

Nos. 18-587, 18-588, & 18-589

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, ET AL.,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL.,

Petitioners,

v.

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, ET AL.

KEVIN K. MCALEENAN, ACTING SECRETARY
OF HOMELAND SECURITY, ET AL.,

Petitioners,

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL.

**On Writs Of Certiorari To The
United States Courts Of Appeals
For The Ninth, D.C., And Second Circuits**

**BRIEF OF NONPROFIT LEGAL SERVICES
ORGANIZATIONS AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

Amici curiae are nonprofit legal services organizations that provide legal assistance on immigration issues to low-income immigrants. *Amici* include 47 organizations, listed and described in the Appendix. Many of *amici*'s clients are eligible for Deferred Action for Childhood Arrivals ("DACA"). Cumulatively, *amici* helped thousands of young people apply for DACA between 2012 and 2017 and have provided legal counseling to many of these same youth in an effort to help them understand their immigration options since the Department of Homeland Security ("DHS") decided to rescind DACA in September 2017. When DHS rescinded DACA, eligible recipients initially had only four weeks to apply for renewal. As a result, *amici* scrambled to help their clients meet the new deadline and to consider whether there were any newly-available options to gain immigration status.² Staff at many of the *amici* organizations worked around the clock to

¹ All parties have filed blanket consents to the filing of amicus briefs. Blanket Consents filed by Petitioner and Respondents, *Dep't of Homeland Security v. Regents of the Univ. of California* (No. 18-587) (July 10, 2019, July 17, 2019, July 23, 2019, July 29, 2019, July 30, 2019, July 31, 2019, and Aug. 1, 2019). Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

² *Amici* regularly screened clients for eligibility for forms of immigration relief that would lead to permanent immigration status before assisting clients with applications for DACA.

contact and counsel as many clients subject to the new deadline as possible and to quickly organize legal clinics to meet their clients' legal needs. *Amici* have observed firsthand the profound negative effects the Government's decision to rescind DACA has had on their clients and the uncertainty their clients now face in every aspect of their lives. As a result of their work with undocumented immigrants generally, and DACA-eligible individuals in particular, *amici* are well-positioned to articulate the nature of the reliance interests engendered by DACA, the legal framework DACA-eligible individuals must navigate if DACA is rescinded, and the effects rescission would have on their clients, their organizations, and the communities they serve.³



SUMMARY OF ARGUMENT

In applying for DACA, hundreds of thousands of brave young people raised their hands and announced their presence in the United States, encouraged by the federal government's assurances that they would be considered for protection from immigration enforcement action. Relying on these assurances, DACA recipients applied for work authorization, pursued their educations, planned for their families' futures, and improved their lives in ways they had dreamed of for

³ Counsel for *amici* have interviewed and/or received information from the legal services organizations that are filing this brief. Information throughout the brief that relates to these organizations' clients was obtained through these interviews and/or related requests for information.

years. Then, on September 5, 2017, DHS abruptly rescinded DACA, causing immediate chaos, uncertainty, and fear. If the judgments below are reversed and the rescission of DACA is reinstated, hundreds of thousands of young people will face a frightening and uncertain future, despite assurances from the Government that enticed them to come forward in the first place. Nearly all DACA recipients will lose the ability to apply for work authorization (likely leading them to lose their jobs and health insurance) and countless other resources they have worked hard to acquire. Losing DACA will leave most DACA recipients without any protection from deportation and force them either to leave the only country they have known since early childhood or to live in constant fear of removal. The rescission of DACA would also harm many family members of DACA recipients, including U.S.-citizen children, who rely on them for support.

If DACA is rescinded, *amici*—legal services organizations that serve these young people and other vulnerable immigrant populations—would also be harmed. They would struggle to meet the needs of an enormous population of immigrants suddenly in need of immediate legal advice and assistance. *Amici* already experienced this situation once, when they were thrown into chaos after the Government issued its decision to rescind DACA in September 2017, during the one-month window originally imposed for filing renewal applications. At the same time that demands on their time would greatly increase, *amici* would also lose valuable

DACA-recipient staff, whom *amici* hired and trained in reliance on DACA.

Despite all this, DHS did not consider, let alone address, the dire consequences its decision would have. Not only is it reckless for an administrative agency to play fast and loose with people's lives in this way, it is also unlawful. This Court has made clear that, under the Administrative Procedure Act ("APA"), when an administrative agency changes policy it *must* consider, among other things, the reliance interests engendered by the previous policy. It must also provide an explanation for the change that is cogent and consistent. Where, as here, an agency neither considers reliance interests nor provides a cogent and consistent explanation for its decision, that decision is arbitrary and capricious. The reliance interests at stake here are substantial because hundreds of thousands of DACA recipients have no choice other than to rely upon the continuation of DACA. The rescission of DACA would inflict very real, tangible damage on hundreds of thousands of people who came forward to be counted and to contribute to this nation, on their dependents, and on the legal services organizations that work tirelessly to serve this community. The Government's failure to even consider these foreseeable and significant consequences of its change in policy renders the rescission unlawful.



ARGUMENT

I. The Government Completely Failed to Consider How Rescinding DACA Would Affect Those Who Reasonably Relied on DACA and, as a Result, the Rescission Is Arbitrary and Capricious.

If the Government's decision to rescind DACA is upheld, the effects on DACA recipients will be severe. Most have no other available path to obtain work authorization, earn a living, or pursue an education, and will find themselves in legal uncertainty and without the means to support themselves and their families. The organizations that support them will lose the significant investments they have made in hiring and training their DACA-recipient employees and in developing DACA-related programs. At the same time, these organizations will likely be overwhelmed with thousands of new requests for assistance as DACA recipients struggle to find ways to protect what they have achieved since 2012. The Government's decision to rescind DACA without considering any of these harms to the individuals' and organizations' reliance interests was arbitrary and capricious.

