Nos. 18-587, 18-588, 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.,
Respondents.

DONALD J. TRUMP, President of the United States, et al.,
Petitioners,
v.
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,
Respondents.

KEVIN K. MCALEENAN,
Acting Secretary of Homeland Security, et al.,
Petitioners,
v.
MARTIN JONATHAN BATALLA VIDAL, et al.,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Ninth, District Of Columbia, and Second Circuits

BRIEF OF ALIANZA AMERICAS AND 10 OTHER IMMIGRATION RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

NEIL V. MCKITTRICK
Counsel of Record
LORENZO R. CABANTOG
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
One Boston Place, Suite 3500
Boston, MA 02108
(617) 994-5726
neil.mckittrick@ogletree.com
Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICI CURIAE*[1]

This case involves an enforcement program decision by the Department of Homeland Security (DHS) that will potentially impact hundreds of thousands of immigrants in this country. *Amici* are organizations that advocate on behalf of various immigrant populations, including persons enrolled in the Deferred Action for Childhood Arrivals (DACA) program. *Amici* have among their members and the populations for which they advocate DACA recipients and their families. As a result of their work with, and advocacy for, immigrant populations, *Amici* have a breadth of understanding of the significant reliance interests of these populations on DACA, which DHS failed to consider when deciding to rescind DACA. (A description of each of the *Amici* appears in Appendix A.)

SUMMARY OF ARGUMENT

DHS's decision to rescind DACA was arbitrary and capricious because it failed to consider the significant reliance interests engendered by DACA. DACA recipients have relied on the program to make major, life-altering decisions. They have obtained Social Security numbers, advanced their education and signed

[1] All parties issued blanket consents to the filing of *amicus* briefs in this matter. *See* S. Ct. R. 37.2(a). Pursuant to S. Ct. R. 37.6, no one other than *Amici* and their counsel have authored any part of this brief or funded its preparation and submission.

school loans, gained employment, undertaken military service, purchased homes and entered into mortgages, and become fully integrated into society. Yet, these facts and data were conspicuously ignored by DHS in its decision to rescind DACA.

In two separate attempts to justify its rescission of DACA, DHS failed to consider in any meaningful way the reliance interests DACA had engendered. In 2017, DHS Acting Secretary Elaine Duke issued a memorandum eliminating DACA. *See* Elaine C. Duke, Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," U.S. Dep't Homeland Security (Sept. 5, 2017) (available at https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca) (the "Duke Memorandum"). The Duke Memorandum ignored the extent to which DACA recipients relied on the program to make major life, educational, financial and employment decisions. The Duke Memorandum's failure to analyze, or even consider, the significant reliance interests violated Supreme Court precedent and a basic tenet of administrative law.

In June 2018, DHS Secretary Kirstjen Nielsen issued a second memorandum attempting to justify her predecessor's rescission of DACA. *See* Kirstjen M. Nielsen, Memorandum from Secretary Kirstjen M. Nielsen on the Rescission of Deferred Action for Childhood Arrivals (DACA) (June 22, 2018) (available at https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf) (the "Nielsen Memorandum"). The Nielsen Memorandum, published five months

following the decision by the District Court for the Northern District of California to enjoin the rescission of DACA and while the case was pending before the Ninth Circuit, was a post hoc rationalization of the DACA rescission, intended to address the administrative decision-making deficiencies identified by the District Court. Indeed, it is not supported by its own administrative record; instead, it relied on the same record that was before Acting Secretary Duke. Although the Nielsen Memorandum mentioned the reliance interest in a conclusory manner, it did not contain any analysis of those interests.

DACA's rescission also potentially represents a form of entrapment. In exchange for deferred action and suspension of removal proceedings, DACA recipients were required to submit personal biographical information, including date and location of entry into the United States and all previous and current residential addresses, along with fingerprints and photographs. Undocumented immigrants provided this information on the condition of confidentiality and that DHS would not share the information with Immigration and Customs Enforcement in connection with removal proceedings. With DACA eliminated, nothing prevents DHS from delivering the information to initiate immigrants' removal.

