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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,  
 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

**DEFENDANTS' SUPPLEMENTAL**  
**MEMORANDUM IN RESPONSE TO**  
**THE COURT'S ORDER REGARDING**  
***HAWAII v. TRUMP***

Judge: Honorable William Alsup

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,

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9 Defendants.

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

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16 Plaintiffs,

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18 v.

No. 3:17-cv-05813-WHA

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

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**DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN RESPONSE TO  
THIS COURT'S ORDER REGARDING *HAWAII v. TRUMP***

This Court has asked for supplemental briefing “discussing the significance, if any,” of the Ninth Circuit’s recent decision in *Hawaii v. Trump*, --- F.3d ---, 2017 WL 6554184 (9th Cir. Dec. 22, 2017). *See* Order, ECF No. 229.<sup>1</sup> That decision involved an appeal of a preliminary injunction against a proclamation issued by the President entitled “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats.” Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (“Proclamation 9645” or “Proclamation”). That Proclamation applies entry restrictions tailored to certain nationals from eight countries that were found to have inadequate information-sharing practices or other risk factors. *See Hawaii*, 2017 WL 6554184, at \*3; *see generally id.* at \*3-\*5 (providing background on Proclamation 9645).

The *Hawaii* decision does not have any significance to this case. The Ninth Circuit’s merits holdings—*i.e.*, that the Proclamation exceeds the President’s authority under 8 U.S.C. §§ 1182(f), 1185(a), and 1152(a), which are provisions of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101, *et seq.*, that concern the suspension of entry and the issuance of immigrant visas—are plainly irrelevant here. *See Hawaii*, 2017 WL 6554184, at \*10-\*21. Likewise, because the nature of the claims and alleged harms in *Hawaii* are fundamentally different than here, the Ninth Circuit’s holdings on justiciability and equitable relief are also inapposite.

**1. Justiciability**

The Ninth Circuit’s justiciability analysis addressed ripeness, the doctrine of consular nonreviewability, and the availability of APA review. *See id.* \*5-\*9. Defendants have not raised a ripeness argument in these cases.<sup>2</sup> Nor have they invoked the doctrine of consular nonreviewability, which limits judicial review of the exclusion of aliens abroad and thus is

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<sup>1</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.

<sup>2</sup> While Defendants have not disputed that at least some of Plaintiffs’ claims here are ripe, the temporary, preliminary injunctive relief that they seek is both premature and inappropriate in light of the nature of Plaintiffs’ alleged harm. *See* Defs.’ Mem. in Opp. to Pls.’ Mot. for Provisional Relief (“Defs.’ Opp’n”) at 32-35, ECF No. 204; Part 2, *infra*.

1 inapplicable here. *Id.* at \*6 (quotation omitted). Plaintiffs may seek to emphasize the Ninth  
2 Circuit’s conclusion that the consular nonreviewability doctrine applies to individual visa  
3 decisions by consular officers but not categorical policies by the President. That conclusion,  
4 however, was expressly based on the erroneous rationale that the doctrine exists to protect the  
5 policy choices of the Congress rather than the President. *See id.* at \*6-\*7. Here, by contrast, the  
6 doctrine of *Heckler v. Chaney*, 470 U.S. 821 (1985), indisputably protects the *executive* branch’s  
7 enforcement decisions as generally committed to agency discretion by law under 5 U.S.C.  
8 § 701(a)(2).

