

Nos. 18-587, 18-588, 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.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF *AMICI CURIAE* 109 CITIES,
COUNTIES, MUNICIPALITIES, AND LOCAL
GOVERNMENT ADVOCACY ORGANIZATIONS
IN SUPPORT OF RESPONDENTS**

MICHAEL N. FEUER
City Attorney
JAMES P. CLARK
VALERIE L. FLORES
DANIELLE GOLDSTEIN
MICHAEL DUNDAS
Counsel of Record
200 N. Main Street
Los Angeles, CA 90012
(213) 978-8100
mike.dundas@lacity.org

MARGARET L. CARTER
DANIEL R. SUVOR
DIMITRI D. PORTNOI
DANIEL J. TULLY
O'MELVENY & MYERS LLP
400 South Hope Street
18th Floor
Los Angeles, CA 90071
(213) 430-6000

Counsel for Amicus Curiae *Counsel for Amicus Curiae*
City of Los Angeles, Calif. *County of Los Angeles, Calif.*
[Additional Captions Listed On Inside Cover]

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

Petitioners,

v.

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

Respondents.

**On Writ of Certiorari Before Judgment to the
United States Court of Appeals
for the District of Columbia Circuit**

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

Petitioners,

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL.,

Respondents.

**On Writ of Certiorari Before Judgment to the
United States Court of Appeals
for the Second Circuit**

QUESTIONS PRESENTED

In 2012, the Secretary of Homeland Security announced a policy that would provide a temporary forbearance of removal for certain undocumented immigrants who unwittingly entered the United States as children. Known as Deferred Action for Childhood Arrivals (DACA), the program allows such noncitizens to receive a renewable two-year term of deferred action—a form of prosecutorial discretion whereby the government declines to pursue removal—if they have no criminal record and satisfy various educational or military service requirements. Under longstanding federal regulations, any person subject to deferred action, including DACA recipients, may apply for government work authorization. In the seven years since DACA was implemented, more than 800,000 young people throughout the country have applied for and received deferred action. In September 2017, the Department of Homeland Security (DHS) announced that it would rescind DACA because it believed the program was unlawful and would likely be struck down by the courts.

The questions presented are:

1. Whether DHS's decision to rescind DACA is judicially reviewable.
2. Whether DHS's decision to rescind DACA is unlawful.

TABLE OF CONTENTS

	Page(s)
STATEMENT OF INTEREST.....	1
INTRODUCTION	4
ARGUMENT	6
I. DACA Recipients Represent the Best of <i>Amici</i> 's Communities.	6
II. Rescinding DACA Harms <i>Amici</i> 's Young People and Communities.	10
A. Rescinding DACA Will Harm the Economy.	11
B. Rescinding DACA Will Undermine <i>Amici</i> 's Public Safety Priorities.	14
III. Petitioners' Purported Rescission of DACA is Unlawful.	16
A. Petitioners Did Not Adequately Consider the Harm of Repealing DACA.	18
B. Post-Hoc Rationalizations Do Not Insulate Petitioners' Decision From Review or Render it Lawful.	26
CONCLUSION.....	38
APPENDIX	1a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Block v. Cmty. Nutrition Inst.</i> , 467 U.S. 340 (1984).....	33
<i>Bowen v. Mich. Acad. of Family Physicians</i> , 476 U.S. 667 (1986).....	28
<i>Camp v. Pitts</i> , 411 U.S. 138 (1973).....	33, 35, 37
<i>Citizens to Pres. Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971).....	24, 28, 32, 35
<i>Encino Motorcars, LLC v. Navarro</i> , 136 S. Ct. 2117 (2016).....	passim
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009).....	18, 20, 22, 25
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	36
<i>Food Mktg. Inst. v. ICC</i> , 587 F.2d 1285 (D.C. Cir. 1978).....	34, 37
<i>Franklin v. Massachusetts</i> , 505 U.S. 788 (1992).....	33
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985).....	28, 29
<i>Hilton v. S.C. Pub. Rys. Comm'n</i> , 502 U.S. 197 (1991).....	25
<i>ICC v. Bhd. of Locomotive Eng'rs</i> , 482 U.S. 270 (1987).....	31
<i>Judulang v. Holder</i> , 565 U.S. 42 (2011).....	18, 27
<i>Landgraf v. USI Film Prods.</i> , 511 U.S. 244 (1994).....	25

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Michigan v. EPA</i> , 135 S. Ct. 2699 (2015).....	18, 27
<i>Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth.</i> , 898 F.2d 753 (9th Cir. 1990).....	30
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	18, 20, 35
<i>Nat’l Lifeline Ass’n v. FCC</i> , 921 F.3d 1102 (D.C. Cir. 2019).....	25
<i>OSG Bulk Ships, Inc. v. United States</i> , 132 F.3d 808 (D.C. Cir. 1998).....	30
<i>Pension Benefit Guar. Corp. v. LTV Corp.</i> , 496 U.S. 633 (1990).....	32, 34, 35
<i>Perez v. Mortg. Bankers Ass’n</i> , 135 S. Ct. 1199 (2015).....	22, 24
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80 (1943).....	27, 33, 34, 37
<i>Smiley v. Citibank (S.D.), N.A.</i> , 517 U.S. 735 (1996).....	25
<i>Texas v. United States</i> , 809 F.3d 134 (5th Cir. 2015).....	19
<i>Util. Air Regulatory Grp. v. EPA</i> , 573 U.S. 302 (2014).....	36
STATUTES	
5 U.S.C. § 601	22
5 U.S.C. § 603	22
5 U.S.C. § 604	22
5 U.S.C. § 701	28

TABLE OF AUTHORITIES
(continued)

	Page(s)
8 U.S.C. § 1324a	37
REGULATIONS	
8 C.F.R. § 274.12	37
RULES	
Sup. Ct. R. 37.3(a)	1
Sup. Ct. R. 37.6	1
OTHER AUTHORITIES	
Alex Nowrasteh, <i>Don't End DACA: The Immigration Program Trump Must Save</i> , N.Y. Post (Aug. 31, 2017).....	11
Barry Moreno, <i>Children of Ellis Island</i> (2005).....	4
George White, <i>Teachers Who Are DACA Recipients Help Ease Anxiety of Undocumented Students</i> , EdSource (Sept. 15, 2017)	9
Gregory Korte, <i>et al.</i> , <i>Trump Administration Struggles with Fate of 900 DREAMers Serving in the Military</i> , USA Today (Sept. 7, 2017).....	8
John Burnett, <i>New Immigration Crackdowns Creating 'Chilling Effect' on Crime Reporting</i> , Nat'l Pub. Radio (May 25, 2017)	14
Julia Wick, <i>L.A.-Area DACA Recipients Contribute Approximately \$5.5 Billion Annually to Economy</i> , Chamber Estimates, LAist (Sept. 21, 2017).....	11

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>L.A. County Sheriff Jim McDonnell’s Statement About Senate Bill 54 Regarding Immigration, The Signal</i> (Sept. 16, 2017)	15
Michelangelo Landgrave & Alex Nowrasteh, <i>The DREAMer Incarceration Rate</i> , Cato Institute (Aug. 30, 2017)	15
Nik Theodore, Dep’t of Urban Planning & Policy, Univ. of Ill. at Chi., <i>Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement</i> (2013)	15
Office of the Press Sec’y, <i>Remarks by the President on Immigration</i> (June 15, 2012)	21
Randy Capps et al., <i>Migration Policy Inst., Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement</i> (2011).....	15
Roberto G. Gonzales & Angie M. Bautista-Chavez, <i>Am. Immigration Council, Two Years and Counting: Assessing the Growing Power of DACA</i> (June 2014)	10
Samantha Schmidt, <i>A ‘Dreamer’ Dies Trying to Save Harvey Victims, Days Before Trump Plans to End DACA</i> , Wash. Post (Sept. 5, 2017).....	10

TABLE OF AUTHORITIES
(continued)

	Page(s)
Scott R. Baker, <i>Effects of Immigrant Legalization on Crime: The 1986 Immigration Reform and Control Act</i> , Stanford Law and Econ. Olin Working Paper (July 28, 2014).....	14
Silva Mathema, <i>Ending DACA Will Cost States Billions of Dollars</i> , Ctr. for Am. Progress (Jan. 9, 2017)	12
<i>State & Local Tax Contributions of Young Undocumented Immigrants</i> , Inst. on Taxation & Econ. Policy (Apr. 30, 2018).....	11
Tom K. Wong et al., <i>DACA Recipients’ Economic and Educational Gains Continue to Grow</i> , Ctr. for Am. Progress (Aug. 28, 2017).....	2, 12
Tom K. Wong et al., Results from Tom K. Wong et al., 2017 National DACA Study (2017)	7, 10
U.S. Dep’t of Homeland Sec., Letter by Secretary Jeh Johnson to U.S. Representative Judy Chu (Dec. 30, 2016).....	21
U.S. Dep’t of Homeland Sec., Memorandum from Secretary Janet Napolitano on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012).....	21

**TABLE OF AUTHORITIES
(continued)**

	Page(s)
U.S. Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012)	7
U.S. Dep't of Justice, Attorney General Sessions Delivers Remarks on DACA (Sept. 5, 2017).....	14

STATEMENT OF INTEREST¹

Amici Curiae are 109 cities, towns, counties, and municipal organizations.² *Amici* come from every corner of the country: from rural farming communities to industrial cities to large, urban metropolises. *Amici* represent a broad, bi-partisan cross-section of American cities and counties with a wide spectrum of economic, political, and cultural perspectives. They include the most populous and diverse cities and counties in the United States, as well as jurisdictions of more modest size. Individuals of every race, ethnicity, culture, and creed call *amici* home.

¹ The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. *See* Sup. Ct. R. 37.3(a). No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

² A complete list of *amici* is provided as **Appendix A**. *Amici* include four non-partisan advocacy organizations charged with representing the interests of the nation's cities, towns, and villages. The National League of Cities advocates for 19,000 cities, towns, and villages, representing more than 218 million Americans. The United States Conference of Mayors represents the country's 1,408 cities with populations of over 30,000. The International Municipal Lawyers Association is a professional organization consisting of more than 2,500 local government member entities represented by their chief legal officers, state municipal leagues, and individual attorneys. The International City/County Management Association is an association of 12,000 city, town, and county managers who oversee the daily operations of the local governments they serve.

