Consolidated Case 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

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,

Plaintiffs-Appellees-Cross-Appellants,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Defendants-Appellants-Cross-Appellees.

On Appeal From The United States District Court
For The Northern District Of California

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INTRODUCTION

This case is about whether 700,000 young people who came to the United States as undocumented children and have lived their entire lives here will be threatened with removal because the government terminated the Deferred Action for Childhood Arrivals (DACA) program. Since 2012, the government has encouraged these individuals, known as "Dreamers," to come out of the shadows and apply for DACA in exchange for presumptively renewable two-year periods of deferred action and work authorization. The program has been an unqualified success. Hundreds of thousands of young people have obtained deferred action under the program and have relied on the government's promises. DACA recipients have served in the military; furthered their educations; opened businesses; become teachers, social workers, lawyers, and medical professionals; and contributed to their communities and our Nation in countless ways.

In September 2017, the government abruptly reversed course, announcing that it would terminate the DACA program and would reject renewal requests for those with statuses expiring after March 5, 2018. Plaintiffs challenged this decision on statutory, constitutional, and equitable grounds. The district court determined that plaintiffs are likely to succeed on their claim that the rescission was arbitrary and capricious in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and that the balance of hardships sharply favors plaintiffs. It therefore

issued a preliminary injunction to protect the hundreds of thousands of current DACA recipients pending a final decision on the merits. The court also rejected the government's arguments that no court can review the decision to rescind DACA and denied the government's motion to dismiss most of plaintiffs' claims.

The government now asks this Court to dissolve the district court's preliminary injunction and largely reverse its rulings about the sufficiency of the pleadings. This Court should reject that invitation. The government is wrong to say that 5 U.S.C. § 701(a)(2) and 8 U.S.C. § 1252(g) bar judicial review of its decision to end a longstanding program protecting 700,000 people from removal. And the government has not established that the district court abused its broad discretion in entering the preliminary injunction. Plaintiffs are likely to succeed on their APA claim because neither of the government's proffered justifications for rescinding DACA (DACA's alleged unlawfulness and "litigation risk") withstand scrutiny. And the government does not dispute that DACA recipients would be seriously and irreparably harmed without the injunction—especially now that the March 5 deadline has passed and the government would not process DACA renewals but for the injunction.

Finally, the government cannot show that the district court erred in refusing to dismiss plaintiffs' equal protection and due process claims on the pleadings.

Plaintiffs cross-appeal on two narrow grounds related to the sufficiency of the pleadings. The district court erred in dismissing plaintiffs' claim that the rescission impermissibly deprives DACA recipients of property and liberty interests protected by the Due Process Clause and their claim that the decision to rescind DACA is procedurally defective because it failed to follow the notice-and-comment procedures required by the APA. Plaintiffs have plausibly alleged such claims and they are legally well-grounded.

This Court should affirm the district court's order granting the preliminary injunction and denying the motion to dismiss, and reverse the portion of the order granting the government's motion to dismiss.

STATEMENT OF JURISDICTION

The district court had federal-question jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over the appeal of the preliminary injunction under 28 U.S.C. § 1292(a)(1) and over appeals from the orders addressing defendants' motions to dismiss under 28 U.S.C. § 1292(b).

The district court entered an order granting plaintiffs' motion for a preliminary injunction and denying the government's motion to dismiss for lack of jurisdiction on January 9, 2018, and an order granting in part and denying in part the government's motion to dismiss for failure to state a claim on January 12, 2018. The district court certified its orders for interlocutory appeal. *See* ER.48-49, 62-63. On

January 16, 2018, the government filed a notice of appeal of the preliminary-injunction order and a petition for interlocutory review of the motion-to-dismiss orders. On January 22, 2018, plaintiffs filed petitions for interlocutory review of the motion-to-dismiss order. On January 25, 2018, this Court accepted the appeals and petitions for interlocutory review. C.A. No. 18-15068, Dkt. 2.

CONSTITUTIONAL AND STATUTORY AUTHORITIES

All pertinent constitutional and statutory authorities appear in the Addendum to this brief.

ISSUES PRESENTED

1. Whether either the APA, 5 U.S.C. § 701(a)(2), or the INA, 8 U.S.C. § 1252(g), precludes judicial review of the government's decision to terminate the DACA program.

2. Whether the district court abused its discretion in entering a preliminary injunction, based on its findings that plaintiffs are likely to succeed on their claim that the decision to end DACA was arbitrary and capricious in violation of the APA and that the equities strongly favor granting preliminary-injunctive relief.

3. Whether plaintiffs sufficiently stated a claim that the government's decision to rescind DACA violates the Equal Protection Clause because it was motivated by discriminatory intent.

4. Whether plaintiffs sufficiently stated a claim that the government's change in policy regarding protection of DACA applicants' personal information violates the Due Process Clause.

5. Whether plaintiffs sufficiently stated a claim that the government's rescission of DACA violates the Due Process Clause because it impermissibly deprives them of their protected interest in renewal of their DACA status and its attendant benefits.

6. Whether plaintiffs sufficiently stated a claim that the rescission of DACA violates the APA because the government failed to follow notice-and-comment procedures, and if so, whether this Court should affirm the preliminary injunction on the alternative ground that plaintiffs are likely to prevail on that claim.

STATEMENT OF THE CASE

I. DEFERRED ACTION AND THE ESTABLISHMENT OF DACA

For more than 60 years, the Department of Homeland Security (DHS) and its predecessor, the Immigration and Naturalization Service (INS), have allowed individuals without lawful status to remain in the United States through deferred action. SER.240. Deferred action is an exercise of the Executive's authority to "[e]stablish[] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). DHS and the INS have exercised this discretion on a programmatic basis, adopting 17 different deferred-action programs in the past 62 years. *See* SER.265-66. These programs recognize that "there simply are not enough resources to enforce

all of the rules and regulations presently on the books," and that "[i]n some situations, application of the literal letter of the law would simply be unconscionable and would serve no useful purpose." SER.1215.

In 2012, Secretary of Homeland Security Janet Napolitano established the DACA program. SER.223-25. She explained that the agency's exercise of "prosecutorial discretion" to permit individuals who met the specified criteria to remain in the United States was "especially justified" because these "productive young people" had "already contributed to our country in significant ways" and "lack the intent to violate the law." SER.223-24. She adopted the DACA program to "ensure that [the government's] enforcement resources are not expended on these low priority cases." SER.223.

Under DACA, undocumented individuals who were brought to the United States as children and met the specified criteria could apply for deferred action for an initial period of two years, which could be renewed. SER.223-25. To apply for DACA, individuals were required to disclose personal information, submit to a rigorous background check, and pay a considerable fee. ER.203-04. Once approved, a DACA recipient could obtain work authorization and a social security number, open a bank or credit card account, purchase a home or car, and obtain tuition benefits and health insurance. ER.205-06.

The government promoted the DACA program through an extensive outreach campaign, repeatedly promising that information submitted to the government "is protected from disclosure" to immigration enforcement agencies—U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP)—except in special circumstances. ER.206-09, 227, 243, 250. The government also consistently and publicly represented that DACA recipients presumptively would be able to renew their status if they continued to satisfy conditions of their enrollment. ER.204-06, 243, 249-50. These representations were integral to the success of the program and the government understood them as such. ER.204-05, 243, 249-50.

More than 700,000 individuals have received deferred action under DACA, enabling them to live and work in this country without fear of deportation. ER.210, 214-18, 227. The Dreamers have relied on the promise of DACA to pursue higher education, make financial commitments, open businesses and hire employees, start families, and make many other life-changing decisions. ER.206. The impact of DACA on Latino communities has been especially profound, because Latinos account for 93 percent of approved DACA applications. ER.219, 232, 245.

The six individual plaintiffs here—Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn—relied on DACA to commit to careers as lawyers, medical professionals, and teachers; to build their homes and families; and to contribute to

their communities. ER.210-19. Without DACA, they will lose their careers, revert to a life in the shadows, and face the constant threat of deportation and separation from their families. ER.199-201, 227-28.

The government has recognized the program's transformative impact on DACA recipients and their families and communities. In December 2016, DHS Secretary Jeh Johnson observed that DACA enabled hundreds of thousands of young people "to enroll in colleges and universities, complete their education, start businesses that help improve our economy, and give back to our communities as teachers, medical professionals, engineers, and entrepreneurs—all on the books." ER.206. Recognizing that DACA recipients risk deportation by identifying themselves to the government to obtain deferred action, Secretary Johnson told them that "representations made by the U.S. government, upon which DACA applicants most assuredly relied, must continue to be honored." ER.208.

II. THE GOVERNMENT'S ABRUPT DECISION TO RESCIND THE DACA PROGRAM

The Trump administration originally committed to continue the DACA program. In March 2017, DHS Secretary John Kelly stated that DACA embodies a "commitment ... by the government towards ... Dreamer[s]." ER.209. In April 2017, the President personally assured the Dreamers that they could "rest easy" because the "policy of [his] administration [is] to allow the dreamers to stay." *Id.*

On September 4, 2017, the government abruptly reversed course. The Attorney General sent a one-page letter to Acting DHS Secretary Elaine Duke. SER.259. The letter's explanation for rescinding the DACA program was quite brief:

> DACA was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch. The related Deferred Action for Patents of Americans and Lawful Permanent Residents (DAPA) policy was enjoined on a nationwide basis in a decision affirmed by the Fifth Circuit on the basis of multiple legal grounds and then by the Supreme Court by an equally divided vote. *See Texas v. United States*, 86 F. Supp. 3d 591, 669-70 (S.D. Tex.), *aff'd*, 809 F.3d 134, 171-86 (5th Cir. 2016), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016). Then-Secretary of Homeland Security John Kelly rescinded the DAPA policy in June. Because the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA.

Id. The Attorney General gave essentially one reason for rescinding DACA—that it is "unconstitutional" because the Fifth Circuit had enjoined a *different* deferred-action program, DAPA, on "multiple legal grounds" (none of which, in fact, were constitutional grounds), and the Supreme Court had affirmed. The following day, the Attorney General announced the decision to end DACA. He gave the same conclusory justification as in his letter: The DACA program "is vulnerable to the

same legal and constitutional challenges that [the Fifth Circuit] recognized with respect to the DAPA program" in the *Texas* case. SER.1354-1355.

Acting Secretary Duke issued a memorandum rescinding DACA. SER.260-64; ER.225-26. The memorandum cited only the "Supreme Court's and the Fifth Circuit's rulings in the ongoing [DAPA] litigation, and the September 4, 2017 letter from the Attorney General." SER.263; ER.130. The memorandum neither analyzed any purported litigation risks nor weighed defending DACA and its widespread benefits against the consequences that rescinding it would have on the hundreds of thousands of DACA recipients, their families, employers, communities, and the economy. The memorandum instructed DHS to stop approving new DACA applications and to allow individuals' DACA status to expire beginning March 5, 2018. SER.263; ER.130.

In addition to rescinding the program, DHS walked back its promises about protecting the personal information of DACA recipients. Rather than pledging to "protect" that information from disclosure to ICE and CBP, DHS said only that it would not "proactively provid[e] [the information] to ICE and CBP for the purpose of immigration enforcement proceedings." ER.208, 227, 261.

Although the President originally promised to support the Dreamers, ER.209, he expressly took responsibility for the decision to rescind DACA, ER.226, and later candidly admitted that the rescission was used to make Dreamers a bargaining chip

in his effort to secure unrelated changes to the immigration laws, ER.44 n.18 ("[T]here can be no DACA without the desperately needed WALL at the Southern Border."). And the President's decision to rescind DACA also must be understood in light of his many statements denigrating non-citizens, especially Mexicans and Latinos. For example, during his first campaign speech, President Trump characterized Mexican immigrants as criminals and "rapists." ER.220, 265. He later defended those remarks as "100 percent correct." ER.220. He tweeted that "[d]ruggies, drug dealers, rapists and killers are coming across the southern border," and asked, "When will the U.S. get smart and stop this travesty?" ER.220. These and many similar statements are the President's response to, and cultivation of, anti-Mexican and Latino animus among his supporters. ER.219-23; *see also* ER.265-66.

