Nos. 18-587 and 18-589

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, *ET AL.*, *Petitioners*,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, *ET AL.*

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, *ET AL.*, *Petitioners*,
v.
MARTIN JONATHAN BATALLA VIDAL, *ET AL.*

On Petitions for Writs of Certiorari to the U.S. Courts of Appeals for the Ninth and Second Circuits

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, English First Foundation, Public Advocate of the U.S., The Senior Citizens League, 60 Plus Foundation, Gun Owners of America, Gun Owners Foundation, Conservative Legal Defense and Education Fund, Patriotic Veterans, Policy Analysis Center, and Restoring Liberty Action Committee in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United, Public Advocate of the United States, The Senior Citizens League, Gun Owners of America, Inc., and Patriotic Veterans are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation, English First Foundation, 60 Plus Foundation, Gun Owners Foundation, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization. These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* filed *amicus* briefs in two of these cases earlier this year:

- U.S. Department of Homeland Security v. Regents of the University of California, Brief

[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amicus Curiae of Citizens United, *et al.*, U.S. Supreme Court (Feb. 2, 2018); and

- Vidal v. Nielsen, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Court of Appeals for the Second Circuit (Mar. 14, 2018).

STATEMENT

Even though the case below was initiated by the Regents of the University of California against Donald J. Trump, Ninth Circuit Judge Wardlaw would have the reader of her opinion believe that the sole plaintiff is Dulce Garcia. At the outset of her lengthy opinion, Judge Wardlaw devotes three detailed paragraphs to Garcia's life, rising from a past of poverty and homelessness to a thriving "legal practice in San Diego," all of which is now being put in jeopardy by "a change in presidential administrations." Bd. of Regents, Univ. of California v. Trump, 2018 U.S. App. LEXIS 31688 at *18-*19 (9th Cir. 2018). It's as if Garcia's life story typifies the 689,800 noncitizens enrolled in Deferred Action for Childhood Arrivals ("DACA") (*id.* at *34), each of whom is supposedly in imminent danger of deportation from this country, even though "the United States of America is the only home she has ever known," having been brought here illegally at four years of age. *Id.* at *18. Judge Wardlaw's broadside allegation seems better suited to having been made in opposition to Trump's immigration policies on the campaign trail, rather than a recitation of facts in support of a judicial

opinion.[2]

Her broad brush enables her to sweep into one group an entire class of DACA eligibles to speak with one voice that they, like Garcia, "trust[ed] the government to honor its promises," and were entitled to "two-year renewable periods of deferred action," even though DACA was a "revocable decision by the government not to deport an otherwise removable person from the country." Regents at *19. And yet Judge Wardlaw contends that the Government would deny Garcia her day in court to contest the Trump administration's decision to end DACA because of the Government's "legal determination that DACA is unlawful is unreviewable by the judicial branch." *Id.* at *20.

However, as the Government points out in its Petition, its action rescinding the DACA program does not entail the "'exercise [of] its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.'" Petition for Certiorari ("Pet.") at 18. Furthermore, a person like Garcia is not likely to be deported given her present professional stature. And there is nothing in the record to indicate the likelihood of any adverse action, even after the repeal of DACA

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[2] *See* J. Richwine, "Ninth Circuit Ruling on DACA Contains Several False or Misleading Statements," Center for Immigration Studies (Nov. 27, 2018) ("In her ruling that the Trump Administration must continue [DACA], Ninth Circuit Judge Kim McLane Wardlaw makes several false or misleading statements intended to portray DACA recipients positively.")

"'for humanitarian reasons or simply for [the INS's] own convenience.'" Regents at *22. Rescission of the DACA program, therefore, does not mean that the INS would no longer recognize what Judge Wardlaw terms "the cruelty and wastefulness of deporting productive young people to countries with which they have no ties," or ignore "those noncitizens ... who have clean criminal records, and who meet various educational or military service requirements." *Id.* at *18-*19. Thus, as Judge Wardlaw concedes, deferred action may be extended to individuals like Garcia under "the Executive's inherent authority to allocate resources and prioritize cases." *Id.* at *21-*22.