Though important differences exist between them, *amici* share a common interest in building communities where all residents, regardless of immigration status, feel safe and empowered to participate in civic life. At their core, local governments exist to provide for the health (*e.g.*, public hospitals), safety (*e.g.*, police departments and county sheriffs), and welfare (*e.g.*, social services agencies) of their residents. The Deferred Action for Childhood Arrivals (DACA) program directly benefits the health, safety and welfare of all of our residents, by encouraging DACA recipients to openly participate in their communities and interact with local government without fear.

Before the program was instituted, many DACA recipients feared the basic tasks of everyday life, like going to work, attending school and church, or simply buying groceries. Many recipients with American citizen children³ stuck Post-it notes to their refrigerators before they left for the day, instructing their children whom to call in case “Mom and Dad” did not come home. These fears are precisely why DACA was created: to both focus limited immigration enforcement resources on the removal of serious criminals and to enable young people to contribute to their communities.

³ A 2017 study by the Center for American Progress found that 25% of DACA recipients have at least one child who is an American citizen. Tom K. Wong et al., *DACA Recipients’ Economic and Educational Gains Continue to Grow*, Ctr. for Am. Progress (Aug. 28, 2017), <https://perma.cc/JT3D-6TVR>.

Amici will suffer substantial harm if DACA is terminated. More than 12% of all active DACA recipients live in the Los Angeles metro area alone.⁴ Another 22% reside in the New York, Dallas, Chicago, or Houston metro regions, while 10% of recipients currently make their homes in Phoenix, Atlanta, the San Francisco Bay area, San Diego, or Denver.⁵ All told, 60% of current DACA recipients—nearly 400,000 individuals—live in *amici*'s communities.⁶

These individuals—most of whom arrived in the United States as children—are no different than the tens of millions of people who live and work alongside them in *amici*'s cities and counties. DACA recipients have made enormous contributions to our communities and to our country. They attend our local schools where they study to become our newest doctors, nurses, and lawyers. As entrepreneurs, they build businesses that revitalize local economies. As teachers, they shape the next generation of leaders. As civil servants, they assist and transform the communities that they call home. Without deferred action, none of these contributions would be possible.

⁴ Figures are based on recipients' residency in a Core Based Statistical Area, as defined by the U.S. Office of Management and Budget, at the time of their most recent DACA application. See *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, No. 3:17-cv-05211-WHA, Dkt. 292-2, U.S. Citizenship and Immigration Services DACA Data as of September 30, 2019 (N.D. Cal. Oct. 1, 2019).

⁵ *Id.*

⁶ *Id.*

Amici are stronger and safer because of the DACA program.

As history teaches, our collective success depends on the contributions of *all* members of society. Our nation's and *amici's* civic, cultural, and economic prosperity in the 20th Century was aided in no small part by the contributions of immigrants, many of whom arrived in the United States as children.⁷ And our future progress is tied to the full participation of such individuals, including the 800,000 young people who have received deferred action under the DACA program. The rescission of DACA jeopardizes *amici's* interests by harming tens of thousands of DACA recipients in *amici's* communities.

INTRODUCTION

Each day, more than 650,000 DACA recipients work to make the world a better place. They are educators, administrators, social workers, firefighters, police officers, soldiers, scientists, engineers, entrepreneurs, artists, journalists, service workers, and civic leaders. They make their communities—our communities—safe and prosperous.

Since its inception, DACA has allowed more than 800,000 hardworking individuals to reach their full potential. The program, which reduces recipients' fear of removal and allows them the opportunity to work for renewable two-year terms, has empowered recipients to participate fully in their communities. These individuals are as much part of the American

⁷ See Barry Moreno, *Children of Ellis Island* (2005).

fabric that binds us together as are their neighbors with lawful immigration status.

The rescission of DACA in the Department of Homeland Security's (DHS) September 5, 2017 Memorandum (September Memorandum) tears at that fabric. Petitioners' decision to rescind DACA is a violation of trust that forces hundreds of thousands of participants back into lives of fear. Keeping talented young people at the margins threatens to rob *amici* and the nation of their promise. It is anathema to *amici*, as it undermines their shared interest in empowering all residents to participate in public life. *Amici* therefore request that the Court affirm the judgments of the Ninth Circuit and the District Court for the District of Columbia, and the orders of the Eastern District of New York.

Amici submit this brief to inform the Court of the profound impact that DACA recipients have had on *amici* and to highlight the consequences that rescission of DACA will have on *amici*, our communities, and our residents. *Amici* also write to address two discrete legal issues—Petitioners' failure to adequately consider reliance interests in the September Memorandum, and Petitioners' attempted post-hoc rationalization of their decision to rescind DACA. Given the significant harm to *amici* and their residents from the rescission, Petitioners' failure to analyze participants' reliance interests and the harm to society at large is alarmingly inadequate. Their attempt to use after-the-fact explanations to prevent the courts from redressing these harms is equally deficient, and was correctly rejected by the courts below.

As all *amici* recognize, our shared future is brighter when opportunities for success are available to all people, regardless of their race, ethnicity, gender, or immigration status. DACA recipients have used these opportunities for seven years to strengthen *amici*'s communities, and should not now have those opportunities taken from them. And their neighbors, coworkers, employers, and local governments should not be denied the countless contributions that DACA recipients have made and will continue to make to our country.

ARGUMENT

I. DACA Recipients Represent the Best of *Amici*'s Communities.

When DACA was first announced, then-DHS Secretary Janet Napolitano and current President of Respondent University of California, explained:

Our nation's immigration laws must be enforced in a firm and sensible manner. But they are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Discretion, which is used in so

many other areas, is especially justified here.⁸

Amici agree: our best interests are advanced by educating and empowering our next generation of leaders, not by tearing students out of their schools and uprooting industrious individuals from their communities. For the last seven years, DACA has advanced our best interests, and *amici* have witnessed hundreds of thousands of young people emerge from the margins to lead productive, exemplary lives.

DACA has allowed recipients to pursue higher education, enhancing their economic productivity and enriching their lives and futures.⁹

For example, Jin Kyu Park arrived in New York City at the age of seven from South Korea. He excelled in his studies and matriculated at Harvard. As an undergraduate in Cambridge, Jin Kyu worked as a research assistant at the Koch Institute for Integrative Cancer Research at MIT, served as the managing editor of the Harvard Undergraduate Research Journal, directed the Phillips Brooks House Association's Chinatown Citizenship program, and founded a nonprofit to help other undocumented

⁸ Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), <https://perma.cc/94JC-2293>.

⁹ Tom K. Wong et al., Results from Tom K. Wong et al., 2017 National DACA Study 3 (2017), <https://perma.cc/R2J8-D57W>.

students. Last November, he became the first DACA recipient ever to become a Rhodes Scholar. After completing his studies at Oxford, Jin Kyu plans to become a doctor so that he can serve immigrant communities like the one where he grew up in Queens.

Many recipients share similar stories. DACA allowed Nelson Magdaleno, who was brought to the United States from Venezuela as a child, to attend Georgia Tech University, one of the nation's top engineering schools. Nelson graduated with honors and has been working in Dallas as an engineer at Texas Instruments since his graduation. Herta Llusho arrived in Detroit from Albania at the age of eleven. She worked tirelessly through high school and college, ultimately receiving a Master's Degree in robotics and automation engineering. Herta now works as a supervising engineer at Ford Motor Company, and regularly volunteers at her church and in her community.

Armed with their high school degrees, college degrees, and the other building blocks of modern life, recipients have gone on to strengthen their communities by dedicating themselves to them. Hundreds have protected our country by serving in the military as part of a Pentagon pilot program.¹⁰ Thousands of recipients, like Chicagoan Cynthia Sanchez and Aus-

¹⁰ Gregory Korte, *et al.*, *Trump Administration Struggles with Fate of 900 DREAMers Serving in the Military*, USA Today (Sept. 7, 2017), <https://perma.cc/EH4W-2DSL>.

tinite Karen Reyes, have taken up teaching, often in underserved communities of color.¹¹

Others have made lasting impacts in the arts. Yehimi Cambrón, an art teacher and artist from Atlanta, paints murals with imagery that evoke survival, opportunity, and other common themes of the immigrant experience. In the classroom, she teaches her high school students how to find expression and empowerment in art. Last year, the Atlanta Superbowl LIII Host Committee commissioned Yehimi to create three murals that highlight Atlanta's civil rights and social justice journey, a commission that would not have been possible without DACA.

Bambadjan Bamba grew up in the South Bronx, worked to put himself through drama school, and now is a successful actor, appearing on NBC's *The Good Place*, and in Disney's *Black Panther*. Daniela Pierre-Bravo arrived in the United States from Chile at age 11. Today, she is a news producer for MSNBC and NBCUniversal in New York City and recently released a non-fiction motivational book with best-selling author Mika Brzezinski.

Still others have made their mark through selfless sacrifice. In times of need or sorrow, congre-

¹¹ See George White, *Teachers Who Are DACA Recipients Help Ease Anxiety of Undocumented Students*, EdSource (Sept. 15, 2017), <https://perma.cc/PPJ2-KR3P>. Although the exact number of DACA recipients employed as teachers is unknown, the Migration Policy Institute estimates that 20,000 "DACA-eligible" individuals are teachers, although some may have attained lawful status by other means. *Id.*

gants turn to the guidance of DACA-recipient Father Rey Pineda, a Catholic priest at Atlanta’s Cathedral of Christ the King. When emergencies have threatened families, friends, and neighbors, DACA recipients have been among the first to answer the call. During Hurricane Harvey, Houston-area paramedic Jesus Contreras worked six straight days to rescue people from the storm. One DACA recipient, Alonso Guillén, was killed while trying to save fellow Texans from perishing in rising floodwaters.¹²

These stories and countless others highlight the lasting impact that the DACA program has had on recipients and on society at large. As *amici* look to the future, we cannot afford to let some of our best and brightest go.