A. The Government Induced DACA Recipients to Rely on DACA and Then Ignored Their Reliance Interests, in Violation of the APA.

The abrupt announcement that DHS was terminating DACA upended the lives of hundreds of thousands of DACA recipients, yet the agency had not even considered the effects its decision would have on their reliance interests. Through the implementation and continuation of DACA, the Government induced young undocumented immigrants brought to the United States as children to rely on DACA. Through DACA, they had new opportunities to obtain students loans to attend college, apply for work authorization so that they could work for living wages, obtain driver's licenses, and otherwise fully participate in society without fear of removal. During this period, DACA recipients have become even more integral to their communities, to which they have been making significant, positive contributions for years. Their reliance on DACA only increased over the five years that DACA remained in existence without adverse action by the Administration or the courts.⁴

Despite the enormous reliance interests created by the incentives and opportunities the Government presented to recipients of DACA, upon which the Government knew DACA recipients extensively relied, the Government nevertheless failed to consider these

⁴ See, e.g., *Crane v. Johnson*, 783 F.3d 244, 255 (5th Cir. 2015); *Arpaio v. Obama*, 797 F.3d 11, 25 (D.C. Cir. 2015).

reliance interests when it rescinded DACA, plunging hundreds of thousands of young people into legal, educational, financial, and familial uncertainty. Rescinding DACA would strip recipients of the ability to plan for their futures in the only country they have known since early childhood and eliminate their ability to support themselves and those who rely on them—including their parents, spouses, and U.S.-citizen children. Instead of considering these interests—or even acknowledging them—DHS moved ahead with an ill-conceived policy change affecting hundreds of thousands of young people, overnight. That is not only bad policy, it is also unlawful because it renders the decision arbitrary and capricious under the APA.

When an agency has not engaged in a reasoned decision-making process, which, among other things, must include consideration of “serious reliance interests” engendered by the previous policy, the agency’s decision is arbitrary and capricious and will not be upheld. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009); see also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–27 (2016). This is so even if the parties have no constitutionally-protected liberty or property interests in the continuation of the previous policy. The agency cannot simply disregard reliance interests when changing policy. See *Encino Motorcars*, 136 S. Ct., at 2126 (explaining that an agency must articulate a reason for a changed position and take into account that “longstanding policies may have engendered serious reliance interests”).

The record establishes that DHS paid no attention to the reliance interests of DACA recipients or others affected by its decision until months after the decision was made. DHS only acknowledged these interests at all after courts began holding that the agency was required to consider such reliance interests. Indeed, the Duke Memorandum rescinding DACA made no reference whatsoever to the rescission's effect on DACA recipients. Memorandum from Acting Secretary Elaine C. Duke on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), available at <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> (hereinafter the "Duke Memorandum"). Four months later, in January 2018, the U.S. District Court for the Northern District of California noted that the Secretary should have weighed "DACA's programmatic objectives as well as the reliance interests of DACA recipients," but failed to do so. *Regents of Univ. of California v. United States Dep't of Homeland Security*, 279 F. Supp. 3d 1011, 1044 (N.D. Cal. 2018). Similarly, in February 2018, when the U.S. District Court for the Eastern District of New York enjoined the Government from rescinding DACA, it determined that there was no evidence whatsoever in the record that DHS had considered how rescission would affect DACA recipients. *New York v. Trump*, 17-CV-5228 (NGG) (JO) (E.D.N.Y. Feb. 13, 2018) (slip op., at 43) ("The record does not indicate that Defendants acknowledged, let alone considered, these *or any other reliance interests* engendered by the DACA program." (emphasis added)).

A few months later, in April 2018, the U.S. District Court for the District of Columbia “vacated” the Duke Memorandum but stayed its decision to allow the Government an opportunity to more fully explain its decision. Order, *Nat’l Ass’n for the Advancement of Colored People v. Trump*, Civ. Action No. 17-1907 (JDB) (D.D.C. Apr. 24, 2018) (hereinafter the “D.D.C. Order”) (“Because DHS failed to even acknowledge how heavily DACA beneficiaries had come to rely on the expectation that they would be able to renew their DACA benefits, its barebones legal interpretation was doubly insufficient and cannot support DACA’s rescission.”).

It was not until June 2018, nine months after the Duke Memorandum, and six months after the Northern District of California enjoined the DACA rescission, that DHS paid lip-service to the idea of considering DACA recipients’ reliance interests in a memorandum issued in response to an order from the D.C. District Court. See Memorandum from Secretary Kirstjen M. Nielsen on the Rescission of Deferred Action for Childhood Arrivals (DACA) at 3 (June 22, 2018) (hereinafter the “Nielsen Memorandum”). Even then, the Secretary merely asserted, without providing any reasoning, analysis, or explanation, that any reliance interests that existed were outweighed by the allegedly questionable legality of DACA and “other reasons for ending the policy.” *Id.* This perfunctory nod to reliance interests is insufficient, especially in light of DHS’s earlier contention in the litigation that any reliance

interests were not longstanding or serious enough to even require consideration. See Memorandum of Law in Opp’n Pl.’s Mots. Prelim. Injunction, *New York v. Trump*, 1:17-CV-5228 (NGG) (JO) (E.D.N.Y. Jan. 13, 2018) at 16–17. “[A]bsent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.” *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citing 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4477 at 782 (1981)).

