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VIA CM/ECF

August 10, 2018

Ms. Molly C. Dwyer
Clerk, United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

RE: *Regents of the University of California v. U.S. Department of Homeland Security*,
Consolidated Case No. 18-15068 (9th Cir.) (oral argument May 15, 2018,
before Judges Wardlaw, Nguyen, Owens)

Dear Ms. Dwyer:

We write in response to plaintiffs' August 7 letter. Plaintiffs' reliance on *NAACP v. Trump* is misplaced.

First, contrary to plaintiffs' position, the court held that it *could* consider most of the Nielsen Memorandum because it provides "a permitted amplification, rather than a prohibited *post hoc* rationalization." Op.12.

Second, the court failed to refute our arguments that there is no "exception" allowing judicial review of enforcement policies resting on legal rationales. Op.14 n.9. Moreover, the court erred in treating the agency's "serious doubts about [DACA's] legality" rationale (Memo.2) as falling within such an exception. Op.15. That is not a legal judgment that courts can review, but rather an unreviewable policy judgment because it concerns discretionary enforcement choices by "a law enforcement agency" as to whether it concludes that it has "sufficient confidence" in its policy's legality and that it is not unduly risking acting in a "legally questionable" manner, such as "undermin[ing] public confidence" and incurring "burdensome litigation." Memo.2.

Third, in holding that rescinding DACA based on serious doubts about its legality was arbitrary and capricious, the court failed to justify its suggestion that there are “meaningful distinctions” between DACA and DAPA. Op.21. The court disregarded the agency’s explanation that the Fifth Circuit’s rejection of DAPA could not have “turn[ed] on whether the covered aliens had a pathway to lawful status,” as “not all of them had” one, and thus turned instead “on the incompatibility of such a major non-enforcement policy with the INA’s comprehensive scheme”—a rationale that plainly applies equally to DACA. Memo.2.

Finally, the court incorrectly held that the agency’s discretionary judgment that any policy concerning DACA recipients “should be enacted legislatively” (Memo.3) was indistinguishable from her legal judgment that DACA is unlawful. Op.16. Secretary Nielsen made clear this was a “separate and independently sufficient reason[,]” “regardless of whether ... [DACA is] illegal or legally questionable.” Memo.1-2. And there is no standard or basis for a court to second-guess the agency’s policy view that, even if it *could* adopt such a massive non-enforcement policy on its own, it *should not do so* without legislative imprimatur.

Sincerely,

s/ Abby C. Wright

Abby C. Wright

Attorney

cc: all counsel (via CM/ECF)

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 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/ Abby C. Wright

ABBY C. WRIGHT