II. Rescinding DACA Harms *Amici*’s Young People and Communities.

DACA has allowed recipients to live without fear and to better contribute to *amici*’s communities. It has drastically improved recipients’ lives, allowing them to obtain better jobs, more education, and improved access to vital services—like healthcare and driver’s licenses¹³—which allow them to better contribute to society. Petitioners’ decision to rescind

¹² Samantha Schmidt, *A ‘Dreamer’ Dies Trying to Save Harvey Victims, Days Before Trump Plans to End DACA*, Wash. Post (Sept. 5, 2017), <https://perma.cc/YT2Q-9H7P>.

¹³ Roberto G. Gonzales & Angie M. Bautista-Chavez, Am. Immigration Council, *Two Years and Counting: Assessing the Growing Power of DACA* 9 (June 2014), <https://perma.cc/K4RB-327Q>; Wong, *supra* note 9.

DACA wrests from these young people the protections that have allowed them to better their communities. It will also directly harm *amici*, particularly their economies and public safety programs, which benefit from the open participation of nearly 400,000 resident recipients.

A. Rescinding DACA Will Harm the Economy.

DACA recipients help drive *amici*'s economies. In Los Angeles alone, they are responsible for approximately \$5.5 billion of the annual GDP.¹⁴ Nationally, DACA recipients pay an estimated \$1.7 billion in state and local taxes every year that go to fund critical programs administered by *amici*.¹⁵

DACA's nationwide impact has been substantial. Adding DACA recipients to the workforce has generated roughly \$30 billion in new earnings, which, according to an op-ed from an analyst at the Cato Institute, "ha[d] a job-creating ripple effect on the economy."¹⁶ Recipients have made profound economic gains because of the DACA program. They have entered the work force, purchased their first homes,

¹⁴ Julia Wick, *L.A.-Area DACA Recipients Contribute Approximately \$5.5 Billion Annually to Economy, Chamber Estimates*, LAist (Sept. 21, 2017), <https://perma.cc/9VDJ-HEDB>.

¹⁵ *State & Local Tax Contributions of Young Undocumented Immigrants*, Inst. on Taxation & Econ. Policy (Apr. 30, 2018), <https://perma.cc/WKL6-U2HJ>.

¹⁶ Alex Nowrasteh, *Don't End DACA: The Immigration Program Trump Must Save*, N.Y. Post (Aug. 31, 2017), <https://perma.cc/9LYT-8895>.

and built businesses that have revitalized their communities. According to one representative survey, 69% of employed DACA recipients moved to a higher-paying job while receiving deferred action, and 5% of recipients started a new business, a rate of entrepreneurship greater than among the general public.¹⁷ The same survey indicated that 50% of surveyed DACA recipients reported that they have bought a car since receiving deferred action and 12% have bought their first home, both of which are major economic drivers.¹⁸ Over the next decade, these workers and business owners are estimated to contribute more than \$433 billion to the national GDP.¹⁹

DHS's decision to rescind DACA will thus have a clear deleterious effect on *amici* and the nation as a whole. One story illustrates what is at stake for DACA recipients and *amici*.

Angelica Hernandez came to the United States at the age of nine with her mother. Growing up in Phoenix, she fell in love with robotics. While attending Carl Hayden High School, Angelica was a member of a team of undocumented students that won a national underwater robotics competition, besting teams from other high schools and from elite engineering universities like MIT. Angelica's passion for robotics led her to Arizona State University, where

¹⁷ Wong, *supra* note 3.

¹⁸ *Id.*

¹⁹ Silva Mathema, *Ending DACA Will Cost States Billions of Dollars*, Ctr. for Am. Progress (Jan. 9, 2017), <https://perma.cc/7NSZ-Y2L7>.

she graduated *summa cum laude*, and then to Stanford, where she received a Master's Degree in Civil and Environmental Engineering. Today she works as an engineer on clean energy and energy efficiency programs at Nexant, an energy company in the Phoenix area.

Because of DACA, Angelica was able to discover a passion and pursue her dream career. But Angelica's other teammates were each too old to qualify for DACA. Of the Carl Hayden students, only Angelica works as an engineer. Contrast their story with those of the members of the MIT student team they defeated in competition. A decade after the competition, three of the four MIT team members had gone onto successful careers in underwater robotics, with one working on a project in Antarctica, while the fourth MIT team member was working in product design for Apple, Inc.

At a time when our country is facing a shortage of professionals in science, technology, engineering, and mathematics (STEM) fields, programs like DACA give certainty to young people who should not be enforcement priorities, enabling more of them to pursue passions that leave *amici* and the nation stronger. Petitioners' rescission of DACA denies hundreds of thousands of recipients the opportunity to pursue their dreams and deprives *amici* of these young people's promise.

B. Rescinding DACA Will Undermine *Amici*'s Public Safety Priorities.

DACA has helped make *amici*'s communities safer because recipients are able to cooperate more freely and effectively with law enforcement.

When undocumented individuals fear interacting with law enforcement, it makes communities less safe and officers' jobs more difficult. Law enforcement agencies report that, as immigration enforcement and the threat of deportation increase, undocumented immigrants are substantially less likely to report crimes, including violent crimes.²⁰ One study estimates that granting legal status to 1% of undocumented immigrants in a county can lower crime rates there by 2 to 6%.²¹ Although then-Attorney General Sessions insinuated that DACA had "put our nation at risk of crime, violence and even terrorism,"²² the facts show just the opposite.²³

²⁰ John Burnett, *New Immigration Crackdowns Creating 'Chilling Effect' on Crime Reporting*, Nat'l Pub. Radio (May 25, 2017), <https://perma.cc/3VJ3-Q8NK>.

²¹ Scott R. Baker, *Effects of Immigrant Legalization on Crime: The 1986 Immigration Reform and Control Act*, Stanford Law and Econ. Olin Working Paper, at 25 (July 28, 2014), <https://perma.cc/G5WH-4EX3>.

²² U.S. Dep't of Justice, Attorney General Sessions Delivers Remarks on DACA (Sept. 5, 2017), <https://perma.cc/482G-5JEA>.

²³ One study by the Cato Institute reported that only 0.25% of DACA recipients have been expelled from the program for criminal activity and that DACA recipients' native-born counterparts were 14% more likely to be incarcerated. See Michel-

Community policing strategies in *amici* cities and counties call for trust and engagement between law enforcement and the people they protect. As Los Angeles County’s then-Sheriff put it shortly after Petitioners announced the September Memorandum, “Public safety is our mission. This requires that people come forward if they are a crime victim or be willing to come forth as a witness to a crime without fear of being deported. When I say that public trust is our currency, I mean it.”²⁴

Amici have prudently considered and created data-driven law enforcement policies to enhance trust with immigrant communities. That trust is undermined when residents fear interaction with the police, and law enforcement suffers as a result. Extensive evidence shows that undocumented immigrants—and their lawfully present family and neighbors—fear that turning to the police will bring adverse immigration consequences, and thus are less likely to report crimes.²⁵ DACA has promoted com-

angelo Landgrave & Alex Nowrasteh, *The DREAMer Incarceration Rate*, Cato Institute (Aug. 30, 2017), <https://perma.cc/HJA9-L6LP>.

²⁴ *L.A. County Sheriff Jim McDonnell’s Statement About Senate Bill 54 Regarding Immigration*, The Signal (Sept. 16, 2017), <https://perma.cc/XF4Y-DJXT>.

²⁵ See, e.g., Nik Theodore, Dep’t of Urban Planning & Policy, Univ. of Ill. at Chi., *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 5–6 (2013), <https://perma.cc/4B5R-7JL4> (finding that 67% of undocumented individuals are less likely to offer information to law enforcement as a witness and 70% are less likely to contact law enforcement even if they were victims of a crime); Randy Capps

munity policing and furthered *amici*'s efforts to ensure that deferred action recipients and their families and neighbors are less vulnerable to crime and exploitation. The rescission of DACA will undermine these crucial efforts, making *amici*'s communities less safe for their tens of millions of residents.

III. Petitioners' Purported Rescission of DACA is Unlawful.

Petitioners' decision to rescind DACA was both a grave policy error and unambiguously unlawful. As each of the courts below correctly concluded, Petitioners acted arbitrarily and capriciously in violation of the Administrative Procedure Act (APA) when they abruptly ended DACA based on a cursory, dubious analysis of the program's legality. *See Regents Pet. Supp. App. 1a–87a; NAACP Pet. App. 1a–74a; Batalla Vidal Pet. App. 62a–129a.* Respondents deftly address Petitioners' arguments in their briefs, *see Regents Resp. Br. 30–55; DACA Recipient Resp. Br. 29–59; State of Cal. Resp. Br. 23–55; State of N.Y. Resp. Br. 30–53; D.C. Resp. Br. 34–61, and amici* will not repeat them here.

et al., Migration Policy Inst., Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement 43 (2011), <https://perma.cc/T3PR-X4LG> (finding in multiple counties that increased local-federal law enforcement cooperation meant “community respondents were likely to report that immigrants were venturing into public places with less frequency, failing to report crimes or interact with police, interacting less with schools and other institutions, patronizing local businesses less often, and changing their driving patterns”).

Amici instead address two discrete legal issues that are of particular significance to them because of the substantial effects that the rescission of DACA will have on *amici* and their millions of residents.

First, when they decided to rescind DACA, Petitioners did not adequately consider the effects of rescission or the legitimate reliance interests engendered by the DACA program, as they were required to do under the Court's precedent. DACA recipients irrevocably rearranged their lives in reliance on deferred action, funding college educations, signing mortgages, enrolling in the military, and starting families. These acts were not just the foreseeable effects of DACA; they were exactly what the program was designed to induce. Petitioners also failed to consider that the hasty decision to rescind DACA will have consequences that reach far beyond DACA recipients to harm *amici*'s economies and communities.

Second, the courts below properly rejected Petitioners' post-hoc attempt in the June 22, 2018 memorandum from then-Secretary Kirstjen M. Nielsen (Nielsen Memorandum) to save the arbitrary and capricious decision announced in the September Memorandum. Although courts have, in limited circumstances, permitted an agency to provide a fuller explanation of the agency's stated rationale after the fact, an agency may not offer new and shifting rationales. The Court should not countenance Petitioners' effort to avoid judicial review and accountability by manufacturing new reasons for the rescission that were not stated in the September Memorandum.

