Nos. 18-15068, 18-15069, 18-15070, 18-15071,
18-15072, 18-15128, 18-15133, 18-15134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

On Cross-Appeal from the United States District Court
for the Northern District of California

REPLY BRIEF OF THE STATES OF CALIFORNIA, MAINE, MARYLAND, AND MINNESOTA

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INTRODUCTION

These consolidated appeals arise out of suits challenging defendants' decision to terminate the Deferred Action for Childhood Arrivals (DACA) program. The States' principal and response brief explained why those challenges are reviewable and why the district court properly entered a preliminary injunction, which partially preserves the status quo while this litigation is completed. The district court erred, however, in dismissing the claim that defendants violated the Administrative Procedure Act when they adopted a substantive rule terminating DACA without first following notice-and-comment procedures. This brief responds to defendants' arguments about that claim.

Like many of the issues in this case, the notice-and-comment issue turns on defendants' stated basis for their decision to end DACA. Notice-and-comment procedures are not required for general statements of policy, which merely provide guidance to agency officials in exercising their discretionary powers. *See, e.g.*, *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987). But a directive that "'narrowly limits administrative discretion' or establishes 'a binding norm'" creates a new rule of substantive law, which must go through notice and comment. *Id.* at 1014 (emphasis omitted).

Defendants have offered an array of different explanations for their decision to end DACA. At times, they argue that it was a "purely discretionary" decision

(ARRB 1; AOB 2; *see id.* at 13-14); that the Acting Secretary concluded "that she should *exercise her discretion* to" terminate DACA (ARRB 7); and that the decision was based on her "policy judgment" (D.Ct. Dkt. 114 at 26; *see* ARRB 9).[1] That is essentially how they frame the decision in responding to the notice-and-comment claim. They argue that the memorandum rescinding DACA merely "explains how the agency intends to exercise its enforcement authority on a prospective basis," but "places 'no limitations' on the agency's exercise of . . . 'otherwise lawful enforcement . . . prerogatives.'" ARRB 53, 54. As a result, they contend, the decision to terminate DACA fits within the "general statement of policy" exception to the notice-and-comment requirement. *See id.* at 53-55.

In the rescission memorandum itself, however, defendants described the decision in a way that establishes it is not a mere policy statement. The memorandum describes a "legal determination" by the Attorney General that DACA is an "unconstitutional" program, "effectuated . . . without proper statutory authority," which "circumvent[s] . . . immigration laws" and contains "the same legal and constitutional defects that the courts recognized as to DAPA." ER 129. It concludes that this legal determination made it "clear that the June 15, 2012 DACA program should be terminated." ER 130. Defendants repeated that

[1] "ARRB" refers to appellants' response and reply brief (Dkt. 134); "AOB" refers to appellants' opening brief (Dkt. 31); "D.Ct. Dkt." refers to the district court's docket in No. 17-cv-5211.

explanation when they publicly announced the decision through a press statement by the Attorney General. SER 1354 ("Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch."). The President reiterated it on the same day: "'the program is unlawful and unconstitutional and cannot be successfully defended in court.'" ARRB 35 (quoting Statement from President Trump (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump). Even in this litigation, defendants acknowledge that the decision was based (in part, they say) on the Acting Secretary's "conclusion, informed by the Attorney General's advice, that indefinitely continuing the DACA policy would itself have been unlawful." AOB 38; *see* ARRB 20.

Defendants' adoption of a legal conclusion as the basis for terminating DACA establishes that they violated the procedural requirements of the APA. The rescission memorandum leaves no doubt that the Department of Homeland Security intends to be bound by the legal determination that it lacks the authority to operate a deferred-action program like DACA. Such a substantive rule may be adopted only through notice-and-comment procedures. Moreover, as the States previously explained, the fact that defendants based their decision to terminate DACA on a legal conclusion has other important consequences for this litigation. Defendants' abrupt change of position, inadequate explanation, and flawed legal

premise render the decision arbitrary, capricious, and contrary to law; and the legal basis of the decision underscores why plaintiffs' APA claims are reviewable. *See* State Br. 17-20, 36-53.