SUMMARY OF ARGUMENT

If, as the Ninth Circuit appears to believe, the continuation of DACA was an action within the judicially unreviewable discretion of the executive department of the Obama administration, then it would be only common sense that the action of the executive department of the Trump Administration rescinding DACA is similarly unreviewable. But the Ninth Circuit ruled otherwise, asserting that President Trump's Attorney General transformed what would have been an exercise of discretion into a judicially reviewable act solely by his belief that DACA should be rescinded because it was initially an unconstitutional exercise of executive authority. The Ninth Circuit decision is erroneous.

First, it is based upon the flawed assumption that the executive oath of office to support the Constitution is subject to review by the judiciary whereas the oaths

of office prescribed by Article VI of the Constitution apply separate and equally to officers of each of its three branches. Second, it is based upon the flawed assumption that judicial review of the constitutionality of the exercise of executive power is exclusive and final, measured only by court precedents, not by the constitutional text. And, third it is based on the flawed assumption that the federal judiciary is more accountable to the People, than the agencies of the executive department.

The case before the court involves the lawfulness of the action by the Trump Administration to wind down and terminate the Obama Administration's DACA policy. This was an issue on which President Trump campaigned, and which he was elected by the People to implement. The actions by the courts below assume the legality of DACA, rather than decide it. They have been seen by many as thwarting the expressed will of the People, not because DACA repeal violates a provision of the U.S. Constitution or a federal law, but because it violates the will of the Judges. If the American People do not believe they can change policy by changing Presidents, our nation will move into a dangerous time, that would resemble what France is now experiencing with the "Yellow Vest" riots.

The issuance of nationwide, universal injunctions by courts proclaiming what the laws are for all rather than settling disputes between parties before it, is a new and troublesome development with serious repercussions for the rule of law. The ability of litigants to file challenges to Executive Branch action

in carefully selected jurisdictions to get rulings from judges thought to be predisposed to the plaintiffs' cause impairs the proper functioning of a constitutional republic. The Court should order briefing on the legality of universal injunctions in its order granting certiorari.

The adverse effects on the nation from the DACA policy, including the financial drain from giving lawful status to hundreds of thousands of persons in the country illegally has been misrepresented in the courts below, demonstrating why judges with no responsibility for the public fisc should exercise great care in issuing orders imposing burdens on the People without responsibility or accountability to the electorate.

ARGUMENT

I. THE ACTION RESCINDING DACA IS JUDICIALLY UNREVIEWABLE.

There can be little doubt that, had the DHS decided to continue DACA, its action would be judicially unreviewable as an exercise of executive discretionary power. As the Government points out in its petition, "[l]ike the decision to *adopt* a policy of selective non-enforcement, the decision whether to *retain* such a policy can 'involve[] a complicated balancing' of factors that are 'peculiarly within [the] expertise' of ... the agency's overall policies." Pet. in 18-587 at 19. As the Government elaborated:

> a decision to abandon an existing non-

> enforcement policy will not, in itself, bring to bear the agency's coercive power over any individual. Indeed, an agency's decision to reverse a prior policy of civil non-enforcement is akin to changes in policy as to criminal prosecutorial discretion, which regularly occur within the U.S. Department of Justice both within and between presidential administrations, and which have never been considered amenable to judicial review. [*Id.*]

The Ninth Circuit panel opinion, however, appears to reject this claim of unreviewable discretion **if** the Government's reason given in support of its decision not to retain DACA is that it was obliged by the Constitution to do so. Indeed, Circuit Judge Wardlaw goes to great lengths to establish that, on this record, the sole reason for the decision to jettison DACA was not a "pragmatic" assessment of "'litigation risk[s],'" but the firm "belief that DACA was illegal." Regents at *53-*57. In other words, Judge Wardlaw reached the conclusion that, because the DACA rescission was based on the Attorney General's opinion that DACA was unconstitutional, it was a reviewable "act of discretion." *Id.* at *57.

A. The Attorney General's Oath to Support the Constitution Is Equal to and Independent of the Judiciary.

As an officer of the Executive Department of the United States, the Attorney General is bound by oath to support "this Constitution" of the United States. Pursuant to that oath of office, the Attorney General

determined that DACA "was an unconstitutional exercise of authority by the Executive Branch." Regents at *32-*33. By his express reliance on the Constitution, Judge Wardlaw believed, the Attorney General's action transformed what theretofore had been an exercise of executive discretion, unreviewable by the judicial branch, into a reviewable constitutional determination. Missing from the judge's analysis is the fact that not only the judiciary is bound by oath to support "this Constitution" of the United States. The Attorney General, as an officer of the executive branch, must support the Constitution as he understands it. As such, the Attorney General is not akin to a junior member of the judicial branch, subject to oversight review by a higher judicial officer. Rather, Article VI of the Constitution treats officers in the executive and judicial branches of the federal government as equals, each independently bound by oath to support the Constitution in the exercise of his respective powers.

