

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

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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 AMERICAN COUNCIL ON EDUCATION AND  
43 OTHER HIGHER EDUCATION ASSOCIATIONS AS  
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

NEAL K. KATYAL

*Counsel of Record*

JESSICA L. ELLSWORTH

STEPHANIE J. GOLD

MITCHELL P. REICH

HOGAN LOVELLS US LLP

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-5600

neal.katyal@hoganlovells.com

*Counsel for Amici Curiae American Council on Educa-  
tion and 43 Other Higher Education Associations*

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## STATEMENT OF INTEREST

*Amici* are 44 associations of colleges, universities, educators, trustees, and other representatives of several thousand institutions of higher education in the United States. *Amici* represent public, independent, large, small, urban, rural, denominational, non-denominational, graduate, and undergraduate institutions and faculty. Each *amicus* is deeply concerned about the harms that the rescission of the Deferred Action for Childhood Arrivals (“DACA”) policy will inflict on America’s institutions of higher education, their students, and the global standing and reputation of the country’s colleges and universities.

*Amicus* American Council on Education (“ACE”) is the major coordinating body for American higher education. Its more than 1,700 members reflect the extraordinary breadth and contributions of four-year, two-year, public and private colleges and universities. ACE members educate two out of every three students in accredited, degree-granting U.S. institutions. ACE participates as *amicus curiae* on occasions such as this where a case presents issues of substantial importance to higher education in the United States.

The Addendum contains information on the other *amici* on this brief.<sup>1</sup>

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<sup>1</sup> No party or counsel for a party authored this brief in whole or in part. No party, counsel for party, or person other than *amici curiae* or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

America's colleges and universities are among the finest in the world. They help preserve our country's democratic values; ensure its economic strength; and contribute to our Nation's influence and global standing. One of the central reasons for the excellence of our postsecondary schools is their ability to attract and enroll talented, motivated, and curious students, regardless of their circumstances, whether born in this country or born abroad.

Yet, prior to DACA, colleges and universities were effectively unable to enroll hundreds of thousands of the most deserving and meritorious students in the United States. The "Dreamers"—undocumented immigrants brought here as children, through no fault of their own, who attended high school or served in the military and have amassed no serious criminal record—faced a battery of severe impediments to attending or completing college or graduate school. Unable to receive federal loans, work legally, or qualify for most state tuition benefits, Dreamers were foreclosed from nearly every avenue for financing their education. Without driver's licenses or work permits, Dreamers could not easily commute to school or complete many courses of study. Forced to live in the shadows, they often had to bear the serious emotional strains and anxiety of their undocumented status alone.

DACA has not removed all of these barriers, but it has made it newly possible for countless Dreamers to get a postsecondary education and unlock the potential such an education affords. Dreamers can now qualify for many work-study programs, take on high-

quality jobs, receive a range of state tuition benefits, and otherwise find the means to pay for tuition. They can drive to work, school, and internships. When they graduate, they can qualify for occupational licenses and work legally in high-quality sectors. In short, while policymakers and politicians remain unwilling or unable to address their predicament legislatively, DACA has offered Dreamers cautious hope that they can live the American Dream, and become part of this country's ever-evolving story of innovators, inventors, entrepreneurs, and leaders.

The statistics bear out the profound difference DACA has made for its recipients, for U.S. colleges and universities, and for the country as a whole. College enrollment rates have increased dramatically for DACA-eligible individuals, and completion rates have skyrocketed. *Amici* have seen up-close the tremendous contributions these individuals have made to our campuses as they prepare for and live lives of impact across America.

Dreamers are Rhodes Scholars, scientists, and campus leaders; they are sources of inspiration and insight for their peers; and they are unparalleled ambassadors for our schools abroad. In the words of one college president: "Dreamers set the bar very high academically, inspiring other students to reach higher as well." Dreamers are also highly productive members of the Nation's economy, contributing over a quarter of a trillion dollars in economic growth, thanks in large part to their ability to earn an advanced education.

The rescission of DACA would reverse all of these gains. In an instant, it would send a message of

exclusion that would irreparably harm our institutions' ability to recruit and retain foreign-born students. It would tear at the fabric of our campus communities. Most importantly, it would pull the rug out from under the Dreamers themselves, who have upended their lives—taking out loans, earning degrees, and taking the risk of revealing their undocumented status—in reliance on DACA. As one DACA recipient stated, rescission would mean that “all the hard work I have put into my goals would be for nothing, and I would be back to the bottom where I started.”