In its opening brief, the Government does not even meaningfully contest its failure to consider reliance interests. Pet. Br. at 42–43. Instead, it argues that Secretary Nielsen need not have considered any reliance interests held by stakeholders because DACA was a “temporary stop-gap measure” that “confer[red] no substantive right.” *Id.* But, merely asserting that DACA was not intended to create reliance interests does not demonstrate that those interests did not exist, let alone that the agency may ignore such interests. See *Encino Motorcars*, 136 S. Ct. at 2126. The Eastern District of New York noted as much when it correctly dismissed DHS’s argument, explaining that a substantive right need not exist for the agency to be required to consider reliance interests engendered by a policy the agency seeks to change. *New York v. Trump*, 17-CV-5228 (NGG) (JO) (slip op., at 4) (citing *Encino Motorcars*, 136 S. Ct., at 2124–26); see also D.D.C. Order (“Because DHS failed to even acknowledge how heavily DACA beneficiaries had come to rely on the expectation that

they would be able to renew their DACA benefits, its barebones legal interpretation was doubly insufficient and cannot support DACA’s rescission.”). Even Secretary Nielsen explicitly acknowledged that “recipients have availed themselves of [DACA] in continuing their presence in this country and pursuing their lives.” Nielsen Memorandum at 3.

The Government also failed to consider any other reliance interests, including those of *amici*, who have worked tirelessly to assist DACA recipients and have built extensive programs and infrastructure within their organizations in reliance on DACA. They have also hired and trained DACA recipients in reliance on DACA. Even if the Secretary’s statements constituted adequate consideration of the reliance interests of DACA recipients—and they do not—there is nothing in the record that indicates the Government gave *any* consideration to reliance interests of *amici* or the harm they would suffer upon DACA’s rescission.

The rescission of DACA and its effects on both recipients and the organizations who serve and employ them would mean that hundreds of thousands of people may suddenly face the complicated immigration removal system alone and without legal assistance, given the serious limitations on resources many *amici* (and other organizations like them) will face, described *infra*. Given the enormity of the interests at stake and the profound reliance interests generated over the course of years, DHS’s failure to consider these interests when it rescinded DACA renders that decision arbitrary and capricious.

B. DACA Recipients' Reliance Interests Are Significant Because Most Do Not Qualify for Other Forms of Immigration Relief.

Amici routinely screened DACA-eligible immigrants to determine whether they qualified for immigration relief under any available program. The vast majority of their DACA-eligible clients do not qualify for permanent immigration status or any other form of protection from removal from the United States.⁵ Moreover, contrary to popular perception, there is no provision that protects DACA recipients from removal based on how long they have lived in the United States, even if they have been here nearly all their lives, contributed positively to their communities, and excelled academically. Additionally, despite arguments made in other contexts, such as the ongoing litigation in the U.S. District Court for the Southern District of Texas, DACA did not create a “loophole” by which DACA recipients could “cut in line” to obtain immigration relief or citizenship ahead of those applicants who applied from their home countries. See, e.g., Pl.’s Mot. Prelim. Injunction and Memorandum in Support, *Texas v. United States*, 1:18-cv-68 (S.D. Tex. 2018) at 3. Rather,

⁵ As Respondents note, DACA is consistent with various Acts of Congress that view undocumented immigrants who came here as children or have been in the United States for a long time as low enforcement priorities. See Brief of Respondents the States of California, et al. at 32 n. 11, *Dep’t of Homeland Security v. Regents of the Univ. of California*, Nos. 18-587, 18-588, 18-589 (U.S. Sept. 27, 2019). As set forth in the Office of Legal Counsel opinion cited therein, DACA is consistent with this legislation. *Id.* at 4, 43; J.A. 827 n. 8.

DACA provided young people who had no choice whether to immigrate to the United States with a path to obtain immigration relief that is entirely distinct from DHS’s visa-granting programs. The tiny fraction of DACA recipients who have obtained lawful immigration status were eligible for such status independently of DACA.

Amici’s experience, based upon years of screening and advising DACA-eligible clients, is that most have not suffered the requisite harm to be eligible for humanitarian forms of immigration relief, and do not have qualifying relatives through whom they can apply for family-based relief. Academic research confirms *amici’s* experience. See, e.g., Tom K. Wong, *et al.*, *Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey*, 2 J. Migration and Hum. Security 4, 287–304 (2014). The rescission of DACA therefore would leave the vast majority of DACA recipients without any protection from deportation.

Humanitarian-based immigration options, such as asylum, Special Immigrant Juvenile Status (“SIJS”), and U and T visas, are narrowly-tailored forms of relief that typically require applicants to have survived persecution; parental neglect, abandonment, or abuse; a serious crime; or a severe form of human trafficking.⁶

⁶ See 8 U.S.C. § 1158 (asylum) (based on past persecution or a well-founded fear for future persecution); 8 U.S.C. § 1101(a)(27) (SIJS); 8 U.S.C. § 1101(a)(15)(U) (U visas); 8 U.S.C. § 1101(a)(15)(T) (T visas); 8 U.S.C. § 1101(a)(51) (VAWA).

Most DACA recipients have not experienced these hardships and do not qualify for these forms of relief.