Thus, the Attorney General is certainly not obliged by law or by his oath of office to submit his legal opinion for court review before he takes action on a constitutional matter before him. Indeed, had the Attorney General submitted his opinion for review by an Article III judge, he would have been rebuffed for having requested the courts for an "advisory opinion," outside the jurisdiction of any federal court over cases and controversies. As all of the justices of the United States Supreme Court wrote to President Washington in 1793:

> [T]he three departments of the government

> [being] in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding questions alluded to, especially as the power given by the Constitution, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive*.... [Quoted in G. Gunther, Constitutional Law at 1393-94 (12th ed., Found. Press: 1991).]

Judge Wardlaw's vision of the role of the judiciary appears to be at odds with the one envisioned by Chief Justice Jay.

> If an agency head is mistaken in her assessment that the law precludes one course of action, allowing the courts to disabuse her of that incorrect view of the law does not constrain discretion, but rather opens new vistas within which discretion can operate. [Regents at *47.]

Elaborating, Judge Wardlaw hypothesized, "if an administrator chooses option A for the sole reason that she believes option B to be beyond her legal authority, a decision from the courts putting option B back on the table allows a reasoned, discretionary policy choice between the two courses of action." *Id.* at *47-*48. In other words, why wait for an individual case or controversy to arise under Article III, Section 2, when the courts could step in and decide the legal questions

before anyone is injured by an erroneous legal decision by an administrative officer? Professor Alexander Bickel cautioned against such activist intervention:

> One of the chief faculties of the judiciary ... is that the judgment of courts can come later, after the hopes and prophecies expressed in legislation have been tested in the actual workings of our society; the judgment of courts may be had in concrete cases that exemplify the actual consequences of ... executive actions. [A. Bickel, The Least Dangerous Branch at 115-16 (Yale Press: 1965).]

B. The Judicial Power "to Say What the Law Is" Is Neither Exclusive Nor Final.

Judge Wardlaw's vision of an upfront, activist judiciary, intimately involved in the exercise of executive discretion, not only violates the separation of powers, but elevates the judiciary to new heights. Not only does she affirm the judiciary's "province and duty ... to say what the law is," she assumes that its province and duty is both exclusive and final. It is neither.

President Andrew Jackson, in his famous 1832 message to the Senate explaining his veto of the bill rechartering the Bank of the United States, put the judiciary and its power of judicial review into its proper place in a government of separated powers:

> The Congress, the Executive, and the Court must each for itself be guided by its own

> opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.... The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve. [Veto Message of the Bill on the Bank of the United States, reprinted in 50 Core American Documents at 166-67 (C. Burkett, ed.: Ashbrook Press: 2016).]

In contrast, Judge Wardlaw believes that the judicial branch has the "ultimate responsibility" — or the final say — as to what the law is. *Id.* at *51. This is a serious misunderstanding of Marbury v. Madison which recognized that: "the very essence of judicial duty" is to decide the case "conformably" to the law or to the Constitution which ever one applies. *Id.,* 5 U.S. 137, 177-78 (1803). However, in Judge Wardlaw's eyes, the judicial branch is apparently above the law, measuring the correctness of a judicial opinion of the law by its own precedents, not by any objective standard.[3] In Blackstone's day, "the laws of nature and of nature's God" provided a universal standard by

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[3] *See, e.g.,* Janus v. AFSCME, Council 31, 138 S. Ct. 2448 at 2497-98 (2018) (Kagan, J., dissenting).

which law in a civil society could be measured. *See* I Blackstone's Commentaries on the Laws of England 38-43, 69-71 (U. Chi. Press, Facsimile ed.: 1765). Thus, Blackstone observed:

> "the law," and the opinion of the judge are not always convertible terms, or one and the same thing; since it sometimes happens that the judge may mistake the law. [*Id.* at 71.]