III. PROCEDURAL HISTORY OF THESE CASES

Plaintiffs filed five related lawsuits challenging the rescission. Plaintiffs contend, *inter alia*, that DACA's rescission (1) is unlawful under the APA because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); (2) violates the APA's notice-and-comment rulemaking requirement, 5 U.S.C. § 553; (3) denies DACA recipients equal protection of the laws; and (4) impermissibly deprives them of constitutionally protected interests in the confidentiality of personal information submitted with their DACA applications and in their ability to renew their DACA status. ER.13-16.

The district court denied the government's motion to dismiss for lack of jurisdiction and granted preliminary-injunctive relief. ER.1-49. The court rejected the government's arguments that the decision to end DACA is unreviewable. ER.18-23. The court held that the decision is not "committed to agency discretion by law" under the APA because it is a "major policy decision[]" based on the agency's "interpretation of the INA"—a "quintessential[ly]" reviewable legal question for which "there is law to apply." ER.19-21. The court also held that 8 U.S.C. § 1252(g) does not bar judicial review, ER.21-23, because that provision applies only to the "three discrete decisions or actions named" in the statute—decisions to "commence proceedings, adjudicate cases, or execute removal orders against any alien," 8 U.S.C. § 1252(g)—and the rescission is none of those. Rather, it is an "across-the-board cancellation of a nationwide program" done "prior to the commencement of any removal proceedings." ER.21.

The district court entered a preliminary injunction based on its initial assessment of the merits and its balancing of the equities. ER.28-48. The court found plaintiffs likely to succeed on their claims that DACA's rescission is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), because neither of the government's claimed reasons for ending DACA withstood scrutiny.

First, the district court rejected the view that DACA is unlawful, because that view is "based on the flawed legal premise that the agency lacked authority to implement DACA." ER.29. The court found that DACA is a permissible exercise of the Executive's immigration enforcement authority because each feature of the program is "anchored in authority granted or recognized by Congress or the Supreme Court." ER.29-30. The court noted that "the government [had] ma[de] no effort" in this litigation "to challenge any of the ... reasons why DACA was and remains within the authority of the agency," ER.33; all it did was cite the *Texas* decision, which the district court distinguished on multiple grounds, ER.35-36.

Second, the district court rejected the government's *post hoc* rationalization that "litigation risk" justified DACA's termination. ER.38-43. The court explained that the Attorney General's stated reason for ending DACA was his belief that it is unlawful, and the Acting Secretary's memorandum relied on that determination, without "consider[ing] whether defending the program in court would (or would not) be worth the litigation risk." ER.39. In fact, the court concluded, the agency never assessed litigation risks or weighed them against "DACA's programmatic objectives" and DACA recipients' "reliance interests." ER.40. In the court's view, the agency's about-face without a reasoned explanation was a paradigmatic example of arbitrary and capricious agency action. ER.41-42.

The district court then concluded that the equities "sharply" favor a preliminary injunction. ER.43-46 & n.19. The government "d[id] not dispute" that plaintiffs will face irreparable injury absent injunctive relief. ER.44. And the "public interest will be served by DACA's continuation," because the rescission "would tear authorized workers from our nation's economy and would prejudice their being able to support themselves and their families." ER.45. The preliminary injunction directs the government "to maintain the DACA program" as it was pre-rescission, except that the government may deny new applications and foreign travel requests. ER.46. The government also may exercise its discretion "on an individualized basis for each renewal application" and may "remove any individual, including any DACA enrollee, who it determines poses a risk to national security or public safety, or otherwise deserves, in its judgment, to be removed." *Id*.

The district court denied in part and granted in part the government's motion to dismiss for failure to state a claim. ER.50-63. The court concluded that plaintiffs sufficiently pleaded that the rescission violates equal protection because plaintiffs alleged "that the rescission had a disproportionate impact on Latinos and Mexican nationals" and that President Trump had made repeated statements evidencing racial animus, which suggested that the rescission was motivated by discriminatory intent. ER.59-61. The court also determined that plaintiffs sufficiently pleaded that the government violated due process because its change in policy to reduce protection

for DACA applicants' personal information was "fundamentally unfair." ER.53, 55-57.

But the court dismissed plaintiffs' claim that rescinding DACA violated plaintiffs' due process right to renewal, reasoning that plaintiffs "fail[ed] to make the threshold showing that they have a protected interest in the continuation of DACA" or "the renewal of benefits thereunder." ER.53, 55. The court also dismissed plaintiffs' claim that the rescission violated the APA's notice-and-comment requirement, explaining that the rescission memorandum is a "general statement of policy," not a rulemaking. ER.51-53.

The government appealed the preliminary-injunction order to this Court. With permission from the district court and this Court, the parties filed interlocutory appeals of the motion-to-dismiss order. This Court consolidated the appeals.[1]

SUMMARY OF THE ARGUMENT

1. The district court correctly concluded that the decision to terminate DACA is subject to judicial review. Neither the APA, 5 U.S.C. § 701(a)(2), nor the INA, 8 U.S.C. § 1252(g), overcome the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). The decision to terminate DACA is not a matter "committed to agency

[1] In the meantime, the government filed a petition for a writ of certiorari before judgment in the Supreme Court, and the Court denied the petition. *DHS v. Regents of Univ. of Cal.*, 2018 WL 1037642 (S. Ct. Feb. 26, 2018).

discretion by law," 5 U.S.C. § 701(a)(2), because the text of the INA, Supreme Court authority, and historic agency practice provide law to apply to evaluate the government's decision.

Section 1252(g) also does not bar judicial review, because it applies *only* to the "three discrete actions named in the statute," *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 487 (1999) (*AADC*)—decisions to "commence proceedings, adjudicate cases, or execute removal orders against any alien"—and this case involves none of those. Rather, the decision to end DACA—and take away the myriad benefits deferred action confers, such as work authorization—is precisely the type of programmatic, policy decision that this Court and other courts have repeatedly recognized is outside Section 1252(g)'s narrow reach.

2. The district court did not abuse its discretion in granting the preliminary injunction to maintain the DACA program. Because all agree that the balance of hardships plainly favors maintaining DACA while this case proceeds, plaintiffs need only raise "serious questions" on the merits. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Plaintiffs have done that and more. As the district court explained, plaintiffs are likely to succeed on the merits of their argument that the rescission was arbitrary and capricious because the government's two justifications for the rescission—DACA's purported unlawfulness and the need

to avoid "litigation risks"—do not hold up. And the court's remedy—a nationwide injunction—is appropriate here, because the rescission's "systemwide impact" warrants a "systemwide remedy," *Lewis v. Casey*, 518 U.S. 343, 359 (1996), and because a more limited injunction would undermine uniform implementation of the immigration laws.

3. The district court correctly concluded that plaintiffs' complaints state a plausible equal protection claim. Plaintiffs' detailed allegations evidence the President's discriminatory intent, raising an inference that the rescission was motivated by the President's discriminatory animus, which he continues to demonstrate through tweets, speeches, and other public statements.

4. The district court also correctly determined that plaintiffs' complaints sufficiently allege that the government's change in its information-sharing policy is so fundamentally arbitrary and unfair that it violates due process. The government's argument that it has not changed its information-sharing policy and its reliance on an ambiguous caveat regarding potential future modifications do not overcome plaintiffs' allegations, which must be taken as true at this juncture.

5. The district court erred in dismissing plaintiffs' other due process claim, because plaintiffs sufficiently pleaded that the rescission impermissibly deprives them of protected liberty and property interests in the renewal of their DACA status. The court should have credited plaintiffs' well-pleaded allegations that they and the

government shared an understanding that DACA recipients could continuously renew their benefits so long as they met certain criteria.

6. Finally, the district court erred in dismissing plaintiffs' notice-and-comment claim. The court wrongly concluded that if DACA could be adopted without notice-and-comment rulemaking, it could be rescinded without it, too. But the memorandum adopting DACA was exempt from this requirement because it was an announcement of how the agency would exercise its enforcement discretion. The rescission, by contrast, constrains agency discretion, and so the notice-and-comment process was required.

STANDARD OF REVIEW

The district court's decision to grant a preliminary injunction is reviewed for abuse of discretion, and it "should be set aside only if the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Doe v. Kelly*, 878 F.3d 710, 719 (9th Cir. 2017). This Court reviews the district court's legal determinations *de novo*. *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017). The Court also reviews the district court's decision on a motion to dismiss for failure to state a claim *de novo*. *Id.* To state a claim, a complaint need only plead facts sufficient to show that a claim is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The question is "'not whether

[plaintiffs] will ultimately prevail," "but whether [the] complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer,* 562 U.S. 521, 529-30 (2011).

ARGUMENT

I. THE GOVERNMENT'S DECISION TO END THE DACA PROGRAM IS JUDICIALLY REVIEWABLE

A. The APA Does Not Bar Judicial Review

The APA provides that agency action generally is reviewable: "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 administrative action," *Mach Mining*, 135 S. Ct. at 1651, especially in the immigration context, *see INS v. St. Cyr*, 533 U.S. 289, 298 (2001). That presumption is overcome where "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2).

The exception for actions committed to agency discretion by law is "a very narrow exception" that comes into play only where "there is no law to apply," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), meaning that "a court would have no judicially manageable standards … for judging how and when an agency should exercise its discretion," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

Here, the district court correctly determined that "there *is* law to apply," ER.21, because the Acting Secretary's stated justification for rescinding DACA—a belief that the program is unlawful—is precisely the type of legal question that courts can and regularly do adjudicate. That question can be answered by reference to the text and structure of the INA, the Executive's broad discretion over immigration matters and long history of using deferred action, and the Supreme Court's analysis of the appropriateness of deferred action. ER.29-33. These "statutes, regulations, established agency policies, [and] judicial decisions … provide a meaningful standard against which to assess" the agency's action. *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003). Indeed, the government's two proffered reasons for ending the program—its supposed illegality and litigation risk—rely on the premise that courts can review DACA's legality.

This case does not involve "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Chaney*, 470 U.S. at 831. Contrary to the government's suggestion, the agency never assessed "how the agency's resources are best spent and how the [decision to end DACA] fits with the agency's overall policies." U.S. Br. 17. The agency did not identify, let alone balance, *any* factors—it just concluded that DACA is unlawful. If the federal courts cannot review that purely legal question, it is difficult to know what (in the government's view) they are allowed to review.

The government asserts that the rescission is unreviewable because it is like a decision not to undertake an enforcement action and such decisions generally are unreviewable. U.S. Br. 16-17 (citing *Chaney*, 470 U.S. at 831). That is wrong: The government took an action to eliminate a longstanding agency program upon which hundreds of thousands of people have relied. *See Villa-Anguiano v. Holder*, 727 F.3d 873, 881 n.9 (9th Cir. 2013) (*Chaney*'s language about a decision not to take enforcement action is inapplicable to cases where "an agency has taken or is proposing to take action"). "The decision to rescind DACA is unlike the non-enforcement decision at issue in *Chaney*," *Batalla Vidal v. Duke*, 2017 WL 5201116, at *10-11 (E.D.N.Y. Nov. 9, 2017), because here, plaintiffs are not seeking to compel the government to take action it refused to take. Rather, they seek to enjoin action the government *did* take—the termination of DACA. ER.19-20.