ARGUMENT

I. DHS FAILED TO CONSIDER THE SIGNIFICANT RELIANCE INTERESTS CREATED BY THE DACA PROGRAM BEFORE IT DECIDED TO RESCIND DACA.

A basic procedural requirement of administrative rulemaking is that an agency must provide adequate reasons for its decisions. *See Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016). If the agency fails to provide at least a minimal level of analysis, its action will be found to be arbitrary and capricious. *See id.* In cases involving a rescission or reversal of policy, an agency must provide "a more detailed justification" in certain circumstances, especially "when its prior policy has engendered serious reliance interests that must be taken into account." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *accord Encino*, 136 S. Ct. at 2125-26 (2016). It would be arbitrary and capricious to ignore such reliance interests. *See Fox*, 556 U.S. at 515.

In its two separate attempts to justify its rescission of DACA, DHS failed to meet this reasoned decision-making standard. Initially, the 2017 memorandum issued by DHS Acting Secretary Duke wholly ignored the fact that DACA recipients relied on the deferred action program to make major life, educational, financial and employment decisions. DHS's subsequent attempt to rectify the deficiencies of the Duke Memorandum by issuing a memorandum in June 2018 by Secretary Nielsen was merely a post hoc rationalization unsupported by an administrative record. This second

attempt at establishing a reasoned rationale baldly asserted, without any factual analysis, that Secretary Nielsen considered the reliance interests of DACA recipients. Neither attempted justification was sufficient to satisfy the reasoned analysis decision-making standard.

A. THE 2017 DUKE MEMORANDUM DID NOT CONSIDER AT ALL THE RELIANCE INTERESTS AT STAKE.

As the U.S. District Court for the District of Columbia held in *NAACP v. Trump*, DHS's rescission of DACA was "particularly egregious . . . in light of the reliance interests involved." 298 F. Supp. 3d 209, 240 (D.D.C.), *denied on reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018). As the Court noted, these reliance interests include: the participation by DACA recipients in international postgraduate research; their application for, and receipt of, student loans; employment opportunities they obtained by virtue of availing themselves of DACA; and educational opportunities such as the pursuit of advanced degrees. *Id.* at 240 n.24. Although "hundreds of thousands" of DACA recipients had "structured their education, employment, and other life activities on the assumption that they would be able to renew their DACA benefits," the 2017 Duke Memorandum made no effort to weigh such interests in the agency's decision-making process. *Id.* at 240.

In *Regents v. DHS*, the U.S. District Court for the Northern District of California likewise held that

Acting Secretary Duke did not weigh the reliance interests of DACA recipients in deciding to rescind DACA. Relying on this Court's decisions in *Encino* and *Fox*, the court found that the abandonment of DACA was arbitrary and capricious because "the administrative record includes no consideration to the disruption a rescission would have on the lives of DACA recipients, let alone their families, employers and employees, schools and communities." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1045-46 (N.D. Cal. 2018).

As this Court explained in *Fox*, an agency changing course on policy "must" account for serious reliance interests engendered by the previous policy. 556 U.S. at 515. The agency's failure to consider such interests renders its decision arbitrary and capricious. *Id.*

Fox involved a Federal Communications Commission ("FCC") enforcement policy to refrain from prosecuting broadcasters for "fleeting expletives," but instead only bring enforcement actions against the "deliberate and repetitive use" of expletives. *Id.* at 506-08. Justice Scalia, writing for the Court, initially observed that an agency is generally not required to provide a more substantial explanation when it changes a previous policy. *Id.* at 514. However, Justice Scalia subsequently explained that "a more detailed justification" is required "when its prior policy has engendered serious reliance interests that must be taken into account." *Id.* at 515.

Encino also emphasized that an agency changing course must consider "reliance interests" that developed

under the previous policy. That case involved the Department of Labor's about-face on its interpretation of a Fair Labor Standards Act regulation concerning the application of minimum wage and overtime provisions to certain car dealership employees. *Encino*, 136 S. Ct. at 2121. The Court held:

> In explaining its changed position, an agency must also be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account . . . In such cases, it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 515-16. . . . It follows that an "unexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *National Cable & Telecommunication Assn. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005).