Most DACA recipients are also not eligible for family-based immigration relief because they do not have a qualifying relative. Even those very few DACA recipients who might have a qualifying relative would typically have to leave the country to apply for a family-based visa at a U.S. consulate abroad. Moreover, most would face strict bars to re-entry because their original entry (even though they were children at the time) was unlawful, resulting in the accrual of “unlawful presence” between the age of 18 and receipt of DACA.⁷ 8 U.S.C. § 1182(a)(9)(B)–(C). The average DACA recipient who applied in 2012 was 20 years old and thus had already accrued two years of unlawful presence before receiving DACA, which results in a ten-year bar to re-entering the United States. See Tom K. Wong, *et al.*, *2017 National DACA Study*, Ctr. for Am. Progress (Aug. 28, 2017) at 12 (hereinafter the “2017 National DACA Study”); 8 U.S.C. § 1182(a)(9)(B)(i)(II). DACA recipients would have to abandon their families, jobs, and schools, and leave the only country most of them have ever known since early childhood, to wait out this ten-year period in their country of birth. Although unlawful presence may be waived, the standards are so difficult to meet that few DACA recipients

⁷ DACA recipients who have accrued unlawful presence and depart the United States are barred from re-entry for varying lengths of time, depending on their length of unlawful presence and number of entries. 8 U.S.C. §§ 1182(a)(9)(B)(i)(I)–(II); 1182(a)(9)(C).

are likely to qualify. In practice, then, these time bars act as complete barriers to relief.

Given how few DACA recipients qualify for immigration status or relief from removal, and the legal and practical hurdles they face even if they do qualify, the reality is that rescinding DACA would strip most recipients of the ability to work legally and obtain protection from deportation—and therefore will inevitably result in real and profound damage to the reliance interests that DACA recipients have nurtured since DACA’s inception.

C. Most DACA Recipients Will Lose the Ability to Work, Drive, Pay for College, and Plan for Their Lives if DACA Is Rescinded.

The reliance interests that DHS so blithely ignored in deciding to rescind DACA involve matters that are fundamental to DACA recipients’ lives—indeed, they are matters fundamental to nearly all Americans. Because the vast majority of DACA recipients are not eligible for most other forms of immigration relief, they rely on DACA for their educational, professional, financial, and familial stability. Without DACA, families, workplaces, and communities will be disrupted and torn apart.

The revocation of DACA would strip its recipients of the ability to live and work legally in this country and would remove any protection from deportation. But the elimination of DACA would strike at

opportunities that “reverberate far beyond th[e] privileges” of legally living and working in the United States. Caitlin Dickerson, *For DACA Recipients, Losing Protection and Work Permits Is Just the Start*, *The New York Times* (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/us/daca-losses-immigration.html> (hereinafter “*Losing Protection*”). DACA recipients have been able to participate fully in economic life and pursue higher educational opportunities more readily. For example, DACA recipients who are now able to work legally have been paying Social Security taxes with the expectation that they will be eligible for Social Security benefits upon retirement, which they will lose if DACA is rescinded.⁸ And 69% of DACA recipients “earn[ed] more money [after qualifying for DACA], which . . . helped [them] become financially independent.” 2017 National DACA Study at 3. As a result of their employment, many DACA recipients also obtained employer-based health insurance. See Jessica Ferger, *Rescinding DACA Could Spur a Public Health Crisis, from Lost Services to Higher Rates of Depression, Substance Abuse*, *Newsweek* (Sept. 6, 2017), <https://www.newsweek.com/daca-immigration-health-care-access-mental-health-660539>. After the implementation of DACA, approximately 80% of DACA recipients

⁸ Soc. Sec. Admin., Social Sec. No. and Card-Deferred Action for Childhood Arrivals, https://www.ssa.gov/pubs/deferred_action.pdf (last visited Sept. 25, 2019); Jose Magaña-Salgado & Tom K. Wong, *Draining the Trust Funds: Ending DACA and the Consequences to Social Security and Medicare*, Immigrant Legal Resource Center (Oct. 2017), https://www.ilrc.org/sites/default/files/resources/2017-09-28_draining_the_trust_funds.pdf.

obtained driver's licenses for the first time and approximately 65% of recipients pursued educational opportunities they previously could not pursue. 2017 National DACA Study at 7, 9.

DACA recipients not only benefitted from opportunities newly available to them, but undertook obligations in reliance on DACA as well. They made “life decisions such as buying homes, pursuing graduate degrees, and starting families. Those decisions came with major obligations that may be unmanageable without a steady job or benefits, but that cannot be canceled or renegotiated.” Dickerson, *Losing Protection*. If DACA is rescinded, investments in student loans, business start-up costs, employment opportunities, cars, and homes will lose most—if not all—of their value. Countless DACA recipients, heeding advice that education is the key to advancement, undertook significant student loan debt to earn degrees they trusted would lead to better, high-paying jobs, but which, without DACA, are worthless. For example, one DACA recipient who took out \$100,000 in student loans to get through college, reported that, without work authorization, she will likely not even “be able to renew her apartment lease,” let alone “fulfill her dreams of attending law school.” See Maria Sacchetti, Patricia Sullivan and Ed O’Keefe, *DACA Injunction Adds to Limbo for “Dreamers” as Trump Crackdown, Hill Talks Continue*, *The Washington Post* (Jan. 10, 2018). And another DACA recipient, who in 2017 had already borrowed approximately \$40,000 to cover her law school expenses—and expected to borrow at least \$20,000 more to complete her degree—feared that, without DACA, she would be

unable to practice law and would have to rely on much lower-paying jobs to make ends meet. Dickerson, *Losing Protection*. Many of *amici*'s clients are students with similar experiences, having taken out loans and worked hard to put themselves through school to become police officers, psychologists, and dentists. Others, who were finally able to apply for mortgages and buy homes—"the pinnacle of the American Dream"—feared they would be unable to pay for the homes they had purchased when they were able to work legally. See Parija Davilanz, *For Dreamers, DACA's End Could Mean Losing Their Homes*, CNN (Jan. 24, 2018), <https://money.cnn.com/2018/01/24/news/economy/daca-dreamers-homeowners/index.html>.