C. The Executive's Exercise of Power Is Politically Accountable to the People, Not the Courts.

Startlingly, Judge Wardlaw claims that, by expanding the power of the judicial branch, the federal government would "promote accountability within the Executive Branch — not accountability to the courts, but democratic accountability to the people." Regents at *48. On its face, this claim is incredible. Of the three branches of the federal government, the judicial branch is the **least** accountable to the people. Both houses of Congress are directly elected by the people at fixed times and for limited terms of office. The President, although not directly elected by the people, must stand for election every four years, and may not stand for reelection after serving two of those four-year terms. In contrast, judges are appointed by the President with the advice and consent of the Senate, "hold[ing] their offices during good behavior."

Except for the remote threat of impeachment under Article II, Section 4, a federal judgeship has become a life-time appointment. As Harvard Professor

Lawrence Tribe has observed: "once appointed, they cease to be accountable even to the elected officials who nominated and confirmed them but rather are secured in their independence by life tenure and guaranteed salary." L. Tribe, American Constitutional Law at 62 (2d ed., Found. Press 1988).

That is not all. As Professor Tribe also points out:

> Perhaps even more significantly, judicial review is itself said to be antidemocratic since its result is the invalidation of government action, legislative or executive — action that, however indirectly, did have the sanction of the electorate. It is obvious, the critics argue, that if judicial review cuts against the grain of representative democracy, judges should invoke their power to strike down legislative and executive power only sparingly. [*Id.*]

The decision to force the retention of DACA on the nation is nothing less than an unconscionable attempt to nullify the results of a presidential election.

II. THE SECRETARY'S DECISION TO RESCIND DACA WAS NOT ARBITRARY AND CAPRICIOUS BECAUSE THE ORIGINAL DECISION TO IMPLEMENT THE DACA POLICY WAS UNLAWFUL.

This case comes to this Court in a somewhat unusual procedural posture — a petition to review three lower court injunctions blocking the Trump Administration's decision to wind down the DACA

program. As such, the issue of the legality of the original DACA program, and as amended, is not front and center. However, should this Court determine that the rescission of DACA is judicially reviewable (which these *amici* believe it is not, *see* Section I, *supra*), then these *amici* would urge that the lawfulness of the original DACA order be identified as one of the questions to be briefed when the writ is issued, for several reasons.

In issuing his injunction District Judge Garaufis directly and repeatedly addressed the issue of the legality of DACA to support his view that its rescission was illegal. Vidal v. Nielsen, 279 F. Supp. 3d 401, 420-27 (E.D.NY. 2018). That fact alone makes it almost impossible to review the legality of the rescission without deciding the legality of DACA.

Moreover, in evaluating the likelihood of success on the merits, Judge Garaufis assumed that the Duke Memorandum was based exclusively on the September 4, 2017, one-page letter of the Attorney General to Acting Secretary Duke. *See* Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017) App. 111a, *et seq*. The judge flatly disagreed with every sentence of the Attorney General's Memorandum. In one section of his argument, he claims that "The Attorney General Erred in Concluding that DACA was unconstitutional"(Vidal at 422), then, "The Attorney General Erred in Concluding that DACA Has the 'Same Legal and Constitutional Defects that the Courts Recognized as to DAPA" (*id.* at 423), and finally that the Duke Memorandum "Relies on a Factually Erroneous

Premise that Courts Have Determined that DACA is Unconstitutional" (*id.* at 427). Each of these foundations for his injunction are refutable and should be reviewed by this Court.

In fact, the DACA wind-down Memorandum issued by Acting Secretary Duke referenced the Attorney General's letter, but was by no means limited to it. The Duke Memorandum asserted several bases for its issuance:

- that the original DACA memorandum of June 15, 2012, was based on a "purported" act of prosecutorial discretion, which could only be applied on "an individualized case-by-case basis." *Id*. at 112a.

- that the DACA memorandum "confer[ed] certain benefits to illegal aliens that Congress had not otherwise acted to provide by law." *Id.*

- that the Feb. 16, 2015 order of the U.S. District Court for the Southern District of Texas enjoining DAPA concluded that the states "were likely to succeed on their claim that the DAPA program did not comply with relevant authorities." *Id*. at 113a.

