



XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Telephone: (415) 510-3920
Facsimile: (415) 703-2552
E-Mail: Michael.Mongan@doj.ca.gov

July 2, 2018

Via Electronic Filing

Molly Dwyer
Clerk of Court
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *Regents of the University of California et al. v. U.S. Department of Homeland Security, et al.*, Consolidated Case Nos. 18-15068, 18-15069, 18-15070, 18-15071, 18-15072, 18-15128, 18-15133, 18-15134 (oral argument May 15, 2018, before Judges Wardlaw, Nguyen, Owens)

Dear Ms. Dwyer:

I write on behalf of the States in response to defendants' letter of June 22 (Dkt. 184).

Defendants submit a three-page memorandum in which current Homeland Security Secretary Nielsen discusses the 2017 rescission of DACA by then-Acting Secretary Duke. Nielsen expresses her "understanding of the Duke memorandum" and her view that "the decision to rescind the DACA policy was, and remains, sound." Mem. 1. Defendants assert that Nielsen's memorandum "respon[ds] to the decision in *NAACP v. Trump*," Ltr. 1; but they have not yet explained what, if any, significance they think it has in that case. See D.D.C. No. 1:17-cv-02325, Dkt. 71 (submission); Dkt. 72 (ordering further briefing and continuing stay). Certainly it provides no basis for vacating the preliminary injunction here.

These suits challenge the 2017 decision announced by Duke. Defendants have repeatedly asserted that Duke was the "sole" decisionmaker, e.g., Dkt. 134 at 38; that "her decision rested ... on the policy and legal concerns set forth in the [2017] Rescission Memo," U.S. Reply 2, *In re United States* (U.S.S.Ct. No. 17-

Molly Dwyer
July 2, 2018
Page 2

801); and that the “lawfulness of her action ... should be determined ‘objectively’ by reviewing the reasons she gave,” *id.* at 6. Nielsen’s new memorandum is not relevant to such a review. The “*post hoc* rationalizations of the agency or the parties ... cannot serve as a sufficient predicate for agency action.” *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981); *see, e.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962).

In any event, Nielsen’s memorandum confirms that the 2017 rescission was based squarely on judicially reviewable contentions that “the DACA policy was contrary to law.” Mem. 2. It adds nothing to the legal arguments defendants have previously offered to support that contention. And if it means to suggest new “policy” rationales for terminating DACA, Mem. 2-3, those rationales were not referenced in Duke’s 2017 decision memorandum, are not supported by the administrative record proffered so far in this case, and may not be used to defend or sustain the 2017 decision. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Sincerely,

s/ Michael J. Mongan

MICHAEL J. MONGAN
Deputy Solicitor General

For XAVIER BECERRA
Attorney General

CERTIFICATE OF SERVICE

I certify that on July 2, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 2, 2018

s/ Michael J. Mongan