Moreover, DACA recipients made life-altering decisions about their family lives in reliance on DACA. These choices will be upended if DACA is rescinded; the effects will be terribly disruptive and will deeply impact U.S. citizens as well. Many DACA recipients will be forced to make heart-breaking decisions about the future of their families, and in particular about the future of their U.S.-citizen children. DACA recipients who are parents will have to decide whether to take their U.S.-citizen children with them if they leave or are deported (separating their children from the communities they know and significantly disrupting their lives) or face long-term and possibly permanent separation from their children. Priscilla Alvarez, *Will DACA Parents Be Forced to Leave Their U.S.-Citizen Children Behind?*, The Atlantic (Oct. 21, 2017), <https://>

www.theatlantic.com/politics/archive/2017/10/donald-trump-daca/543519/ (explaining that, because of the rescission of DACA, an estimated 200,000 U.S.-citizen children are at risk of being separated from their DACA-recipient parents). As of 2017, approximately 25% of DACA recipients had a child who is a U.S. citizen. *Id.* If these DACA recipients decide to leave their U.S.-citizen children in the United States, they will need to make legal, practical, and financial arrangements for the care and custody of those children.

These harms are not speculative. One study profiled a DACA recipient who “was born in Mexico, but came to the United States at the age of nine. She received DACA when she was studying for a master’s degree at Stanford. She bought a house, married another DACA recipient, and has two children who are U.S. citizens.” Julia Carrie Wong, *Fear and Uncertainty for Dreamers as DACA Ends: ‘Where am I going to go?’*, *The Guardian* (Sept. 5, 2017), <https://www.theguardian.com/us-news/2017/sep/05/dreamers-daca-trump-ends-program-fears-for-future>. This DACA recipient is not eligible for other immigration relief, so she and her partner must consider options “to protect [their] daughters in case [they] are deported.” *Id.* *Amici* are aware of countless similar situations among their clients, which cause their clients a significant amount of stress and anxiety. See generally *Forum: Monday Political News Roundup*, KQED (Feb. 26, 2018), <https://www.kqed.org/forum/2010101864021/monday-political-news-roundup> (discussing “state of limbo” faced by DACA recipients).

The reliance interests of DACA recipients in DACA's continuation implicate every facet of their lives and their communities. These interests are substantial, and the consequences of rescinding DACA would be dire for DACA recipients and their families. Nonetheless, the record indicates the Government ignored these interests, and went so far as to claim they were too insubstantial to warrant consideration, despite the Government's obligation to consider reliance interests as part of its reasoned decision-making. The decision to rescind the policy without even acknowledging these interests was thus arbitrary and capricious.

D. Rescinding DACA Will Also Harm Organizations that Represent DACA-Eligible Individuals.

Given *amici's* role in providing services to their DACA-recipient clients, *amici* understand that the primary harm that would occur if DACA were rescinded would be to DACA recipients. However, DACA's rescission would also have countless ripple effects in myriad communities throughout the country. The harm caused to *amici* represents just one, albeit grave, example of these harms. If DACA is rescinded, *amici* and similar organizations will lose the benefit of the significant investment of time and resources that have been expended in reliance on DACA's existence. They will be overwhelmed with client needs resulting from the rescission and face those needs with depleted staff as their DACA-recipient employees become ineligible for work permits. Many *amici* are leanly staffed and

funded and will not have the resources needed to meet the emergent legal needs of thousands of new and existing clients who will be plunged into crisis if DACA is rescinded. This effect on the legal services organizations will in turn cause additional harm to DACA recipients, as they try to find legal assistance in a community of overwhelmed legal services providers.

The rescission of DACA would upend the programs and resources crafted by *amici* in reliance on the guidelines, and it would render moot *amici*'s investment of substantial time and funding in the years following announcement of the guidelines. *Amici*'s reliance on DACA increased as the eligible population became more comfortable coming forward. As hundreds of thousands successfully received deferred action and the few legal challenges that were brought failed without this Court granting further review, *amici* organizations shifted and increased programming to meet community needs. Since DACA's inception in 2012, *amici* and similar organizations have played a critical role in counseling candidates eligible for DACA and ensuring they receive the step-by-step legal assistance they need to apply for DACA. Many organizations spent significant resources educating the community about DACA after it was first announced. When the guidelines were initially implemented, eligible immigrants were hesitant to apply out of fear the Government would use their application information to remove them from the United States. For instance, staff at Church World Service ("CWS") recall that fear was so rampant that, initially, no participants would

show up to DACA informational sessions or clinics. CWS and other *amici* expended considerable time and effort to assuage these fears and help clients build the courage to apply for DACA, which eventually came to be understood as a reliable and safe path for young adults brought here as children to obtain deferred action and work authorization.

As those education efforts succeeded, the organizations shifted to providing large-scale legal assistance. *Amici* and similar organizations screened candidates for eligibility for DACA as well as for more permanent forms of immigration relief. They helped those who were eligible for DACA apply in the first instance and later helped DACA recipients apply to renew. *Amici*'s role has included: (i) screening interested candidates for DACA eligibility criteria, including taking account of each applicant's unique circumstances; (ii) assisting eligible candidates to complete and file DACA applications—a complicated process that U.S. Citizenship and Immigration Services (“USCIS”) itself has recognized often requires legal assistance;⁹ (iii) assisting with follow-up, including responding to USCIS requests for evidence; (iv) handling renewal applications, including giving additional legal advice resulting from a change in an applicant's circumstances; and (v) aiding DACA applicants and recipients in applying for

⁹ See *Find Legal Services*, USCIS, <https://www.uscis.gov/avoid-scams/find-legal-services> (last visited Sept. 26, 2019) (“If [applicants] are not sure . . . which USCIS forms to submit, then [they] may need immigration legal advice from an authorized service provider.”).

employment authorization, which involves filing a seven-page application and analyzing over twenty-five pages of instructions.¹⁰

To keep up with demand, *amici* gradually increased DACA-related programs, trainings, and staff positions. For example, the Legal Aid Society in New York City (the “Society”) handles several hundred DACA cases per year. The Society works on individual DACA renewals on an ongoing basis, and holds group application assistance clinics at *pro bono* law firms where they can counsel numerous applicants in a single day. In order to keep up with demand, paralegal staff became Department of Justice-accredited representatives so that they could assist with DACA renewals, as well as with other immigration matters. As a part of their training, the Society began providing paralegal case managers with DACA-specific training because, given the volume of its DACA practice, nearly all case managers were working on DACA cases. All of these shifts required investments of time and money. For the Society and many other *amici*, the rescission of DACA means that the resources invested in providing DACA-specific training to case managers and developing application assistance clinics over the past seven years will all be lost.

