

July 2, 2018

VIA ELECTRONIC FILING

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 (9th Cir.) (oral argument May 15, 2018, before Judges Wardlaw, Nguyen, Owens)

Dear Ms. Dwyer:

I write in response to the government's June 22, 2018, letter regarding the memorandum issued the same day by Secretary of Homeland Security Kirstjen Nielsen.

The Nielsen memorandum does not purport to replace Acting Secretary Duke's original decision to rescind DACA. That is, the new memorandum is not a new agency decision (*i.e.*, a "Rescission 2.0"). Instead, it simply attempts to further justify Acting Secretary Duke's initial decision, which was itself based on the Attorney General's view that DACA is unlawful. Mem. 1. It reaffirms that rescinding DACA was "Acting Secretary Duke's decision" and provides "further explanation" for that decision. *Id.* at 1, 3. Secretary Nielsen "concur[s] with and decline[s] to disturb" that decision based on her belief that the decision "was, and remains, sound." *Id.* at 3. Acting Secretary Duke's September 2017 memorandum rescinding DACA thus remains the operative agency decision under review.

And that agency decision cannot be justified using post hoc rationalizations. "[A]n agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself," not "based on *post hoc* rationalizations" like those offered by Secretary Nielsen. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). This Court therefore should not consider the Nielsen memorandum's additional justifications for the rescission. That is especially true because they are premised on the same legal error as the initial rescission decision—the view that DACA is unlawful. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007); *see also* Mem. 2 (Secretary Nielsen says she is "bound by" the "determination and ruling by the Attorney General"). To the extent the memorandum attempts to add new "policy"

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justifications for the rescission, those were not included in the initial rescission memorandum and should not be considered. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The new memorandum therefore is not relevant to review of the preliminary injunction.

Sincerely,

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

Counsel for Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

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