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15 *Attorneys for Defendants*

16 **UNITED STATES DISTRICT COURT FOR THE**  
 17 **NORTHERN DISTRICT OF CALIFORNIA**

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

21 Plaintiffs,

22 v.

23 UNITED STATES DEPARTMENT OF  
 24 HOMELAND SECURITY and KIRSTJEN  
 M. NIELSEN,<sup>1</sup> in her official capacity as the  
 25 Secretary of Homeland Security,

26 Defendants.

No. 3:17-cv-05211-WHA

**DEFENDANTS' RESPONSE TO**  
**PLAINTIFFS' MOTION FOR JUDICIAL**  
**NOTICE AND TO SUPPLEMENT THE**  
**RECORD**

Judge: Honorable William Alsup  
 Hearing: February 8, 2018, 8:00 a.m.  
 Place: San Francisco U.S. Courthouse,  
 Courtroom 12, 19th Floor

27 <sup>1</sup> Pursuant to Federal Rule of Civil Procedure 25(d), Kirstjen M. Nielsen, in her official capacity  
 28 as the Secretary of Homeland Security, has been substituted as a defendant in all of these matters  
 (Nos. 17-5211, 17-5235, 17-5329, 17-5380, 17-5813) for Elaine C. Duke.

1  
2 STATE OF CALIFORNIA, STATE OF  
3 MAINE, STATE OF MARYLAND, and  
4 STATE OF MINNESOTA,

5 Plaintiffs,

6 v.

7 U.S. DEPARTMENT OF HOMELAND  
8 SECURITY, KIRSTJEN M. NIELSEN, in her  
9 official capacity as Secretary of Homeland  
10 Security, and the UNITED STATES OF  
11 AMERICA,

12 Defendants.

No. 3:17-cv-05235-WHA

13 CITY OF SAN JOSE, a municipal  
14 corporation,

15 Plaintiff,

16 v.

17 DONALD J. TRUMP, President of the United  
18 States, in his official capacity, KIRSTJEN M.  
19 NIELSEN, in her official capacity as  
20 Secretary of Homeland Security, and the  
21 UNITED STATES OF AMERICA,

22 Defendants.

No. 3:17-cv-05329-WHA

23 DULCE GARCIA, MIRIAM GONZALEZ  
24 AVILA, SAUL JIMENEZ SUAREZ,  
25 VIRIDIANA CHABOLLA MENDOZA,  
26 NORMA RAMIREZ, and JIRAYUT  
27 LATTHIVONGSKORN,

28 Plaintiffs,

v.

UNITED STATES OF AMERICA,  
DONALD J. TRUMP, in his official capacity

No. 3:17-cv-05380-WHA

1 as President of the United States, U.S.  
2 DEPARTMENT OF HOMELAND  
3 SECURITY, and KIRSTJEN M. NIELSEN,  
4 in her official capacity as Secretary of  
5 Homeland Security,

6  
7  
8  
9 Defendants.

10  
11 COUNTY OF SANTA CLARA and  
12 SERVICE EMPLOYEES INTERNATIONAL  
13 UNION LOCAL 521,

14 Plaintiffs,

15 v.

No. 3:17-cv-05813-WHA

16 DONALD J. TRUMP, President of the United  
17 States, in his official capacity; JEFFERSON  
18 BEAUREGARD SESSIONS, Attorney  
19 General of the United States, in his official  
20 capacity; KIRSTJEN M. NIELSEN, Secretary  
21 of Homeland Security, in her official capacity;  
22 and the U.S. DEPARTMENT OF  
23 HOMELAND SECURITY,

24  
25  
26  
27  
28 Defendants.

**DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION  
FOR JUDICIAL NOTICE AND TO SUPPLEMENT THE RECORD**

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2 Plaintiffs in these five related lawsuits have filed a Motion for Judicial Notice and to  
3 Supplement the Record (“Pls.’ Mot.”), ECF No. 227.<sup>2</sup> In their motion, Plaintiffs refer to a  
4 December 29, 2017 tweet, in which President Trump said:

5  
6 The Democrats have been told, and fully understand, that there can be no DACA  
7 without the desperately needed WALL at the Southern Border and an END to the  
horrible Chain Migration & ridiculous Lottery System of Immigration etc. We must  
protect our Country at all cost!

8 Decl. of Jeffrey M. Davidson in Supp. of Pls.’ Mot. for Judicial Notice and to Supplement the  
9 Record, Ex. A, ECF No. 227-2.

