. Washington*, 497 F.2d 626, 639 (D.C. Cir. 1973) (presence  
 7 of substantial constitutional claim to procedural due process “informed” court’s construction of statutory  
 8 procedures).

9 **B. Plaintiffs Have Adequately Pleaded Equal Protection Claims.**

10 The government ignores the applicable standard for evaluating plaintiffs’ equal protection claim  
 11 articulated in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), and  
 12 subsequent Ninth Circuit decisions. Instead, the government attempts to recast plaintiffs’ equal  
 13 protection claim as a selective prosecution claim. Opening Br. 32-35. But this case challenges a policy  
 14 decision to rescind the DACA program, not individual prosecution decisions, and plaintiffs have pleaded  
 15 facts showing discriminatory intent and discriminatory treatment that violate the Constitution’s equal  
 16 protection guarantee.<sup>11</sup>

17 Under *Arlington Heights*, a plaintiff must “produce direct or circumstantial evidence  
 18 demonstrating that a discriminatory reason more likely than not motivated the defendant and that the  
 19 defendant’s actions adversely affected the plaintiff in some way.” *Ave. 6E Invs., LLC v. City of Yuma*,  
 20 818 F.3d 493, 504 (9th Cir. 2016) (quoting *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d  
 21 1142, 1158 (9th Cir. 2013)). A plaintiff does not have to prove “that the discriminatory purpose was the  
 22 sole purpose of the challenged action, but only that it was a ‘motivating factor.’” *Arce v. Douglas*, 793  
 23 F.3d 968, 977 (9th Cir. 2015).

24 Plaintiffs’ factual allegations, which must be taken as true, establish each of *Arlington Heights*’  
 25 intent factors, recognized by the Ninth Circuit in *Arce*:

26 The Supreme Court articulated the following, non-exhaustive factors that a court should  
 27

28 <sup>11</sup> This claim is asserted in Case Nos. 17-cv-05235, 17-cv-05329, 17-cv-05813, and 17-cv-05380.

1 consider in assessing whether a defendant acted with discriminatory purpose: (1) the  
 2 impact of the official action and whether it bears more heavily on one race than another;  
 3 (2) the historical background of the decision; (3) the specific sequence of events leading to  
 the challenged action; (4) the defendant's departures from normal procedures or  
 substantive conclusions; and (5) the relevant legislative or administrative history.

4 793 F.3d at 977 (citing *Arlington Heights*, 429 U.S. at 266); *see also Ave. 6E Invs.*, 818 F.3d at 504.

5 Plaintiffs have pleaded facts establishing all five of these factors.

6 *First*, plaintiffs have alleged that “individuals of Mexican heritage, and Latinos . . . together  
 7 account for 93 percent of approved DACA applications.” *See, e.g., Garcia* Compl. ¶¶ 99, 100, 151.  
 8 Thus there is no question that “the impact of the official action . . . bears more heavily on one race than  
 9 another.” *Arce*, 793 F.3d at 977 (citing *Arlington Heights*, 429 U.S. at 266).

10 *Second*, plaintiffs allege that “[t]he historical background of the decision” to rescind DACA  
 11 shows invidious discriminatory animus against Mexican and other Latino immigrants. *Garcia* Compl.  
 12 ¶¶ 99, 100, 151; *see also Pac. Shores Props.*, 730 F.3d at 1159. Because “officials . . . seldom, if ever,  
 13 announce . . . that they are pursuing a particular course of action because of their desire to discriminate  
 14 against a racial minority,” it is appropriate to examine “whether they have ‘camouflaged’ their intent.”  
 15 *Arce*, 793 F.3d at 978 (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064, 1066 (4th Cir. 1982));  
 16 *see also Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 641 F. Supp. 2d 563, 571  
 17 (E.D. La. 2009) (“The references to ‘ghetto,’ ‘crime,’ ‘blight,’ and ‘shared values’ are similar to the  
 18 types of expressions that courts in similar situations have found to be nothing more than ‘camouflaged  
 19 racial expressions.’”).

20 Here, the “pattern of bias against Mexicans and Latinos” began with President Trump’s pre-  
 21 election statements. Among other things, he characterized Mexican immigrants as “rapists,” “killers,”  
 22 and criminals, including in the speech launching his campaign.<sup>12</sup> *Garcia* Compl. ¶¶ 101-03, 109; *see*  
 23 *also Washington v. Trump*, 847 F.3d at 1167 (allegations concerning President’s statements support  
 24

25 <sup>12</sup> The Ninth Circuit has considered President Trump’s statements as evidence of discriminatory  
 26 intent, indicating that “[i]t is well established that evidence of purpose beyond the face of the challenged  
 27 law may be considered in evaluating . . . Equal Protection Clause claims.” *Washington v. Trump*, 847  
 28 F.3d at 1167; *see also Aziz v. Trump*, 234 F. Supp. 3d 724, 734–35 (E.D. Va. 2017) (considering  
 President Trump’s statements regarding the “travel ban” as part of the historical context of the order,  
 which “can include statements by relevant policymakers”).

1 claim of discriminatory intent); *Garcia* Compl. ¶¶ 101–09. This pattern of discriminatory statements  
 2 continued after he took office. *See Garcia* Compl. ¶¶ 110–12. And at a rally in Arizona on August 22,  
 3 2017—at the time the administration was deliberating the rescission of DACA—President Trump  
 4 described unauthorized immigrants as “animals” who bring “the drugs, the gangs, the cartels, the crisis  
 5 of smuggling and trafficking.” *Garcia* Compl. ¶ 111. Within days of that speech, he pardoned  
 6 Maricopa County Sheriff Joseph Arpaio, who had been convicted of criminal contempt for intentionally  
 7 disobeying a federal court order to end a “pervasive culture of discriminatory bias against Latinos.” *Id.*  
 8 ¶ 112. The President stated that Sheriff Arpaio had been “convicted for doing his job.” *Id.*<sup>13</sup>

9 The government argues that President Trump’s statements “have no connection” to the  
 10 Rescission because he has “show[n] support for DACA recipients.” Opening Br. 34. But despite  
 11 President Trump’s occasional statements of reassurance to DACA recipients, he has also frequently  
 12 voiced animus against Mexicans, including *after* his statements of reassurance.<sup>14</sup> Indeed, the Rescission  
 13 has proven false the President’s statements of reassurance; by contrast, he has never repudiated his  
 14 comments regarding Mexican and Latino immigrants.<sup>15</sup>

15 As to the third, fourth, and fifth *Arlington Heights* intent factors, plaintiffs allege that the  
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17 <sup>13</sup> While these allegations are drawn from the *Garcia* complaint, the *County of Santa Clara* and *San*  
 18 *Jose* complaints each allege the same or similar pattern of bias. *Cnty. of Santa Clara* Compl. ¶¶ 9, 75,  
 76; *San Jose* Compl. ¶¶ 30–36, 54.