Since 2012, *amici* have also been committed to outreach activities aimed at ensuring that information about DACA reaches its intended beneficiaries. *Amici*

¹⁰ See *I-765, Application for Employment Authorization*, USCIS, <https://www.uscis.gov/i-765> (last visited Sept. 26, 2019).

have devoted substantial time and resources to providing young immigrants with accessible and reliable information about DACA by, for example, creating know-your-rights pamphlets, hosting clinics and information sessions, promoting information through social media, and counseling members of their communities. Many organizations have dedicated significant resources toward this effort, and have been forced to devote even more since September 2017 to keep their clients well-informed.

Rescission of DACA would also cause legal services organizations to be inundated with calls from new and prospective clients with questions and concerns about their immigration status. *Amici* would be forced to divert their already-strained resources to triage this influx of need, much like they experienced during the one-month renewal period following issuance of the Duke Memo. See *infra* Section II.B. Many *amici* would also be faced with the difficult process of re-screening almost all of their DACA-eligible clients, and likely others who did not come forward for legal assistance when they initially applied for DACA, to identify any forms of relief that may now be available to them. Many *amici* have served hundreds and even *thousands* of DACA clients and will be overwhelmed with the increased need. For example, the Society has assisted thousands of DACA recipients over the last seven years. When initial applications began in August 2012, the demand for services far outpaced the agency's ability to meet the need, with the result that desperate young would-be applicants spent the night camped

outside its Brooklyn office in the hopes of being among the people served the next morning. Should DACA be rescinded, similar demands are anticipated.¹¹ If in the end there is no alternative form of relief available to specific DACA recipients, it will be impossible for *amici* to represent them all in removal proceedings given that there are nearly 700,000 potentially affected individuals.¹² This will leave DACA-recipient clients, who will have significant legal needs, with very limited options.

Finally, rescission of DACA would prevent DACA recipients from renewing employment authorization, so *amici* may lose valuable employees who rely on DACA. Staff of *amici* who are DACA recipients have desirable language skills and cultural competency to work with immigrant communities. Their experiences, knowledge, existing networks, and trust within their communities render them uniquely suited to meet the needs of such communities. The loss of these staff would not only disrupt *amici*'s ability to provide

¹¹ Volunteers of Legal Service ("VOLS"), for example, which has only three full-time immigration staff, would need to re-screen the more than 600 DACA recipients they served.

¹² Beyond the burden placed on *amici* and their clients if removal proceedings were initiated against 700,000 individuals, immigration courts would also be tremendously burdened by adding this number of removal proceedings to the over 1 million proceedings that are currently backlogged. See Michelle Hackman, *U.S. Immigration Courts' Backlog Exceeds One Million Cases*, The Wall Street Journal (Sept. 18, 2019), <https://www.wsj.com/articles/u-s-immigration-courts-backlog-exceeds-one-million-cases-11568845885>.

compassionate, informed services, but also could incapacitate some *amici* through the sudden loss of these employees. The individual clients of DACA-recipient employees will lose their advocates, and this work will be difficult for *amici* to transition to others in their organizations, given that most *amici* are leanly staffed. The loss of staff at exactly the same time when demand for their services increases substantially would be devastating to *amici* and all of their clients.

Amicus organization Immigrant Justice Corps (“IJC”), for example, employs DACA recipients as part of its fellowship program, the mission of which is to recruit, train, and populate the immigration field with high-quality legal advocates. Attorneys and non-attorneys (who become Department of Justice-accredited representatives) represent immigrants before DHS and in court through the fellowship program in a variety of immigration matters, including DACA applications. These fellows, including DACA recipients, have served more than 60,000 clients since the fellowship program’s inception in 2014. The DACA-recipient fellows, as individuals directly affected by immigration policies, bring a unique and invaluable perspective on the immigration system and its impact on individuals and families. The loss of these fellows would substantially harm both the program and the clients the program serves.

Given *amici*’s reliance interests, even were DHS’s statements to constitute evidence of adequate consideration of the reliance interests of the DACA recipients—and they do not—there is nothing in the record

that indicates the Government gave *any* consideration to reliance interests of *amici* that provide services and employment to DACA recipients or the harm they would face from rescission. See *Fox Television Stations*, 556 U.S. at 515–16 (explaining that when a “prior policy has engendered serious reliance interests . . . [i]t would be arbitrary or capricious to ignore such matters,” and an agency seeking to change the policy must provide a “reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy”). The Government’s complete failure to consider or acknowledge *any* of these important reliance interests renders the decision to rescind DACA arbitrary and capricious.