A. Petitioners Did Not Adequately Consider the Harm of Repealing DACA.

“Federal administrative agencies are required to engage in ‘reasoned decisionmaking.’” *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (quotation omitted). An 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.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation omitted).²⁶ When an agency seeks to depart from prior policy, it must “demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency’s proper understanding of its authority.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring in part). “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.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Fox Television*, 556 U.S. at 515). Petitioners’ explanation for rescinding DACA fails to meet these standards.

On September 5, 2017, then-Acting Secretary of Homeland Security Elaine C. Duke issued a memo-

²⁶ Cf. *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (“When reviewing an agency action, we must assess, among other matters, ‘whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’”) (quotation omitted).

randum rescinding DACA. *Regents* Pet. App. 111a–119a. In the five-page memorandum, Acting Secretary Duke summarized the procedural history of litigation filed by Texas and a coalition of states challenging a separate deferred-action program called Deferred Action for Parents of Americans (DAPA). *Id.* at 112a–116a. *See also Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016) (*per curiam*). The memorandum also incorporated by reference a one-page letter from then-Attorney General Sessions, in which the Attorney General instructed Acting Secretary Duke to rescind DACA because the program’s enactment was purportedly unlawful (Sessions Letter). *Regents* Pet. App. 116a; *see also* J.A. 877–78 (letter noting that DACA had been “effectuated by the previous administration through executive action [and] without proper statutory authority,” and concluding that “[s]uch an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch.”).

Based on the outcome of the DAPA litigation and the Sessions Letter, the September Memorandum concluded that “it is clear that the June 15, 2012 DACA program should be terminated.” *Regents* Pet. App. 117a. Although it acknowledges DHS’s departure from existing policy, the September Memorandum does not discuss the effects of the rescission, save for a passing reference to unexplained “complexities associated with winding down the program.” *Id.* The memorandum makes no mention at all of any reliance interests likely to be harmed by

the change in policy. Such cursory treatment of the wide-reaching impacts of rescission does not comply with the APA.

Although a decision enacting a *new* policy generally need not provide more than a “rational connection between the facts found and the choice made,” *State Farm*, 463 U.S. at 43 (quotation omitted), Acting Secretary Duke was not working “on a blank slate” when she issued the September Memorandum: the DACA program had been in place for over half a decade and offered protections and opportunities that have benefited not just individual applicants but also state and local governments and the public at large. *See supra* Section II. Under these circumstances, “a more detailed justification” for the policy reversal is required. *Fox Television*, 556 U.S. at 515 (holding that agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” when its “prior policy has engendered serious reliance interests that must be taken into account”) (quotation omitted); *accord Encino Motorcars*, 136 S. Ct. 2125–26.

Here, the reliance interests are fundamental. As a result of the DACA program, nearly a million individuals, many from *amici*’s communities, have stepped out of the shadow of fear and begun to lead open and productive lives. Beneficiaries structured their education, employment, housing, and other life activities on the reliance that they would be protected by deferred action and employable because of their work authorization if they continued to satisfy eligibility criteria. J.A. 879–980. DACA has given recipients of deferred action the encouragement and

comfort to openly enter the work force, take on student loans, sign mortgages, and even start new businesses.

DACA applicants shared intimate details and biometric data with DHS for the opportunity to participate in the program. Plainly, they would not have provided this information without being able to rely upon the positive impacts of the program. That reliance was not merely foreseeable, it was expected by DHS.²⁷ Petitioners' decision to rescind DACA upsets these interests: it would upend the enriching lives that DACA recipients have built and drive thousands of productive members of our communities to the margins of society.

The DACA program has also created reliance interests beyond individual recipients. When DACA was announced, DHS found that by granting young, long-term immigrants deferred action and offering the opportunity to apply for work authorization, the program would benefit not only the recipients, but society as a whole.²⁸ That is precisely what hap-

²⁷ See U.S. Dep't of Homeland Sec., Letter by Secretary Jeh Johnson to U.S. Representative Judy Chu (Dec. 30, 2016), <https://perma.cc/3MVA-6EU5> ("We believe these representations made by the U.S. government, upon which DACA applicants most assuredly relied, must continue to be honored.").

²⁸ U.S. Dep't of Homeland Sec., Memorandum from Secretary Janet Napolitano on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://perma.cc/B2CW-SPRR>; Office of the Press Sec'y, Remarks by the President on Immigration (June 15, 2012), <https://perma.cc/H9YP-8869>.

pened. As detailed above, the DACA program has made our communities more economically robust and discernibly safer. *See supra* Section II. Rescission will not only deal *amici* the staggering loss of hundreds of thousands of individual economic contributors and cause fear that undermines public health and safety, but it will also force *amici* to operate and fund the social safety net that will be needed to catch recipients' families when jobs are lost, health insurance plans are discontinued, college educations are forfeited, homes fall into foreclosure, and families are forced apart by low-priority removals. Although they may be different in kind from recipients' interests, *amici*'s interests are no less relevant.²⁹ *See Encino Motorcars*, 136 S. Ct. at 2126 (holding that industry reliance on prior policy should be considered by agency).

The September Memorandum inexplicably contains no mention of these obvious reliance interests. Its passing reference to certain unidentified "complexities" associated with rescission, *Regents* Pet. App. 117a, falls far short of Petitioners' obligation to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television*, 556 U.S. at 515–16; *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) ("[T]he APA requires an agency to provide more substantial justifi-

²⁹ Indeed, Congress has also directed that when agencies consider policy changes of this magnitude, they consider impact on small businesses and localities. *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601, 603–04.

cation . . . when its prior policy has engendered serious reliance interests that must be taken into account.”) (quotation omitted).

Petitioners now assert that “the Secretary sufficiently considered the reliance interests of DACA recipients” as required by the APA.³⁰ Pet. Br. 42. But Petitioners point to nowhere in the September Memorandum where Acting Secretary Duke considered any reliance interests. Instead, they rely exclusively on the Nielsen Memorandum. Pet. Br. 42; *see Regents* Pet. App. 120a–126a. As discussed below, the Nielsen Memorandum’s *post-hoc* explanations cannot permissibly be considered in assessing the legality of Petitioners’ decision to rescind DACA. *See infra* Section III.B.2.

Even if the memorandum could be considered, Secretary Nielsen’s after-the-fact explanation does not satisfy Petitioners’ burden. The Nielsen Memorandum states only that the Secretary did not come to her “conclusions lightly,” and was “keenly aware that DACA recipients have availed themselves of the

³⁰ In passing, Petitioners appear to suggest that they were not required to consider reliance interests based on the presence of certain disclaimers in the policy memorandum. *See* Pet. Br. 42 (“By its own terms, the policy ‘confer[red] no substantive right’ or lawful ‘immigration status.’”). Whether DACA recipients had a constitutionally protected liberty or property interest in the existence of the DACA program is wholly different than whether the recipients had *reliance interests* that Petitioners were required to consider. *Batalla Vidal* Pet. App. 115a–116a; *cf. Encino Motorcars*, 136 S. Ct. at 2126–27 (holding that agency required to consider automobile industry’s reliance interests in prior interpretation of Fair Labor Standards Act).

policy in continuing their presence in this country and pursuing their lives.” *Regents* Pet. App. 125a. But that was the extent of the discussion,³¹ and, in the very next sentence, those reliance interests were found to be outweighed by the “questionable legality” of the DACA program and “other reasons for ending the policy.” *Id.*

Such a “summary discussion . . . f[alls] short of the agency’s duty to explain why it deemed it necessary to overrule its previous position.” *Encino Motorcars*, 136 S. Ct. at 2126–27 (where agency stated that “it had carefully considered all of the comments, analyses, and arguments made for and against the proposed changes,” concluding that “[i]n light of the serious reliance interests at stake, the Department’s conclusory statements do not suffice to explain its decision”) (quotation omitted); *accord Perez*, 135 S. Ct. at 1209 (agency must provide “more substantial justification” for departure from past practice).

Vacatur is therefore required. Compliance with the APA’s requirements is not a mere formality. *Cf. Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (review of agency action under APA is to be “thorough, probing, [and] in-depth”). An agency’s duty to consider reliance interests and competing concerns is a bulwark against arbitrary administrative action. Here, as elsewhere, the law

³¹ In fact, Secretary Nielsen went so far as to disavow any substantive discussion of reliance interests, stating, instead, that “issues of reliance would best be considered by Congress.” *Id.*

seeks to protect settled expectations. *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (“[S]ettled expectations should not be lightly disrupted.”); *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991) (“*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations . . .”).

This case demonstrates precisely why the law imposes such a requirement. Because Petitioners wholly failed to meet it, their decision to rescind DACA is unlawful. *See Encino Motorcars*, 136 S. Ct. at 2126–27 (agency policy change was unlawful where the agency did not sufficiently address reliance interests); *Nat’l Lifeline Ass’n v. FCC*, 921 F.3d 1102, 1114–15 (D.C. Cir. 2019) (departure from prior forbearance policy was arbitrary and capricious where commission failed to consider the primary effects of change, including the interests of providers who “had crafted business models and invested significant resources” in reliance on the prior policy).³²

³² *Accord Fox Television*, 556 U.S. at 515 (“It would be arbitrary or capricious to ignore such matters.”); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (“[C]hange that does not take account of legitimate reliance on prior interpretation . . . may be ‘arbitrary, capricious [or] an abuse of discretion.’”) (quotations omitted).

B. Post-Hoc Rationalizations Do Not Insulate Petitioners' Decision From Review or Render it Lawful.

On June 22, 2018, in response to the District of Columbia district court's order vacating the September Memorandum,³³ then-Secretary Nielsen issued a memorandum further addressing DHS's decision to rescind the DACA program. *Regents* Pet. App. 120a–126a. The Nielsen Memorandum did not purport to rescind DACA anew. *Id.* at 121a (“Having considered the Duke memorandum and Acting Secretary Duke’s accompanying statement, the administrative record for the Duke memorandum that was produced in litigation, and the judicial opinions reviewing the Duke memorandum, I decline to disturb the Duke memorandum’s rescission of the DACA policy . . .”). Instead, it attempted to elucidate “why the decision to rescind the DACA policy was, and remains, sound.” *Id.* In explaining her “understanding of the Duke memorandum,” Secretary Nielsen offered additional detail supporting Acting Secretary Duke’s conclusion that DACA was unlawful. *Id.* at 121a–123a. She also set forth new policy rationales not reflected in the September Memorandum that

³³ The district court concluded that “DACA’s rescission was unlawful and must be set aside” because it was predicated on a judgment of the DACA program’s lawfulness that “was virtually unexplained” and thus arbitrary and capricious. *NAACP* Pet. App. 73a–74a. The court, however, stayed its order of vacatur for ninety days “to afford DHS an opportunity to better explain its view that DACA is unlawful.” *Id.*

are independent of whether DACA is “illegal or legally questionable.” *Id.* at 123a–125a.