Id. at 2126 (other internal citations omitted).

The reliance interests of the DACA recipients are even more significant than the business interests at issue in *Fox* and *Encino*. The interests at stake here include major life decisions by approximately 700,000 people, each of whom provided considerable personal information to the government in reliance on the expected protections of the DACA program. DHS strayed from this Court's precedent in *Fox* and *Encino* when it failed to consider these "serious reliance interests." The

rationale of the Duke Memorandum, which eliminated DACA, came down to one sentence: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." Duke Memorandum at 3.

Missing from the Duke Memorandum was any mention or consideration of the significant educational, employment, and financial decisions made by DACA recipients in reliance on the DACA program. Also absent was the consideration of, or even any reference to, the significant reliance interests of third parties—including schools and universities, employers and businesses, families and communities—that will be affected by the government's abrupt policy change. "[T]he interests and investments thereby created deserve at least some minimal protection." Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 Yale L.J. 2122, 2205 (2019). By protecting these expectations, "people and institutions [can] make plans against a relatively stable background of rules and official practices." *Id.* The Duke Memorandum considered none of these issues.

B. THE JUNE 2018 NIELSON MEMORANDUM WAS A POST HOC RATIONALIZATION THAT IS NOT PROPERLY PART OF THE ADMINISTRATIVE RECORD AND WHICH ALSO FAILED TO CONSIDER ADEQUATELY THE SUBSTANTIAL RELIANCE INTERESTS INVOLVED.

This Court has repeatedly held that after-the-fact attempts by agencies to justify their actions "cannot serve as a sufficient predicate for agency action." *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981); *accord Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49, 103 S. Ct. 2856, 2870 (1983). Indeed, agency actions are judged "solely by the grounds invoked by the agency" *at the time* the decision is made. *Sec. and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Courts have been loathe to accept after-the-fact explanations to justify agency action. *See, e.g.*, *Vargas v. I.N.S.*, 938 F.2d 358, 363 (2d Cir. 1991) ("Post hoc explanations—especially those offered by appellate counsel—are simply an inadequate basis for the exercise of substantive review of an administrative decision."); *Matter of Bell Petroleum Servs., Inc.*, 3 F.3d 889, 905 (5th Cir. 1993) ("We will not accept the [agency's] post-hoc rationalizations in justification of its decision, nor will we attempt to supply a basis for its decision that is not supported by the administrative record."). While these cases typically critique arguments made by agency counsel on appeal, the principle applies with equal force to any after-the-fact explanation offered by

an agency that attempts to defend a challenged decision. Moreover, the timing and circumstances surrounding the publication of the Nielsen Memorandum demonstrate that it is not itself *agency action*. *See* Petitioner's Brief ("Pet. Br.") at 29. Indeed, DHS counsel submitted a letter concerning the Nielsen Memorandum to the Ninth Circuit *five months after* the Northern District of California's decision in *Regents* and while the case was *pending* on appeal. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 510 n.24 (9th Cir. 2018).

The focal point for judicial review is the administrative record in existence when the agency made the decision, not the response provided by an agency after a court rules on that agency decision. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). DHS made the decision to rescind DACA in 2017, and it provided the Duke Memorandum to justify that decision. There is nothing in the Duke Memorandum to suggest that the Department ever considered the significant reliance interests involved at that time.

If the Nielsen Memorandum was in fact a standalone policy, it would be supported by its own administrative record. It is not. The entire administrative record consisted of 256 pages that were submitted to the district court before DHS issued the Nielsen Memorandum. *Regents*, 279 F. Supp. 3d at 1028. Nothing in the 256-page record indicated that either Acting Secretary Duke or Secretary Nielsen considered, in any

meaningful way, the reliance interests of DACA recipients.[2]