There are many problems with the government's legal defense of this harsh and destructive policy. But the higher education community is particularly troubled by the government's threshold claim that its decision is wholly exempt from judicial review. Sanctioning that remarkable argument would threaten to immunize from legal scrutiny numerous other major decisions disguised as “enforcement policies” that impact our higher education system.

The government's nonreviewability argument is untenable. The narrow “tradition of nonreviewability” for civil non-enforcement actions does not extend to the rescission of DACA, which (1) is not an individual non-enforcement action (or a non-enforcement action at all); (2) rests on a legal conclusion amenable to judicial review; and (3) will result in the revocation of tangible benefits, such as work authorization. Indeed, it is logically incoherent for the government to claim that *DACA itself was reviewable*—and to endorse the Fifth Circuit's holding to that effect—but that DACA's *rescission* is somehow exempt from judicial scrutiny. The government's

attempt to cram its rescission action into the narrow limitations on judicial review embodied in 8 U.S.C. § 1252(b)(9) and (g) is equally unavailing: Its argument is flatly irreconcilable with those provisions' text and ignores the limited construction this Court has given both statutes.

The Court should not write the Administration a blank check to make this monumental policy choice without even a patina of judicial review. DACA has been an unmitigated good for this country, its higher education system, and the young persons whom it has benefited. The lower courts' judgments should be affirmed.

## **ARGUMENT**

### **I. THE RESCISSION OF DACA WILL INFLICT PROFOUND HARMS ON COLLEGES AND UNIVERSITIES, THEIR STUDENTS, AND THE COUNTRY AS A WHOLE.**

#### **A. America's Colleges and Universities Thrive on a Diverse Student Body and a Reputation for Inclusiveness.**

America's higher education system is one of the crown jewels of our democracy. The country's colleges and universities regularly rank among the finest in the world. *See World University Rankings 2020*, Times Higher Educ.<sup>2</sup> Americans of every background have gained enrichment, social mobility, and eco-

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<sup>2</sup> [https://www.timeshighereducation.com/world-university-rankings/2020/world-ranking#!/page/0/length/25/sort\\_by/rank/sort\\_order/asc/cols/stats](https://www.timeshighereducation.com/world-university-rankings/2020/world-ranking#!/page/0/length/25/sort_by/rank/sort_order/asc/cols/stats) (all websites last visited Oct. 3, 2019).

conomic advancement by attending our postsecondary schools. And, for decades now, the world's leaders in the sciences, humanities, arts, and politics have come to the United States to be educated, work, and contribute to our country's progress.

One central ingredient in the success of our higher education system is its historic openness and diversity. That openness is nowhere more evident than in our tradition of enrolling and educating persons born outside the United States. "The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here." *Arizona v. United States*, 567 U.S. 387, 416 (2012). Many of the leading graduates of our country's colleges and universities were born abroad. And today, more than 1 million enrollees in our colleges and universities are international students. *Enrollment Trends*, Inst. for Int'l Educ. (2018).<sup>3</sup>

Admitting and enrolling students born outside the United States benefits colleges, universities, and the country at large in numerous ways. For one, it ensures that our colleges and universities enroll the best, brightest, most motivated and curious undergraduate and graduate students. Schools can build the strongest possible student body when they close their doors to no one, and can select from the country (and the world) as a whole, rather than being limited to a subset of the population.

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<sup>3</sup> <https://www.iie.org/Research-and-Insights/Open-Doors/Data/International-Students/Enrollment>.

Furthermore, enrolling a diverse class helps colleges and universities provide a better education to all of their students. This Court has repeatedly recognized the “educational benefits that flow from a diverse student body.” *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 308 (2013). Campus diversity helps to create and maintain an “atmosphere which is most conducive to speculation, experiment, and creation.” *Id.* (internal quotation marks omitted). It opens up students to new ideas and perspectives, and breaks down “isolation and stereotypes.” *Id.* In practical terms, it helps give students “the skills needed in today’s increasingly global marketplace,” which “major American businesses have made clear \*\*\* can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

Enrolling foreign-born students is also critical in enabling American schools to compete in the “global competition” for international students and scholars. NAFSA: Ass’n of Int’l Educators, *Restoring U.S. Competitiveness for International Students and Scholars* 1 (June 2006).<sup>4</sup> The finest international students and scholars are most interested in coming to a country when its schools are perceived as welcoming and open-minded. *See id.* at 5. For that reason, other countries have made a concerted effort in recent decades to attract the leading minds from around the world into their universities. *Id.* at 4.