Petitioners heavily rely on the Secretary’s new explanations to argue that the September Memorandum is unreviewable by this Court, *see* Pet. Br. 26–32, and in an attempt to bolster the legally flawed and inadequate decision-making that infects the September Memorandum, *see* Pet. Br. 37–43, but the Nielsen Memorandum cannot carry either point. “A court may uphold agency action only on the grounds that the agency invoked when it took the action.” *Michigan*, 135 S. Ct. at 2710 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). Accordingly, Secretary Nielsen’s new, after-the-fact explanations provide no basis to disturb the lower courts’ decisions.

1. *The Nielsen Memorandum Does Not Alter the Reviewability Determination Made by the Courts Below.*

Each of the courts below concluded that Petitioners’ decision to rescind the DACA program is reviewable under the APA. *Regents* Pet. Supp. App. 23a–45a; *NAACP* Pet. App. 25a–43a, 95a–103a; *Battalla Vidal* Pet. App. 1a–58a. These decisions are correct, *see* *Regents* Resp. Br. 17–30; *DACA Recipient* Resp. Br. 17–29; *State of Cal.* Resp. Br. 13–23; *State of N.Y.* Resp. Br. 16–30; *D.C.* Resp. Br. 21–34, 49–61, and the Nielsen Memorandum provides no basis for disturbing them.

“[C]ourts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking.” *Judulang*, 565 U.S. at 53. Although

there is a “strong presumption” in favor of judicial review of agency action, *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), the APA bars judicial review of agency action “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). “This is a very narrow exception” applicable only “in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.” *Overton Park*, 401 U.S. at 410.

Petitioners argue that the rescission of DACA is the type of enforcement decision that is presumptively unreviewable under the APA. *See* Pet. Br. 17–21. In support of this position, they rely on the Court’s decision in *Heckler v. Chaney*, 470 U.S. 821 (1985). There, the Food and Drug Administration declined to take enforcement action against prison officials for using certain drugs in human executions when they had not been approved for that purpose. *Id.* at 823–24. In response to a petition from a group of death row inmates, the agency questioned whether it had jurisdiction to prohibit the use of drugs in executions, but concluded that assuming it did have jurisdiction, it would “decline to exercise it under [the agency’s] inherent discretion.” *Id.* at 824. The Court held that the agency’s discretionary decision not to enforce was unreviewable under the APA, concluding that “agency refusals to institute investigative or enforcement proceedings” fall within the narrow general exception to reviewability. *Id.* at 837–38. The Court, however, expressly did not reach the question of whether “a refusal by the agency to institute proceedings based solely on the belief that it

lacks jurisdiction” might nonetheless be reviewable. *Id.* at 833 n.4.

Each of the courts below rejected Petitioners’ argument that the rescission of DACA is the type of discretionary decision that enjoys a *Chaney*-presumption of nonreviewability.

The Eastern District of New York rejected Petitioners’ assertion that “the decision to rescind the DACA program constitutes ‘an exercise of enforcement discretion’ that is ‘entrusted to the agency alone’ and immune from judicial review.” *Batalla Vidal* Pet. App. 28a. Judge Garaufis reasoned that the “decision to rescind DACA is unlike the non-enforcement decision at issue in *Chaney*” because the rescission was actually an enforcement decision, not a non-enforcement decision. *Id.* at 28a–31a. As the court noted, Respondents did not challenge DHS’s refusal to prosecute certain alleged violations of law or individual non-enforcement decisions, because DHS’s rescission of DACA was a commitment to take enforcement action. *Id.* The court also reasoned that Petitioners’ decision to rescind DACA was not motivated by a “complicated balancing of . . . factors” within their expertise, as was the case in *Chaney*, but instead was based on their understanding that the program was unlawful. *Id.*

The Ninth Circuit similarly concluded that Acting Secretary Duke’s decision was reviewable under the APA. While acknowledging that Petitioners’ decision falls outside the bounds of *Chaney* because it implicated *enforcement* action (not nonenforcement action), *Regents* Pet. Supp. App. 34a–35a, n.13, the court based its conclusion on circuit precedent that

“directly addressed the question” left open by *Chaney*’s footnote four. *Id.* at 26a. The court followed *Montana Air Chapter No. 29 v. Federal Labor Relations Authority*, 898 F.2d 753 (9th Cir. 1990), which held that a nonenforcement decision is presumptively reviewable “if it is based solely on a belief that the agency lacked the lawful authority to do otherwise,” and concluded that it could review Petitioners’ decision because it was based on Petitioners’ belief that DACA was unlawful. *Id.* at 23a–42a.

Finally, the District Court for the District of Columbia also concluded that DHS’s decision was reviewable under the APA. *NAACP* Pet. App. 42a–43a. The court concluded that Petitioners’ decision did not reflect a “discretionary enforcement policy,” but instead represented a “legal interpretation[] couched as [a] broad enforcement polic[y],” which fell outside of *Chaney* and was reviewable. *Id.* at 34a–35a (citing *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808 (D.C. Cir. 1998)); *id.* at 31a–43a.

Although the courts below employed slightly different reasoning, their reviewability analysis shares a common thread—an enforcement decision, particularly one based on the agency’s interpretation of the scope of its legal authority, is not a presumptively unreviewable exercise of discretion under Section 701. *Regents* Pet. Supp. App. 29a (“[W]here the agency’s decision is based not on an exercise of discretion, but instead on a belief that any alternative choice was foreclosed by law, the APA’s ‘committed to agency discretion’ bar to reviewability [] does not apply.”); *NAACP* Pet. App. 42a–43a (rescission solely

supported by “a legal determination which, when made in the context of a general enforcement policy, is not subject to *Chaney*’s presumption of unreviewability”); *Batalla Vidal* Pet. App. 30a–31a (“Defendants stated that they were required to rescind the DACA program because it was unlawful, which suggests both that Defendants did not believe that they were exercising discretion when rescinding the program and that their reasons for doing so are within the competence of this court to review.”). Because the only reasons for rescission in the September Memorandum were Acting Secretary Duke’s and Attorney General Sessions’s conclusions that DACA was unlawful, that decision was reviewable under the APA. *Regents* Pet. Supp. App. 34a–42a; *NAACP* Pet. App. 41a–43a; *Batalla Vidal* Pet. App. 28a–31a.

Against this backdrop,³⁴ the irrelevance of the Nielsen Memorandum is clear. Insofar as the memorandum offered additional explanation regarding the program’s purported unlawfulness, *Regents* Pet. App. 122a–123a (discussing Attorney General’s conclusion that DACA “was contrary to law” and other “serious doubts about its legality”), it did not change the fact that the Acting Secretary’s decision to re-

³⁴ As discussed at length by Respondents, the conclusion reached by the courts below is consistent with the Court’s precedent, including its decision in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), and most closely adheres to the concerns animating the *Chaney* presumption. *Regents* Resp. Br. 18–25; *DACA Recipient* Resp. Br. 21–24 ; *State of Cal.* Resp. Br. 15–21; *State of N.Y.* Resp. Br. 23–29; *D.C.* Resp. Br. 26–30.

scind DACA was based on the belief that the program was unlawful. Such a decision is reviewable, whether supported only by the September Memorandum’s bare analysis or Secretary Nielsen’s additional explanation.

To the extent the Nielsen Memorandum offered rationales separate and distinct from the sole reason provided in the September Memorandum, *id.* at 123a–125a (discussing “sound reasons of enforcement policy to rescind the DACA policy”), those after-the-fact explanations cannot insulate the Acting Secretary’s decision from review.³⁵ Although the Court has permitted limited remand to an agency for further explanation of previously articulated reasoning, *see Overton Park*, 401 U.S. at 420, such a remand is “for a fuller explanation of the agency’s reasoning *at the time of the agency action*,” *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (emphasis added). New rationales advanced

³⁵ The Ninth Circuit refused to consider the Nielsen Memorandum because it was not part of the administrative record, but also noted that it constituted an impermissible “post-hoc rationalization” of the decision to rescind DACA. *Regents* Pet. Supp. App. 57a–58a, n.24. The District Court for the District of Columbia considered the Nielsen Memorandum, but concluded that certain rationales were new post-hoc rationalizations whereas others built upon Acting Secretary Duke’s reviewable legal conclusion. *NAACP* Pet. App. 88a–95a. However you slice it, the Nielsen Memorandum does not provide a basis for altering the lower courts’ reviewability determinations: any further legal analysis does not change the fact that DHS’s legal conclusion is reviewable, and any new rationales should be disregarded.

after the fact must be disregarded. *Cf. Chenery*, 318 U.S. at 88 (APA review is based solely on “the grounds upon which the [agency] itself based its action”).

This rule makes perfect sense. The APA is meant to promote accountability of federal agencies to the public. *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (“The APA sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.”); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 348–49 (1984) (discussing presumption in favor of judicial review of agency action). If agencies were permitted to go back to the drawing board and manufacture new rationales for challenged decisions in order to short-circuit judicial review, the APA would be rendered impotent. But that is exactly what Petitioners seek to do here.

Petitioners argue that the Court need only disregard post-hoc explanations offered by *counsel*. Pet. Br. 29 (“[C]ourts may not accept *appellee counsel’s* post hoc rationalizations for agency action.”) (quotation omitted). This rejoinder misses the mark. The crucial issue is not *who* provides the subsequent reasoning, but *what* that after-the-fact reasoning is (i.e., whether it provides further explanation of prior stated reasons or supplies new rationales altogether).