19 <sup>14</sup> Even assuming that President Trump and his administration “do not personally hold such views,”  
 20 courts have held that “the presence of community animus can support a finding of discriminatory  
 21 motives by government officials.” *Ave. 6E Invs.*, 818 F.3d at 504. Plaintiffs have alleged repeated  
 22 public communications reflecting President Trump’s response to and cultivation of anti-Mexican and  
 23 Latino animus among his supporters. *Garcia* Compl. ¶¶ 101–12; *Cnty. of Santa Clara* Compl. ¶¶ 9, 75,  
 24 76; *San Jose* Compl. ¶¶ 30–36, 54. Thus, the government’s argument fails for the alternative reason that  
 the decision to rescind DACA may also have been a response to constituents’ bias. *See also Romer v.*  
*Evans*, 517 U.S. 620, 635 (1996) (rejecting state’s argument that challenged law was justified by, among  
 other things, “respect for other citizens’ freedom of association, and in particular the liberties of  
 landlords or employers who have personal or religious objections to homosexuality”).

25 <sup>15</sup> Although the government also argues that President Trump’s statements are not connected to the  
 26 “relevant decision-maker (the Acting Secretary),” this argument mischaracterizes plaintiffs’  
 27 allegations—the *Garcia* plaintiffs, for instance, allege that President Trump himself took responsibility  
 for the decision to rescind DACA. *Garcia* Compl. ¶ 124.

1 government created a pretext for its discriminatory animus in “[t]he specific sequence of events leading  
 2 up to the challenged decision,” in “the defendant’s departures from its normal procedures or substantive  
 3 conclusions,” and in the “relevant . . . administrative history.” *Arce*, 793 F.3d at 977 (citing *Arlington*  
 4 *Heights*, 429 U.S. at 266). In a little over six months, the government, indeed, the same Administration,  
 5 went from maintaining that it was committed to DACA to calling DACA “fundamentally a lie.” *Garcia*  
 6 *Compl.* ¶¶ 45–47, 122, 154. Only the thinnest of justifications was offered for this about-face:  
 7 “litigation risk.” *Id.* at ¶¶ 116–20. But on the same day the rescission of DACA was announced,  
 8 President Trump was unconcerned about litigation risk, writing on Twitter: “If [Congress] can’t [act], I  
 9 will revisit this issue!”<sup>16</sup>

10 Moreover, in the rescission memorandum, the Acting Secretary cited only the Attorney  
 11 General’s one-page letter, while failing to provide (a) any legal analysis of the purported litigation risk;  
 12 (b) any acknowledgment of the widespread benefits of the DACA program; or (c) any analysis of the  
 13 foreseeable harms to the hundreds of thousands who relied on DACA’s benefits. *Id.* at ¶¶ 121–23.<sup>17</sup>  
 14 Plaintiffs have plausibly alleged that racial animus, and not the stated pretext, was the primary  
 15 motivation for the government’s decision to rescind DACA.

### 16 C. Plaintiffs Have Adequately Pleaded Substantive Due Process Claims.

17 Plaintiffs also have stated claims under substantive Due Process Clause of the Fifth  
 18 Amendment.<sup>18</sup> The substantive component of due process prevents the government from infringing on  
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20 <sup>16</sup> @realDonaldTrump, Twitter (Sept. 5, 2017, 5:38 PM), <https://twitter.com/realDonaldTrump>.  
 21 According to the government, President Trump’s tweets are official statements of the President of the  
 22 United States. *See, e.g.,* Def.’s Suppl. Submission & Further Resp. to Pl.’s Post-Briefing Notices at 4,  
 23 *James Madison Project v. Dep’t of Justice*, No. 17-00144 (D.D.C. Jan. 23, 2017) (“[T]he government is  
 treating the President’s statements . . . whether by tweet, speech, or interview—as official statements of  
 the President of the United States.”).

24 <sup>17</sup> *See also* *Cnty. of Santa Clara Compl.* ¶¶ 55–58, 77; *San Jose Compl.* ¶¶ 30–44; *States Compl.*  
 25 ¶¶ 101–16. Senior Administration decisionmakers, including President Trump, also exhibited their bias  
 through unfounded assertions scapegoating DACA recipients and accusing them of hurting the country.  
 26 *States Compl.* ¶¶ 111-16, 175-76.

27 <sup>18</sup> Substantive due process claims are asserted in Case Nos. 17-cv-05380, 17-cv-05235, and 17-cv-  
 28 05813.

1 important interests unless the infringement is narrowly tailored to serve a compelling governmental  
 2 interest.<sup>19</sup> *See, e.g., Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014).<sup>20</sup> It also prohibits  
 3 government conduct that “shocks the conscience” or interferes with rights implicit in the concept of  
 4 ordered liberty. *Marsh v. Cnty. of San Diego*, 680 F.3d 1148, 1155 (9th Cir. 2012).

5 **1. The government effectively concedes that plaintiffs have adequately alleged a**  
 6 **substantive due process claim.**

7 The government’s motion to dismiss plaintiffs’ substantive due process claim focuses  
 8 exclusively on allegations regarding changes to the government’s “policy on the use of information  
 9 contained in DACA requests,” Opening Br. 38, and ignores the claim in the *Garcia* and *County of Santa*  
 10 *Clara* complaints that “[r]escission of the DACA program violated the Due Process Clause.” *Cnty. of*  
 11 *Santa Clara* Compl. ¶ 65 (emphasis added); *Garcia* Compl. ¶¶ 142–46 (“The government’s arbitrary  
 12 termination of the DACA program and deprivation of the opportunity to renew DACA status violates  
 13 the due process rights of Plaintiffs and other DACA recipients.”). By failing to address these  
 14 allegations, the government effectively concedes that plaintiffs have adequately alleged a substantive  
 15 due process claim as to the overall rescission of DACA. *See Perez v. Alta-Dena Certified Dairy, LLC*,  
 16 647 F. App’x 682, 685 (9th Cir. 2016) (reversing dismissal where movant sought only “to dismiss  
 17 [certain] ‘pieces’ of the two causes of action”); *Ramirez Medina*, 2017 WL 5176720, at \*9 (“failure to  
 18 address” certain allegations “defeats [defendants’] assertion that [plaintiff] failed to state a claim”  
 19 regarding DACA revocation).

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21 <sup>19</sup> Even under rational basis review, the Rescission does not pass muster. As set forth more fully in  
 22 plaintiffs’ motion for provisional relief, the government’s action here is wholly arbitrary, *see* Dkt. No.  
 111, at 15–29, and not rationally related to any legitimate governmental objective.