ARGUMENT

I. PLAINTIFFS STATED A CLAIM THAT DEFENDANTS VIOLATED THE APA'S NOTICE-AND-COMMENT REQUIREMENT

Defendants acknowledge that the exception to the notice-and-comment requirement for general statements of policy is reserved for documents that "'are binding on neither the public nor the agency.'" ARRB 52. Statements of policy "merely provide[] *guidance* to agency officials in exercising their discretionary powers." *Mada-Luna*, 813 F.2d at 1013. Defendants assert that the rescission memorandum fits this description because it "explains how the agency intends to exercise its enforcement authority on a prospective basis." ARRB 53 (citing ER 130-131). But the memorandum does more than that. It adopts a categorical "legal determination" that DACA is unlawful (ER 129; *see* ER 130, 176)—establishing a new rule of substantive law prohibiting DHS from creating or continuing deferred action programs like DACA. *See* State Br. 67-69.[2]

[2] Indeed, the memorandum does not even direct "that deferred action could be granted on an individual, case-by-case basis" going forward (ARRB 55 (citing ER 130)), as defendants say it does. The language cited by defendants states that DHS "[w]ill adjudicate—on an individual, case-by-case basis—properly filed pending DACA initial requests and associated applications for Employment Authorization

(continued…)

Defendants offer no direct response to this argument. *See* ARRB 51-56. They do not dispute that the memorandum embodies a legal determination that DACA is unlawful; indeed, they have conceded that it does. *See* AOB 38.[3] And although they assert without elaboration that "[n]othing in the Rescission Memo evidences an 'inten[t] to be bound'" (ARRB 54), they have clearly adopted the view that DHS lacks authority to operate DACA and similar programs going forward (*see* AOB 38; ARRB 27-30; ER 129-130, 176). The rescission memorandum thus "replaces agency discretion" to operate deferred-action

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(…continued)
Documents that have been accepted by" September 5, 2017, and that it "[w]ill reject all DACA initial requests and associated applications for Employment Authorization Documents filed after" that date. ER 130. It says nothing else about whether (or how) DHS will respond to initial requests for deferred action submitted after September 5.

[3] Throughout their response and reply brief, defendants insist that their decision to terminate DACA nonetheless rests on a discretionary determination. By their reading, the memorandum "did not rest on the judgment that DACA *must* be rescinded because it was *in fact* legally invalid, but rather explained [the Acting Secretary's] conclusion that DACA 'should' be rescinded." ARRB 2; *see id.* at 7, 20, 24, 27-28. But the memorandum clearly expresses the view that the Attorney General's "legal determination"—based on the decisions in the *Texas* litigation—necessitates the termination of DACA. ER 129-130; *see* ER 39; Webster's Third New International Dictionary 2104 (2002) ("should" is "used in auxiliary function to express duty, obligation, necessity, propriety, or expediency"). Indeed, as noted above, defendants do not dispute that the memorandum rests in part on a legal determination. They instead assert (incorrectly) that it *also* relies on a discretionary policy judgment. *See* ARRB 20 ("[T]he memorandum thus did not rely *solely* on illegality *per se*, but rather principally on litigation risk and legality concerns.") (emphasis added).

programs like DACA—discretion that has been recognized and employed by administrations of both parties for decades—"with a new 'binding rule of substantive law'" prohibiting it from doing so. *Mada-Luna*, 813 F.2d at 1014. That the rescission memorandum "does not categorically forbid DHS" from exercising deferred action in particular cases in the future (ARRB 54) does not change the fact that DHS limited its discretion by binding itself to a substantive position that bars deferred action programs such as DACA.

Defendants are not correct that if the rescission memorandum "is a substantive rule, then *a fortiori* the restriction on discretion imposed by DACA itself was a substantive rule." ARRB 55. The 2012 memorandum establishing DACA qualified as a policy statement because it merely gave agency officials guidance about how to exercise discretion in making deferred action decisions, while expressly preserving their ability to deny requests for deferred action on a "case by case basis." ER 142. As this Court has held, that type of guidance document is a quintessential statement of policy. *See Mada-Luna*, 813 F.2d at 1012-1013. Defendants were free to alter that statement in a manner that preserved existing agency discretion. They instead opted to terminate DACA in the 2017 rescission memorandum by adopting a position flatly prohibiting the agency from operating such a program. *See* ER 129-130; AOB 38. The "availability of [the 'statement of policy'] exception from section 553's requirements must be

determined on a rule-by-rule basis." *Mada-Luna*, 813 F.3d at 1012 n.6. Given the material differences between the 2012 memorandum and the 2017 memorandum, there is no basis for concluding that the substantive nature of the later memorandum "necessarily implies" that the earlier one was substantive as well. ARRB 55. Nor is there any need to fear that treating the two memoranda differently "would offend both law and equity." *Id.*