That is precisely the distinction the Supreme Court made in *Chaney*: The Court contrasted "affirmative act[s]" with non-enforcement decisions, explaining that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." 470 U.S. at 831-32. By contrast, "when an agency *does* act to enforce, that action itself provides a focus for judicial review." *Id.* at 832. The decision to rescind DACA is an affirmative, "coercive" government

action. Because of it, hundreds of thousands of people will lose their deferred action status and its many attendant benefits.[2]

A policy reversal that upsets the status quo is presumptively reviewable under the APA. *See Robbins v. Reagan*, 780 F.2d 37, 47 (D.C. Cir. 1985). Because the government's "rescissions of [its] commitments" exert "direct influence on the individuals or entities to whom the repudiated commitments were made," courts should not be precluded from reviewing them. *Id.* That is why it was appropriate for the district court to consider DACA recipients' reliance interests in assessing reviewability: Those interests underscore the nature of the agency decision here—an action ending a program, which "bears no resemblance to an agency decision not to regulate something never before regulated," as in *Chaney*. ER.20-21.

The decision to terminate DACA was a broad, programmatic decision. The courts of appeals have repeatedly recognized that "an agency's statement of a *general enforcement policy* may be reviewable for legal sufficiency," even if the "decision to decline enforcement in the context of an individual case" is unreviewable. *See Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C.

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[2] The government also relies (U.S. Br. 18-19) on *Morales de Soto v. Lynch*, 824 F.3d 822 (9th Cir. 2016), to argue that affirmative agency actions are unreviewable. But that decision's brief discussion of *Chaney* was dicta, and the court did not even mention (let alone rely on) Section 701(a)(2). *See id*. at 827 n.4.

Cir. 1994); *see also, e.g.*, *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996) ("*Chaney* applies to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards."); *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) (review appropriate where agency's "interpretation has to do with the substantive requirements of the law").[3] For that reason, the Fifth Circuit concluded in *Texas* that the decision to adopt the DAPA program was judicially reviewable. *See* 809 F.3d at 169.[4]

Finally, relying on *ICC v. Bhd of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987), the government contends (U.S. Br. 23) that an unreviewable agency action does not become reviewable because the government provides a "reviewable" reason. That case, like *Chaney*, involved attempted review of agency inaction—namely, decisions not to reconsider or clarify prior orders. 482 U.S. at 277. And the Supreme Court found a "tradition of nonreviewability" of refusals to reconsider

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[3] The government argues (U.S. Br. 19) that *Chaney* was a "categorica[l]" decision not to enforce the drug laws against manufacturers of lethal-injection drugs. But the FDA in *Chaney* had not affirmatively announced a general policy embodying its enforcement priorities; rather, it declined to take action in response to petitions in individual cases. *See* 470 U.S. at 823.

[4] *Lincoln v. Vigil*, 508 U.S. 182 (1993), is not to the contrary. The programmatic decision there—how to spend funds from a lump-sum appropriation—was one for which there was no "meaningful standard" to judge whether the agency appropriately spent its funds. *Id.* at 191, 193. That is not true of the rescission, which rested on a purely legal conclusion.

agency orders. *Id.* at 282. But there is no such tradition of nonreviewability of agency action—especially not for a programmatic decision such as the one here.

B. The INA Does Not Bar Judicial Review

The government also relies on 8 U.S.C. § 1252(g), but that provision is inapplicable by its terms. Consistent with the "strong presumption in favor of judicial review of administrative action," *St. Cyr*, 533 U.S. at 298, Section 1252(g) is a "narrow" provision that eliminates judicial review over only three enumerated immigration actions: those that "*commence* proceedings, *adjudicate* cases, or *execute* removal orders." *AADC*, 525 U.S. at 482, 487 (quoting 8 U.S.C. § 1252(g)). The Supreme Court has analyzed that provision and emphatically held that "the provision applies only" to those "three discrete actions." *Id.*

This is not a case involving any of the three actions listed in Section 1252(g). ER.22. The decision to end DACA does not commence or adjudicate any particular non-citizen's immigration case or execute any removal order. Rather, it ended a nationwide program that allowed certain qualifying non-citizens to remain in the United States. That action itself did not commence removal proceedings; rather, it removed an impediment to later removal proceedings in individual cases.

In an unbroken line of cases, the federal courts of appeals have recognized that Section 1252(g) has no application to programmatic challenges like the one at issue here. For example, this Court has held that Section 1252(g) "does not remove

federal jurisdiction to grant injunctive relief to classes of aliens challenging deportation procedures." *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1121 (9th Cir. 2001); *see also Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc); *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998). Other courts of appeal have likewise refused to apply Section 1252(g) to legal or policy challenges to immigration procedures. *See Garcia v. Att'y Gen. of U.S.*, 553 F.3d 724, 729 (3d Cir. 2009) (plaintiff was "not challenging the discretionary *decision* to commence proceedings, but [the] very *authority* to commence those proceedings after the limitation period has expired"); *Itaeva v. INS*, 314 F.3d 1238, 1241 (10th Cir. 2003) (legal question whether "suspension of deportation is unavailable" under Visa Waiver Program). Indeed, in *Texas*, the Fifth Circuit held that Section 1252(g) did not apply to certain States' programmatic challenge to DAPA. 809 F.3d at 164. If DAPA is reviewable, then surely the decision to rescind DACA is reviewable.

The government relies (U.S. Br. 25-26) on the Supreme Court's statement in *AADC* that Section 1252(g) seems "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations." 525 U.S. at 485. But the Court was referring to *individual* decisions not to grant deferred action after removal proceedings had commenced, *see id.* at 463, not programmatic challenges to a policy potentially leading to removal proceedings. *See id.* at 482; *see also St. Cyr*, 533 U.S. at 311 n.34 (Section 1252(g) "not relevant to" question

whether federal courts had jurisdiction to review Attorney General's interpretation that individual was statutorily ineligible for waiver of deportation). It would strain credulity to read *AADC* to preclude judicial review here, because the whole point of that decision was that Section 1252(g) must be applied "narrow[ly]" to only the three "discrete acts" listed in the statute. 525 U.S. at 482, 487.

Next, the government contends (U.S. Br. 26) that the decision to terminate DACA fits within Section 1252(g) because it is an "action" along the way to a potential, later "commence[ment] of proceedings" against an individual. This "action" argument is inconsistent with the government's APA argument, *see* pp. 20-22, *supra*, and it was squarely rejected in *AADC*. In light of the provision's text, history, and purposes, the Supreme Court found it "implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." 525 U.S. at 482. And the government's reading of Section 1252(g) cannot be correct, because it would make the other provisions in Section 1252 that bar judicial review (*see* U.S. Br. 26-27) "entirely redundant." *AADC*, 525 U.S. at 483.

In accordance with *AADC*, the courts of appeals have uniformly rejected attempts to expand Section 1252(g)'s scope. For example, this Court has held that "§ 1252(g) does not bar review of the actions that occurred *prior* to any decision to 'commence proceedings'" or "execute [] removal order[s]." *Wong v. United States*,

373 F.3d 952, 965 (9th Cir. 2004). The other courts of appeals have followed suit. *See, e.g.*, *Chehazeh v. Att'y Gen. of U.S.*, 666 F.3d 118, 134-35 (3d Cir. 2012) (no bar to challenge to BIA decision to reopen proceedings); *Garza-Moreno v. Gonzales*, 489 F.3d 239, 242 n.2 (6th Cir. 2007) (no bar to challenge to denial of administrative closure); *Fornalik v. Perryman*, 223 F.3d 523, 531-32 (7th Cir. 2000) (Section 1252(g) applicable "only where the alien's well-pleaded complaint is based on one of [the statute's] three listed factors"); *Sabhari v. Reno*, 197 F.3d 938, 942 (8th Cir. 1999) (Section 1252(g) "has nothing to do" with challenge regarding petition for adjustment of status); *Bowrin v. U.S. INS*, 194 F.3d 483, 488 (4th Cir. 1999) (per curiam) (reading *AADC* "to hold that § 1252(g) does not apply to agency interpretations of statutes[,] as these decisions do not fall into any of the three categories enumerated in § 1252(g)").

The cases upon which the government relies are inapposite, because they arise where the government has already commenced removal proceedings against a particular individual. U.S. Br. 26 (citing *Vasquez v. Aviles*, 639 F. App'x 898 (3d Cir. 2016), and *Botezatu v. INS*, 195 F.3d 311 (7th Cir. 1999)). The government cites *no* case where Section 1252(g) barred a challenge by plaintiffs against whom the government has not commenced proceedings, let alone a case involving a challenge to an immigration policy. The Court should not accept the government's tortured reading of Section 1252(g).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENTERING THE PRELIMINARY INJUNCTION

A preliminary injunction is warranted when plaintiffs establish that (1) they are "likely to succeed on the merits"; (2) they are "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities" tips in their favor; and (4) an "injunction is in the public interest." *Cottrell*, 632 F.3d at 1131. Under this Court's "sliding scale approach," "a stronger showing of one element may offset a weaker showing of another." *Id*. Accordingly, if the "hardship balance tips sharply toward the plaintiff[s]," then the plaintiffs need only show "serious questions going to the merits." *Id.* at 1131-32.

A. Plaintiffs Indisputably Face Irreparable Injury In The Absence Of An Injunction, And The Injunction Is In The Public Interest

The district court found, and the government does not dispute, that "the balance of hardships tips sharply in plaintiffs' favor." ER.46 n.19. Plaintiffs—especially the individual DACA recipients—unquestionably would face serious, irreparable harm if DACA were to expire during the pendency of this litigation. ER.43-44. By contrast, preserving the status quo by maintaining DACA for current DACA recipients—all of whom have been rigorously vetted to ensure they pose no threat to national security or public safety—harms no one, and the government does not argue otherwise. ER.45-46. The government likewise does not take issue with the district court's conclusion that temporary injunctive relief is

in the public interest, because terminating DACA will have destabilizing effects on communities and families and on the Nation's economy. ER.45.

B. Plaintiffs Have Demonstrated A Likelihood Of Success On The Merits Of Their APA Claim

Although plaintiffs need only raise "serious questions" about whether the government acted lawfully in rescinding DACA, *Cottrell*, 632 F.3d at 1132, they have gone farther, establishing that they are likely to succeed on their claim that the rescission is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), because neither of the government's proffered justifications holds water. ER.43, 46 n.19.

1. The rescission rests on the flawed legal premise that DACA is unlawful

The Acting Secretary said that she was terminating DACA because, in her view, continuing the program would be unlawful. ER.129-30. Because the Secretary never justified that view—and in fact it is wrong—the rescission is arbitrary and capricious. ER.29.

a. DACA is a lawful exercise of DHS's discretionary authority over immigration and its statutory authority under the INA. DACA's central feature—deferred action—is a permissible exercise of DHS's authority to "[e]stablis[h] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and take all actions necessary for that purpose, 8 U.S.C. § 1103(a)(3). "As part of this

authority, it is well settled that the Secretary can exercise deferred action, a form of prosecutorial discretion whereby [DHS] declines to pursue the removal of a person unlawfully present in the United States." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017) (*Brewer II*). The Supreme Court has recognized that deferred action is "a regular practice" that the government may exercise "for humanitarian reasons or simply for [its] own convenience." *AADC*, 525 U.S. at 483-84 n.8; *see Arizona v. United States*, 567 U.S. 387, 396 (2012) (DHS's "broad discretion" in this area is a "principal feature of the removal system"). The government concedes, as it must, that it "may exercise discretion to forbear from seeking the removal of an alien for a designated period." U.S. Br. 6.