9         The Ninth Circuit’s analysis of the availability of APA review in *Hawaii* is also inapposite  
10 here. Although the Ninth Circuit rejected the Government’s argument that 5 U.S.C. § 701(a)(2)  
11 barred review of the Proclamation because it is an action committed to the Executive’s discretion  
12 under the text of 8 U.S.C. §§ 1182(f) and 1185(a), the court reasoned that Section 701(a)(2) does  
13 not apply where “a court is tasked with reviewing whether an executive action has exceeded  
14 statutory authority.” *Hawaii*, 2017 WL 6554184, at \*8 (citation omitted). Here, by contrast,  
15 Plaintiffs do not allege that Defendants have violated the INA at all, and no provision of the INA  
16 even arguably constrains the Government’s discretion in winding down a prior deferred-action  
17 policy. To the contrary, and further unlike in *Hawaii*, the INA precludes federal district courts  
18 from engaging in judicial review of deferred-action decisions. *See* 8 U.S.C. § 1252(g); *Reno v.*  
19 *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999). Likewise, although the Ninth  
20 Circuit held that the State of Hawaii’s efforts to enroll students and hire faculty members from  
21 the countries covered by the Proclamation fell within the INA’s zone of interests, the court relied  
22 on specific INA provisions providing for the temporary admission of certain nonimmigrant aliens  
23 as students, scholars, teachers, trainees, and professors in fields of specialized knowledge or skill,  
24 among others, into the United States. *See id.* at \*9 (citing 8 U.S.C. § 1101(a)(15)(F); *id.*  
25 § 1101(a)(15)(J); *id.* § 1101(a)(15)(H); *id.* § 1101(a)(15)(O)). Here, by contrast, the university,  
26 state, municipal, and union Plaintiffs can point to no provision of the INA giving them an interest  
27 in whether individuals with no lawful immigration status should receive deferred action, because  
28

1 no such provision exists. *See* Defs.’ Mem. in Support of Motion to Dismiss at 20-22, ECF No.  
2 114.

## 3 **2. Equitable Relief**

4 The Ninth Circuit’s analysis of irreparable harm is inapposite here. The court found that  
5 application of the Proclamation caused the *Hawaii* plaintiffs to suffer irreparable harm to the  
6 extent individuals were separated from family members who sought to enter the United States,  
7 universities were unable to recruit or retain students and faculty members, and certain associations  
8 suffered from diminished membership. *See Hawaii*, 2017 WL 6554184, at \*22. Whatever else  
9 can be said of these alleged harms, they are fundamentally different from the harms that Plaintiffs  
10 allege here. Because Proclamation 9645 placed specific, targeted restrictions on the entry of  
11 foreign nationals from eight countries, a preliminary injunction could be tailored to provide an  
12 immediate remedy to affected individuals by enjoining specific sections of the Proclamation,  
13 thereby allowing them to obtain visas and enter the country if they are otherwise eligible and  
14 admissible.<sup>3</sup> Plaintiffs’ injuries here are fundamentally different: DACA recipients claim that  
15 they cannot make long-term plans (such as family, educational, and career plans) and that they  
16 are suffering psychological harm due to the uncertainty associated with their deferred action. *See*  
17 Defs.’ Opp’n at 32-35. No preliminary injunction—which would last at most through the  
18 conclusion of these lawsuits—can provide Plaintiffs with the long-term certainty that they seek.  
19 In that regard, the Ninth Circuit’s analysis of irreparable harm in the context of a preliminary  
20 injunction is completely irrelevant here.

21 Nor is the Ninth Circuit’s analysis of the scope of injunctive relief applicable here. The  
22 court upheld a nationwide injunction against the Proclamation’s entry restrictions based on its  
23 view that doing so was necessary for “immigration policy” to remain “uniform” and consistent  
24 with the laws enacted by Congress. *Hawaii*, 2017 WL 6554184, at \*24 (citation omitted). But  
25 that logic does not apply even on its terms to the rescission of DACA. After all, DACA itself is  
26 a policy of *prosecutorial discretion* that declines to enforce the INA against some individuals but

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27 <sup>3</sup> While the Ninth Circuit modified the district court’s preliminary injunction in respects not  
28 relevant here, that injunction remains stayed by the Supreme Court pending the disposition of the  
Government’s petition for a writ of certiorari. *See Hawaii*, 2017 WL 6554181, at \*24-\*25.

1 not others; accordingly, issuing an injunction against the rescission of DACA that is nationwide  
2 rather than limited to the individual DACA recipients who have cognizable relationships with the  
3 Plaintiffs would *exacerbate* the degree to which there is a departure from the INA's uniform law.  
4 For these same reasons, nothing in the Ninth Circuit's analysis supports the entry of the proposed  
5 order that Plaintiffs have submitted, as nothing in that opinion would support a wholesale  
6 reinstatement of the DACA policy on a preliminary, and hence only temporary, basis.

7  
8 Dated: January 8, 2018

Respectfully submitted,

9 CHAD A. READLER  
Acting Assistant Attorney General

10 BRIAN STRETCH  
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18 STEPHEN M. PEZZI (DC Bar #995500)  
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