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<sup>4</sup> [https://www.nafsa.org/sites/default/files/ektron/uploadedFiles/NAFSA\\_Home/Resource\\_Library\\_Assets/Public\\_Policy/restoring\\_u.s.pdf](https://www.nafsa.org/sites/default/files/ektron/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Public_Policy/restoring_u.s.pdf).

Policies that welcome the immigrants who reside within our borders are critical to preserving our higher education system's reputation for openness and inclusion.

Moreover, attracting and enrolling foreign-born students is greatly in the interest of the country at large. Foreign-born students contribute tens of billions of dollars to the U.S. economy and support hundreds of thousands of jobs each year. *NAFSA International Student Economic Value Tool*, NAFSA (estimating that foreign-born students contributed \$39 billion and supported 455,000 jobs during the 2017-2018 academic year).<sup>5</sup> Many of these international students remain in our country to live, work, and found businesses. See Xueying Han & Richard P. Applebaum, Ewing Marion Kauffman Found., *Will They Stay or Will They Go? International STEM Students Are Up for Grabs* (July 2016).<sup>6</sup> Others return home inculcated with American values of democracy, tolerance, education, and the rule of law, helping spread American ideals and strengthening our country's influence and national security.

**B. Prior to DACA, Many of the Nation's Most Promising Students Faced Severe Challenges to Enrollment in or Completion of Undergraduate and Graduate Programs.**

For many years, American colleges and universities faced a severe gap in their ability to include the more than one million foreign-born "Dreamers" in their

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<sup>5</sup> <https://www.nafsa.org/policy-and-advocacy/policy-resources/nafsa-international-student-economic-value-tool>.

<sup>6</sup> <https://files.eric.ed.gov/fulltext/ED570660.pdf>.

student bodies and communities. Dreamers are individuals who were brought to the United States as children, resided here continuously, and attended high school or served in the armed forces without committing any serious crime. No. 18-587 Pet. App. 97a-98a; see *Deferred Action for Childhood Arrivals (DACA) Data Tools*, Migration Policy Inst.<sup>7</sup> These individuals include countless students whose enrollment would markedly enrich college and university campuses: high school valedictorians; promising STEM candidates, leaders, or artists; and persons who “embod[y] the American dream.” No. 18-587 Supp. Br. App. 5a.

Like “[m]ost young adults in the United States,” Dreamers typically “aspire to some type of postsecondary education.” Roberto G. Gonzales et al., *Becoming DACAmented: Assessing the Short-Term Benefits of Deferred Action for Childhood Arrivals (DACA)*, 58 *Am. Behavioral Scientist* 1852, 1854 (Nov. 2014) [hereinafter, “*Becoming DACAmented*”]. But prior to DACA, severe structural barriers made it punishingly difficult for many Dreamers to afford, enroll in, or successfully complete college or graduate school.

The most daunting impediment many Dreamers faced was financial. The vast majority of high school graduates—and nearly every undocumented immigrant—cannot afford college without some form of tuition assistance, financial aid, or part-time em-

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<sup>7</sup> <https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles>.

ployment. But prior to DACA, each of those avenues was largely foreclosed to Dreamers.

Dreamers were largely barred from the most straightforward path to college affordability: enrolling in a public college or university and paying the lower rate charged for in-state residents. More than 30 States categorically prohibited undocumented immigrants from qualifying as residents for in-state tuition purposes. Zenen Jaimes Pérez, Ctr. for Am. Progress, *Removing Barriers to Higher Education for Undocumented Students* 5-6 (Dec. 2014) [hereinafter, “*Removing Barriers*”].<sup>8</sup> While a minority of States permitted undocumented students to qualify for the in-state rate, Dreamers often could not establish their eligibility without providing their Social Security numbers or disclosing information that risked revealing their undocumented status. *Id.* at 19, 24. In practice, many undocumented immigrants were thus compelled to pay the out-of-state rate at state schools, which is on average 61% higher, and sometimes seven times as high, as the rate charged for in-state residents. *Id.* at 5; see Neeta Kantamneni et al., *Academic and Career Development of Undocumented College Students: The American Dream?*, 64 *Career Development Quarterly* 318, 319 (2016) [hereinafter, “*Academic and Career Development*”].<sup>9</sup>

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<sup>8</sup> <https://www.luminafoundation.org/files/resources/removing-barriers-for-undocumented-students.pdf>.

<sup>9</sup> In two states, even that higher rate was not an option: South Carolina and Alabama banned undocumented students from attending many public colleges altogether. See Sejal Zota, *Unauthorized Immigrants’ Access to Higher Education: Fifty States, Different Directions*, 79 *Popular Gov’t* 46, 50 (2009).