23 <sup>20</sup> The government’s assertion that substantive due process claims are narrowly limited to certain  
 24 “fundamental liberty interest[s],” Opening Br. 40, is inconsistent with precedent recognizing that  
 25 deprivations of liberty *and* property can serve as a basis for such claims. *E.g., Action Apartment Ass’n,*  
 26 *Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026 (9th Cir. 2007) (citing *Nunez v. City of Los*  
 27 *Angeles*, 147 F.3d 867, 871 (9th Cir. 1998)); *see also Waldman v. Conway*, 871 F.3d 1283, 1292 (11th  
 28 Cir. 2017) (Even “[w]here a fundamental liberty interest does not exist, substantive due process  
 nonetheless protects against the arbitrary and oppressive exercise of government power.”); *Maldonado*  
*v. Fontanes*, 568 F.3d 263, 272–73 (1st Cir. 2009). And in any event, rescission of DACA implicates  
 many essential liberty interests that are protected by substantive due process. *See* Section II.C.2.II.C.2.

1                   **2. The Rescission implicates multiple constitutionally protected interests.**

2                   The government’s argument that “DACA recipients have no protected liberty or property interest  
3 in deferred action entitling them to due process protections,” Opening Br. 36, is wrong.

4                   *First*, the government’s narrow focus on “deferred action” misconstrues the protected interest  
5 here, which is not the initial, discretionary grant of deferred action, but rather the plaintiffs’ protected  
6 liberty and property interests that flow from a DACA grant and its renewal. *Garcia* Compl. ¶¶ 27–32,  
7 138, 140; *UC* Compl. ¶¶ 69–70; *Cnty. of Santa Clara* Compl. ¶¶ 7, 60–63. The ability to renew DACA  
8 was “one of the main benefits used to induce Dreamers to step forward, subject themselves to a rigorous  
9 background investigation, and share sensitive personal information with the government.” *Garcia*  
10 Compl. ¶¶ 22–26, 141; *UC* Compl. ¶¶ 3–5, 25, 29, 69–70; *Cnty. of Santa Clara* Compl. ¶¶ 5, 28, 60, 72,  
11 80, 82; *see also States* Compl. ¶¶ 78, 99. The program would have been irrational and unsuccessful if it  
12 had extended only for two years, and indeed, the government consistently represented that applicants  
13 would have the opportunity to apply for renewal and would be eligible for renewal if they met certain  
14 requirements. *Garcia* Compl. ¶¶ 22–26; *Cnty. of Santa Clara* Compl. ¶¶ 5, 28. It is well established  
15 that an individual may have a protected interest in the renewal or retention of government benefits,  
16 including eligibility for immigration relief, even if the benefits were discretionary when first conferred.<sup>21</sup>

17                   Other protected liberty and property interests flowing from DACA and its renewal include  
18 (i) freedom from government custody or detention; (ii) the right to live with and care for family  
19 members; (iii) the right to practice a chosen profession; (iv) the right to travel internationally; (v) public  
20 benefits; (vi) work authorization; and (vii) professional licenses. *Garcia* Compl. ¶¶ 27–32, 54, 73, 128;

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<sup>21</sup>                   *See, e.g., Stauch v. City of Columbia Heights*, 212 F.3d 425, 430 (8th Cir. 2000) (finding “a  
protected property interest in the renewal of [plaintiff’s] rental licenses”); *Wedges/Ledges of Cal., Inc. v.*  
*City of Phoenix*, 24 F.3d 56, 64 (9th Cir. 1994) (finding “a protect[a]ble property interest in retaining []  
existing license tags”); *Richardson v. Town of Eastover*, 922 F.2d 1152, 1157 (4th Cir. 1991)  
 (“entitlement to a renewal may be implied . . . from policies, practices, and understandings”); *Geneva*  
*Towers*, 504 F.2d at 489 (plaintiffs “have a legitimate, objectively justifiable claim . . . that they will  
continue to receive” government benefits); *see also Ixcot v. Holder*, 646 F.3d 1202, 1213 (9th Cir.  
2011); *Arevalo v. Ashcroft*, 344 F.3d 1, 14 (1st Cir. 2003) (“[A]pplications for discretionary  
[immigration] relief, once made, often become a source of expectation and even reliance.”).

1 UC Compl. ¶¶ 29–38, 46–49, 69–70; *Cnty. of Santa Clara* Compl. ¶¶ 30, 38–49, 60–63; *see also States*  
 2 Compl. ¶¶ 5–6, 83–87, 137–40. These benefits have “enable[d] [DACA recipients] to do a wide range  
 3 of things open to [citizens]. . . . Subject to the conditions of [the program], [they] can be gainfully  
 4 employed and [are] free to be with family and friends and to form the other enduring attachments of  
 5 normal life.” *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (holding that revocation of parole requires  
 6 due process and noting that parolees “relied on at least an implicit promise that parole [would] be  
 7 revoked only if [they] failed to live up to the parole conditions”). The government does not dispute that  
 8 these interests are entitled to constitutional protection under established precedent.<sup>22</sup>

9 *Second*, the two cases cited by the government for the proposition that there is no protectable  
 10 interest in obtaining “deferred action” are easily distinguished. Opening Br. 37 (citing *Romeiro de Silva*  
 11 *v. Smith*, 773 F.2d 1021 (9th Cir. 1985), and *Velasco-Gutierrez v. Crossland*, 732 F.2d 792 (10th Cir.  
 12 1984)). Both cases addressed early INS operations instructions—which, unlike the programmatic  
 13 exercise of discretion embodied by DACA, involved “unfettered discretion” rather than published  
 14 eligibility criteria and established procedures. *Compare Romeiro de Silva*, 773 F.2d at 1024, and  
 15 *Velasco-Gutierrez*, 732 F.2d at 797, with *Gonzalez Torres*, 2017 WL 4340385, at \*4 (requiring DHS to  
 16 follow the DACA standard operating procedures).

17 Moreover, and of particular significance here, the plaintiffs in the government’s cases had not yet  
 18 been granted deferred action, whereas DACA recipients have organized their lives around DACA,  
 19 including the ability to renew their DACA grants, and relied on its many protections and benefits.  
 20 *Garcia* Compl. ¶¶ 32, 41–42, 53–55, 72–75, 78–81, 94–98, 128, 130, 170, 195–96; UC Compl. ¶¶ 3–5,  
 21 35–38, 69–70; *Cnty. of Santa Clara* Compl. ¶¶ 1, 3, 7, 30–31, 38, 48, 72, 83; *States* Compl. ¶¶ 5–6, 87–  
 22 88, 168. Once DACA was conferred, beneficiaries developed interests protected by the Constitution.