The government's authority in this area is underscored by its regular practice of granting deferred action and similar forms of discretionary relief on a programmatic basis over the past 60 years. *See supra*, pp. 5-6. The largest of these policies, the "Family Fairness" policy, accorded "indefinite voluntary departure" to undocumented spouses and children of aliens with legalized status, potentially encompassing 1.5 million people. ER.5. Congress has "accepted and ratified" the practice of granting deferred action, *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015), in multiple provisions of the INA. *E.g.*, 8 U.S.C. § 1227(d)(2) (denial of administrative stay "shall not preclude the alien from applying for … deferred action"); REAL ID Act of 2005,

Pub. L. No. 109-13, § 201(c)(2)(B)(viii), 119 Stat. 302 (2005) (permitting participating States to issue driver's licenses to aliens with "approved deferred action status").

During the renewable, two-year period of deferred action under DACA, recipients may obtain work authorization; do not accrue "unlawful presence" for purposes of re-entry; and may apply for advance parole to travel overseas and return to the United States. ER.32. As the district court explained, "each [of these] feature[s] of the DACA program is anchored in authority granted or recognized by Congress or the Supreme Court." ER.30; *see* ER.32; *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1059, 1062 (9th Cir. 2014) (*Brewer I*). For example, the INA permits employers to hire any alien who is "authorized to be so employed" either by the INA "or by the Attorney General," 8 U.S.C. § 1324a(h)(3), and DHS has permissibly interpreted that provision to mean that any "alien who has been granted deferred action" is eligible for work authorization, 8 C.F.R. § 274a.12(c)(14). The INA also exempts from the bar on re-entry non-citizens who have remained in the United States because their presence has been "authorized by the Attorney General," 8 U.S.C. § 1182(a)(9)(B)(ii), such as during a period of deferred action, 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2). And regulations allow recipients of deferred action to apply for advance parole to travel overseas and return to the United States. 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R.

§ 212.5(f). Critically, the administration has not amended any of these regulations or questioned their validity.

b. The Acting Secretary's decision was arbitrary and capricious because she failed to adequately justify the decision to terminate DACA. Under the APA, the government must "clearly disclos[e] and adequately sustai[n]" its reasoning, *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (*Chenery I*), "with such clarity as to be understandable," *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*). And because the conclusion that DACA is unlawful is contrary to the government's longstanding position that deferred-action programs (including DACA itself) are permissible, the agency was required to "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

The only legal analysis the Acting Secretary provided was a citation to the Fifth Circuit's decision about the DAPA program in *Texas* and the Attorney General's conclusory statement that DACA "has the same … defects" as DAPA. ER.129. That threadbare "conclusory statemen[t]" falls well short of the statement of reasoned analysis the APA requires. *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014). And the President undermined any suggestion that the administration believed DACA was unlawful when he suggested that he might "revisit the issue" of DACA—*i.e.*, potentially revive the program—at a later time. *See* http://twitter.com/realDonaldTrump/status/905228667336499200. In this

litigation as well, the government has failed to offer any full-throated defense of the Acting Secretary's conclusion that DACA is unlawful. All the government says (U.S. Br. 31, 39-40) is that the conclusion is "reasonable."

Under the APA, however, a "reasonable" but wrong legal analysis cannot sustain agency action. "[A]n order may not stand if the agency has misconceived the law." *Chenery I*, 318 U.S. at 94; *see Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (setting aside agency order that "ignore[d] the statutory text"). That is true even if, as the government contends (U.S. Br. 39-40), rescinding DACA was within its statutory authority. Just as a judicial decision based on "an erroneous view of the law" is "necessarily" an abuse of discretion, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *see Koon v. United States*, 518 U.S. 81, 100 (1996), an agency action that is otherwise "permissible as an exercise of discretion … cannot be sustained 'where it is based not on the agency's own judgment but on an erroneous view of the law,'" *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998) (quoting *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985)). In particular, when "a statute grants an agency discretion but the agency erroneously believes it is bound to a specific decision," the agency's decision cannot be upheld "as an exercise of the discretion that the agency disavows." *United States v. Ross*, 848 F.3d 1129, 1134 (D.C. Cir. 2017). That is precisely what happened here: DHS claims that it had no discretion and had to rescind DACA because it was unlawful.

c. The government "makes no effort" to explain why DACA actually is unlawful. ER.33. For example, while the government describes *Texas*'s holding that DAPA conflicts with the INA (U.S. Br. 30), it cites only INA provisions that support deferred action and similar relief (*id*. at 35, 37 (citing 6 U.S.C. § 202(5) and 8 U.S.C. § 1103(a)(1))). Further, although the Attorney General said he found "constitutional defects" in DACA, ER.129, the government has not identified any relevant constitutional provisions. Moreover, the Fifth Circuit's decision in *Texas* is not binding on this Court, and the government does not even attempt to argue that this Court should adopt it. Indeed, in the district court, the government walked away from the Fifth Circuit's holding that DAPA was procedurally defective, *Texas*, 809 F.3d at 178, instead telling the court that "INS deferred-action directives" are "policy statements exempt from notice and comment," Dkt. 204 at 26-27.

In any event, the Fifth Circuit's decision about DAPA does not establish that DACA is unlawful. DAPA was a never-implemented deferred-action program that would have affected up to 4.3 million individuals. *Texas*, 809 F.3d at 147-48. The Fifth Circuit itself recognized that "DAPA and DACA are not identical" and that "any extrapolation from DACA [to DAPA] must be done carefully." *Id.* at 173-74. As the district court explained, neither of the Fifth Circuit's holdings—that DAPA likely was substantively unlawful because it conflicted with the INA and

procedurally unlawful because it was not adopted through notice-and-comment rulemaking, *id.* at 178, 186—calls into question *DACA*'s lawfulness.

With respect to the first holding, the Fifth Circuit determined that granting deferred action to alien parents of citizens and lawful permanent residents—a feature of DAPA but not DACA—conflicted with the INA because the INA already gave those individuals a way to obtain a lawful immigration status based on their children. *Texas*, 809 F.3d at 179-80. DACA "has no such analogue in the INA," because the INA does not provide any pathway to lawful presence for the Dreamers. ER.37.[5] The government points to the Fifth Circuit's statement that other provisions of the INA "confe[r] eligibility for 'discretionary relief.'" U.S. Br. 30 (quoting *Texas*, 809 F.3d at 179). But those provisions show Congress's intent to "*ratif*[*y*] the Executive Branch's longstanding historical practice" of deferred action, not to *limit* that preexisting practice. *Batalla Vidal*, 2018 WL 834074, at *16 (emphasis added).[6]

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[5] The government now argues (U.S. Br. 32) that the INA's silence on this point makes DACA "more inconsistent with the INA," but that is not what the Fifth Circuit held, *see Texas*, 809 F.3d at 186, and Congress's silence as to childhood arrivals leaves the government free to interpret its broad authority under 6 U.S.C. § 202(5) to set immigration enforcement priorities, *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1604 (2014).

[6] Congress's failure to pass the DREAM Act does not limit the agency's ability to use deferred action. That Act was not a deferred-action program; instead, it would have given the Dreamers a pathway to permanent residency. ER.33-34. Congress's failure to act left the status quo intact—a status quo where the agency can use, and often has used, deferred action.

The Fifth Circuit also thought DAPA was "unreasonable" because it covered 4.3 million people—more than one-third of the people unlawfully present in the United States. *Texas*, 809 F.3d at 148, 181-82. DACA, by contrast, "is open to far fewer individuals than DAPA would have been." *Batalla Vidal*, 2018 WL 834074, at *16. Finally, DAPA was challenged before it took effect, whereas DACA has been in place for over five years. Thus any legal challenge to DACA necessarily would have to overcome the significant reliance interests that have developed over those years, as well as the doctrine of laches. ER.40.[7]

The Fifth Circuit's second holding—that DAPA was procedurally unlawful because it was adopted without notice-and-comment rulemaking, 809 F.3d at 178—does not undermine DACA. The memorandum adopting DACA was a "general statement of policy," not a substantive rule, and so it was not subject to notice-and-comment rulemaking. *Batalla Vidal*, 2018 WL 834074, at *14-15. *Compare Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009) ("substantive" rule that "narrowly limits administrative discretion" or establishes a "binding norm" is a rule requiring notice and comment), *with Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) ("[g]eneral statements of policy … issued by

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[7] The government is wrong to say that laches applies only where "unreasonable delay in bringing suit prejudice[s] the government" (U.S. Br. 34 n.7); it also applies when an untimely delay in bringing suit affects "third parties' rights," *Sampson v. United States*, 533 F.2d 499, 501 n.2 (9th Cir. 1976).

an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power" are exempt from notice and comment).

The government conceded below that "INS deferred-action directives" are "policy statements exempt from notice and comment," Dkt. 204 at 26-27, and the DACA memorandum is no exception. Even without the memorandum, the agency could grant deferred-action requests without notice and comment, because those are individual adjudications. The memorandum merely announced to the public "how … DHS would exercise its prosecutorial discretion" in those individual adjudications, just as DHS and the INS have done for every deferred-action or similar policy. *Batalla Vidal*, 2018 WL 834074, at *15. By its own terms, the memorandum itself "confer[red] no substantive right" and did not purport to bind the agency; instead, it stated that the agency would process applications "on a case by case basis." ER.142-43. And agency employees actually exercised discretion in adjudicating DACA applications. ER.34-35; *see Batalla Vidal*, 2018 WL 834074, at *15; *Arpaio v. Obama*, 27 F. Supp. 3d 185, 209 n.13 (D.D.C. 2014), *aff'd*, 797 F.3d 11 (D.C. Cir. 2015). The agency conferred rights—protected by due process—by exercising its discretion in adjudicating individual applications, not by announcing its intentions in the memorandum.

d. The government's failure to defend the rescission memorandum's principal justification underscores that plaintiffs are likely to prevail under the APA.

The government failed to make any argument in the district court that DACA is unlawful, instead simply claiming litigation risk. *See* Dkt. 204, at 10-11, 14-21. And the government's concession that deferred-action directives are exempt from notice-and-comment rulemaking forecloses any argument that DACA was procedurally unlawful.

2. The government's *post hoc* "litigation risk" justification is arbitrary and capricious

Although the rescission memorandum said that the reason for terminating DACA was that the program is unlawful, the government has made a different argument in this litigation—that DACA's rescission was justified by "litigation risks." U.S. Br. 29. The district court correctly deemed that justification a *post hoc* rationalization and recognized that it is arbitrary and capricious. ER.38-43.

a. It is well-settled that courts "may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Instead, APA review is limited to the "grounds invoked by the agency." *Chenery II*, 332 U.S. at 196. "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

The government's litigation-risks rationale is a "classic post hoc rationalization" because it appears "[n]owhere in the administrative record." ER.39. As two district courts have recognized, the reason "actually given" by the Attorney

General and the Acting Secretary was "DACA's purported illegality"; neither the Attorney General nor the agency ever "consider[ed] whether defending the program in court would (or would not) be worth the litigation risk." *Id.*; *see Batalla Vidal*, 2108 WL 834074, at *18-19. Although the rescission memorandum mentioned possible litigation challenging DACA, it never identified any "risks" posed by this litigation that the government would avoid by rescinding DACA. The government now suggests (U.S. Br. 35-36) the decision was motivated by a concern that a "court-imposed" end to the program would be more "immediate" and "disruptive" than an "administrative wind-down." But the rescission memorandum "offers absolutely no indication that [the government] considered these impacts," and no one reading the memorandum would "have guessed that [the government] made [its] decision for this reason." *Batalla Vidal*, 2108 WL 834074, at *18-20. The memorandum's statement that DACA should be terminated in "an efficient and orderly fashion" (U.S. Br. 37) was not a *reason* for terminating DACA; it was a statement of *how* the Acting Secretary planned to end the program.

b. In any event, the government's litigation-risks rationale does not withstand scrutiny. The rescission memorandum did not even assess the risks of litigation. The memorandum merely cited the Attorney General's belief that DACA likely would be enjoined because DAPA had been enjoined in *Texas* because DACA "has the same legal and constitutional defects that the courts recognized as to

DAPA." ER.129. Neither the Acting Secretary nor the Attorney General ever considered the "differences between DAPA and DACA that might have led to a different result" in any litigation than in *Texas*. ER.39-40; *see* pp. 34-37, *supra*. Nor did they consider whether the very reviewability arguments they make in this appeal would preclude review of DACA. And the litigation-risks rationale makes little sense, because no one would think that a decision to rescind DACA—a longstanding program currently affecting nearly 700,000 people—would go unchallenged in court, and it did not. "At most, the [government] deliberately traded one lawsuit for another." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (rejecting as arbitrary rationale for rule that it would "'reduc[e] the potential for conflicts'" in litigation). The government cannot engage in "rescission by concession"—abandoning a rule in the face of litigation—since otherwise "the doctrine requiring agencies to give reasons before they rescind rules would be a dead letter." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015).

