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Via Electronic Filing

July 2, 2018

Ms. Molly Dwyer
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Regents of the University of California, et al. v. U.S. Department of Homeland Security, et al.*,
Consolidated Case No. 18-15068 (argued May 15,
2018).

Dear Ms. Dwyer:

Pursuant to Federal Rule of Appellate Procedure 28(j), the University of California plaintiffs write to respond to the letter submitted by defendants on June 22, 2018.

Defendants do not assert that the June 22, 2018 memorandum issued by the Secretary of Homeland Security—purportedly in response to the district court’s decision in *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018)—is a new administrative action. Instead, they assert that the June 22 memorandum “provide[s] additional explanation of the basis for the DACA rescission” and “confirm[s] the lawfulness” of that action. Plaintiffs disagree. A court reviewing agency action under the Administrative Procedure Act must evaluate that action based solely on the rationale supplied by the agency at the time of its decision, and post-hoc rationalizations must be disregarded. *See, e.g., San Luis v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014); *Ass’n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811–12 (9th Cir. 1980). Indeed, “post hoc explanations” like those presented in the June 22 memorandum “serve only to underscore the absence of an

adequate explanation in the administrative record itself.” *Humane Soc’y of U.S. v. Locke*, 626 F.3d 1040, 1050 (9th Cir. 2010).

These considerations apply with particular force to the June 22 memorandum’s references to enforcement policy and reliance interests—justifications that appear neither in the rescission memorandum itself nor in the administrative record. *See Alvarado Cmty. Hosp. v. Shalala*, 155 F.3d 1115, 1124 (9th Cir. 1998) (“explanatory materials cannot be used to offer new rationalizations for agency action”), amended, 166 F.3d 950 (9th Cir. 1999). In short, the Secretary’s June 22 memorandum is entirely irrelevant to the issues presently before this Court.

Although it is not apparent what, if any, significance the government believes that the June 22 memorandum has for the court’s decision in *NAACP v. Trump*, that court has ordered the government to address that issue, if it wishes to, no later than July 11, 2018. (Order attached.) Regardless of the government’s forthcoming submissions, however, the June 22 memorandum is not a basis to vacate the district’s court’s preliminary injunction here.

Sincerely,

s/ Jeffrey M. Davidson

Jeffrey M. Davidson

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

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2018, 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. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Jeffrey M. Davidson

Jeffrey M. Davidson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED
PEOPLE, et al.,**

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Civil Action No. 17-1907 (JDB)

**TRUSTEES OF PRINCETON
UNIVERSITY, et al.,**

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

Civil Action No. 17-2325 (JDB)

SCHEDULING ORDER

Upon consideration of [71] defendants' notice and [71-1] the attached memorandum issued by Secretary Kirstjen M. Nielsen (the "Nielsen Memo"), and the entire record herein, it is hereby

ORDERED that the following schedule will govern further proceedings in these cases:

1. Defendants' motion to revise [69] the Court's April 24, 2018 Order, if any, shall be filed by not later than Wednesday, July 11, 2018. Defendants' motion shall be limited to twenty pages in length.
2. Plaintiffs' joint opposition to defendants' motion, if any, shall be filed by not later than Monday, July 23, 2018 and shall be limited to twenty pages in length.

3. Defendants' reply in support of their motion, if any, shall be filed by not later than Friday, July 27, 2018 and shall be limited to seven pages in length.
4. The parties' briefs should address the effect, if any, of the Nielsen Memo on the positions taken in prior briefing on the dispositive motions in these cases. The parties are encouraged to incorporate by reference material from that prior briefing.

It is further **ORDERED** that the stay of [69] the Court's Order vacating the September 5, 2017 memorandum rescinding the Deferred Action for Childhood Arrivals ("DACA") program is **CONTINUED** until such time as any motion filed in accordance with the above schedule is resolved.¹

SO ORDERED.

/s/
JOHN D. BATES
United States District Judge

Dated: June 27, 2018

¹ The Court also entered an Order vacating DACA's rescission in the NAACP case. See Order, NAACP v. Trump, Civ. Action No. 17-1907 (JDB) (D.D.C. Apr. 24, 2018), ECF No. 22. The stay of vacatur pursuant to that Order is likewise **CONTINUED** until any motion filed in accordance with the above schedule is resolved.