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 24 <sup>22</sup> *E.g., Nozzi*, 806 F.3d at 1190–91 (finding protected property interest in government benefits);  
 25 *Lopez-Valenzuela*, 770 F.3d at 781 (“freedom from bodily restraint has always been at the core of the  
 26 liberty protected by the Due Process Clause”) (citation and quotations omitted); *Engquist v. Or. Dep’t of*  
 27 *Agric.*, 478 F.3d 985, 997–98 (9th Cir. 2007) (due process protects “the right to pursue a chosen  
 28 profession”); *Wallis v. Spencer*, 202 F.3d 1126, 1136, 1141 (9th Cir. 2000) (ability to live with and care  
 for close family members is “an essential liberty interest” protected by the Due Process Clause);  
*DeNieva v. Reyes*, 966 F.2d 480, 485 (9th Cir. 1992) (the “right to international travel [is] a liberty  
 interest that is protected by the Due Process Clause of the Fifth Amendment.”).

1 *See, e.g., Bell v. Burson*, 402 U.S. 535, 539 (1971) (“[o]nce [driver’s] licenses are issued, . . . their  
2 continued possession may become essential in the pursuit of a livelihood,” and they cannot “be taken  
3 away without” due process); *Gallo v. U.S. Dist. Ct. for Dist. of Ariz.*, 349 F.3d 1169, 1179 (9th Cir.  
4 2003) (“Our case law holds that a professional license, once conferred, constitutes an entitlement subject  
5 to constitutional protection.”); *Ramirez Medina*, 2017 WL 5176720, at \*9 (denying government’s  
6 motion to dismiss and finding that “the representations made to applicants for DACA cannot and do not  
7 suggest that no process is due to them, particularly in Plaintiff’s case where benefits have already been  
8 conferred”).

9 *Third*, the government’s argument regarding agency discretion does not disturb the conclusion  
10 that DACA implicates protected interests. *See* Opening Br. 36–37. The Ninth Circuit has repeatedly  
11 explained that the property interests protected by the Due Process Clause “extend beyond tangible  
12 property and include anything to which a plaintiff has a ‘legitimate claim of entitlement.’” *Nozzi*, 806  
13 F.3d at 1191 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576–77 (1972)).  
14 “A legitimate claim of entitlement is created ‘and [its] dimensions are defined by existing rules or  
15 understandings that stem from an independent source such as state law—rules or understandings that  
16 secure certain benefits and that support claims of entitlement to those benefits.’” *Id.* (quoting *Roth*, 408  
17 U.S. at 577). This independent source may be a statute, regulation, “explicit contractual provisions,”  
18 “implied” agreements, or “rules or mutually explicit understandings.” *Perry v. Sindermann*, 408 U.S.  
19 593, 601–02 (1972) (“A person’s interest in a benefit is a ‘property’ interest for due process purposes if  
20 there are such rules or mutually explicit understandings that support his claim of entitlement to the  
21 benefit”).

22 Here, plaintiffs have alleged a legitimate claim of entitlement to the continuation of the benefits  
23 conferred under DACA. DHS’s rules and the government’s operation of the program, the government’s  
24 communications with plaintiffs regarding DACA renewals, and the public promises of government  
25 officials of both political parties, together created an understanding that DACA recipients were entitled  
26 to the continued benefits of the program so long as they met the renewal criteria. *Garcia* Compl. ¶¶ 16,  
27 22–26, 33–34, 41–47, 114, 138–41; *UC* Compl. ¶¶ 3–5, 25–32, 39, 70–71; *Cnty. of Santa Clara* Compl.  
28 ¶¶ 5, 7, 25–28, 38–40, 60–63, 72, 80–83; *States* Compl. ¶¶ 90–100, 165–68.

1 Finally, the language in the 2012 DACA Memorandum stating that it “confers no substantive  
2 right” does not disturb DACA recipients’ entitlement to protection. *See* Opening Br. 37. As the Ninth  
3 Circuit has explained, the “identification of property interests under constitutional law turns on the  
4 substance of the interest recognized, not the name given that interest by the state.” *Newman v.*  
5 *Sathyavaglswaran*, 287 F.3d 786, 797 (9th Cir. 2002) (finding a protected property interest despite the  
6 government’s “labeling of the interests” otherwise). Here, the Court must look beyond the federal  
7 government’s statements to determine the legal effect of its actions. *See, e.g., Scenic Am., Inc. v. U.S.*  
8 *Dep’t of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016) (agency action was “final” despite disclaimer that  
9 agency “may provide further guidance in the future as a result of additional information”); *Appalachian*  
10 *Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (agency action was “final” despite disclaimer  
11 that action “[did] not represent final Agency action, and cannot be relied upon to create any rights  
12 enforceable by any party”).

### 13 3. The Rescission fails to serve a compelling state interest.

14 The government’s motion to dismiss underscores that the rescission violated the Due Process  
15 Clause because it is not “narrowly tailored to serve a compelling state interest.” *Lopez-Valenzuela*, 770  
16 F.3d at 780. The government must meet this heightened standard because the Rescission infringes on  
17 fundamental liberty interests, including (i) freedom from government custody or detention; (ii) the right  
18 to live with and care for close family members; and (iii) the right to practice a chosen trade or  
19 profession. *See e.g., id.* (freedom from detention is a “fundamental liberty interest” held by  
20 undocumented immigrants); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944, 951 (9th Cir.  
21 1997) (rights to “free movement” and “to rear children without undue governmental interference” are  
22 both “fundamental”); *Engquist*, 478 F.3d at 996–97 (pursuing occupation of one’s choice is covered by  
23 substantive due process protection of “rights implicit in the concept of ordered liberty”) (internal  
24 quotation marks omitted); *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“freedom of personal  
25 choice in matters of family life” including “care, custody, and management of” children is a  
26 “fundamental liberty interest”).

1 The Rescission fails to pass constitutional muster under strict scrutiny for two independent  
2 reasons.<sup>23</sup>

3 *First*, the government maintains that the Rescission was based entirely on minimizing purported  
4 “litigation risk,” Opening Br. 24–26, a justification that cannot rise to the level of a compelling state  
5 interest. *See Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (“avoiding the litigation . . . could not be a  
6 compelling interest”); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012,  
7 2024 (2017) (state’s “policy preference for skating as far as possible from religious establishment  
8 concerns . . . cannot qualify as compelling”).