The circumstances of the Nielsen Memorandum suggest that it was created to address the deficiencies of the Duke Memorandum, as identified by the district court. Although Secretary Nielsen's Memorandum asserted that she was "keenly aware" of the reliance interests, that she "does not believe that the asserted reliance interests outweigh the questionable legality of the DACA policy," and that she "did not come to these conclusions lightly," Nielsen Memorandum at 3, it does not mean that such interests were actually considered. Recitation of such buzzwords, absent evidence of actual consideration in the administrative decision, is insufficient to satisfy the standard established by *Fox* and *Encino*. As the Court explained in *Encino*, "the agency 'must examine the *relevant data* and articulate a satisfactory explanation for its action including a rational connection between the *facts* found and the choice made.'" *Encino*, 136 S. Ct. at 2125 (quoting *State Farm*, 463 U.S. at 43) (emphasis added). The Nielsen Memorandum contains no data or analysis of facts related to the reliance interests at issue. Instead, it contains only conclusory statements unsupported by

[2] The administrative record contains three letters from members of Congress, one to Acting Secretary Duke and two to the President, about DACA recipients, but as noted above, Acting Secretary Duke did not mention any reliance interests at all, and Secretary Nielsen merely referred to reliance in a conclusory manner, without any analysis, or specific discussion of any particular aspect of reliance and/or the weight, if any, to be accorded such reliance.

the record. This Court's holding in *Encino* applies equally well here: "In light of the serious reliance interest at stake, the Department's conclusory statements do not suffice to explain its decision." *Encino*, 136 S. Ct. at 2127 (citing *Fox*, 556 U.S. at 515-16).

DHS's reliance on *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991), for the proposition that the Nielsen Memorandum, "*is* agency action," is misplaced for two reasons. First, *Martin* did not involve a rescission of policy. As this Court has held in *Fox* and *Encino*, an agency "must" provide a reasoned analysis where a previous policy has engendered serious reliance interests. Second, the agency action at issue in *Martin* was the Secretary of Labor's first-time interpretation of a safety regulation during an adjudication before the Occupational Safety and Health Review Commission. In contrast, Secretary Nielsen's Memorandum was DHS's second bite at the apple, an attempt to salvage her predecessor's rule-making decision by claiming that she had considered the relevant reliance interests.

Neither the 2017 Duke Memorandum nor the 2018 Nielsen Memorandum adequately considered the significant reliance interests involved. Accordingly, DHS failed to satisfy the fundamental principle of *Fox* and *Encino* to evaluate the reliance interests impacted by the reversal of agency policy.

II. THE RELIANCE INTERESTS INVOLVE SIGNIFICANT SOCIAL AND ECONOMIC BENEFITS TO DACA RECIPIENTS AND THE COMMUNITY AT LARGE.

DACA recipients relied on the deferred action program to their detriment. To be eligible for the program, individuals underwent an extensive background check and completed USCIS Form I-821D, which requested personal data, including biographical information, date and point of entry into the country, immigration status (or lack thereof), educational history, and all previous residential addresses since entering the United States. *See Regents*, 279 F. Supp. 3d at 1022. Applicants provided documented proof of identity and continuous residence in the United States, as well as photographs, fingerprints and signatures.

As the Northern District of California recognized in *Regents*, DACA conferred significant protections in exchange for an applicant's enrolling in the program and providing significant personal information:

> *First*, under pre-existing regulations, DACA recipients became eligible to receive employment authorization for the period of deferred action, thereby allowing them to obtain social security numbers and to become legitimate taxpayers and contributing members of our open economy. 8 C.F.R. § 274a.12(c)(14). *Second*, deferred action provided a measure of safety for a period of two years from detention and removal, albeit always subject to termination at any time in any individual case. *Third*, DACA recipients could apply for "advance

> parole" to obtain permission to travel overseas and be paroled back into the United States. 8 C.F.R. § 212.5(f). *Fourth*, also pursuant to pre-existing regulations, DACA recipients avoided accrual of time for "unlawful presence" under the INA's bar on re-entry. 8 U.S.C. § 1182(a)(9)(B)–(C) (establishing three-year, ten-year, and permanent bars on the admission of aliens after specified periods of "unlawful presence").

Id. at 1023.