II. The Government’s Justifications for Rescinding DACA Are Belied by the Nature of Its Implementation.

The Government’s decision to rescind DACA was internally inconsistent because allowing some DACA recipients to renew, but requiring them to do so on an arbitrarily short timeline, runs counter to the Government’s stated justifications for rescission and its own policy statements. First, despite its arguments in this litigation that DACA was unlawful, the Government implemented a narrow exception when it rescinded DACA, allowing a small number of DACA recipients to renew during a short window. If DHS believed that DACA was unlawful, it should not have allowed renewals at all. Second, when it rescinded DACA, DHS imposed a one-month window for applying for renewal,

while also declaring that its goal was an “orderly” end to DACA. If DHS truly intended an orderly wind-down of DACA, it would not have imposed an arbitrary and unreasonably short deadline on the complicated renewal process, and the chaos that ensued proves this point.

When DACA was adopted in 2012, young undocumented immigrants brought to the United States as children were told by DHS that they could apply to remain and work lawfully in the United States. See Memorandum from Janet Napolitano, Sec’y of Homeland Security, U.S. Dep’t of Homeland Security, to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., *et al.*, at 2–3 (June 15, 2012). The policy’s intent was to avoid “expel[ling] talented young people, who, for all intents and purposes, are Americans.” President Barack Obama, Remarks by the President on Immigration (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>. Even after DHS rescinded DACA, President Trump referenced allowing DACA recipients to be able to remain safely in the country:

We’re looking at allowing people to stay here. We’re working with everybody. . . . Everybody is on board. . . . We’re not talking about amnesty. We’re talking about . . . taking care of people, people that were brought here, people that have done a good job, and were not brought here of their own volition.

Sheryl Gay Stolberg and Yamiche Alcindor, *Trump's Support for Law to Protect 'Dreamers' Lifts Its Chances*, The New York Times (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/us/politics/trump-daca-dreamers.html>. President Trump also indicated that he would revisit the continuation of DACA if a deal did not pass Congress within six months. Sophie Tatum, *Trump: I'll 'Revisit' DACA if Congress Can't Fix In 6 Months*, CNN (Sept. 6, 2017), <https://www.cnn.com/2017/09/05/politics/donald-trump-revisit-daca/index.html>. The rescission of DACA and the rescission's devastating effects were not consistent with these kinds of statements.

A. The Government's Justification for Rescission that DACA Was Illegal Was Inconsistent With Allowing Some DACA Recipients to Renew.

Although the Duke Memorandum claimed that DACA contained “legal and constitutional defects,” it provided an exception to total rescission for a limited set of DACA recipients. This opportunity was limited to individuals whose status was expiring between September 5, 2017 and March 5, 2018, despite USCIS's past practice of allowing a one-year renewal grace period (which in many cases was utilized because candidates were unable to afford the \$495 filing fee given the financial strains experienced by many DACA recipients).¹³ Any renewals filed subject to the exception

¹³ Prior to the announcement of the exception to the rescission, USCIS had in its written guidance that DACA provided a one-year grace period for DACA recipients to renew their status

were required to be physically received by USCIS on or before October 5, 2017. Duke Memorandum. Individuals eligible for this exception could renew their work authorization for an additional two years, assuming they could quickly file before the renewal window closed on October 5, 2017.

The Government’s decision to allow for renewal of DACA status without explaining how, if DACA were truly unlawful, it could continue to violate the law, is itself arbitrary and capricious. See *Encino Motorcars*, 136 S. Ct. at 2126 (“[A]n ‘unexplained inconsistency’ in agency policy ‘is a reason for holding an interpretation to be an arbitrary and capricious change. . . .’” (internal citation omitted)). The lower courts correctly recognized this. See D.D.C. Order, Civ. Action No. 17-1907 (JDB) (slip op., at 41–45); *Regents*, 279 F. Supp. 3d, 1011 at 1045–46; *New York v. Trump*, 17-CV-5228 (NGG) (JO) (slip op., at 37–39).

Without any statements from the Government in the record on this point, there is no basis on which to come to any other conclusion. See also *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (explaining that this Court

after it expired. See <https://www.uscis.gov/archive/frequently-asked-questions> (“If you file after your most recent DACA period expired, but within one year of its expiration, you may submit a request to renew your DACA.”). The Government failed to account for the fact that certain individuals were within that one-year grace period and waiting to renew in reliance on the USCIS guidance. Based on the way the exception was implemented, these individuals could not reapply.

has “frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner” in order to pass arbitrary and capricious review). Ultimately, the Government articulated no good reasons whatsoever for how it handled this important decision, which negatively affected so many people and organizations. As a result, the Government’s actions were arbitrary and capricious.

B. The Chaotic Nature of the Rescission’s Implementation Refutes the Government’s Purported Desire for an “Orderly Wind-Down” of DACA.

The Government argues that it rescinded DACA in order to bring about an “orderly wind-down” of DACA rather than having DACA ended through litigation. Pet. Br. at 34–35. However, the way in which the Government implemented the rescission supports the findings of every lower court decision before the Court that the rescission was arbitrary and capricious. Once the rescission was announced, USCIS set an unprecedented and arbitrary one-month window—from September 5, 2017 to October 5, 2017—for eligible individuals, subject to the exception discussed above, to renew DACA. The chaos this would cause was clear from the beginning—when the rescission was announced, members of Congress repeatedly warned USCIS that a one-month window for renewals was unrealistic, particularly given the economic realities for

many DACA recipients and the logistics of processing a large volume of applications by mail.¹⁴

This manner of implementing the alleged “careful” and “gradual[]” rescission, Pet. Br. at 56, did, in fact, result in chaos for *amici* and their clients. The termination of DACA and the arbitrary one-month window for renewal applications forced *amici*—who serve as a critical bridge in communicating information from USCIS to thousands of intended beneficiaries—to scramble. *Amici* had less than one month to both develop and implement a comprehensive response, including engaging in extensive community outreach

¹⁴ On September 26, 2017, ninety-two members of Congress wrote a letter to Secretary Duke stating that “the decision to require all DACA recipients whose permits expire in the next six months to have their renewal submitted by October 5th is a deadline that is arbitrary and puts an undue financial burden on many law-abiding people within the program.” Letter from Members of Congress to Elaine C. Duke, Acting Sec’y, Dep’t Homeland Security (Sept. 26, 2017), https://newhouse.house.gov/sites/newhouse.house.gov/files/DACA%20Deadline%20Extension%20Letter_0.pdf.