Nor could Dreamers qualify for federal or state financial aid to fill the gap. Undocumented students are “ineligible for all forms of federal financial aid, including Pell Grants, the Federal Work-Study Program, and federal loans.” *Removing Barriers* at 20. And nearly every State makes undocumented immigrants ineligible for state education grants, too. *Id.* at 6; see Alene Russell, Am. Ass’n of State Colls. and Univs., *State Policies Regarding Undocumented College Students: A Narrative of Unresolved Issues, Ongoing Debate and Missed Opportunities* 4 (Mar. 2011).<sup>10</sup>

Private banks presented no better an option for most undocumented students. Before DACA, few financial institutions were willing to extend loans to undocumented students and their parents. *Removing Barriers* at 21. And those that were would often impose difficult-to-meet conditions, such as finding a co-signer who was a U.S. citizen or lawful permanent resident, and charging interest rates in excess of twice the rate for federal student loans. *Id.*; see John Coyle, *The Legality of Banking the Undocumented*, 22 *Geo. Immigr. L.J.* 21, 23 (2007) (“[U]ndocumented immigrants \*\*\* pay disproportionately more to access basic financial services.”).

That left working part-time as the only realistic way for most Dreamers to finance their education. But before DACA, Dreamers could not legally work in the United States. See *Becoming DACAmented* at

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<sup>10</sup> [https://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/PM\\_Undocumented\\_Students-March2011.pdf](https://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/PM_Undocumented_Students-March2011.pdf).

1854. They were thus “generally limited to low-wage jobs,” where they were afforded minimal legal protections and few opportunities for advancement. *Id.*; see Neeta Kantamneni et al., *DREAMing Big: Understanding the Current Context of Academic and Career Decision-Making for Undocumented Students*, 43 J. Career Dev. 483, 489 (2016) [hereinafter, “*DREAMing Big*”]. Getting to and from these jobs also was not easy: Dreamers could not qualify for driver’s licenses, and so, for many, a daily commute meant exposing oneself to the risk of arrest, apprehension, and deportation. *Becoming DACAmented* at 1855.

Moreover, even when Dreamers did have some narrow pathway to college affordability open to them, students often lacked the information and institutional support necessary to capitalize on it. Undocumented immigrants generally do not have the “social networks [that] play an all-important role in relaying key information” about schools, tuition assistance, and work-study jobs. *Id.* As aspiring “first-generation college students,” they usually cannot rely on members of their immediate family to provide such information. *Removing Barriers* at 19. Moreover, high school college and career counselors often “lack the training to navigate the specific barriers faced by undocumented students,” and, prior to DACA, most Dreamers were reluctant to share with their counselors that they were undocumented in the first place. *Id.* at 17-18, 23-24; see *DREAMing Big* at 489-490.

Those Dreamers who could finance a postsecondary education continued to face serious and unique challenges upon arriving on campus. *Removing Barriers* at 24-25. Many undocumented students

were told that they needed a second form of identification to acquire a student ID, and had their admissions revoked when they were unable to provide one. *See DREAMing Big* at 488. Without driver's licenses, Dreamers could not easily travel to and from school, or take advantage of off-campus academic and career opportunities. *Id.* at 489. When the financial support they had relied on to enroll in school dried up, many Dreamers found that they needed to take semesters off to earn or save money to finance more of their education. *Removing Barriers* at 25.

Dreamers' academic options were also constrained. Many majors and fields of study "require hands-on participation outside the classroom." *Becoming DACAmented* at 1854. But, because of their undocumented status, Dreamers were excluded from many study opportunities and nearly all paid internships. *Id.* Some Dreamers reported changing majors because they found that background checks were needed to gain practical training necessary to succeed in their chosen field of study. *Academic and Career Development* at 323-324.