In addition to the submission of substantial personal identifying information to the government, DACA recipients paid significant fees and planned their lives in reliance on the government's promises to provide tangible protections pursuant to DACA. Arguably, the most significant and tangible promises to DACA recipients included the ability to obtain a temporary Social Security number and a two-year renewable employment authorization.[3] These protections increase an immigrant's potential to improve his or her incorporation into society and mobility trajectory. *See*

---

[3] The government has only rarely denied a renewal application for work authorization. In 2017, for example, the government received approximately 431,197 renewal applications. It denied only 3,352, for a renewal rate of approximately 99.3%. *See* Form I-765, Application for Employment Authorization, Eligibility Category and Filing Type, fiscal years 2003-2018, available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I-765_RAD_FY03-18.pdf. Therefore, DACA recipients could reasonably rely on the near-certain expectation that their work authorizations would be renewed.

Roberto G. Gonzales et al., *Becoming DACAmented: Assessing the Short-Term Benefits of Deferred Action for Childhood Arrivals (DACA)*, 58 Am. Behav. Scientist 1852, 1853 (2014). Sixteen months after DACA was implemented, recipients experienced greater access to education, employment, and societal opportunities. *Id.* at 1866. Many attend universities and have started internships which provided them with the opportunity to be in a "better position to leverage their education to pursue better jobs with higher earnings." *Id.* at 1857. Without DACA, however, undocumented youth could not obtain greater access to educational opportunities. *Id.* at 1855. Accordingly, they would be "excluded from work, study opportunities, and paid internships." *Id.* at 1854. Indeed, some internships require Social Security numbers to process background checks, thus "excluding undocumented youth from gaining applied skills and expanding professional networks." *Id*.

In addition to vastly improved educational opportunities, DACA confers significant financial and employment opportunities. Social Security numbers allow DACA recipients to open bank accounts and obtain credit cards, thereby improving their financial stability. *See id.* at 1863.[4] DACA recipients are more likely than undocumented immigrants to obtain drivers'

[4] An on-line real estate database company estimated that, as of 2017, 123,000 DACA enrollees were homeowners, paying an estimated $380 million per year in property taxes. Alexander Casey, *An Estimated 123,000 "Dreamers" Own Homes and Pay $380M in Property Taxes*, Zillow (Sept. 20, 2017) (available at https://www.zillow.com/research/daca-homeowners-380M-taxes-16629).

licenses, which lead to greater educational and employment opportunities for young immigrants. *See id.*

The significant reliance interests also implicate the interests of DACA recipients' families, employers, schools, and communities. As DACA recipients receive Social Security numbers and obtain employment authorizations, they are deeply integrated into society through employment and educational opportunities. This not only benefits DACA recipients but also impacts educational institutions, employers and communities at large. As the Regents of the University of California explained, they have "invested considerable resources in recruiting students and staff who are DACA recipients," and the University will "lose significant intellectual capital and productivity" as a result of the rescission. *Regents*, 279 F. Supp. 3d at 1026. In addition, DACA recipients will lose their work authorizations, and the various states and counties that employ them will lose the time and resources in training these employees. *Id.* at 1027. Rescission of DACA also will cause harm to the county and state economies by decreasing tax revenue and will result in immigrants' increased dependency on subsidized health care. *Id.* at 1027, 1034.

Schools, employers, and the community at-large have thus relied on the continuation of DACA. A sudden about-face will have a significant impact on the entities that employ and educate DACA recipients. In light of the significant economic reliance interests at stake, "review of the bases for the rescission should be

relatively intense." *Emerson, Official Reason*, 128 Yale L.J. at 2205.

DACA recipients have come to rely on DACA's benefits to obtain undergraduate and postgraduate education, private and public employment, and social and economic integration.[5] Thus, a searching review for the agency's reasons for rescission of the program is required.