The government now asserts that the Attorney General could assess litigation risks without even "setting out the [relevant] legal arguments" or "evaluat[ing] … the likelihood of [their] success." U.S. Br. 31. But the APA requires more: The government must "consider … the relevant factors" before acting. *State Farm*, 463 U.S. at 30-31. That was not done here. And any assessment of the government's litigation risks was necessarily skewed by the Attorney General's mistaken belief

about DACA's lawfulness and by his misreading of the decision in *Texas*. The Attorney General took the view that in *Texas*, the courts had found "constitutional defects … as to DAPA." ER.129. But that is "flatly incorrect"; both the district court and the Fifth Circuit in *Texas* "expressly *declined* to reach the plaintiffs' constitutional claim." *Batalla Vidal*, 2018 WL 834074, at *17 (emphasis added).

c. The litigation-risks rationale also fails because the government did not weigh any perceived litigation risks against countervailing interests that would have warranted defending DACA. ER.40-42. "[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). That is especially true where, as here, an agency changes positions: The "agency must be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars*, 136 S. Ct. at 2126.

Here, the government never considered "the disruption a rescission would have on the lives of DACA recipients, let alone their families, employers and employees, schools and communities." ER.41-42. Since 2012, over 700,000 DACA recipients, including the individual plaintiffs here, have relied on the availability of DACA to advance their education, serve in the U.S. military, start businesses, have families, and make many other life-changing decisions. SER.1470-72. They have made significant contributions to their employers and educational institutions, who

have made decisions and investments based on the expectation that DACA recipients would continue to work or study in the United States. SER.1476-78. The rescission memorandum never mentions these reliance interests. Nor does it consider the significant cost to the economy—an approximately $215 billion loss over the next two years if the decision to rescind DACA stands. SER.359.

The government's assertion that these significant and very real consequences are "too insubstantial" for the Acting Secretary to even consider (U.S. Br. 35) is both wrong and cruel. Even if a program may be "revoked at any time," that does not diminish reliance interests on the program. ER.40. As the Supreme Court explained in *Encino Motorcars*, the Department of Labor could abandon its interpretation of a statutory exemption from the overtime provisions of the Fair Labor Standards Act, but only if it appropriately accounted for the reliance interests engendered by its prior position. 136 S. Ct. at 2125. Here, DACA recipients' reliance interests are even stronger because the government assured them that they could presumptively renew their status and that it would protect their personal information. *See infra*, at pp. 53-66. Even if DACA recipients had no reason to expect renewals, the vast effects of ending the program would readily qualify as an "important aspect" of the decision that the government failed to consider. *State Farm*, 463 U.S. at 43.

C. A Nationwide Injunction Is Appropriate In This Case

The government created a nationwide emergency by rescinding DACA, yet it complains (U.S. Br. 48-56) that the district court's nationwide injunction was not properly tailored to remedy this wrong. The government is incorrect.

This Court has long recognized that "[t]here is no general requirement that an injunction affect only the parties in the suit" and that "there is no bar against … nationwide relief … when it is appropriate." *Bresgal v. Brock*, 843 F.2d 1163, 1169-70 (9th Cir. 1987) (citing *Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979)). It is "the extent of the [relevant] violation"—not the "geographical scope" of the plaintiffs—that dictates the appropriate "scope of injunctive relief." *Yamasaki*, 442 U.S. at 705. Thus, where "there has been a systemwide impact[,] [there] may … be a systemwide remedy." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2449 (2014) ("invalid" agency action struck down on its face).

These principles apply with special force in the administrative law context, where the "ordinary result" of an order finding agency rules to be unlawful is that the rules "are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). The Supreme Court itself has recognized that a successful APA challenge by one "adversely affected" individual can affect an "entire" agency

program. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990). In those cases, a "nationwide injunction … is compelled by the text of the [APA]," which provides that an unlawful agency action shall be "'*set aside*'" rather than enjoined as to the individual plaintiffs. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (quoting 5 U.S.C. § 706(2)(A)), *aff'd in part, rev'd in part on other grounds by Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). The government is wrong to say (U.S. Br. 50) that an injunction must be strictly limited to the parties before the court; courts often set aside unlawful agency action in its entirety. *See, e.g.*, *Asarco v. EPA*, 616 F.2d 1153, 1162 (9th Cir. 1980) (vacating a Clean Air Act rule).

Here, the district court correctly concluded that a nationwide injunction is appropriate. The government's rescission of DACA is an agency action of "broad applicability," so that a plaintiff who establishes an APA violation "may obtain 'programmatic' relief that affects the rights of parties not before the court." *Nat'l Min. Ass'n*, 145 F.3d at 1409 (citation omitted). The district court recognized as much, finding that the rescission's harms "reach[] beyond the geographical bounds of the Northern District of California" and into "every state and territory of the United States." ER.47. The remedy for unlawful agency action of such "broad applicability" cannot "simply [be] that the court forbids its application to a particular individual." *Nat'l Min. Ass'n*, 145 F.3d at 1409 (citation omitted).

Practical considerations also support nationwide relief in this case. "[A]n injunction issued here only as to the plaintiff[s]" could "cause all others [equally] affected by the [rescission] … to file separate actions for [similar] relief." *Nat'l Min. Ass'n*, 145 F.3d at 1409. Without a nationwide injunction, there likely will be "a flood of duplicative litigation." *Id.* As the Fifth Circuit noted in the *Texas* case, "a geographically-limited injunction" does not make sense in this context because "beneficiaries would be free to move among states." 809 F.3d at 188. A partial injunction would sow widespread administrative confusion and "detract[] from the integrated scheme of [immigration] regulation created by Congress." *Id.* (citation omitted); *see also Washington v. Trump*, 847 F.3d 1151, 1166-67 (9th Cir. 2017) (noting the "constitutional and statutory requirement for uniform immigration law and policy"). The district court here is not out on a limb in ordering nationwide preliminary-injunctive relief. Another district court entered the same relief as a remedy for DACA's unlawful rescission, *see Batalla Vidal*, 2018 WL 834074, at *25, and the Fifth Circuit affirmed the nationwide injunction with respect to DAPA, *see Texas*, 809 F.3d at 188.

The principles invoked by the government (U.S. Br. 49-53) support the injunction here. The district court did limit injunctive relief to the policy or provision "that produced the injury in fact that the plaintiff has established." *Lewis*, 518 U.S. at 357, 360. Unlike in *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644,

665 (9th Cir. 2011), where this Court vacated a nationwide injunction that would have "significantly disrupt[ed] the administration of the Medicare program" and "create[ed] great uncertainty for the government," here, a narrower injunction would "result in administrative confusion," ER.48, and would disserve "the public interest," *Haven Hospice*, 638 F.3d at 665.[8]

III. THE DISTRICT COURT DID NOT ERR IN DENYING THE GOVERNMENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A. Plaintiffs Have Stated A Plausible Equal Protection Claim

1. Plaintiffs have stated a straightforward equal protection claim: The administration's decision to rescind DACA was motivated by animus against Latinos, who comprise the vast majority of DACA recipients. To adequately plead such a claim, a plaintiff must plausibly allege "that a discriminatory reason more

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[8] The government also challenges the injunction on the ground that the County of Santa Clara plaintiffs lack standing. U.S. Br. 54-56. But the government has conceded that the individual plaintiffs and the union have standing to challenge DACA's rescission. This Court need not go further. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (standing of one plaintiff in consolidated cases satisfies Article III). In any event, the district court rightly concluded that the County of Santa Clara has Article III and statutory standing in its proprietary capacity as an employer of many DACA recipients. ER.23-24. The County has expended significant resources hiring and training its DACA recipient employees, ER.251-52, and if those employees lose their work authorization, the County will need to expend significant resources to cover their responsibilities, conduct searches for their replacements, and train new employees (if replacements can be found). ER.252-53. These concrete injuries, which result directly from DACA's rescission, confer both Article III and statutory standing, for the reasons explained in the States' brief. *See* States Resp. Br. Secs. I.C and II.B.

likely than not motivated the defendant and that the defendant's actions adversely affected the plaintiff in some way." *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016); *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *De La Cruz v. Tormey*, 582 F.2d 45, 58 (9th Cir. 1978). A plaintiff does not have to allege "that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a 'motivating factor.'" *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015). In assessing whether a defendant acted with discriminatory purpose, courts may consider "the impact of the official action and whether it bears more heavily on one race than another" and "the historical background of the decision." *Id.* (citing *Arlington Heights*, 429 U.S. at 266).

Plaintiffs' allegations, which are construed in the light most favorable to plaintiffs at this stage of the litigation, are plainly plausible. The *Garcia* complaint, for instance, alleges that the rescission bears more heavily on "individuals of Mexican heritage, and Latinos … [who] together account for 93 percent of approved DACA applications" and that the ultimate decision-maker—President Trump—has made many statements demonstrating discriminatory animus against Latinos. ER.219, 232; *see also* ER.265-66. President Trump's longstanding "pattern of bias against Mexicans and Latinos" began before he was elected. ER.219-21, 265-66. Among other things, he characterized Mexican immigrants as "rapists," "killers,"

and criminals, including in the speech launching his presidential campaign. ER.219-21, 265-66. He continued to make those discriminatory statements once he became President. Just weeks before the rescission, for example, President Trump called undocumented immigrants "animals" who bring "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking." ER.222, 265.

Plaintiffs have also sufficiently alleged that the government's stated reason for the rescission was a pretext for discriminatory animus. ER.209, 224-26, 232, 260-61, 266. Plaintiffs pointed to irregularities and inconsistencies in "[t]he specific sequence of events leading up to the challenged decision" and the "relevant . . . administrative history," as well as "the defendant's departures from its normal procedures or substantive conclusions"—all of which are factors the court can consider in determining whether plaintiffs stated an equal protection claim. *Arce*, 793 F.3d at 977 (citing *Arlington Heights*, 429 U.S. at 266). For example, the *Garcia* complaint alleges that although various members of the Trump administration (including the President himself) initially told "[t]he dreamers [to] rest easy" because they were committed to DACA, ER.209; *see* p. 8, *supra*; they then abruptly reversed course, with little explanation and no consideration of the impact of the rescission on DACA recipients, ER.209, 224-26, 232. That about-face bolsters the claim of pretext.

Taken together, these allegations state a plausible equal protection claim, and, on remand, the government will bear the burden of showing a compelling state interest to justify the rescission.