9 *Second*, even if the government could identify some compelling state interest, its blanket  
10 revocation of benefits from nearly 700,000 people—each of whom has been individually adjudged to  
11 meet certain criteria—is the opposite of narrowly tailored. *See Lopez-Valenzuela*, 770 F.3d at 783, 784,  
12 788 (law categorically denying bail to undocumented immigrants was not narrowly tailored because it  
13 “employ[ed] an overbroad, irrebuttable presumption rather than an individualized hearing to determine  
14 whether a particular arrestee poses an unmanageable flight risk”); *Nunez*, 114 F.3d at 952 (curfew  
15 ordinance that failed to provide exceptions for legitimate activities violated substantive due process).  
16 And to the extent the government truly had concerns about the legality of DACA, it could have  
17 addressed specific elements of the program or altered its administration going forward, rather than  
18 eliminating the program outright.<sup>24</sup>

#### 19 4. The Rescission is fundamentally unfair.

20 The Rescission also violates substantive due process because it punishes nearly 700,000 young  
21 people who were brought to the United States as children. The government does not contest that  
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24 <sup>23</sup> The government’s assertion that the rescission is legislative in character and “applies across-the-  
25 board to a large number of people,” Opening Br. 38, underscores that it is subject to strict scrutiny under  
the “familiar . . . substantive due process standard” outlined in *Lopez-Valenzuela*. 770 F.3d at 780.

26 <sup>24</sup> On October 18, 2017, the Attorney General testified to Congress that DACA could be legal  
27 under *Texas v. United States* if it were implemented “on an individualized basis.” *Oversight of the U.S.*  
28 *Dep’t of Justice: Hearing before the S. Comm. on the Judiciary*, 115th Cong. (2017) (testimony of  
Jefferson B. Sessions, Att’y Gen. of the United States), [goo.gl/NoUWCp](http://goo.gl/NoUWCp).

1 fundamentally unfair government action “may rise to the level of a substantive due process violation.”  
2 Opening Br. 40.

3 The Due Process Clause forbids the government from depriving individuals of liberty or property  
4 in a manner that “shock[s] the conscience” and “offend[s] the community’s sense of fair play and  
5 decency.” *Marsh*, 680 F.3d at 1155 (quoting *Rochin v. California*, 342 U.S. 165, 172–73 (1952)).  
6 While “the measure of what is conscience-shocking is no calibrated yard stick,” *Johnson v. Newburg*  
7 *Enlarged Sch. Dist.*, 239 F.3d 246, 252 (2d Cir. 2001) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S.  
8 833, 847 (1998)), the Ninth Circuit has found that government conduct that needlessly causes “fear” and  
9 “severe emotional distress” or “is likely to cause [a] family profound grief” may shock the conscience  
10 and violate the Due Process Clause. *Marsh*, 680 F.3d at 1155 (concluding that a prosecutor’s delivery of  
11 a child’s autopsy photograph to the press, without any legitimate governmental purpose, violated  
12 mother’s substantive due process rights).

13 Plaintiffs’ complaints underscore how the Rescission will destroy the personal, professional, and  
14 familial aspirations of nearly 700,000 young people and uproot them from the only home most have ever  
15 known. *See, e.g., Garcia* Compl. ¶¶ 128–32; *Cnty. of Santa Clara* Compl. ¶¶ 35, 39, 50; *UC* Compl. ¶¶  
16 46–49; *States* Compl. ¶¶ 52, 63, 168. The government’s broken promises—and the profound  
17 consequences from this breach of trust—“shock the conscience and offend the community’s sense of fair  
18 play and decency.” *Marsh*, 680 F.3d at 1155. This is doubly so because of the government’s cruel bait-  
19 and-switch: after being promised certainty, security, and opportunity, DACA recipients made life-  
20 changing decisions such as purchasing homes, enrolling in graduate programs, and starting families.  
21 *See, e.g., App.* at 2201-03, Topics 1, 2, 4, 5. Now, the government says those promises were  
22 “fundamentally a lie,” and plaintiffs face deportation, financial ruin, and the prospect of lengthy—or  
23 even permanent—separation from family, friends, and community. *Garcia* Compl. ¶¶ 4–9, 32, 128–30,  
24 170, 196; *Cnty. of Santa Clara* Compl. ¶¶ 3–4, 29–31, 35, 38–39, 45–50, 61–65, 72, 80–83; *UC* Compl.  
25 ¶¶ 1–6, 28, 38, 46–49; *see also States* Compl. ¶¶ 119, 125, 130–31, 165–68. The targeting of young  
26 immigrants who arrived in the United States through no choice of their own “shock[s] the conscience”  
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1 and is antithetical to “our fundamental democratic notions of fair play, ordered liberty and human  
2 decency.” *Johnson*, 239 F.3d at 252.<sup>25</sup>

3 The government’s motion fails to address plaintiffs’ allegations regarding the government’s  
4 broken promises and its “unconstitutional bait-and-switch.” *Garcia* Compl. ¶¶ 143–46. The Due  
5 Process Clause is implicated where, as here, “an individual has reasonably relied on [government  
6 representations made] for his guidance or benefit and has suffered substantially because of their  
7 violation by the [government].” *United States v. Caceres*, 440 U.S. 741, 752–53 (1979). The  
8 government promised DACA recipients that it would provide them with renewable protection from  
9 deportation, and the opportunity to live and work in the United States, so long as they played by the  
10 rules. *Garcia* Compl. ¶ 169. After providing assurances of confidentiality, protection, and opportunity,  
11 the government changed the rules, depriving plaintiffs of the benefit of their bargain and leaving them  
12 exposed and even more vulnerable to deportation—a “particularly severe” sanction “intimately related  
13 to the criminal process.” *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010). This is precisely the type of  
14 “unconstitutional bait-and-switch” that is forbidden by the Due Process Clause. *Garcia* Compl. ¶ 143;  
15 *see Raley v. Ohio*, 360 U.S. 423, 425–26 (1959) (holding that prosecuting an individual for conduct that  
16 state officials advised was legal violated due process); *Cox v. Louisiana*, 379 U.S. 559, 568–69 (1965)  
17 (same).

18 The government also does not deny that the Due Process Clause “forbids the government from  
19 breaking its promises” where, as here, individuals have been induced to undertake actions with  
20 significant implications for their personal liberty. *Garcia* Compl. ¶ 144. This includes situations where

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22 <sup>25</sup> The government asserts that *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003), forecloses  
23 plaintiffs’ substantive due process claim, but that case is readily distinguishable. Opening Br. 40-41.  
24 *Munoz* rejected a claim by an undocumented immigrant (who was ineligible for immigration relief) that  
25 the length of his stay and his relationships with family and friends in the United States gave him a right  
26 to remain. *Id.* at 954. Here, by contrast, the government established and vigorously promoted DACA,  
27 offering vulnerable young people explicit permission to live and work in the United States if they  
28 stepped forward, disclosed sensitive personal information, paid a considerable fee, passed a rigorous  
DHS background check, and were admitted to the program in the government’s discretion. Hundreds of  
thousands of individuals accepted this explicit quid pro quo and made life-changing decisions in reliance  
on the government’s promises. *Ramirez Medina*, 2017 WL 5176720, at \*9.