III. RESCINDING DACA WOULD POTENTIALLY RESULT IN THE ENTRAPMENT OF RECIPIENTS.

DACA recipients detrimentally relied on the representation that information submitted to DHS would be confidential and would not be used for removal purposes. *Regents*, 279 F. Supp. 3d at 1022 (citing United States Citizenship and Immigration Services Form I-821D). If DACA were rescinded, however, the protection against the use of incriminating information would cease to exist. As one legal scholar observed pre-rescission, "Were the government to change course and

[5] The Defense Department estimates that, as of 2017, approximately 900 DACA recipients were serving in the military or had signed contracts to serve through the Military Accessions Vital to the National Interest (MAVNI) program which offered a promise of fast-track review of citizenship application for enrollees. In rescinding DACA, DHS did not even mention MAVNI enrollees. *See* Alex Horton, *The military looked to 'dreamers' to use their vital skills. Now the U.S. might deport them.* (Sept. 7, 2017) (available at https://www.washingtonpost.com/news/checkpoint/wp/2017/09/07/the-military-looked-to-dreamers-to-use-their-vital-skills-now-the-u-s-might-deport-them/).

resume enforcement, then these applications could amount to neatly packaging the immigrants' information on a platter for law enforcement officials." Zachary S. Price, *Reliance on Nonenforcement*, 58 Wm. & Mary L. Rev. 937, 1002 (2017) (quotations omitted). The result of DACA's rescission would be the unsuspecting cooperation of DACA recipients by providing the government with information that would be used against them.

When the government obtains information by assuring noneforcement, "due process principles of fair notice should limit the government's use of that information in future enforcement efforts." *Id.* at 1001. In *Cox v. Louisiana*, 379 U.S. 559 (1965), this Court overturned a conviction for picketing where city officials instructed the defendant to picket. Although the defendant did as instructed, he still was charged and convicted. In overturning the conviction on due process grounds, this Court explained:

> Under all the circumstances of this case, after the public officials acted as they did, to sustain appellant's later conviction for demonstrating where they told him he could "would be to sanction an indefensible sort of entrapment by the State convicting a citizen for exercising a privilege which the State had clearly told him was available to him."

Id. at 571, 85 S. Ct. at 484 (quoting *Raley v. Ohio*, 360 U.S. 423, 426, 79 S. Ct. 1257, 1260 (1959)).

The reversal of DACA would likewise involve an "indefensible sort of entrapment." As noted above, DACA required applicants to provide extensive personal information, with the understanding that such information would not be used against them. If the government now uses that information to initiate removal proceedings against DACA recipients, it would amount to entrapping those persons who "exercis[ed] a privilege which the [government] has clearly told them was available." *Id.* at 571.

The promise that information would not be provided to Immigration and Customs Enforcement likely led to deferred action recipients to "live more openly in reliance on the government's promise." Price, *Reliance on Nonenforcement*, 58 Wm. & Mary L. Rev. at 959. As one legal scholar observed, "[I]t seems doubtful that immigrants would have taken this risk without the perceived assurance that doing so would place them at reduced, rather than increased, risk of future enforcement." *Id.* at 960.

DHS argues that DACA recipients could not reasonably rely on the promise of DACA because President Obama, in remarks announcing DACA, stated that it was merely a "temporary stop gap measure" and not a "permanent fix." However, in those same remarks, President Obama also said that DACA "is taking steps to lift the shadow of deportation from these young people." By lifting the shadow of deportation, DACA "giv[es] a degree of relief and hope to talented, driven, patriotic young people." *Remarks by the President on Immigration*, June 15, 2012 (available at

https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration). President Obama further explained that "it makes no sense to expel talented young people, who, for all intents and purposes are Americans . . . to expel these young people who want to staff our labs, or start new businesses, or defend our country." *Id.* As the Northern District of California observed in *Regents*, "689,800 young people . . . had come to rely on DACA to live and to work in this country." 279 F. Supp. 3d at 1045.

CONCLUSION

This Court should affirm the judgments of the U.S. Court of Appeals for the Ninth Circuit, the U.S. District Court for the District of Columbia, and the orders of the U.S. District Court for the Eastern District of New York.

Respectfully submitted,

NEIL V. MCKITTRICK
Counsel of Record
LORENZO R. CABANTOG
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
One Boston Place, Suite 3500
Boston, MA 02108
(617) 994-5726
neil.mckittrick@ogletree.com

Dated: October 4, 2019