- that the U.S. Court of Appeals for the Fifth Circuit agreed that the "DAPA policy conflicted with the discretion authorized by Congress" as the Immigration and Nationality Act "flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby

> make them newly eligible for a host of federal and state benefits, including work authorization." Moreover "'DAPA is foreclosed by Congress' careful plan; the program is "manifestly contrary to the statute" and therefore was properly enjoined.'" *Id.*

Then, turning to the Attorney General's input, she added:

- that she had consulted with the Attorney General as to risk of litigation pending in Texas. *Id.* at 116a.

- that the Attorney General sent a letter to the Department … articulating his legal determination that DACA "was effectuated by the previous administration through executive action, without proper statutory authority and no established end-date after Congress' repeated rejection of proposed legislation." *Id.*

- that the Attorney General stated that "Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch." *Id.*

Only after making all of those findings, does the Duke Memorandum make one passing reference to the Attorney General's statement that DACA "has the same legal and constitutional defects that the courts recognized as to DAPA." However, Judge Garaufis seized on that sentence to justify his injunction, stating "[t]his premise is flatly incorrect" as the Texas

courts' findings were based on the Administrative Procedure Act, not the Constitution. Vidal at 427. Rather than finding a smoking gun, that statement is, at best, ambiguous as it could be read to reflect (i) the Attorney General's misunderstanding of the holding of the court, or (ii) the Attorney General drawing a logical conclusion from findings and statements made by the courts, even though those courts did not ultimately decide the constitutional issues at that time. However, given all the other bases given for the decision, the Acting Secretary's Memorandum certainly cannot simply be dismissed as having relied solely on the Attorney General's statement about constitutionality.

Lastly, Judge Garaufis seemed to find that the Sessions letter was "factually erroneous" because it concluded "that the Southern District of Texas and Fifth Circuit would enjoin the continued operation of the DACA program...." *Id*. at *61. However, in this case, it was Judge Garaufis who appears to have made the "erroneous" statement, not the Attorney General. In February 2018, District Judge Hanen issued a detailed explanation as to why DAPA and DACA were legally indistinguishable. *See* Texas v. United States, 328 F.Supp.3d 662, 723-25 (S.D.TX. 2018).

Thus, whether the prior administration's DACA policy is lawful should be an important question on which this Court grants review. It would be entirely anomalous to say that one administrative action undoing another administrative action because it was unlawful is arbitrary and capricious without examining whether that initial administrative action

is lawful. Not to review the original DACA policy would only result in further delay and a waste of judicial resources, prolonging the controversy and effectively negating the vote of the American people in electing a new President to implement new policies different from a prior administration. Every year that DACA remains in place is another year of compelled adherence to the prior administration's illegal DACA policy.

III. THE NATIONWIDE INJUNCTIONS EXCEEDED THE DISTRICT COURTS' AUTHORITY.

Former Attorney General Sessions recounted:

> In the first 175 years of this Republic, not a single judge issued one of these orders.
>
> But, they have been growing in frequency and, since President Trump took office less than two years ago, 27 district courts have issued such an order. [Attorney General Jeff Sessions Remarks on Judicial Encroachment (Oct. 15, 2018)[4].]

The cases below fall into that category. On January 9, 2018, Judge William Alsup of the Northern District of California issued a preliminary injunction "to maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the

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[4] https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-heritage-foundation-judicial-encroachment.

rescission on September 5, 2017," with certain narrow exemptions. The district judge asserted "a nationwide injunction is appropriate" because:

> Our country has a strong interest in the uniform application of immigration law and policy. Plaintiffs have established injury that reaches beyond the geographical bounds of the Northern District of California. The problem affects every state and territory of the United States. [Regents of the Univ. of Cal. v. United States Dept. of Homeland Sec., 279 F.Supp.3d 1011, 1048-49 (2018).]

Judge Alsup cited two cases in support of his view, both of which have been substantially weakened by the passage of time.

First, Judge Alsup relied on the Ninth Circuit's opinion in Washington v. Trump, 847 F.3d 1151, 1167 (9th Cir. 2017), enjoining President Trump's Executive Orders and Proclamations to deny entry to aliens from certain countries, based on the need for uniformity in immigration law and policy.[5] That reliance may not be well-founded, as revealed by the well-considered view of a member of this Court. Although it denied a stay, this Court, in a *per curiam* order, narrowed the injunctions, leaving them in place, over the dissent of Justices Thomas, Alito, and Gorsuch. *See* Trump v. IRAP and Trump v. Hawaii, 582 U.S. ____ 138 S. Ct. 34 (2017). Although neither the *per curiam* opinion

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[5] Regents, 279 F.Supp.3d at 1049.

nor the dissent discussed the nationwide nature of the injunctions under review, the Ninth Circuit opinion on which Judge Alsup relied was overturned by this Court on June 26, 2018. *See* Trump v. Hawaii, 138 S.Ct. 2392 (2018). Because this Court "reverse[d] the grant of the preliminary injunction as an abuse of discretion," it made "it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court." *Id*. at 2423.