The post-hoc rationalization rule aims to ensure that an agency action is upheld only on the basis of the grounds *that were provided at the time the challenged action was taken*. See *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (agency action must “stand or fall” based on “determinative reason” identified in the

agency’s “contemporaneous explanation”) (citing *Chenery*, 318 U.S. at 80); *Food Mktg. Inst. v. ICC*, 587 F.2d 1285, 1290 (D.C. Cir. 1978) (“*Post-hoc* rationalizations by the agency on remand are no more permissible than are such arguments when raised by appellate counsel during judicial review.”); *cf. Pension Benefit Guar. Corp.*, 496 U.S. at 654 (remand was limited to explanation of “agency’s reasoning at the time of the agency action”).

An agency may of course take *new* action in response to a legal challenge. For example, DHS could have rescinded the September Memorandum and issued a new decision. Secretary Nielsen could have then contemporaneously “explain[ed] *her* reasons” for rescinding the DACA program. Pet Br. 29. Petitioners expressly refused to do so.

Notwithstanding their assertions that the Nielsen Memorandum “is agency action, not a post hoc rationalization of it,” Pet. Br. 29 (quotation omitted), the memorandum plainly shows that Petitioners *expressly* refused to take new action. *Regents* Pet. App. 121a (“I decline to disturb the Duke memorandum’s rescission of the DACA policy.”). Whatever Petitioners’ reasons were for that decision, it came with consequences, one of which was that Secretary Nielsen could not offer *new rationales* for rescission not included in the September Memorandum. Because the Nielsen Memorandum offered either further reasoning of DHS’s reviewable legal conclusion or new explanations that must be disregarded, it provides no basis to alter the lower courts’ conclusions that Petitioners’ rescission of DACA is reviewable under the APA.

2. *The Nielsen Memorandum Does Not Save Petitioners' Decision to Rescind DACA From Being Arbitrary and Capricious.*

Petitioners also assert that the Nielsen Memorandum establishes that the rescission of DACA was lawful. Pet. Br. 37–43. But as with the reviewability analysis, the memorandum cannot shore up Petitioners' inadequate decision-making.

Giving “adequate reasons” for an agency’s decision is “[o]ne of the basic procedural requirements of administrative rulemaking.” *Encino Motorcars*, 136 S. Ct. at 2125. In an APA challenge, “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *State Farm*, 463 U.S. at 50. As with reviewability, post-hoc rationalizations that do not build on the agency’s contemporaneous explanation but instead provide new reasons for the decision cannot be considered in an arbitrary-and-capricious review of the agency action. *See Pension Benefit Guar. Corp.*, 496 U.S. at 654; *Camp*, 411 U.S. at 143; *Overton Park*, 401 U.S. at 419.

Either the statements set forth in the Nielsen Memorandum are enlarging on Petitioners’ *old* legal rationale about DACA’s legality or they are *new* policy reasons for rescission. But either way, Petitioners’ decision is arbitrary and capricious.

Certain reasons provided in the Nielsen Memorandum are in the former category: they simply enlarge upon the erroneous conclusion in the September Memorandum that DACA was unlawful. Secretary Nielsen’s reaffirmation of Acting Secretary Duke’s and Attorney General Sessions’s conclusions,

Regents Pet. App. 122a–123a (noting the Attorney General’s conclusion that “the DACA policy was contrary to law” and that she was “bound by” that determination), and discussion of reasons “to avoid discretionary policies that are legally questionable,” *id.* at 123a, mirror the legal rationale provided in the September Memorandum, *id.* at 112a–116a, and should be rejected for the same reasons. *NAACP* Pet. App. 103a–109a (district court considering above-referenced policy rationales from Nielsen Memorandum and finding no basis to alter conclusion that rescission was arbitrary and capricious).

That legal conclusion was erroneous when Petitioners issued the September Memorandum, *see Regents* Resp. Br. 44–55; *DACA Recipient* Resp. Br. 37–48; *State of Cal.* Resp. Br. 25–41; *State of N.Y.* Resp. Br. 43–51; *D.C.* Resp. Br. 34–49, and remains so even with Secretary Nielsen’s additional analysis.³⁶ Because the decision to rescind DACA was

³⁶ Petitioners contend that DHS correctly concluded that DACA was unlawful in part because the DACA program is not an “interstitial matter” of immigration enforcement over which the agency retains authority. Pet. Br. 44 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Instead, they assert it is an “agency decision[] of vast ‘economic and political significance,’” pointing to work authorization, which Petitioners claim “aid [DACA recipients] in their continuing unlawful presence.” Pet. Br. 44–45 (citing *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Petitioners’ argument is meritless, *see, e.g., Regents* Resp. Br. 49–53; *DACA Recipient* Resp. Br. 37–40; *State of Cal.* Resp. Br. 27–34, and relies on an incorrect premise. The availability of work authorization is not grounded in the DACA program. Instead, it flows from the Secretary of Homeland Security’s express authority to

based on a faulty legal conclusion, it must be set aside. *See Chenery*, 318 U.S. at 94 (“[I]f the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.”).

The other reasons stated in the Nielsen Memorandum are new and were never previously considered by Acting Secretary Duke. Such after-the-fact justifications are irrelevant to the Court’s arbitrary-and-capricious analysis. *See Camp*, 411 U.S. at 143; *Food Mktg. Inst.*, 587 F.2d at 1290.

Secretary Nielsen discussed various “policy reasons of enforcement policy” supporting the rescission, including her belief that DHS should not adopt broad policies of non-enforcement when they were not authorized by Congress, should only exercise its discretion on a case-by-case basis, and should project a clear message about “enforcement of the immigration laws.” *Regents* Pet. App. 123a–124a. But the five-page September Memorandum did not discuss these reasons for rescission.³⁷ *Id.* at 111a–119a.

“authorize” various immigrants for employment who have shown “economic necessity to work.” 8 U.S.C. § 1324a(h)(3); 8 C.F.R. § 274.12(c)(14). The Secretary has for decades granted work authorization to certain qualified immigrants and exercised her discretion to do so for DACA recipients when the program was instituted in 2012.

³⁷ Petitioners note that the District Court for the District of Columbia concluded that certain of these policy reasons were not “post-hoc rationalizations.” Pet. Br. 29. Even if the policy considerations are viewed as an elaboration of the September

The Nielsen Memorandum’s cursory discussion of recipients’ reliance interests, *id.* at 125a, likewise had no root in the September Memorandum, *id.* at 111a–119a, and should be rejected for this reason alone. *See Encino Motorcars*, 136 S. Ct. at 2126.

* * *

Petitioners lean heavily on the Nielsen Memorandum to support their assertions that the decision to rescind the DACA program is not subject to judicial review and is substantively valid. *See* Pet. Br. 26–32, 37–43, 50–52. But the three-page Nielsen Memorandum cannot shore up the faulty decision-making in the September Memorandum because it merely restates erroneous legal conclusions or offers new, post-hoc policy rationalizations that cannot be considered. Under this Court’s precedent, such explanations provide no basis to disturb the lower courts’ reviewability and merits determinations.

CONCLUSION

For the foregoing reasons, the September Memorandum undermines *amici*’s interests in fostering safe, prosperous communities where all individuals—including the hundreds of thousands of residents receiving deferred action under DACA—are given an opportunity to participate and grow. The courts below correctly decided that Petitioners’ deci-

Memorandum, they are based on Acting Secretary Duke’s original legal conclusion, and as explained in the preceding paragraph, do not change the fact that Petitioners’ decision was arbitrary and capricious.

sion to rescind DACA is reviewable and unlawful. Accordingly, the Court should affirm the judgments of the Ninth Circuit and the District Court for the District of Columbia, and the orders of the Eastern District of New York.

Respectfully submitted,

MICHAEL N. FEUER

City Attorney

JAMES P. CLARK

VALERIE L. FLORES

DANIELLE GOLDSTEIN

MICHAEL DUNDAS

Counsel of Record

200 N. Main Street

Los Angeles, CA 90012

(213) 978-8100

mike.dundas@lacity.org

MARGARET L. CARTER

DANIEL R. SUVOR

DIMITRI D. PORTNOI

DANIEL J. TULLY

O'MELVENY & MYERS LLP

400 South Hope Street

18th Floor

Los Angeles, CA 90071

(213) 430-6000

*Counsel for Amicus Curiae
City of Los Angeles, Calif.*

*Counsel for Amicus Curiae
County of Los Angeles, Calif.*

October 4, 2019

APPENDIX A

LIST OF *AMICI CURIAE*

MICHAEL N. FEUER <i>City Attorney</i>	MARGARET L. CARTER
JAMES P. CLARK	DANIEL R. SUVOR
VALERIE L. FLORES	DIMITRI D. PORTNOI
DANIELLE GOLDSTEIN	DANIEL J. TULLY
MICHAEL DUNDAS	O'MELVENY & MYERS LLP
200 N. Main Street	400 South Hope Street
Los Angeles, CA 90012	18th Floor
	Los Angeles, CA 90071
<i>Counsel for Amicus Curiae</i>	<i>Counsel for Amicus Curiae</i>
<i>City of Los Angeles, California</i>	<i>County of Los Angeles, California</i>
EVE V. BELFANCE <i>Director of Law</i>	DONNA R. ZIEGLER <i>County Counsel</i>
161 S. High Street, Suite 202	1221 Oak Street, Suite 450
Akron, OH 44308	Oakland, CA 94612
<i>Counsel for Amicus Curiae</i>	<i>Counsel for Amicus Curiae</i>
<i>City of Akron, Ohio</i>	<i>County of Alameda, California</i>
CRAIG LABADIE <i>City Attorney</i>	WILLIAM G. KELLY, JR. <i>Corporation Counsel</i>
1000 San Pablo Avenue	24 Eagle Street
Albany, CA 94706	Albany, NY 12207
<i>Counsel for Amicus Curiae</i>	<i>Counsel for Amicus Curiae</i>
<i>City of Albany, California</i>	<i>City of Albany, New York</i>

<p>ESTEBAN A. AGUILAR, JR. <i>City Attorney</i> P.O. Box 2248 Albuquerque, NM 87103</p>	<p>JOANNA C. ANDERSON <i>City Attorney</i> 301 King Street, Suite 1300 Alexandria, VA 22314</p>
--	--