10 The Court should not take judicial notice of the tweet for purposes of their Administrative  
11 Procedure Act claims because Plaintiffs cannot rely on material outside of the Administrative  
12 Record (“AR”) to demonstrate that the rationale supporting the rescission of DACA was  
13 pretextual. *See* Defs.’ Mem. in Opp’n to Pls.’ Mot. for Provisional Relief (“Defs.’ PI Opp.”),  
14 ECF No. 204, at 21-22. Nor is the President’s tweet relevant to the question whether then-Acting  
15 Secretary Duke—the only official vested with authority to make the decision—offered pretextual  
16 reasons for rescinding DACA. *Id.* at 22-24.

17 In any event, the tweet—issued almost four months after the rescission—simply does not  
18 “support[ ] the inference that defendants rescinded DACA not for the reasons [that] they stated,  
19 but to create [a] bargaining opportunity.” Pls.’ Mot. at 2. The Administrative Record indicates  
20 that DACA was rescinded due to litigation risk and concerns about the policy’s legality. *See* AR  
21 254-55, ECF No. 64-1. As reflected in the appendix that Plaintiffs themselves submitted with  
22 their motion for provisional relief, DACA was never intended to be anything more than “a  
23 temporary stopgap measure” until Congress could address the issue, including the “need to pass  
24 comprehensive immigration reform . . . that continues to improve our border security.” *Remarks*  
25 *by President Obama on Immigration* (June 15, 2012), App’x in Supp. of Pls.’ Mot. for Prov.  
26 Relief (Pls.’ App’x), Ex. Q, at 1739-40, ECF No. 121-1; *see also* Defs.’ PI Opp., ECF No. 204,

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28 <sup>2</sup> All references to docket entries refer to the docket in *Regents of the University of California v. U.S. Dep’t of Homeland Sec.*, No. 3:17-cv-05211-WHA.

1 at 23. DACA’s rescission, however, was prompted by the *Texas* lawsuit and the litigation risk  
2 that flowed therefrom. Nothing in the tweet—which is completely silent on DACA’s rescission—  
3 says otherwise.

4 Nor does the tweet “underscore[ ] that the Rescission was fundamentally unfair and did  
5 not further any compelling government interest” so as to violate substantive due process. Pls.’  
6 Mot. at 3. As noted above, the tweet does not indicate that the rescission of DACA “was a tactic  
7 used to gain leverage to enact the administration’s immigration agenda.” *Id.* (citation omitted).  
8 The determination by the then-Acting Secretary of Homeland Security that DACA should be  
9 rescinded is a separate question from the terms on which the President would support  
10 congressional legislation. Nor can legislative negotiations “shock[ ] the conscience,” as Plaintiffs  
11 suggest. *Id.* To the contrary, in a January 3, 2018 letter to congressional leadership, former  
12 Secretary of Homeland Security (and named Plaintiff) Janet Napolitano explicitly recognized that  
13 “successful implementation of DACA legislation . . . could include sensible increases in border  
14 security funding,” and noted that “bipartisan legislation provides an opportunity to both  
15 permanently protect these young people and further secure the border.” *See* Declaration of Brad  
16 P. Rosenberg, Ex. A (attached hereto). Plaintiff Napolitano’s acknowledgement that securing the  
17 border is a worthy legislative goal is, of course, a goal that is also referenced in the tweet upon  
18 which Plaintiffs rely.<sup>3</sup> And in any event, when faced with a policy that is likely to be invalidated  
19 or one inherently temporary, it is entirely reasonable and appropriate for the political branches to  
20 consider various legislative solutions.

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26 <sup>3</sup> Plaintiffs quibble over the contours of possible immigration legislation by referring to that  
27 legislation as “harsh.” Pls.’ Mot. at 2. It is respectfully submitted that it is not this Court’s role  
28 to evaluate the relative policy merits of various legislative proposals. To the extent that the  
Plaintiffs have particular views on the form of proposed legislation, they can make their views  
known to the legislative branch, as named Plaintiff Napolitano has already done.

1 Dated: January 5, 2018

Respectfully submitted,

2 CHAD A. READLER  
Acting Assistant Attorney General

3 BRIAN STRETCH  
4 United States Attorney

5 BRETT A. SHUMATE  
6 Deputy Assistant Attorney General

7 JENNIFER D. RICKETTS  
Branch Director

8 JOHN R. TYLER  
9 Assistant Branch Director

10 */s/ Brad P. Rosenberg*  
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Senior Trial Counsel  
11 STEPHEN M. PEZZI (DC Bar #995500)  
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16 **UNITED STATES DISTRICT COURT FOR THE**  
 17 **NORTHERN DISTRICT OF CALIFORNIA**

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

21 Plaintiffs,

22 v.