However, Justice Thomas substantively questioned the validity of nationwide injunctions. Discussing how such injunctions prevent "legal questions from percolating through the federal courts, encourag[e] forum shopping, and mak[e] every case a national emergency for the courts and for the Executive Branch," Justice Thomas stated his fundamental concern:

> I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality. [*Id*. at 2425 (Thomas, J., concurring).]

Second, Judge Alsup asserted "the Fifth Circuit reached the same conclusion" in affirming "the

appropriate scope of an injunction over DAPA[6] ... holding that uniform application of the immigration laws justified a nationwide injunction. So too here." Regents, 279 F.Supp.3d at 1049. *See* Texas v. United States, 809 F.3d 134 (5th Cir. 2015) *aff'd by an evenly divided court* United States v. Texas, 136 S.Ct. 2271 (2016). However, Judge Alsup failed to note that the injunction under review in the Fifth Circuit had been issued by Judge Hanen with respect to the adoption of the DAPA program for violation of APA's procedural requirements.

In his February 16, 2015 decision, Judge Hanen found that the Obama Administration has "clearly legislated a substantive rule without complying with the procedural requirements under the Administration [sic] Procedure Act" requiring "notice and comment." Texas v. United States, 86 F. Supp. 3d 591, 676-77 (S.D.TX. 2015). The APA grants district courts the authority to "hold unlawful and set aside agency action, findings, and conclusions" in such circumstances. 5 U.S.C. § 706. Since the DAPA policy was not implemented in accordance with "notice and comment" requirements, Judge Hanen concluded that it was invalid. He summarized his ruling as follows:

> this temporary injunction enjoins the implementation of the DAPA program that awards legal presence and additional benefits to the four million or more individuals potentially covered by the DAPA

[6] "Deferred Action for Parents of Americans and Lawful Permanent Residents."

> Memorandum and to the three expansions/additions to the DACA program also contained in the same DAPA Memorandum. [Texas, 86 F.Supp.3d at 677.]

There is no language characterizing Judge Hanen's opinion as "nationwide" or "universal." He only relied on the terms of the APA holding that the Department of Homeland Security could not continue to implement a policy that had been adopted in violation of APA's procedural requirements.

By contrast, the Ninth Circuit had made clear that the injunction was **not** based on a violation of APA's notice-and-comment requirement. *See* Regents at *101. Rather, the Ninth Circuit asserted "that the claim underlying the injunction here is an arbitrary-and-capricious challenge under the APA" which should lead to the rule being "'vacated — not that their application to the individual petitioners is proscribed.'" *Id*. at *78-79. However, the "arbitrary and capricious" finding of the district court was grounded exclusively on the claim that it "was based solely on an erroneous legal premise..." that DACA itself was adopted illegally, and was rescinded for that reason. *Id*. at *65, *71-77, *82. This was not a procedural APA violation. Judge Alsup's opinion falsely assumes that only judges can assess and act on their view about the legality of any policy, and the Justice Department's view that DACA was illegal was a usurpation of that judicial role. In essence, Judge Alsup admits that, if the DACA rescission had been based on a change in policy, he would have had no ground to enjoin it. And, the Ninth Circuit disregarded subsequent information

from Secretary Nielsen as to the additional policy reasons for the policy change. *Id*. at *78 n.24. *See also* Petitioners' Supplemental Brief (Nov. 19, 2018) at 4-5. Even concurring Judge Owens could not go along with the Ninth Circuit's assertion that it could review the DACA rescission for compliance with the substantive rules of the APA. Regents at *103. That rationale was a thin reed on which to base a finding of the DACA rescission being considered "arbitrary and capricious," and without such a finding there could be no "set aside" order and no national injunction.

The widely criticized practice of district courts issuing nationwide injunctions is an important issue which has not been resolved by this Court, but should be.