<p><i>Counsel for Amicus Curiae</i> <i>City of Albuquerque, New Mexico</i></p>	<p><i>Counsel for Amicus Curiae</i> <i>City of Alexandria, Virginia</i></p>
---	--

<p>GREGORY J. SWAIN <i>County Attorney</i> 2660 Riva Road, 4th Floor Annapolis, MD 21401</p>	<p>STEPHEN A. MACISAAC <i>County Attorney</i> 2100 Clarendon Boulevard, Suite 403 Arlington, VA 22201</p>
--	---

<p><i>Counsel for Amicus Curiae</i> <i>Anne Arundel County, Maryland</i></p>	<p><i>Counsel for Amicus Curiae</i> <i>County of Arlington, Virginia</i></p>
---	---

<p>SHANNON CHAFFIN <i>City Attorney</i> Aleshire & Wynder, LLP 2440 Tulare Street, Suite 410 Fresno, CA 93721</p>	<p>NINA R. HICKSON <i>City Attorney</i> 55 Trinity Avenue, Suite 5000 Atlanta, GA 30303</p> <p><i>Counsel for Amicus Curiae</i> <i>City of Atlanta, Georgia</i></p>
--	--

<p><i>Counsel for Amicus Curiae</i> <i>City of Arvin, California</i></p>	
---	--

ANNE L. MORGAN
City Attorney
PO Box 1546
Austin, TX 78767

Counsel for Amicus Curiae
City of Austin, Texas

FARIMAH F. BROWN
City Attorney
2180 Milvia Street,
4th Floor
Berkeley, CA 94704

Counsel for Amicus Curiae
City of Berkeley, California

EUGENE O'FLAHERTY
Corporation Counsel
One City Hall Square,
Room 615
Boston, MA 02201

Counsel for Amicus Curiae
City of Boston, Massachusetts

ANDRE M. DAVIS
City Solicitor
100 N. Holliday Street,
Suite 101
Baltimore, MD 21146

Counsel for Amicus Curiae
City of Baltimore, Maryland

JAYME B. SULLIVAN
City Attorney
150 N. Capitol Boulevard
Boise, ID 83701

Counsel for Amicus Curiae
City of Boise, Idaho

THOMAS A. CARR
City Attorney
1777 Broadway
P.O. Box 791
Boulder, CO 80302

Counsel for Amicus Curiae
City of Boulder, Colorado

BEN PEARLMAN
County Attorney
 P.O. Box 471
 Boulder, CO 80306

*Counsel for Amicus Curiae
 County of Boulder, Colo-
 rado*

NANCY E. GLOWA
City Solicitor
 795 Massachusetts
 Avenue
 Cambridge, MA 02139

*Counsel for Amicus Curiae
 City of Cambridge, Massa-
 chusetts*

RALPH KARPINOS
Town Attorney
 405 Martin Luther King
 Jr. Boulevard
 Chapel Hill, NC 27514

*Counsel for Amicus Curiae
 Town of Chapel Hill, North
 Carolina*

EILEEN BLACKWOOD
City Attorney
 City Hall
 149 Church Street
 Burlington, VT 05401

*Counsel for Amicus Curiae
 City of Burlington, Vermont*

JUAN A. GONZALEZ
Chief Counsel
 1100 East Monroe Street
 Brownsville, Texas 78520

*Counsel for Amicus Curiae
 County of Cameron, Texas*

CHERYL WATSON FISHER
City Solicitor
 500 Broadway,
 Room 307
 Chelsea, MA 02150

*Counsel for Amicus Curiae
 City of Chelsea, Massachu-
 setts*

5a

MARK A. FLESSNER
Corporation Counsel
30 N. LaSalle Street,
Suite 800
Chicago, IL 60602

Counsel for Amicus Curiae
City of Chicago, Illinois

WILLIAM R. HANNA
Director of Law
40 Severance Circle
Cleveland Heights, OH
20740

Counsel for Amicus Curiae
City of Cleveland Heights,
Ohio

ZACH KLEIN
City Attorney
77 N. Front Street,
4th Floor
Columbus, OH 43214

Counsel for Amicus Curiae
City of Columbus, Ohio

STEPHEN G. QUINN
City Attorney
1055 Rowland Street
Clarkston, GA 30021

Counsel for Amicus Curiae
City of Clarkston, Georgia

SUELLEN FERGUSON
City Attorney
4500 Knox Road
College Park, MD 20740

Counsel for Amicus Curiae
City of College Park, Mary-
land

SHARON L. ANDERSON
County Counsel
651 Pine Street,
9th Floor
Martinez, CA 94553

Counsel for Amicus Curiae
County of Contra Costa, Cali-
fornia

6a

KIMBERLY M. FOXX
States Attorney
69 W. Washington,
32nd Floor
Chicago, IL 60602

Counsel for Amicus Curiae
Cook County, Illinois

HEATHER M. MINNER
City Attorney
10300 Torre Avenue
Cupertino, CA 95014

Counsel for Amicus Curiae
City of Cupertino, California

JOHN BUTRUS
Federal Practices
Division Chief
133 N. Riverfront
Boulevard, LB 19
Dallas, TX 75207

Counsel for Amicus Curiae
County of Dallas, Texas

CAROL A. SCHWAB
City Attorney
9770 Culver Boulevard
Culver City, CA 90232

Counsel for Amicus Curiae
City of Culver City, California

CHRISTOPHER J. CASO
Interim City Attorney
1500 Marilla Street,
Room 7DN
Dallas, Texas 75201

Counsel for Amicus Curiae
City of Dallas, Texas

INDER KHALSA
City Attorney
Richards Watson &
Gershon
44 Montgomery Street,
Suite 3800
San Francisco, CA 94104

Counsel for Amicus Curiae
City of Davis, California

7a

BARBARA J. DOSECK
City Attorney
101 West Third Street
P.O. Box 22
Dayton, OH 45401

Counsel for Amicus Curiae
City of Dayton, Ohio

LAWRENCE GARCIA
Corporation Counsel
2 Woodward Avenue
Detroit, MI 48226

Counsel for Amicus Curiae
City of Detroit, Michigan

ANGELA WHEELER
City Attorney
1101 S. Saginaw Street
Flint, MI 48502

Counsel for Amicus Curiae
City of Flint, Michigan

KRISTIN M. BRONSON
City Attorney
1437 Bannock St.,
Room 353
Denver, CO 80202

Counsel for Amicus Curiae
City and County of Denver,
Colorado

KIMBERLY M. REHBERG
City Attorney
101 City Hall Plaza
Durham, NC 27701

Counsel for Amicus Curiae
City of Durham, North Caro-
lina

DOUGLAS T. SLOAN
City Attorney
2600 Fresno Street
Fresno, CA 93721

Counsel for Amicus Curiae
City of Fresno, California

N. LYNN BOARD	Howard G. Rifkin
<i>City Attorney</i>	<i>Corporation Counsel</i>
31 S. Summit Avenue	550 Main Street, Room 210
Gaithersburg, MD 20877	Hartford, CT 06103

<i>Counsel for Amicus Curiae</i>	<i>Counsel for Amicus Curiae</i>
<i>City of Gaithersburg, Maryland</i>	<i>City of Hartford, Connecticut</i>

MICHAEL O. FREEMAN	KATHERINE B. RILEY
<i>County Attorney</i>	<i>Board Attorney</i>
C-2000 Government Center	Barrett Law Group, P.A.
300 S. Sixth Street	P.O. Box 927
Minneapolis, MN 55487	Lexington, MS 39095
<i>Counsel for Amicus Curiae</i>	<i>Counsel for Amicus Curiae</i>
<i>County of Hennepin, Minnesota</i>	<i>County of Holmes, Mississippi</i>

CRYSTAL BARNES	PAUL S. AOKI
<i>Acting City Solicitor</i>	<i>Acting Corporation</i>
20 Korean Veterans Plaza, # 204	<i>Counsel</i>
Holyoke, MA 01040	530 S. King St., Room 110
	Honolulu, HI 96813

<i>Counsel for Amicus Curiae</i>	<i>Counsel for Amicus Curiae</i>
<i>City of Holyoke, Massachusetts</i>	<i>City and County of Honolulu, Hawaii</i>

RONALD C. LEWIS
City Attorney
900 Bagby, 4th Floor
Houston, Texas 77002

Counsel for Amicus Curiae
City of Houston, Texas

E.I. CORNBROOKS, IV
City Attorney
Karpinski, Colaresi &
Karp, P.A.
120 East Baltimore Street
Baltimore, MD 21202

Counsel for Amicus Curiae
City of Hyattsville, Maryland

ELEANOR M. DILKES
City Attorney
410 East Washington
Street
Iowa City, IA 52240

Counsel for Amicus Curiae
City of Iowa City, Iowa

CLYDE J. ROBINSON
City Attorney
241 West South Street
Kalamazoo, MI 49007

Counsel for Amicus Curiae
City of Kalamazoo, Michigan

DANIEL T. SATTERBERG
Prosecuting Attorney
516 Fourth Avenue,
W400
Seattle, WA 98104

Counsel for Amicus Curiae
King County, Washington

CHARLES W. SWANSON
City Law Director
400 Main Street, Room 699
Knoxville, TN 37901

Counsel for Amicus Curiae
City of Knoxville, Tennessee

10a

JIM SMIERTKA <i>City Attorney</i> 124 W. Michigan Avenue Lansing, MI 48933 <i>Counsel for Amicus Curiae</i> <i>City of Lansing, Michigan</i>	JENNIFER VEGA-BROWN <i>City Attorney</i> 700 North Main Las Cruces, NM 88001 <i>Counsel for Amicus Curiae</i> <i>City of Las Cruces, New Mexico</i>
RAQUEL RUANO <i>City Attorney</i> City Hall – Room 306 200 Common Street Lawrence, MA 01840 <i>Counsel for Amicus Curiae</i> <i>City of Lawrence, Massa-</i> <i>chusetts</i>	CHARLES PARKIN <i>City Attorney</i> 411 W. Ocean Boulevard, 9th Floor Long Beach, CA 90802 <i>Counsel for Amicus Curiae</i> <i>City of Long Beach, California</i>
MICHAEL P. MAY <i>City Attorney</i> 210 Martin Luther King Jr. Boulevard, Room 401 Madison, WI 53703 <i>Counsel for Amicus Curiae</i> <i>City of Madison, Wisconsin</i>	BRIAN E. WASHINGTON <i>County Counsel</i> 3501 Civic Center Drive, Suite 275 San Rafael, CA 94903 <i>Counsel for Amicus Curiae</i> <i>County of Marin, California</i>