1 the government has offered immigration benefits in exchange for certain conduct, *see, e.g., Thomas v.*  
 2 *INS*, 35 F.3d 1332, 1337 (9th Cir. 1994) (principles of plea bargaining entitled noncitizen “to  
 3 performance by the government of its promise” not to oppose his motion for relief from deportation), as  
 4 well as other circumstances where the government offers a quid pro quo, such as plea bargain  
 5 agreements and cooperation agreements, *e.g., Santobello v. New York*, 404 U.S. 257, 262 (1971);  
 6 *Buckley v. Terhune*, 441 F.3d 688, 699 (9th Cir. 2006) (en banc); *Brown v. Poole*, 337 F.3d 1155 (9th  
 7 Cir. 2003).<sup>26</sup>

8 **5. Plaintiffs have alleged due process claims as to the government’s**  
 9 **information-sharing policies.**

10 The government’s attacks on plaintiffs’ information-sharing claims also fail. The principles  
 11 articulated in *Cox* and *Raley*, discussed above—i.e., that the government may not punish people for  
 12 engaging in conduct that the government itself has encouraged or permitted—apply squarely to  
 13 plaintiffs’ claims relating to information misuse. *See Raley*, 360 U.S. at 437-39; *Cox*, 379 U.S. at 568-  
 14 71. In particular, the government’s assertion that “no Plaintiff alleges facts sufficient to show that there  
 15 actually has been a substantive change in policy regarding information sharing,” Opening Br. 39,  
 16 misstates both the standard for a motion to dismiss and plaintiffs’ allegations. Contrary to the  
 17 government’s assertion, plaintiffs allege that the government has “backtrack[ed]” on its “prior repeated  
 18 assurances” and changed the standard for when information provided in a DACA request will be  
 19 provided to ICE and CBP for immigration enforcement proceedings: “Now, rather than affirmatively  
 20

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21 <sup>26</sup> Courts have held that “specific performance” is “the only viable remedy” for such due process  
 22 violations. *Brown*, 337 F.3d at 1161–62 (ordering specific performance and explaining that  
 23 “fundamental fairness demands that the [government] be compelled to adhere to” its promises where the  
 24 individual had “met the terms of the agreed-upon bargain” and rescission of the agreement was  
 25 “impossible under [the] circumstances”). And any argument that the government should be permitted to  
 26 break its promise to plaintiffs on account of its sudden revelation that DACA is purportedly unlawful is  
 27 easily dismissed; the Ninth Circuit has rejected that same argument on at least two separate occasions.  
 28 *E.g., Buckley*, 441 F.3d at 699 (rejecting the state’s argument that its prior offer was not “lawful” and  
 explaining that “it is now too late for the state to argue that it was not in a position” to make such an  
 offer after the individual in question already had “fulfilled his promises”); *Brown*, 337 F.3d at 1161  
 (rejecting the government’s argument that it need not honor a plea deal that the prosecutor “had no right  
 to offer” as any such lack of authority “may be a problem for the state, but not for [the defendant],” who  
 “had no reason to know that the prosecutor’s promises were improper”).

1 ‘protect[ing] [this information] from disclosure,’ the government represents only that such sensitive  
2 information ‘will not be proactively provided to ICE and CBP for the purpose of immigration  
3 enforcement proceedings.’” *Garcia* Compl. ¶ 126 (quoting DACA FAQs); *Cnty. of Santa Clara* Compl.  
4 ¶ 58; *UC* Compl. ¶ 28; *States* Compl. ¶ 122. Plaintiffs have further alleged that through a series of new  
5 policies that eliminate privacy protections applicable to DACA data and significantly broaden DHS’s  
6 enforcement priorities, DACA recipients are now at risk of being placed in removal proceedings based  
7 on information they provided in reliance on DHS’s promises. *States* Compl. ¶¶ 126-31.

8 The government’s assertion that its prior policy remains unchanged—notwithstanding the  
9 significant changes to its public guidance—cannot overcome plaintiffs’ allegations to the contrary.  
10 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (a court must “accept  
11 factual allegations in the complaint as true and construe the pleadings in the light most favorable to the  
12 nonmoving party”). To the extent the government seeks to defeat plaintiffs’ information-use claim by  
13 taking the position that it has not and never will use information provided by DACA applicants for  
14 immigration enforcement purposes (absent special circumstances), it must offer more than a vague  
15 litigation assertion that the prior policy “currently remains in effect.” Opening Br. 39. This is especially  
16 true given the government’s failure to honor its other promises regarding DACA.

17 Nor can the government defeat plaintiffs’ information-use claims by relying on language in the  
18 DACA FAQs that, if credited, would render meaningless the government’s repeated public  
19 representations about information sharing. *See* Opening Br. 39 (asserting that the government’s  
20 information-sharing “policy ‘may be modified, superseded, or rescinded at any time’”). This statement  
21 does not nullify the government’s contrary “represent[ations] to applicants, Congress, and the general  
22 public” about the limits on the use of information provided by DACA applicants. *Garcia* Compl. ¶ 35.  
23 Indeed, Secretary Jeh Johnson explained last year that “[s]ince DACA was announced in 2012, DHS has  
24 consistently made clear that information provided by applicants . . . will not later be used for  
25 immigration enforcement purposes except where it is independently determined that a case involves a  
26 national security or public safety threat, criminal activity, fraud, or limited other circumstances,” and  
27 that this approach was the “long-standing and consistent practice of DHS (and its predecessor INS)” for  
28 “decades.” App. at 1822 (Johnson Letter); *see also Garcia* Compl. ¶¶ 36–37; *States* Compl. ¶ 98, Exh.

1 H. As Secretary Johnson acknowledged, “DACA applicants most assuredly relied” upon “these  
2 representations” and the government’s “consistent practice.” *Id.*<sup>27</sup>

3 **D. Plaintiffs Have Pleaded Equitable Estoppel Claims.**

4 Equitable estoppel “will be applied against the government” where “justice and fair play require  
5 it.” *Watkins v. U.S. Army*, 875 F.2d 699, 706 (9th Cir. 1989) (en banc) (citation omitted), *cert. denied*,  
6 498 U.S. 957 (1990). Plaintiffs have alleged each of the elements necessary to bring estoppel claims  
7 against the government.<sup>28</sup> The government does not even seriously challenge that the four traditional  
8 estoppel elements are met.<sup>29</sup> Instead, it attacks only the “two additional elements . . . beyond those  
9 required for traditional estoppel,” which require that (1) the government engaged in “affirmative  
10 misconduct going beyond mere negligence,” and (2) that “the government’s wrongful act will cause a  
11 serious injustice, and the public’s interest will not suffer undue damage” by application of estoppel. *Id.*  
12 at 707. Plaintiffs’ claims easily meet these standards.