IV. THE NEW YORK DISTRICT COURT ERRONEOUSLY CONCLUDED THAT ENDING DACA WOULD HARM THE SOCIAL SECURITY TRUST FUNDS.

The injunction order issued by the U.S. District Court for the Eastern District of New York acknowledged that it is within the government's authority to end DACA: "New Administrations may ... alter or abandon their predecessors' policies...." Vidal at 408-09. But the court then left the realm of law to address matters of policy. The court stated that policies may change when administrations change, "even if these policy shifts may impose staggering personal, social, and economic costs." *Id*.

To that end, the court asserted "the costs of the

DACA rescission over the next decade at ... $24.6 billion in lost Social Security and Medicare tax contributions." *Id*. at 409 n.4. For the estimate of $24.6 billion in lost Social Security and Medicare tax contributions, the court cited the amicus brief of 114 companies. That brief, in turn, cites to and relies exclusively on a policy brief of the Immigrant Legal Resource Center ("ILRC") on the "economic cost of ending DACA." The ILRC policy brief arrives at its estimate of tax receipts based on the number of employed DACA recipients, average annual wages, and payroll taxes over the next 10 years. It limited its projection to 10 years, but DACA recipients would not have been eligible to retire in that timeframe due to the DACA age requirements. This estimate is misleading because its methodology focuses only on income and ignores the expenses on Social Security that DACA recipients will impose on the Social Security Trust Fund in the future. Moreover, lower income workers, such as most of those benefitted by DACA, will receive disproportionately greater benefits relative to taxes paid than will higher income workers, causing a significant net drain on trust funds.[7] The

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[7] An illegal alien born in 1995, granted lawful status under DACA, who fell into the "low earnings" tier (career average earnings equal to $22,215) would receive annual Social Security benefits of $12,276 in wage-indexed 2017 dollars. On the other hand, a U.S. citizen born the same year in the "high earnings" tier (career average earnings equal to $78,985) would **pay 3.5 times the taxes** paid by the low income worker, but would receive annual Social Security benefits of $26,802 — **only 2.2 times the benefits paid** to the low income worker. *See* Office of the Chief Actuary, Social Security Administration, Actuarial Note No. 2017.9 (July 2017), "Replacement Rates for Hypothetical Retired

court's decision also ignores the drain from the DACA recipients who may qualify for disability benefits before retirement.[8]

The court's assertion about the high cost of rescinding DACA is in error. Actually, it is DACA itself — not the rescission of DACA — that should by logic have an adverse effect on the federal budget. Looking at just one federal program, persons granted "lawful status" under DACA are no longer barred from receiving Social Security Disability Insurance and Retirement benefits.[9] 8 U.S.C. § 1611(b)(2)-(3).[10]

Workers," Table C.

[8] *See* Congressional Research Service, "Social Security Benefits for Noncitizens" (Nov. 17, 2016) at 9.

[9] The U.S. District Court for the Southern District of Texas recently confirmed that:

> unlawfully present aliens would normally be barred from receiving Social Security retirement benefits, Social Security disability benefits, and health insurance under Part A of the Medicare program because these are federal public benefits. DACA, however, by making its recipients lawfully present, removes an otherwise insurmountable roadblock to their receipt of Social Security, Medicare, and other benefits. [Texas, 328 F.Supp.3d at 675.]

[10] The Social Security Board of Trustees 2018 Annual Report anticipates the rescission of DACA will have a negligible impact on the long-term health of the Social Security system — certainly not the significant losses assumed by the New York District Court. *See* 2018 Annual Report of the Trustees (June 5, 2018) at 37, https://www.ssa.gov/OACT/TR/2018/ tr2018.pdf.

Even without the addition of DACA beneficiaries to the disability rolls, the trust funds from which those benefits are generally paid face a seriously troubled financial future. *See id.* at 2-3. Decisions that would grow the future liabilities of the United States should be left to the branch with the power of the purse. Congress has developed a nuanced system of entitlement programs and immigration controls, including the payment of benefits only to certain persons. DACA upends that system, usurping the power of the purse from Congress and imposing new and untold liabilities on the United States, putting older Americans at increased financial risk, in ways that Congress to date has refused to sanction.

CONCLUSION

For the foregoing reasons, the Petitions for Writs of Certiorari should be granted, and the parties directed to brief the two additional issues identified herein.

Respectfully submitted,

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