23 UNITED STATES DEPARTMENT OF  
 24 HOMELAND SECURITY and KIRSTJEN  
 25 M. NIELSEN, in her official capacity as the  
 Secretary of Homeland Security,

26 Defendants.

No. 3:17-cv-05211-WHA

**DECLARATION OF  
BRAD P. ROSENBERG**

1  
2 STATE OF CALIFORNIA, STATE OF  
3 MAINE, STATE OF MARYLAND, and  
4 STATE OF MINNESOTA,

5 Plaintiffs,

6 v.

7 U.S. DEPARTMENT OF HOMELAND  
8 SECURITY, KIRSTJEN M. NIELSEN, in her  
9 official capacity as Secretary of Homeland  
10 Security, and the UNITED STATES OF  
11 AMERICA,

12 Defendants.

No. 3:17-cv-05235-WHA

13 CITY OF SAN JOSE, a municipal  
14 corporation,

15 Plaintiff,

16 v.

17 DONALD J. TRUMP, President of the United  
18 States, in his official capacity, KIRSTJEN M.  
19 NIELSEN, in her official capacity as  
20 Secretary of Homeland Security, and the  
21 UNITED STATES OF AMERICA,

22 Defendants.

No. 3:17-cv-05329-WHA

23 DULCE GARCIA, MIRIAM GONZALEZ  
24 AVILA, SAUL JIMENEZ SUAREZ,  
25 VIRIDIANA CHABOLLA MENDOZA,  
26 NORMA RAMIREZ, and JIRAYUT  
27 LATTHIVONGSKORN,

28 Plaintiffs,

v.

UNITED STATES OF AMERICA,  
DONALD J. TRUMP, in his official capacity

No. 3:17-cv-05380-WHA

1 as President of the United States, U.S.  
2 DEPARTMENT OF HOMELAND  
3 SECURITY, and KIRSTJEN M. NIELSEN,  
4 in her official capacity as Secretary of  
5 Homeland Security,

6 Defendants.

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

10 Plaintiffs,

11 v.

No. 3:17-cv-05813-WHA

12 DONALD J. TRUMP, President of the United  
13 States, in his official capacity; JEFFERSON  
14 BEAUREGARD SESSIONS, Attorney  
15 General of the United States, in his official  
16 capacity; KIRSTJEN M. NIELSEN, Secretary  
17 of Homeland Security, in her official capacity;  
18 and the U.S. DEPARTMENT OF  
19 HOMELAND SECURITY,

20 Defendants.

21 I, Brad P. Rosenberg, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

22 1. I am a Senior Trial Counsel at the U.S. Department of Justice, Civil Division,  
23 Federal Programs Branch. In that capacity I serve as lead counsel for the defendants in the  
24 above-captioned, related matters. The statements contained in this declaration are based on my  
25 personal knowledge or upon information provided to me in my official capacity.

26 2. Attached hereto as Exhibit A is a true and correct copy of a letter published on  
27 The New York Times's website. I obtained a copy of the letter on January 4, 2018 from the  
28 website: <https://www.nytimes.com/interactive/2018/01/03/us/politics/document-Letter-on-DACA-From-Former-Homeland-Security.html>.

1 I declare under penalty of perjury that the foregoing is true and correct.

2 Executed this 5th day of January, 2018.

3  
4 /s/ Brad P. Rosenberg  
5 BRAD P. ROSENBERG  
6 Senior Trial Counsel  
7 U.S. Department of Justice  
8 Civil Division, Federal Programs Branch  
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# **Exhibit A**

January 3, 2018

The Honorable Mitch McConnell  
Majority Leader, U.S. Senate  
Washington, DC 20510

The Honorable Paul D. Ryan  
Speaker, U.S. House of Representatives  
Washington, DC 20515

The Honorable Charles E. Schumer  
Democratic Leader, U.S. Senate  
Washington, DC 20510

The Honorable Nancy Pelosi  
Democratic Leader, U.S. House of Representatives  
Washington, DC 20515

The Honorable Ron Johnson  
Chair of Homeland Security Committee, U.S. Senate  
Washington, DC 20510

The Honorable Claire McCaskill  
Ranking Member, U.S. Senate  
Washington, DC 20510

The Honorable Michael McCaul  
Chair of Homeland Security Committee, U.S House  
of Representatives  
Washington, DC 20515

The Honorable Bennie G. Thompson  
Ranking Member, U.S. House of Representatives  
Washington, DC 20515

Dear Leader McConnell, Minority Leader Schumer, Speaker Ryan, Minority Leader Pelosi, Chairman Johnson, Chairman McCaul, Ranking Member McCaskill, and Ranking Member Thompson:

We write to you today as Congress considers legislation to allow certain young immigrants, known as Dreamers, who came to the country as children, to be able to continue to live, work and contribute to our country. We write not only in strong support of this legislation, but to stress that it should be enacted speedily, in order to meet the significant administrative requirements of implementation, as well as the need to provide certainty for employers and these young people. For these reasons, the realistic deadline for successfully establishing a Dreamers program in time to prevent large scale loss of work authorization and deportation protection is only weeks away, in the middle of January.