13 *First*, the government asserts that plaintiffs have “not identified any governmental misconduct,  
14 let alone extraordinary misconduct,” Opening Br. 44, and, in particular, that plaintiffs failed to plead “an  
15 affirmative misrepresentation or affirmative concealment of a material fact by the government.” *Id.* at  
16 43. The government ignores that Acting Secretary Duke—who purportedly made the decision to rescind  
17 DACA—stated at the time that “DACA was fundamentally a lie.” *Garcia Compl.* ¶ 122. And if this  
18

19 <sup>27</sup> Far from supporting the government’s flawed theory, *Gerhart v. Lake Cty.*, 637 F.3d 1013 (9th  
20 Cir. 2011)—which was decided on a motion for summary judgment—underscores the viability of  
21 plaintiffs’ claims. In *Gerhart*, the court held that a property owner’s unilateral “belief” did not give rise  
22 to a protected interest where there was no “evidence or allegation of a mutual understanding that he was  
23 otherwise entitled to a permit.” *Id.* at 1020–21. Here, by contrast, the government expressly,  
24 repeatedly, and recently promised to protect applicants’ information and acknowledged widespread  
25 reliance on those promises. *Garcia Compl.* ¶¶ 33–47; *UC Compl.* ¶ 28; *Cnty. of Santa Clara Compl.*  
26 ¶¶ 4, 29, 64, 72, 80–82; *States Compl.* ¶¶ 118–25, 165–68.

27 <sup>28</sup> This claim is asserted in Case Nos. 17-cv-05235, 17-cv-05813, and 17-cv-05380.

28 <sup>29</sup> Without citing any case law or otherwise attempting to support their argument, the government  
asserts in a footnote that plaintiffs have failed to plead the traditional elements for estoppel. *See*  
Opening Br. 44 n.16. “[S]uch a conclusory argument [is not] sufficient to actually present a ground for  
dismissing a cause of action.” *U.S. ex rel. Campie v. Gilead Scis., Inc.*, No. 11-0941, 2015 WL 106255,  
at \*18 n. 9 (N.D. Cal. Jan. 7, 2015). Regardless, plaintiffs have satisfied their pleading burden with  
respect to these elements. *See, e.g., States Compl.* ¶¶ 3, 11, 164–71; *Garcia Compl.* ¶¶ 192–99; *Cnty. of*  
*Santa Clara Compl.* ¶¶ 10, 79–86.

1 were not enough, the government also mischaracterizes the affirmative misconduct element and what  
 2 plaintiffs allege. Plaintiffs need only allege that the government has engaged in “affirmative misconduct  
 3 going beyond mere negligence”—*not* extraordinary misconduct. *See Watkins*, 875 F.2d at 707. And  
 4 “affirmative misconduct . . . require[s] an affirmative misrepresentation”; it “does not require that the  
 5 government *intend* to mislead a party.” *Id.* (emphasis added). Plaintiffs have more than satisfied their  
 6 burden of alleging that the government engaged in affirmative misconduct:

- 7 • The government made many representations about DACA’s terms that it is now violating, including  
 8 “that DACA was lawful and that information collected in connection with the DACA program  
 9 would not be used for immigration enforcement purposes absent special circumstances,” *Garcia*  
 10 *Compl.* ¶ 126; *States Compl.* ¶ 165 (similar); *Cnty. of Santa Clara Compl.* ¶ 80 (similar), and that  
 11 “DACA recipients would have the opportunity to apply for renewed deferred action status at the end  
 12 of their respective two-year authorization periods.” *Cnty. of Santa Clara Compl.* ¶ 80; *see also*  
 13 *Garcia Compl.* ¶¶ 14–26, 33–47; *States Compl.* ¶ 78; *Cnty. of Santa Clara Compl.* ¶ 28.
- 14 • In January 2017, the government eliminated privacy protections applicable to DACA information  
 15 and is now requiring agencies like DHS to ensure that their privacy policies exclude individuals who  
 16 are not U.S. citizens or lawful permanent residents. *Garcia Compl.* ¶ 125; *States Compl.* ¶ 126  
 (similar); *Cnty. of Santa Clara Compl.* ¶ 58 (similar).
- The government issued the rescission memo and released Acting Secretary Duke’s statement that  
 “DACA was fundamentally a lie,” along with DHS guidance altering the government’s prior  
 assurances that “[i]nformation provided in [a DACA] request is protected from disclosure to ICE  
 and CBP.” *Garcia Compl.* ¶¶ 118–22, 126 (footnotes omitted); *see also States Compl.* ¶¶ 126, 130;  
*Cnty. of Santa Clara Compl.* ¶ 58.

17 The government’s misconduct here is analogous to the facts in *Watkins*, where the Army was estopped  
 18 from denying re-enlistment to a soldier because it had made “ongoing active misrepresentations” to the  
 19 soldier over a multi-year period indicating he was eligible to re-enlist even though he was gay. 875 F.2d  
 20 at 706-08. The Ninth Circuit concluded that “the Army did not stand aside while *Watkins* reenlisted or  
 21 accepted a promotion; it plainly acted affirmatively in admitting, reclassifying, reenlisting, retaining, and  
 22 promoting *Watkins*.” *Id.* at 708.

23 Just as in *Watkins*, the government’s conduct here has gone “far beyond a mere failure to inform  
 24 or assist.” *Id.* The government made repeated representations over many years about DACA to  
 25 recipients in various official DHS forms and other publications and actively encouraged individuals to  
 26 apply for and renew their DACA grants. *See Garcia Compl.* ¶¶ 14–26, 33–41; *States Compl.* ¶¶ 7, 90-  
 27 99, 125, 130-31; *Cnty. of Santa Clara Compl.* ¶¶ 29, 80-83. The government’s reversal, coupled with  
 28 the implementation of its new information-sharing policies, strips DACA recipients of their expectations

1 and places them at risk of being removed based on personal, confidential information that the applicants  
2 gave to the government based on an assurance that it would not be used for enforcement. These actions  
3 are undoubtedly “affirmative misconduct.”<sup>30</sup>

4       *Second*, the government’s argument that there can be no “serious injustice” caused by the  
5 rescission of a “discretionary policy” cannot be credited. Opening Br. 44. At its core, this argument  
6 challenges the reasonableness of plaintiffs’ reliance on DACA and on the government’s representations  
7 about the terms of the program. But plaintiffs’ reliance is irrelevant as to this element, which requires  
8 “the person seeking estoppel against the government . . . [to] show that the potential injustice to him  
9 outweighs the possibility of damage to the public interest.” *Salgado-Diaz*, 395 F.3d at 1167. Plaintiffs  
10 have met that standard by specifically alleging how the Rescission harms them now and will harm them  
11 in the future. *See Garcia* Compl. ¶¶ 4–9, 128–32; *States* Compl. ¶¶ 1, 4-5, 10, 27, 29-30, 35-41, 47-56,  
12 60, 64, 66, 70-74, 177; *Cnty. of Santa Clara* Compl. ¶¶ 15, 20, 60-63. The government offers no  
13 response to these allegations.