2. The government attempts (U.S. Br. 41-44) to pick apart plaintiffs' allegations, but it identify no reason that the district court erred. First, the government argues that the complaints fail to allege that the Acting Secretary herself was motivated by racial animus. But the *Garcia* plaintiffs allege that President Trump was motivated by discriminatory animus and that he "directed the decision to end the program." ER.61; *see* p. 10, *supra* (President expressly took responsibility for ending DACA). The Acting Secretary reported to the President, and that is sufficient to allege the necessary discriminatory animus. *See Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1163 n.26 (9th Cir. 2013) (discriminatory intent of City Council could be inferred from "angry comments from citizens" attending public meetings).

As to President Trump's statements, the government argues (U.S. Br. 44-45) that they are "insufficient" because they are purportedly based on "nationality, as opposed to ethnicity" and because they did not specifically refer to DACA. The government does not, and cannot, dispute that the statements reflect the President's racial animus—it just says they do not concern the exact right kind of animus. It is as if the government forgets that the Executive's broad authority over immigration

is subject to constitutional constraints. But it is. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). The Constitution does not permit targeting of individuals in this way, even if "national origin" is used as a smokescreen for other protected characteristics. *See Int'l Refugee Assistance Project v. Trump*, --- F.3d ---, 2018 WL 894413, at *15-16 (4th Cir. Feb. 15, 2018) (considering President's statements of animus in the context of his "Muslim Ban" Executive Order); *Washington*, 847 F.3d at 1167 (same).

And, in any event, the President's statements are not limited to national origin. Plaintiffs allege that his "statements and actions reflect a pattern of bias" against not just Mexican nationals, but all "Latinos," ER.219, 265, and Hispanics and Latinos constitute an ethnic group for constitutional purposes, *see, e.g.*, *Hernandez v. Texas*, 347 U.S. 475, 479-80 (1954). National origin is relevant to race discrimination where a country's residents are predominantly of one ethnicity. *See, e.g.*, *Sinai v. New England Tel. & Tel. Co*., 3 F.3d 471, 474 (1st Cir. 1993).

It does not matter that the President has occasionally made statements to reassure DACA recipients. Because "officials … seldom, if ever, announce ... that they are pursuing a particular course of action because of their desire to discriminate against a racial minority," courts consider "whether they have 'camouflaged' their intent." *Arce*, 793 F.3d at 978. Plaintiffs have sufficiently alleged that the President's purportedly reassuring statements amount to "camouflage." After those

statements, the President continued to voice animus against Latinos, calling them "animals." ER.222. And after pardoning Maricopa County Sheriff Joseph Arpaio, who had been held in criminal contempt for intentionally disobeying a federal court order to cease unconstitutionally targeting Latinos, the President praised the Sheriff as an "American patriot" and suggested that he was "convicted for doing his job." *Id.*; ER.265-66. These statements raise a plausible inference that racial animus was a motivating factor for the rescission, and no more is required at the pleading stage. ER.60-61.

Finally, the government argues (U.S. Br. 43) that the President's pre-election statements of animus cannot support an equal protection claim challenging the President's conduct once in office. But it cites no authority for that position, and multiple courts have rejected it. *See, e.g.*, *Washington*, 847 F.3d at 1167 (President's pre-election statements regarding a "Muslim ban" raised "serious allegations and presented significant constitutional questions"); *Aziz v. Trump*, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017) (same). And sadly, the President has continued to make these statements after taking office. Nor should this Court limit its analysis to statements in the administrative record, rather than the pleadings, *see Casa de Maryland v. U.S. Dep't of Homeland Sec.*, 2018 WL 1156769, at *10-12 (D. Md. Mar. 5, 2018) (taking that approach); constitutional claims are not limited to the administrative record, *see Webster v. Doe*, 486 U.S. 592, 604-05 (1988).

3. The government cannot ignore the significance of the President's many statements displaying racial animus. So instead, it attempts to recast plaintiffs' claim as one for selective prosecution. U.S. Br. 40-42 (citing *United States v. Armstrong*, 517 U.S. 456 (1996), and *AADC*, 525 U.S. 471). But plaintiffs' well-pleaded complaints do not allege such claims. Plaintiffs are not alleging that they, individually, are being impermissibly targeted for removal (much less criminal prosecution) or are victims of selective enforcement. Instead, they claim that the government decided to rescind an entire government program based on racial animus. The concerns that motivated the Supreme Court's holding in *AADC*—that selective prosecution claims interfere with "prosecutorial discretion" and obstruct and "[p]ostpon[e] justifiable deportation," 525 U.S. at 489—do not apply here because plaintiffs are not seeking a defense to deportation but are challenging a policy as a whole. It is well-established that the government cannot make such programmatic decisions for racially discriminatory reasons. *See Arlington Heights*, 429 U.S. at 265-66; *Jean v. Nelson*, 711 F.2d 1455, 1485-93 (11th Cir. 1983) (reversing dismissal of claim alleging that immigration policy was enforced against Haitians in a discriminatory manner and applying *Arlington Heights* factors). If the government were correct that this is a selective-prosecution case, then nearly any programmatic decision would be as well, because programmatic decisions ultimately affect individuals.

Indeed, this Court has already rejected the government's efforts to apply *AADC* outside of its particular context. In *Wong*, the government invoked *AADC* when a plaintiff "allege[d] that the INS officials denied her various immigration benefits because of her membership in a protected class." 373 F.3d at 970. This Court rejected that argument, explaining that the plaintiff's claims "cannot fairly be characterized as selective prosecution claims at all" because they "do not implicate the Attorney General's prosecutorial discretion" to choose to deport one particular individual or another. *Id.* at 970. The same is true here.

B. Plaintiffs Have Stated A Substantive Due Process Claim Based On The Government's Change In Its Information-Sharing Policy

The district court correctly denied the government's motion to dismiss plaintiffs' substantive due process claims based on the government's change to its policy concerning the use of DACA applicants' personal information.

1. The Due Process Clause "protect[s] every person within the nation's borders"—including those "whose presence in this country is unlawful, involuntary, or transitory"—from "deprivation of life, liberty or property without due process of law." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (en banc). "A threshold requirement" of a due process claim "is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Wedges/Ledges of Cal., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994). Protected property interests "include anything to which a plaintiff has a 'legitimate claim of entitlement.'" *Nozzi*

v. Hous. Auth. of L.A., 806 F.3d 1178, 1191 (9th Cir. 2015). A "legitimate claim of entitlement" is created and defined "by existing rules or understandings that stem from an independent source," such as those that "secure certain benefits." *Id.* This independent source may be a statute, a regulation, "explicit contractual provisions," "implied" agreements, or "rules or mutually explicit understandings." *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972).

Plaintiffs have sufficiently alleged that the government's repeated promises to "protect[] [DACA applicants' personal information] from disclosure to ICE and CBP" give rise to a protected property interest because they reflect a mutually explicit understanding that the government would honor those promises. ER.207-08, 227. As DHS has acknowledged, "[s]ince DACA was announced," the agency "has consistently made clear that information provided by applicants ... will not later be used for immigration enforcement purposes except where it is independently determined that a case involves a national security or public safety threat, criminal activity, fraud, or limited other circumstances." ER.207; *see also* ER.243, 250. Both USCIS's official instructions for the DACA application and its online DACA FAQs provided the same assurances. ER.207-08, 261.

As Secretary Johnson recognized, "DACA applicants most assuredly relied" upon "these representations" and the government's "consistent practice." ER.207 This is not a mere "subjective belief" that the government can discount, U.S. Br. 48

(citing *Gerhart v. Lake Cty.*, 637 F.3d 1013 (9th Cir. 2011)), because plaintiffs have alleged "a mutual understanding" (*id.* at 1020-21) that must be taken as true at the pleading stage. And the government's submission blinks reality: The government's assurances persuaded hundreds of thousands of Dreamers to come out of the shadows and apply for DACA. ER.206-08, 210-12, 214-16, 218, 243, 250, 261-63.

The government disclaims any reliance on these statements because the DACA FAQs state that the "information-sharing policy may be 'modified, superseded, or rescinded at any time.'" U.S. Br. 47-48. But that language "simply allows the government to change its policy in connection with future applicants," ER.56-57 (emphasis added), not to renege on promises made to prior applicants. At most, the government's disagreement with the meaning of the language in the FAQs presents a fact question, which "cannot be resolved on the pleadings." ER.57. And even if plaintiffs were wrong about this language, the Court still has the government's other, repeated "represent[ations] to applicants, Congress, and the general public" that it would protect applicants' information. ER.207. The government's assurances that DACA applicants' personal information would be affirmatively protected from disclosure to ICE and CBP therefore give rise to a constitutionally protected interest.

2. Plaintiffs have also sufficiently alleged that by changing its policy to say only that this sensitive information "will *not be proactively provided* to ICE and

CBP," ER.227, 261, the government has violated plaintiffs' due process rights because its actions are fundamentally unfair, *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8, 850 (1998), "shock the conscience," and "offend the community's sense of fair play and decency." *Marsh v. Cty. of San Diego*, 680 F.3d 1148, 1155 (9th Cir. 2012).

The government's first response (U.S. Br. 45-47) is that its policy in fact has not changed. But, as plaintiffs have alleged, online FAQs about DACA's rescission show that the government has "backtrack[ed]" on its "prior repeated assurances" on the confidentiality of DACA applicants' sensitive information. ER.227, 261. Now, according to these FAQs, DHS says only that the information "*will not be proactively provided* to ICE and CBP for the purpose of immigration enforcement proceedings." ER.227, 261. That is a real difference to the hundreds of thousands of DACA applicants who fear deportation. The government's contrary assertions cannot overcome plaintiffs' allegations, which must be construed in plaintiffs' favor. *See Manzarek v. St. Paul Fire & Marine Ins. Co*., 519 F.3d 1025, 1031 (9th Cir. 2008).[9] And the government's assertions fall flat in light of President Trump's

[9] The government also invokes various "publicly available materials," U.S. Br. 46-47, but that "extraneous evidence should not be considered in ruling on a motion to dismiss," *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001), especially where, as here, the government's sources postdate the complaint and were never presented to the district court, *see Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998).

executive order directing all agencies to "ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information." ER.226.

The government's change in its policy about use of DACA applicants' information for immigration enforcement actions "shock[s] the conscience" and "offend[s] the community's sense of fair play and decency." *Marsh*, 680 F.3d at 1155; *see* ER.206, 228, 230-31, 243, 250, 261-63. As alleged, the government's revised policy puts plaintiffs at risk for detention, arrest, and deportation—essentially punishing them for applying for DACA relief that the government itself encouraged. ER.228, 261-63. That type of bait-and-switch, with such profound consequences for DACA applicants, is fundamentally unfair under the Due Process Clause, which forbids such tactics. *See Raley v. Ohio*, 360 U.S. 423, 437-39 (1959) (prosecuting someone for conduct that state officials advised was legal violated due process); *Cox v. Louisiana*, 379 U.S. 559, 568-71 (1965) ("convicting a citizen for exercising a privilege which the State had clearly told him was available to him" violates due process).

The government dismisses these "potentially profound consequences" as too insignificant to implicate due process. ER.57. But if the government uses DACA applicants' information against them for enforcement purposes, the likely

consequence for many, and the palpable threat to all, is deportation—a "particularly severe" sanction akin to criminal prosecution. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010). Inducing DACA applicants to provide information that will assist in their deportation from the only country they know as home is shocking conduct, the type that courts should intervene to stop. That shock is not minimized simply because the government's policy warned applicants in advance that their information could be used in certain limited circumstances. Applicants accepted those limited, acknowledged risks when they applied for DACA. They did not accept the risk that the government would abandon the other assurances that were "crucial" to "induc[ing] [them] to apply for DACA." ER.243.

IV. THE DISTRICT COURT ERRED IN DISMISSING TWO OF PLAINTIFFS' CLAIMS

While the district court gave careful consideration to the important issues discussed above, it incorrectly dismissed two of plaintiffs' claims on the pleadings. *See* ER 51-55.