This Court's decision in *Mada-Luna* does not support defendant's position. *See* ARRB 53-54. That case dealt with two sequential INS operating instructions regarding the exercise of deferred action. The Court examined each of them individually, holding that both the 1978 instruction and the 1981 instruction qualified as general statements of policy because they offered guidance that preserved agency discretion and did not establish any "binding norm." *Mada-Luna*, 813 F.2d at 1017. The Court did not hold that *every* agency statement regarding deferred action qualifies as a general statement of policy. To the contrary, it recognized that "not *all* INS operating instructions would qualify under [the] exception" for "'general statements of policy,'" explaining that "[a]gencies cannot exempt their proposed new rules from the APA's notice-and-comment or other requirements merely by classifying them as 'operating instructions.'" *Id.* at 1012 n.6. Regardless of label, an agency directive that "'narrowly limits

administrative discretion'" cannot qualify as a general statement of policy. *Id.* at 1014.

Finally, even if this Court were to disagree with our arguments and conclude that the 2012 memorandum establishing DACA was a substantive rule, that would only provide further reason why defendants had to follow notice-and-comment procedures before rescinding it. *See* State Br. 68-69. The APA expressly directs that an agency's process for "repealing a rule" itself constitutes a "rule making," 5 U.S.C. § 551(5), which is subject to the notice-and-comment requirement, *see* 5 U.S.C. § 553(b). That is true even if the putative reason for repealing the rule is that it was defectively promulgated. *See Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982). So if the 2012 memorandum created a substantive rule that should have been (but was not) promulgated through a notice-and-comment process, it follows that the same process should have been employed to rescind it.

Defendants contend that the authority invoked by plaintiffs on this point is "inapposite" because it involved "substantive rules that were promulgated through notice-and-comment rulemaking and were . . . claimed to be defective for some other reason." ARRB 56. But they offer no persuasive explanation why the reasoning of *Consumer Energy* should not apply to a case such as this one. Defendants have recently adopted the position that the memorandum creating

DACA established a substantive rule that has bound agency discretion since 2012. *See* ARRB 29 n.5. Under these circumstances, it is consistent with the APA to require the agency to notify the public of that conclusion and accept comment on whether DACA was defectively promulgated. Just as in *Consumer Energy*, the question whether the original policy was defectively promulgated is itself "one worthy of notice and an opportunity to comment," 673 F.2d at 447 n.79—particularly from the standpoint of employers and hundreds of thousands of DACA recipients who have relied on it over the years. *Cf. Nat'l Treasury Emps. Union v. Cornelius*, 617 F. Supp. 365, 369, 371 (D.D.C. 1985) (applying *Consumer Energy* where agency "suddenly announced" that prior rule exceeded agency's statutory authority, four years after the rule was adopted and after it had "been relied upon by federal employees and the Federal Circuit").

No one disputes that elections have policy consequences. New administrations may change existing policies or rules; but they must do so within the constraints of federal law. In particular, when such a change involves final agency action, the Executive Branch must comply with the procedural (and substantive) requirements of the APA. By adopting a categorical legal determination that DHS lacks statutory authority to operate the DACA program, without following notice-and-comment procedures, defendants violated 5 U.S.C. § 553.

CONCLUSION

For the foregoing reasons and those in the States' prior brief, the order regarding the motion to dismiss should be reversed with respect to the notice-and-comment claim and affirmed with respect to the substantive APA and due process claims. The order granting a preliminary injunction should be affirmed.

Dated: April 17, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a)(5)-(6) and Ninth Circuit Rule 28.1-1(d) because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, and contains 2,159 words.

Dated: April 17, 2018

s/ Michael J. Mongan

CERTIFICATE OF SERVICE

I certify that on April 17, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 17, 2018 *s/ Michael J. Mongan*