14       Likewise, the government does not deny that the use of DACA recipients’ information for  
15 enforcement purposes would lead to serious injustice: “[D]eportation is a drastic measure and at times  
16 the equivalent of banishment or exile.” *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *see also Ng*  
17 *Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation “may result [] in loss of . . . all that makes life  
18 worth living”). Nor can the government plausibly assert that equitable estoppel would damage the  
19 public interest, since DACA recipients have passed rigorous government background checks and made  
20 significant contributions to this country. *See Garcia* Compl. ¶¶ 19–21, 48–98; *States* Compl. ¶¶ 4, 7, 26,  
21 30-32, 37-38, 49, 55, 69-70, 72; *Cnty. of Santa Clara* Compl. ¶¶ 27-29, 32-34, 51; *see also Watkins*, 875  
22 F.2d at 709.

23  
24  
25 <sup>30</sup> As in *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1166–67 (9th Cir. 2005), plaintiffs seek to estop  
26 the government from using the information collected from them for immigration enforcement purposes.  
27 In that case, the Ninth Circuit found that the affirmative misconduct prong was satisfied because, like  
28 here, the government obtained information from the petitioner under false pretenses and in violation of  
constitutional protections. *Id.*; *see also id.* at 1166 (“the government cannot rely on the post-expulsion  
events its own misconduct set in motion” as a basis to remove petitioner from the United States).

1 The government’s remaining arguments are equally meritless. Contrary to the government’s  
2 assertion that equitable estoppel is not a cause of action, the Ninth Circuit recognizes that an affirmative  
3 “claim for equitable estoppel lies only where the party to be estopped has engaged in conduct that causes  
4 justifiable reliance by the party asserting the claim.” *Wenger v. Monroe*, 282 F.3d 1068, 1076–77 (9th  
5 Cir. 2002), *as amended on denial of reh’g and reh’g en banc* (Apr. 17, 2002) (noting availability of  
6 equitable estoppel claim against government but affirming dismissal where plaintiff failed to plead  
7 justifiable reliance).<sup>31</sup> Plaintiffs have sufficiently pleaded justifiable reliance, among the other required  
8 elements, and thus the claim is proper under *Wenger*. See *Garcia* Compl. ¶¶ 53, 55, 59, 72, 78, 85, 94–  
9 95, 194; *States* Compl. ¶¶ 8, 99, 139, 166–68.

10 The government’s argument that equitable estoppel does not apply to its “policy decisions” is not  
11 the law in this Circuit. In *Watkins*, for example, the Ninth Circuit affirmed the district court’s order  
12 estopping the Army from refusing to reenlist plaintiff “despite [the Army’s] longstanding policy that  
13 homosexuality was a nonwaivable disqualification for reenlistment.” 875 F.2d at 701, 711. Any  
14 concern about the impact on policy decisions is considered under the public interest prong. See *id.* at  
15 708–09; see also *Salgado-Diaz*, 395 F.3d at 1166–67 (applying equitable estoppel in immigration  
16 context).

17 Finally, the government’s unsupported argument that equitable estoppel is “only available for  
18 individualized claims,” Opening Br. 44 n.15, is incorrect. Courts may entertain arguments for equitable  
19 estoppel in non-individualized cases, including in class actions. See *Lyng v. Payne*, 476 U.S. 926, 929,  
20 935 (1986) (stating that 2,500-member class would not have prevailed on an equitable estoppel theory  
21 because of inability to demonstrate detrimental reliance—not because estoppel was categorically  
22 unavailable to them); see also *Stevens v. GCS Serv., Inc.*, 281 F. App’x 670, 671 (9th Cir. 2008)  
23 (similar).

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26 <sup>31</sup> The government’s reliance on *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) is misplaced.  
27 *Alexander* concerned private rights of action to enforce federal legislation, which is not at issue in these  
28 cases. *Id.* And even if equitable estoppel were not an independent cause of action, it is well recognized  
as a “judicial remedy.” 28 Am. Jur. 2d *Estoppel and Waiver* § 27 (2017).

1 **III. Nationwide Injunctive and Declaratory Relief Is Permissible and Appropriate.**

2 This Court has full authority to issue a nationwide injunction. *See Califano v. Yamasaki*, 442  
3 U.S. 682, 702 (1979) (injunction’s scope “is dictated by the extent of the violation established, not by  
4 the geographical extent of the plaintiff class”); *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987)  
5 (holding that “[c]lass-wide relief may be appropriate even in an individual action,” and injunction  
6 against federal agency “could hardly” be “on anything other than a nationwide basis”). Nationwide  
7 relief is appropriate where, as here, the challenged federal government action is invalid on its face. *See*  
8 *Decker v. O’Donnell*, 661 F.2d 598, 618 (7th Cir. 1980).

9 Indeed, in the *Texas* DAPA litigation, the Fifth Circuit held that the importance of uniform  
10 application of the immigration laws made a nationwide injunction appropriate even though the plaintiffs  
11 there had not established nationwide injury. *Texas II*, 809 F.3d at 187-88. The Ninth Circuit cited that  
12 opinion approvingly in affirming nationwide provisional relief blocking the Administration’s initial  
13 version of the travel ban. *Washington v. Trump*, 847 F.3d at 1166-67. Here, there is nationwide injury  
14 to nearly 700,000 people, their families, employers, and communities, and the interest in the uniform  
15 application of the immigration laws remains. Accordingly, a nationwide injunction is even more  
16 appropriate here than in the *Texas* litigation.

17 Moreover, a declaration that DACA is lawful is appropriate relief. Given that the stated basis for  
18 the Rescission is “litigation risk” arising from the supposed unlawfulness of DACA, which plaintiffs  
19 dispute, the government cannot credibly argue that there is no “actual controversy” concerning the  
20 lawfulness of DACA. Opening Br. 45 (quoting 28 U.S.C. § 2201(a)). Indeed, the government, in its  
21 motion to dismiss, and plaintiffs, in their motion for provisional relief, have both briefed whether DACA  
22 is lawful. Dkt. No. 111, at 23-27; Opening Br. 27-28. Thus, “there is a substantial controversy, between  
23 parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a  
24 declaratory judgment.” *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

25 **CONCLUSION**

26 For the foregoing reasons, this Court should deny the government’s motion to dismiss.  
27  
28

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Respectfully submitted,

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**ATTESTATION**

I, Jeffrey M. Davidson, hereby attest, pursuant to Civil L.R. 5-1, that I have received authorization to electronically sign and file this document from each of the persons identified in the signature block.

Dated: November 22, 2017

/s/ Jeffrey M. Davidson

Jeffrey M. Davidson

*Counsel for Plaintiffs The Regents of the University of California and Janet Napolitano, in her official capacity as President of the University of California*

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