A. Plaintiffs Have Stated A Plausible Due Process Claim Based On The Rescission Of DACA

Plaintiffs alleged that DACA recipients have a legitimate claim of entitlement to the ability to renew their status and to receive DACA's benefits so long as they meet the program's criteria. ER.229-30; *see also* ER.262 (County has protected interest in employment relationships and County programs benefiting County

residents). Those allegations sufficiently implicate plaintiffs' constitutionally protected liberty and property interests. The district court disagreed on this threshold question, ER.54, but its decision reflects a fundamental misconstruction of plaintiffs' allegations and an improper "weighing" of those allegations at the pleading stage. *United States v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 262 (5th Cir. 2014).

Constitutionally protected liberty interests "may arise from the Constitution itself" or "from an expectation or interest created by [governmental] laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Though the DACA memorandum itself grants no rights, each discretionary decision to grant deferred action under DACA conveyed constitutionally protected liberty and property interests on the recipient by "enabl[ing] [the recipient] to do a wide range of things open to [citizens,] … [such as] be[ing] gainfully employed and [being] free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). DACA thus implicates numerous core liberty interests, including freedom from government custody or detention, *Lopez-Valenzuela*, 770 F.3d at 781; the right to live with and care for family members, *Wallis v. Spencer*, 202 F.3d 1126, 1136, 1141 (9th Cir. 2000); the right to practice a chosen profession, *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 997–98 (9th Cir. 2007); and the right to travel internationally, *DeNieva v. Reyes*, 966 F.2d 480, 485 (9th Cir. 1992).

Crucially, this Court and other courts of appeals have held that one may have a constitutionally protected interest in the renewal or retention of state-created benefits where, for example, the person seeking renewal "need only meet [a set of] objective criteria to qualify," *Stauch v. City of Columbia Heights*, 212 F.3d 425, 430 (8th Cir. 2000), or there are "substantive limitation[s] on the discretion" of officials empowered with revoking such benefits, *Wedges/Ledges*, 24 F.3d at 64 ("protectable property interest in retaining" existing licenses); *see also Nozzi*, 806 F.3d at 1193 (protected property interest in "stable and renewable Section 8 benefits"). And—as is especially relevant here—an "entitlement to [such] renewal may be implied ... from policies, practices, and understandings." *Richardson v. Town of Eastover*, 922 F.2d 1152, 1157 (4th Cir. 1991). Where a plaintiff has plausibly alleged a "legitimate claim of entitlement" to the ongoing receipt of benefits, he "must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices'" of the program. *Sindermann*, 408 U.S. at 603; *see also Geneva Towers Tenants Org. v. Federated Mortg. Inv'rs*, 504 F.2d 483, 489 (9th Cir. 1974).

Plaintiffs have alleged that the rescission violates their constitutionally protected property and liberty interests in "the ability to seek renewal of their DACA status[] as long as they continue to play by the rules and meet the program's nondiscretionary criteria for renewal." ER.230; *see also* ER.243. The "2012 DACA

Memorandum explicitly directs that DACA be '*subject to renewal*,'" and DHS accordingly "established a straightforward renewal process" that "does not require DACA recipients to meet all of the initial criteria" but only "three basic criteria." ER.204. These "policies and procedures, and the representations of numerous government officials, created a clear and reasonable expectation" that DACA recipients "would be entitled to continuously renew their DACA status so long as they stayed out of trouble and played by the rules." ER.205; *see also* ER.249-50.

Plaintiffs' allegations are all the more plausible when viewed in the context of DACA's rollout and operation. Eligible DACA recipients were understandably reluctant to come out of the shadows. ER.206. The ability to renew DACA was "one of the main benefits used to induce Dreamers to step forward, subject themselves to a rigorous background investigation, and share sensitive personal information with the government." ER.204; *see also* ER.243, 250. The government consistently represented that applicants could apply for renewal and would presumptively receive renewal if they met certain basic requirements. ER.204-05, 243, 250. Statements by public officials characterizing DACA as a "commitment" that "must continue to be honored" further evidence a collective recognition that DACA was a promise on which Dreamers could reasonably rely. ER.206-09. Under these circumstances, plaintiffs have sufficiently pleaded a protected interest in presumptive renewal of their DACA status and retention of their benefits so long as

they meet the eligibility criteria. *E.g.*, *Stauch*, 212 F.3d at 430; *Wedges/Ledges*, 24 F.3d at 64.

Indeed, this Court has expressly recognized that there may be a protected interest in the continued receipt of a benefit even where, as here, the benefit has an "initial expiration date." *Orloff v. Cleland*, 708 F.2d 372, 377 (9th Cir. 1983). In *Orloff*, this Court held that a government employee may have a "*de facto* property interest" in "continued [government] employment"—*beyond* an "apparent [contractual] expiration date"—where "prior treatment" of the employee and similarly situated colleagues created a mutual "understanding" of such continued employment. *Id.* at 377. The district court was thus wrong to conclude that because "all existing DACA recipients will receive deferred action through the end of their two-year terms," the rescission "acts only prospectively" and does not impact "extant benefits." ER.54-55 (emphasis omitted). The ability to renew *is* an extant benefit, *Stauch*, 212 F.3d at 430, and the rescission indisputably revokes it.

In addition to the protected interests created by the government's "nondiscretionary criteria for renewal" of DACA, ER.229-30, plaintiffs have alleged that such interests were created based on the actual treatment of DACA recipients and implementation of the program. *Orloff*, 708 F.2d at 377 (citing *Sindermann*, 408 U.S. at 593). The Sixth Circuit's decision in *Gunasekera v. Irwin*, 551 F.3d 461 (6th Cir. 2009), is instructive on this point. The court there held that a state

university professor sufficiently pleaded a property interest in his "Graduate Faculty status" where development of a "common practice and understanding" gave him "a legitimate claim to [the] status so long as he met [four stated criteria]." *Gunasekera*, 551 F.3d at 468-69. In reversing the lower court's Rule 12(b)(6) dismissal, the court explained that because the professor's "*custom-based* argument … does not turn on the language" of the "university guidelines," the claim survived even if the criteria did not facially "restrain[] [decision-makers'] discretion." *Id.* (emphasis added).

Here, similarly, even if plaintiffs had not alleged that the government applied "nondiscretionary criteria for renewal," ER.229-30, USCIS data cited in the *Garcia* complaint shows that more than 99 percent of adjudicated DACA renewal applications were approved. *See* USCIS, *Form I-821D Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012-2017* (Mar. 31, 2017) (cited in ER.219). This, along with plaintiffs' other allegations, sufficiently alleges a "common practice and understanding" giving plaintiffs "a legitimate claim to [DACA renewal] so long as [they] met the stated conditions." *Gunasekera*, 551 F.3d at 468. Indeed, Dreamers like plaintiffs only exited the shadows and took out "student loans, accepted job offers, moved to new cities, started businesses, bought homes and cars, and made numerous other life changing decisions" because of the mutual expectation that they

would receive more than two years of protection under DACA. ER.198. The district court erred in holding otherwise. ER.54.

Certain language in the DACA FAQs—such as the assertion that USCIS "retain[ed] the ultimate discretion to determine whether deferred action [was] appropriate in any given case even if the guidelines [were] met," ER.54 (citing DACA FAQs)—does not disturb plaintiffs' legitimate claim of entitlement. Courts routinely decline to credit such "boilerplate" language. *E.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000); *see also Scenic Am., Inc. v. U. S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016). The identification of constitutionally protected interests "turns on the substance of the interest recognized, not the name given that interest by the state." *Newman v. Sathyavaglswaran*, 287 F.3d 786, 797 (9th Cir. 2002) (finding protected property interest despite state's "labeling of the interests" otherwise). Thus, the effect of the government's boilerplate language depends on "weigh[ing] [its statement] against the evidence of its actual practice," *Verlo v. Martinez*, 820 F.3d 1113, 1147 (10th Cir. 2016)—a fact issue that cannot be resolved on a motion to dismiss, *id.*; *see Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("complaint survives a motion to dismiss" where "there are two alternative explanations, … both of which are plausible").

To be clear: Plaintiffs' claim is not premised on any right to the initial discretionary grant of deferred action, but rather on the protected liberty and property

interests that flow from the initial grant of DACA, including—crucially—its presumptive renewal. ER.205-06, 229-30, 243-54, 262. Even though the initial grant of DACA was discretionary, both the government and DACA recipients understood that DACA status, once granted, was renewable so long as recipients met specified criteria. ER.202-05, 207, 229-30, 243-44.[10] Those interests cannot be taken away willy-nilly. *See, e.g.*, *Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once [driver's] licenses are issued, ... their continued possession may become essential in the pursuit of a livelihood," and they cannot "be taken away without" due process.); *Morrissey*, 408 U.S. at 482 (due process implicated where parolees "relied on at least an implicit promise that parole [would] be revoked only if [they] failed to live up to the parole conditions"). So although the government had discretion in creating the DACA program and granting individuals benefits in the first instance, plaintiffs

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[10] The principal authorities the district court relied upon are inapposite. *See* ER.53-54. The plaintiff in *Romeiro de Silva v. Smith* had not been granted deferred action at all, and that case addressed a far different exercise of prosecutorial discretion, one where agency decision-makers had "unfettered discretion." 773 F.2d 1021, 1024 (9th Cir. 1985). *Munoz v. Ashcroft* rejected a claim by an undocumented immigrant that the length of his stay in the United States gave him a right to remain. 339 F.3d 950, 954 (9th Cir. 2003). Here, by contrast, the government established and vigorously promoted DACA, offering vulnerable young people permission to live and work in the United States if they disclosed personal information, paid a considerable fee, passed a background check, and were admitted to the program. Hundreds of thousands of individuals accepted this *quid pro quo* and made life-changing decisions in reliance on it.

sufficiently alleged that they had a mutual understanding with the government that gave them a legitimate claim of entitlement to renewal of DACA. *See Gunasekera*, 551 F.3d at 468; *Wedges/Ledges*, 24 F.3d at 63 ("narrow [] criterion" created a protected property interest).[11]

B. Plaintiffs Have Stated A Plausible APA Notice-And-Comment Claim

The district court also erred in dismissing plaintiffs' claims that the rescission is invalid under the APA because it was not adopted through notice-and-comment rulemaking.[12] A rule is "substantive"—and must be adopted through notice and comment—if it "narrowly limits administrative discretion" or establishes a "binding norm" that "so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion." *Colwell*, 558 F.3d at 1124. The rescission is a substantive rule because, unlike DACA itself, it binds DHS by prohibiting it from issuing DACA renewals or granting advance parole requests under DACA, with no exception for case-by-case determinations.

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[11] Because the lower court did not consider plaintiffs' allegations that the rescission shocks the conscience, this Court should "reverse … [and] remand to the district court for its consideration of [that element] in the first instance." *Tecza v. Univ. of San Francisco*, 532 F. App'x 667, 669 (9th Cir. 2013).

[12] Because the County of Santa Clara and union plaintiffs did not bring notice-and-comment claims, they do not join in this argument.

The district court's contrary ruling conflicts with the only other decision to address an Executive Branch decision to terminate a deferred-action program without undergoing notice-and-comment rulemaking. In that case, the government rescinded a program that granted "extended voluntary departure" to nonimmigrants who had sought, but not received, "Third Preference" visas based on exceptional ability in the arts and sciences. *United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 979-80 (E.D. Pa. 1977). A federal court held that the rescission was ineffective because the agency did not comply with the APA's notice-and-comment procedures, even though the original policy was never published in the Federal Register. *Id.* at 983-86 & n.8. Because the rescission in *Parco* "left no discretion" for the agency to consider requests for deferred action, ER.52, it was "in reality a flat rule of eligibility" requiring notice and comment. 426 F. Supp. at 984-85.