As former Secretaries of the Department of Homeland Security, we are acutely aware of the challenges that must be met and the time necessary for DHS to implement a system to effectively adjudicate applications for status adjustments by Dreamers. There is a misconception that because President Trump rescinded the program in a fashion where the number of individuals losing DACA escalates dramatically starting March 5th, there is no urgency about addressing Dreamer's status or that this executive authorization can be further extended. In fact, DACA has been rescinded and legislation is the only permanent way to prevent these Dreamers from losing work authorization and becoming subject to immediate deportation.

Establishing a program to effectively adjudicate a new immigration application system must be done responsibly. Career officials at USCIS are well trained, but creating a secure and reliable process will take time, followed by a period of months to ensure individual applicants are thoroughly reviewed. For context, in 2012 when DACA was established, it took nearly 90 days before the first applications were approved. Even if it only takes half of that time for USCIS to establish a DACA process under legislation, Congress needs to pass a bill by January 19th to provide enough time for USCIS to process applications before tens of thousands of DACA recipients are negatively impacted by the loss of their work authorization or removal from the United States. This 45 day timeline - leading into March 5th when the number of DACA recipients losing status skyrockets to an average of 1,200 a day - is very aggressive, but should be seen as an actual best-case deadline based on our collective experience with these

administrative and security requirements.

DACA provides recipients protection from deportation and an employment authorization document (EAD) which needs to be renewed every two years. Once legislation is passed, applicants will have to apply through this new process. If an individual's DACA lapses in the meantime, the individual would lose his or her ability to work legally and, depending on the legislation, would be subject to immediate deportation until they could receive the benefits of this new legislative program. Delay in enacting DACA legislation would inject serious uncertainty for businesses who currently employ Dreamers, as well as for the large numbers of DACA beneficiaries who must fear that they will be fired and forced to hide until this new program is established and the new application process is underway.

Over 90% of DACA recipients are currently employed. Every week of delay means thousands of new DACA recipients losing work authorization, negatively impacting the business community by creating uncertainty for all businesses employing DACA recipients. DACA recipients work in every sector of the US economy. Congressional delay past the next few weeks will force the employers of hundreds of thousands of DACA recipients into a state of instability, in which they have to plan for losing these critical employees. The 690,000 DACA recipients - who came to this country at the average age of six and have lived here twenty years - deserve certainty as well. Our country is better if these individuals do not have to spend the next few months planning for a future where they cannot work legally and could be deported at any time, many to countries they do not remember.

To ensure a successful implementation of DACA legislation, Congress should pass bipartisan legislation in the next few weeks to allow these young people to continue to fully contribute to this country. We are also optimistic that this legislation could include sensible increases in border security funding. Illegal border crossings of the southwest border have dropped to the lowest point in modern history, but bipartisan legislation provides an opportunity to both permanently protect these young people and further secure the border.

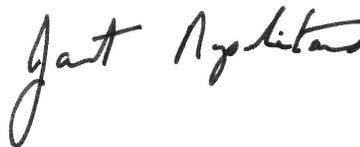
Ultimately, Congress must decide whether to pass legislation to permanently protect these young people from deportation and allow them to continue contributing to the only nation they have known. As former Secretaries of the Department of Homeland Security, we urge them to do so and to act now. Not only is there no reason to delay, but establishing this new program in 45 days would be an incredible accomplishment done in record time. This means Congress must act by the middle of January to ensure a successful program, avoid significant hardship for USCIS, the business community and Dreamers themselves.

Sincerely,



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Michael Chertoff



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Janet Napolitano



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Jeh Johnson

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA**

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 KIRSTJEN M. NIELSEN, in her official capacity as Acting Secretary of the Department of Homeland Security,

Defendants.

No. 3:17-cv-05211-WHA  
No. 3:17-cv-05235-WHA  
No. 3:17-cv-05329-WHA  
No. 3:17-cv-05380-WHA  
No. 3:17-cv-05813-WHA

**[PROPOSED] ORDER**

Plaintiffs in the above-docketed and related cases have filed a motion for judicial notice and to supplement the record regarding a December 29, 2017 tweet by President Trump. *See* No. 3:17-cv-05211-WHA, ECF No. 227. Because Plaintiffs cannot rely upon materials outside of the Administrative Record for purposes of their claims under the Administrative Procedure Act, and because the tweet that Plaintiffs propose to cite does not bear upon the issues in this case, Plaintiffs' motion shall be, and it hereby is, DENIED. IT IS SO ORDERED.

\_\_\_\_\_  
William Alsup  
United States District Judge

\_\_\_\_\_  
Date