

COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
LONDON LOS ANGELES NEW YORK SAN FRANCISCO
SEOUL SHANGHAI SILICON VALLEY WASHINGTON

Covington & Burling LLP
One Front Street
San Francisco, CA 94111-5356
T +1 415 591 6000

Via Electronic Filing

September 17, 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, before Judges Wardlaw, Nguyen, Owens).

Dear Ms. Dwyer:

The University of California plaintiffs write in response to defendants' September 13, 2018 Rule 28(j) letter regarding the decision in *Texas v. United States*, No. 18-cv-00068 (S.D. Tex. Aug. 31, 2018).

First, although the *Texas* court expressed a negative view about the lawfulness of DACA, it nonetheless held that the irreparable harm, balance of equities, and public interest factors rendered a preliminary injunction against DACA inequitable. *See* Op. 115. Those same factors overwhelmingly support the district court's preliminary injunction here. And the reliance interests recognized in *Texas* strongly support plaintiffs' APA claims on the merits. *See* ER41-43.

Second, *Texas* undermines the government's assertion that it needed to rescind DACA to avoid the "risk of an immediate, disruptive, court-imposed" injunction against DACA by the Texas district court. Gov't's Principal Br. 36. As discussed in the briefing in this Court, any reasonable assessment of such a risk was required to consider that "the irreparable harm, balance of hardships, and public interest factors would have swung" against such an injunction. Regents' Principal & Resp. Br 52-57. That is exactly what has now happened in *Texas*, where the court recognized that the profound reliance interests engendered by DACA, and the six-year delay in challenging the program, weighed decisively against a preliminary injunction. Op. 111, 113. The government's failure to properly assess "litigation risk" renders the rescission arbitrary and capricious.

Third, like every court to have reviewed the rescission of DACA, the *Texas* court rejected the government's threshold reviewability defenses. *See* Op. 57-62.

Fourth, although the *Texas* court stated that it would likely find that DACA was contrary to the Immigration and Nationality Act, *see* Op. 79, its reasoning cannot withstand scrutiny. As

the district court here carefully and correctly held, “each feature of the DACA program is anchored in authority granted or recognized by Congress or the Supreme Court.” See ER30. Moreover, even if there were concerns about the legality of DACA, the government still could not rescind the program without considering ways to account for those concerns while still achieving DACA’s programmatic objectives. See Regents’ Principal & Resp. Br. 60-62.

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 September 17, 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