The district court's attempts to distinguish *Parco* only underscore its similarity to this case. The key fact in *Parco*—that "after repeal of the regulation, [discretion would be exercised] unfavorably in *each* … case," ER.52—is present here. As a result of the rescission, DACA recipients will be categorically denied relief under the program. And here, as in *Parco* (*id*.), the rescission will be the sole reason why many DACA recipients are denied relief that they otherwise would have been granted. The district court attempted to distinguish *Parco* because there, "'discretion' was exercised favorably in all cases of a certain kind," *id.* (quoting

Parco, 426 F. Supp. at 984), whereas here, DACA applications were sometimes denied. But that just shows that DACA itself is a discretionary program that could be adopted without notice-and-comment rulemaking; it does not answer the question whether terminating the DACA program "narrowly limits administrative discretion" and therefore requires notice-and-comment procedures. *Colwell*, 558 F.3d at 1124.

The district court wrongly equated adopting DACA and rescinding DACA. ER.3. Whereas granting deferred action under DACA was an *exercise* of discretion that did not require notice-and-comment rulemaking, the rescission could only be adopted through notice and comment because it *forbids* that discretion. *See Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) ("cabining of an agency's prosecutorial discretion can in fact rise to the level of a substantive, legislative rule"). That principle also distinguishes *Mada-Luna v. Fitzpatrick*, where this Court held that notice-and-comment procedures were not required because the agency merely replaced one nonbinding policy statement with another one that left field agents "'free to consider the individual facts' in each case." 813 F.2d 1006, 1017 (9th Cir. 1987).

Further, plaintiffs' notice-and-comment challenge to the rescission would still be valid even if DACA itself were also subject to the same notice-and-comment requirements. Agencies must use notice-and-comment procedures when repealing a substantive rule "even where the rule at issue may be defective." *Am. Forest*

Resource Council v. Ashe, 946 F. Supp. 2d 1, 26 (D.D.C. 2013). A substantive rule adopted without notice-and-comment rulemaking may be subject to timely challenge, but it is not "void *ab initio*," and therefore it cannot simply "be deleted without more ado." *Nat'l Treasury Employees Union v. Cornelius*, 617 F. Supp. 365, 371 (D.D.C. 1985). Otherwise, an agency could "circumvent the requirements of [notice and comment] merely by confessing that the regulations were defective in some respect and asserting that modification or repeal without notice and comment was necessary to correct the situation." *Consumer Energy Council v. FERC*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982).

This Court should follow *Parco* and reverse the district court's dismissal here. For the same reasons, it should hold that plaintiffs are likely to succeed on their notice-and-comment claim and affirm the injunction on that additional ground.

CONCLUSION

The district court's orders granting a preliminary injunction and denying in part the government's motion to dismiss should be affirmed and its order granting in part the motion to dismiss should be reversed.

Dated: March 13, 2018

Respectfully submitted,

s/ Theodore J. Boutrous, Jr.

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STATEMENT OF RELATED CASES

This consolidated appeal arises out of (a) the government's appeal of the district court's preliminary-injunction order, *see* Case Nos. 18-15068 (9th Cir. Jan. 16, 2018), 18-15069 (9th Cir. Jan. 16, 2018), 18-15070 (9th Cir. Jan. 16, 2018), 18-15071 (9th Cir. Jan. 16, 2018), and 18-15072 (9th Cir. Jan. 16, 2018); (b) the government's interlocutory appeal of the district court's partial denial of the government's motion to dismiss, *see* Case No. 18-15128 (9th Cir. Jan. 25, 2018); and (c) plaintiffs' interlocutory appeals of the district court's partial grant of the government's motion to dismiss, *see* Case Nos. 18-15133 (9th Cir. Jan. 25, 2018) and 18-15134 (9th Cir. Jan. 25, 2018).

This Court also previously heard a petition for writ of mandamus filed by the government and directed against the district court order regarding completion of the administrative record in this case. *See In re United States of America, et al.*, Case No. 17-72917 (9th Cir. Oct. 20, 2017).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 13, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-15068

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

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Signature of Attorney or Unrepresented Litigant: s/ Theodore J. Boutrous, Jr.

Date: Mar 13, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

ADDENDUM

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5 U.S.C § 553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C § 701

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

> **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> **(B)** contrary to constitutional right, power, privilege, or immunity;
>
> **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> **(D)** without observance of procedure required by law;
>
> **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

6 U.S.C. § 202

The Secretary shall be responsible for the following:
(1) Preventing the entry of terrorists and the instruments of terrorism into the United States.
(2) Securing the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States, including managing and coordinating those functions transferred to the Department at ports of entry.
(3) Carrying out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the date on which the transfer of functions specified under section 251 of this title takes effect.
(4) Establishing and administering rules, in accordance with section 236 of this title, governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States.
(5) Establishing national immigration enforcement policies and priorities.
(6) Except as provided in part C of this subchapter, administering the customs laws of the United States.
(7) Conducting the inspection and related administrative functions of the Department of Agriculture transferred to the Secretary of Homeland Security under section 231 of this title.
(8) In carrying out the foregoing responsibilities, ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce.

8 U.S.C. § 1103

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

(2) He shall have control, direction, and supervision of all employees and of all the files and records of the Service.

(3) He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.

* * *

8 U.S.C. § 1182

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(9) Aliens previously removed

(A) Certain aliens previously removed

* * *

(B) Aliens unlawfully present

(i) In general

Any alien (other than an alien lawfully admitted for permanent residence) who--

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) of this title or section 1229a of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

(ii) Construction of unlawful presence

For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

* * *

(d) Temporary admission of nonimmigrants

* * *

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien

applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

* * *

8 U.S.C. § 1227

* * *

(d) Administrative stay

(1) If the Secretary of Homeland Security determines that an application for nonimmigrant status under subparagraph (T) or (U) of section 1101(a)(15) of this title filed for an alien in the United States sets forth a prima facie case for approval, the Secretary may grant the alien an administrative stay of a final order of removal under section 1231(c)(2) of this title until

(A) the application for nonimmigrant status under such subparagraph (T) or (U) is approved; or

(B) there is a final administrative denial of the application for such nonimmigrant status after the exhaustion of administrative appeals.

(2) The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.

(3) During any period in which the administrative stay of removal is in effect, the alien shall not be removed.

(4) Nothing in this subsection may be construed to limit the authority of the Secretary of Homeland Security or the Attorney General to grant a stay of removal or deportation in any case not described in this subsection.

8 U.S.C. § 1252

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing **pursuant** to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the

Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates

judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,
(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and
(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that--

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection--

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 or any other

habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal--

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of--

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry

as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner--

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this

paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1324a

* * *

(h) Miscellaneous provisions

(1) Documentation

In providing documentation or endorsement of authorization of aliens (other than aliens lawfully admitted for permanent residence) authorized to be employed in the United States, the Attorney General shall provide that any limitations with respect to the period or type of employment or employer shall be conspicuously stated on the documentation or endorsement.

(2) Preemption

The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231

SEC. 202. MINIMUM DOCUMENT REQUIREMENTS AND ISSUANCE STANDARDS FOR FEDERAL RECOGNITION.

* * *

(c) MINIMUM ISSUANCE STANDARDS.—

* * *

(2) SPECIAL REQUIREMENTS.—

(A) IN GENERAL.—To meet the requirements of this section, a State shall comply with the minimum standards of this paragraph.

(B) EVIDENCE OF LAWFUL STATUS.—A State shall require, before issuing a driver's license or identification card to a person, valid documentary evidence that the person—

(i) is a citizen or national of the United States;

(ii) is an alien lawfully admitted for permanent or temporary residence in the United States;

(iii) has conditional permanent resident status in the United States;

(iv) has an approved application for asylum in the United States or has entered into the United States in refugee status;

(v) has a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States;

(vi) has a pending application for asylum in the United States;

(vii) has a pending or approved application for temporary protected status in the United States;

(viii) has approved deferred action status; or

(ix) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.

* * *

8 C.F.R. § 214.14

* * *

(d) Annual cap on U–1 nonimmigrant status—

(1) General. In accordance with section 214(p)(2) of the Act, 8 U.S.C. 1184(p)(2), the total number of aliens who may be issued a U–1 nonimmigrant visa or granted U–1 nonimmigrant status may not exceed 10,000 in any fiscal year.

(2) Waiting list. All eligible petitioners who, due solely to the cap, are not granted U–1 nonimmigrant status must be placed on a waiting list and receive written notice of such placement. Priority on the waiting list will be determined by the date the petition was filed with the oldest petitions receiving the highest priority. In the next fiscal year, USCIS will issue a number to each petition on the waiting list, in the order of highest priority, providing the petitioner remains admissible and eligible for U nonimmigrant status. After U–1 nonimmigrant status has been issued to qualifying petitioners on the waiting list, any remaining U–1 nonimmigrant numbers for that fiscal year will be issued to new qualifying petitioners in the order that the petitions were properly filed. USCIS will grant deferred action or parole to U–1 petitioners and qualifying family members while the U–1 petitioners are on the waiting list. USCIS, in its discretion, may authorize employment for such petitioners and qualifying family members.

(3) Unlawful presence. During the time a petitioner for U nonimmigrant status who was granted deferred action or parole is on the waiting list, no accrual of unlawful presence under section 212(a)(9)(B) of the INA, 8 U.S.C. 1182(a)(9)(B), will result. However, a petitioner may be removed from the waiting list, and the deferred action or parole may be terminated at the discretion of USCIS.

* * *

8 C.F.R. § 274a.12

* * *

(c) Aliens who must apply for employment authorization. An alien within a class of aliens described in this section must apply for work authorization. If authorized, such an alien may accept employment subject to any restrictions stated in the regulations or cited on the employment authorization document. USCIS, in its discretion, may establish a specific validity period for an employment authorization document, which may include any period when an administrative appeal or judicial review of an application or petition is pending.

* * *

> **(14)** An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment;

* * *

28 C.F.R. § 1100.35

(a) Federal law enforcement officials who encounter alien victims of severe forms of trafficking in persons who are potential witnesses to that trafficking may request that the Immigration and Naturalization Service (INS) grant the continued presence of such aliens in the United States. All law enforcement requests for continued presence must be submitted to the INS, Headquarters Office of Field Operations, in accordance with INS procedures. Each federal law enforcement agency will designate a headquarters office to administer submissions and coordinate with the INS on all requests for continued presence. The designated headquarters office will be responsible for meeting all reporting requirements contained in INS procedures for the processing and administering of the requests for continued presence in the United States of eligible aliens.

(b) Upon receiving a request, the INS will determine the victim's immigration status. When applicable and appropriate, the INS may then use a variety of statutory and administrative mechanisms to ensure the alien's continued presence in the United States. The specific mechanism used will depend on the alien's current status under the immigration laws and other relevant facts. These mechanisms may include parole, voluntary departure, stay of final order, section 107(c)(3)–based deferred action, or any other authorized form of continued presence, including applicable nonimmigrant visas.

> **(1)** The alien's continued presence in the United States under this subpart does not convey any immigration status or benefit apart from that already encompassed by the particular form of authorized continued presence granted. In most circumstances, victims granted continued presence will be eligible for temporary employment authorization.
>
> **(2)** The continued presence granted through any of the mechanisms described in this paragraph (b) will contain the terms normally associated with the particular type of authorized continued presence granted, including, but not limited to, duration of benefit, terms and procedures for receiving an extension, travel limitations, and employment authorization unless expressly waived in an individual approval. Aliens granted deferred action based upon section 107(c)(3) are considered to be present in the United States pursuant to a period of stay authorized by the Attorney General for purposes of INA sections 212(a)(9)(B)(I) and (C).

* * *