RAUL J. AGUILA <i>City Attorney</i> 1700 Convention Center Drive Miami Beach, FL 33139	SUSAN SEGAL <i>City Attorney</i> 350 S. Fifth Street, Room #210 Minneapolis, MN 55415
<i>Counsel for Amicus Curiae</i> <i>City of Miami Beach, Florida</i>	<i>Counsel for Amicus Curiae</i> <i>City of Minneapolis, Minnesota</i>
LESLIE J. GIRARD <i>Acting County Counsel</i> 168 West Alisal Street, 3rd Floor Salinas, CA 93901	MARC P. HANSEN <i>County Attorney</i> 101 Monroe Street Rockville, MD 20850
<i>Counsel for Amicus Curiae</i> <i>County of Monterey, California</i>	<i>Counsel for Amicus Curiae</i> <i>Montgomery County, Maryland</i>
DONALD A. LARKIN <i>City Attorney</i> 17575 Peak Avenue Morgan Hill, CA 95307	KRISHAN CHOPRA <i>City Attorney</i> 500 Castro Street Mountain View, CA 94041
<i>Counsel for Amicus Curiae</i> <i>City of Morgan Hill, California</i>	<i>Counsel for Amicus Curiae</i> <i>City of Mountain View, California</i>

12a

JOHN ROSE, JR. <i>Corporation Counsel</i> 165 Church Street, # 441 New Haven, CT 06510	KATHLEEN E. GILL <i>Corporation Counsel</i> 515 North Avenue New Rochelle, NY 10801
---	--

<i>Counsel for Amicus Curiae</i> <i>City of New Haven, Connecticut</i>	<i>Counsel for Amicus Curiae</i> <i>City of New Rochelle, New York</i>
---	---

GEORGIA M. PESTANA <i>Acting Corporation Counsel</i> 100 Church Street New York, NY 10007	JEFF P. H. CAZEAU <i>City Attorney</i> 776 NE 125 Street North Miami, FL 33161
--	---

<i>Counsel for Amicus Curiae</i> <i>City of New York, New York</i>	<i>Counsel for Amicus Curiae</i> <i>City of North Miami, Florida</i>
---	---

BARBARA J. PARKER <i>City Attorney</i> One Frank H. Ogawa Plaza, 6th Floor Oakland, CA 94612	WM. MATTHEW DITZHAZY <i>City Attorney</i> 38300 Sierra Highway Palmdale, CA 93550
--	--

<i>Counsel for Amicus Curiae</i> <i>City of Oakland, California</i>	<i>Counsel for Amicus Curiae</i> <i>City of Palmdale, California</i>
--	---

JEFFREY S. BALLINGER <i>City Attorney</i> 3200 E. Tahquitz Canyon Way Palm Springs, CA 92262 <i>Counsel for Amicus Curiae City of Palm Springs, Cali- fornia</i>	SAMUEL S. GOREN <i>City Attorney</i> Goren Cherof Doody & Ezrol, P.A. 3099 East Commercial Boulevard, Suite 200 Fort Lauderdale, FL 33308 <i>Counsel for Amicus Curiae City of Pembroke Pines, Flor- ida</i>
YVONNE HILTON <i>City Solicitor</i> 313 City-County Building 414 Grant Street Pittsburgh, PA 15219 <i>Counsel for Amicus Curiae City of Pittsburgh, Pennsyl- vania</i>	MARCEL S. PRATT <i>City Solicitor</i> 1515 Arch Street, 17th Floor Philadelphia, PA 19102 <i>Counsel for Amicus Curiae City of Philadelphia, Pennsyl- vania</i>
CRIS MEYER <i>City Attorney</i> 200 W. Washington Street, 13th Floor Phoenix, AZ 85003 <i>Counsel for Amicus Curiae City of Phoenix, Arizona</i>	DAVID MINCHELLO <i>Corporation Counsel</i> 515 Watchung Avenue Plainfield, NJ 07061 <i>Counsel for Amicus Curiae City of Plainfield, New Jersey</i>

14a

TRACY P. REEVE
City Attorney
1221 SW Fourth Avenue,
Suite 430
Portland, OR 97240

Counsel for Amicus Curiae
City of Portland, Oregon

JEFFREY DANA
City Solicitor
444 Westminister Street,
Suite 220
Providence, RI 02903

Counsel for Amicus Curiae
City of Providence, Rhode
Island

JASON LOOS
City Attorney
201 4th Street SE
Rochester, MN 55904

Counsel for Amicus Curiae
City of Rochester, Minne-
sota

TRISHA WATERBURY CECIL
Municipal Attorney
Mason, Griffin & Pierson,
P.C.

101 Poor Farm Road
Princeton, NJ 08540

Counsel for Amicus Curiae
Municipality of Princeton,
New Jersey

BRUCE GOODMILLER
City Attorney
450 Civic Center Plaza
Richmond, CA 94804

Counsel for Amicus Curiae
City of Richmond, California

TIMOTHY R. CURTIN
Corporation Counsel
30 Church Street,
Room 400A
Rochester, NY 14614

Counsel for Amicus Curiae
City of Rochester, New York

15a

SUSANA ALCALA WOOD <i>City Attorney</i> 915 I Street, Fourth Floor Sacramento, CA 95814 <i>Counsel for Amicus Curiae</i> <i>City of Sacramento, California</i>	LYNDSEY M. OLSON <i>City Attorney</i> 15 West Kellogg Boulevard, Suite 400 Saint Paul, MN 55102 <i>Counsel for Amicus Curiae</i> <i>City of Saint Paul, Minnesota</i>
CHRISTOPHER A. CALLIHAN <i>City Attorney</i> 200 Lincoln Avenue Salinas, CA 93901 <i>Counsel for Amicus Curiae</i> <i>City of Salinas, California</i>	ANDY SEGOVIA <i>City Attorney</i> 100 Military Plaza 3rd Floor City Hall San Antonio, TX 78201 <i>Counsel for Amicus Curiae</i> <i>City of San Antonio, Texas</i>
MARA W. ELLIOTT <i>City Attorney</i> 1200 Third Avenue, Suite 1620 San Diego, CA 92101 <i>Counsel for Amicus Curiae</i> <i>City of San Diego, California</i>	DENNIS J. HERRERA <i>City Attorney</i> City Hall Room 234 One Dr. Carlton B. Goodlett Place San Francisco, CA 94102 <i>Counsel for Amicus Curiae</i> <i>City and County of San Francisco, California</i>

JOHN C. BEIERS
County Counsel
 Hall of Justice and
 Records
 400 County Center,
 6th Floor
 Redwood City, CA 94063

Counsel for Amicus Curiae
County of San Mateo, Cali-
fornia

ERIN K. MCSHERRY
City Attorney
 200 Lincoln Avenue
 Santa Fe, NM 98501

Counsel for Amicus Curiae
City of Santa Fe, New Mex-
ico

PETER S. HOLMES
City Attorney
 701 Fifth Avenue,
 Suite 2050
 Seattle, WA 98104

Counsel for Amicus Curiae
City of Seattle, Washington

DANA MCRAE
County Counsel
 701 Ocean Street,
 Room 505
 Santa Cruz, CA 95060

Counsel for Amicus Curiae
County of Santa Cruz, Cali-
fornia

LANE DILG
City Attorney
 1685 Main Street
 Santa Monica, CA 90401

Counsel for Amicus Curiae
City of Santa Monica, Califor-
nia

FRANCIS X. WRIGHT, JR.
City Solicitor
 93 Highland Avenue
 Somerville, MA 02143

Counsel for Amicus Curiae
City of Somerville, Massachu-
setts

STEPHANIE STEELE
Corporation Counsel
 227 W. Jefferson Boulevard, Suite 1200S
 South Bend, IN 46601

Counsel for Amicus Curiae
City of South Bend, Indiana

JOHN M. LUEBBERKE
City Attorney
 425 N. El Dorado Street
 Stockton, CA 95202

Counsel for Amicus Curiae
City of Stockton, California

DAVID A. ESCAMILLA
County Attorney
 P.O. Box 1748
 Austin, TX 78767

Counsel for Amicus Curiae
Travis County, Texas

MIKE RANKIN
City Attorney
 P.O. Box 27210
 Tucson, AZ 85726

Counsel for Amicus Curiae
City of Tucson, Arizona

KATHRYN EMMETT
Corporation Counsel
 888 Washington Boulevard
 Stamford, CT 06904

Counsel for Amicus Curiae
City of Stamford, Connecticut

WILLIAM FOSBRE
City Attorney
 747 Market Street,
 Room 1120
 Tacoma, WA 98402

Counsel for Amicus Curiae
City of Tacoma, Washington

RACHEL B. TURPIN
City Attorney
 6200 Southcenter Boulevard
 Tukwila, WA 98188

Counsel for Amicus Curiae
City of Tukwila, Washington

ANGELO AUTERI
Corporation Counsel
 1100 Valley Brook Avenue
 Lyndhurst, NJ 07071

Counsel for Amicus Curiae
City of Union City, New Jersey

MICHAEL JENKINS
City Attorney
Best Best & Krieger LLP
1230 Rosecrans Avenue,
Suite 110
Manhattan Beach, CA
90266

Counsel for Amicus Curiae
City of West Hollywood,
California

CHUCK THOMPSON
General Counsel
International Municipal
Lawyers Association
51 Monroe Street,
Suite 404
Rockville, MD 20850

Counsel for Amicus Curiae
International Municipal
Lawyers Association

National League of Cities
660 North Capitol Street
NW
Washington, DC 20001

JOHN DANIEL REAVES
General Counsel
U.S. Conference of Mayors
1200 New Hampshire Ave-
nue NW, Suite 800
Washington, DC 20036

Counsel for Amicus Curiae
U.S. Conference of Mayors

International City/County
Management Association
770 North Capitol Street
NE,
Suite 500
Washington, DC 20002