The Congressional Hispanic Caucus, on September 28, asked the administration to “exercise common sense” and extend the deadline. Press Release, Congressman Gutiérrez, Reps. Roybal-Allard, Lujan Grisham, Gutiérrez Statement on October 5th DACA Deadline (Sept. 28, 2017), <https://roybal-allard.house.gov/news/documentsingle.aspx?DocumentID=398344>.

The Caucus wrote a final letter, on October 3, stating that 50,000 recipients—nearly one third of those eligible—had not submitted their applications due to tight timeframes and the substantial application fee. It again urged an extension. Press Release, Congressional Hispanic Caucus, CHC Request Reset of DACA Renewal Deadline (Oct. 3, 2017), <https://congressionalhispaniccaucus-castro.house.gov/media-center/press-releases/chc-requests-reset-of-daca-renewal-deadline>.

and counseling candidates who were immediately and adversely impacted by the rescission. This included an emergency outreach process, wherein lawyers and staff made efforts to identify and contact previous DACA clients to notify them of the upcoming renewal deadline. For many clients this required individualized outreach by telephone and other means, which consumed considerable resources and required the diversion of staff and other resources from other important programs.

The sudden and unanticipated rescission also generated fear and mistrust, which compounded the difficulties *amici* experienced conducting outreach. Otherwise eligible individuals became reluctant to access legal services or provide information to USCIS. In some instances, guidance counselors and social workers called *amici* on behalf of DACA applicants fearful of meeting with lawyers and staff. This need to liaise with intermediaries before being able to reach affected individuals further complicated the outreach process and forced *amici* to expend even more resources. For instance, *amici* were forced to postpone other client appointments in an attempt to triage among DACA renewal clients and other immigration cases, deferring work on other cases until after the renewal deadline.

In light of these harms, the Government's assertion that it was trying to accomplish an "orderly wind-down" of DACA strains credulity. Pet. Br. at 34–35. The predictable scramble and the harm caused by implementation of the renewal window showed that the Government's decision was not "the product of reasoned

decisionmaking.” See *Motor Vehicle Mfrs. Ass’n of U.S.*, 463 U.S. at 43, 52. Instead, the implementation is indicative of the haphazard and thoughtless way in which the Government handled the rescission as a whole. The Government has not provided any evidence to support its decision to rescind DACA, especially on such an expedited timeline. See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015) (“[T]he APA requires an agency to provide more substantial justification when . . . its prior policy has engendered serious reliance interests that must be taken into account.” (emphasis added) (internal citations and quotations omitted)). The Government’s decision to give applicants and the organizations that serve them only one month to conduct thousands of attorney-client consultations and prepare tens of thousands of applications provides insight into the capricious nature of the decision-making process that went into the decision to rescind DACA, and it therefore cannot be upheld.

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CONCLUSION

DACA recipients relied on DACA to develop their family, educational, financial, and professional lives, and they stand to lose all they have invested in this process if DACA is rescinded. *Amici* organizations have worked tirelessly to serve these deserving youth, but will be stretched far beyond capacity if DACA is, in fact, rescinded. They will lose staff and resources and their clients will suffer. The Government failed to consider the profound effects rescinding DACA would

have on the reliance interests of those who had relied on DACA, and this failure renders the rescission arbitrary and capricious. For all of these reasons, the judgments of the U.S. Court of Appeals for the Ninth Circuit, the U.S. District Court for the Eastern District of New York, and the U.S. District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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APPENDIX

Amici include the following legal services organizations:

1. African Services Committee
2. American Gateways
3. Asian Law Alliance
4. Brooklyn Defender Services
5. Canal Alliance
6. Catholic Charities of Southern New Mexico
7. Central American Resource Center of California
8. Central West Justice Center
9. Centro Legal de la Raza
10. Children's Law Center of Massachusetts
11. Church World Service
12. Community Legal Center
13. Community Legal Services in East Palo Alto
14. Diocesan Migrant & Refugee Services, Inc.
15. Dolores Street Community Services
16. East Bay Sanctuary Covenant
17. Empire Justice Center
18. Equal Justice Center
19. Heartland Alliance's National Immigrant Justice Center
20. Hebrew Immigrant Aid Society (HIAS) Pennsylvania

21. Immigrant Justice Corps
22. Immigrant Law Center of Minnesota
23. Immigrant Legal Advocacy Project
24. Immigrant Legal Center
25. Immigrant Legal Resource Center
26. Just Neighbors
27. Justice Center of Southeast Massachusetts
28. The Latin American Association
29. La Union del Pueblo Entero
30. Legal Aid Justice Center
31. The Legal Aid Society in New York City
32. Legal Aid Society of San Mateo County
33. Legal Services for Children
34. Massachusetts Law Reform Institute
35. MinKwon Center for Community Action
36. National Justice for Our Neighbors
37. New Mexico Immigrant Law Center
38. New York Legal Assistance Group
39. Northern Manhattan Improvement Corporation
40. Northwest Immigrant Rights Project
41. OneJustice
42. Refugee and Immigrant Center for Education and Legal Services
43. Rocky Mountain Immigrant Advocacy Network

44. Safe Horizon
 45. Services, Immigrant Rights, and Education Network
 46. UnLocal, Inc.
 47. Volunteers of Legal Service
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