Dreamers also had to contend with the psychological and emotional toll of attending school in the shadows. *Id.* at 324-325. Many Dreamers experienced deep anxiety or fear while grappling with the financial, practical, and academic challenges of attending school as an undocumented immigrant. But many such students feared sharing their status with peers or school administrators, and few institutional programs were in place to provide them support. *Id.*

The effects of these impediments were severe. Before DACA, out of approximately 65,000 undocumented immigrants who graduated from high school each year, only 7,000 to 13,000 individuals—or less than 20%—enrolled in college. *Id.* at 319. That rate was less than *one-third* the rate of college enrollment among the general population of high school graduates. See Economic News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, *College Enrollment and Work Activity of Recent High School and College Graduates Summary* (Apr. 25, 2019).<sup>11</sup> One study found that the likelihood of a high school graduate from Mexico or Central America enrolling in college was nearly four times higher if the graduate was a documented rather than undocumented immigrant. Emily Greenman & Matthew Hall, *Legal Status and Educational Transitions for Mexican and Central American Immigrant Youth*, 91 *Social Forces* 1475, 1490-92 (2013).<sup>12</sup>

Furthermore, those undocumented students who did enroll in college had markedly worse outcomes than their peers. Undocumented students were more than three times as likely as their peers to “stop out” of school (*i.e.*, temporarily leave college with the intention of returning). Roberto G. Gonzales & Angie M. Bautista-Chavez, Am. Immigration Council, *Two Years and Counting: Assessing the Growing Power of DACA* 7-8 (June 2014) [hereinafter, “*Two*”

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<sup>11</sup> <https://www.bls.gov/news.release/hsgec.nr0.htm>.

<sup>12</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3816545/pdf/sot040.pdf>.

*Years and Counting*”].<sup>13</sup> And at the time DACA was announced in 2012, only 8% of Dreamers had completed a postsecondary education and received an associate’s, bachelor’s, or advanced degree. See Jeanne Batalova et al., Migration Policy Inst., *DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action* 16 (Aug. 2014).<sup>14</sup>

These grim prospects had profoundly negative consequences on Dreamers beginning as early as high school. Many Dreamers spent their childhoods believing themselves to be largely or fully American. See *Becoming DACAmended* at 1855. But upon learning of the web of legal and practical snares that would flow from their “illegality”—or witnessing siblings and peers trying and failing to attend or complete college—many Dreamers lost the motivation to learn. Leisy Janet Abrego, “*I Can’t Go to College Because I Don’t Have Papers*”: *Incorporation Patterns of Latino Undocumented Youth*, 4 *Latino Stud.* 212, 220-224 (2006) [hereinafter “*Incorporation Patterns*”].<sup>15</sup>

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<sup>13</sup> [http://www.immigrationpolicy.org/sites/default/files/research/two\\_years\\_and\\_counting\\_assessing\\_the\\_growing\\_power\\_of\\_daca\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/research/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf).

<sup>14</sup> <https://www.migrationpolicy.org/research/daca-two-year-mark-national-and-state-profile-youth-eligible-and-applying-deferred-action>.

<sup>15</sup> [https://www.academia.edu/3684916/Abrego\\_Leisy.\\_2006.\\_I\\_can\\_t\\_go\\_to\\_college\\_because\\_I\\_don\\_t\\_have\\_papers\\_Incorporation\\_Patterns\\_of\\_Latino\\_Undocumented\\_Youth.\\_Latino\\_Studies\\_4\\_3\\_212-231](https://www.academia.edu/3684916/Abrego_Leisy._2006._I_can_t_go_to_college_because_I_don_t_have_papers_Incorporation_Patterns_of_Latino_Undocumented_Youth._Latino_Studies_4_3_212-231).

For some, the experience of “discover[ing]” their illegality was akin to “awakening to a nightmare.” Roberto G. Gonzales & Leo R. Chavez, “Awakening to a Nightmare”: *Abjectivity and Illegality in the Lives of Undocumented 1.5-Generation Latino Immigrants in the United States*, 53 *Current Anthropology* 255, 262 (2012).<sup>16</sup> It meant realizing that they, unlike the peers with whom they spent their childhoods, would be barred from unlocking the opportunities that only a college education can afford, and living as full and productive members of American society. *Id.*

**C. DACA Has Made It Substantially Easier for Dreamers to Enroll in Postsecondary Institutions and Has Carried Enormous Benefits for Colleges, Universities, and the Country.**

DACA has not removed every impediment that previously stood in the way of Dreamers, but it has dramatically improved the educational outcomes for DACA students, and it has carried enormous benefits for colleges, universities, and the country as a whole.

DACA has made it newly possible for many Dreamers to afford, attend, and complete college and graduate school. DACA makes it possible for recipients to apply for work authorization and apply for a Social Security card. In all 50 States and the District of Columbia, it also enables recipients to apply for driver’s licenses. *See Nat’l Immigration Law Ctr., Access to Driver’s Licenses for Immigrant Youth*

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<sup>16</sup> <https://pdfs.semanticscholar.org/4515/9747881c9cd7961b282a9066c3e7f4b1a93a.pdf>.

*Granted DACA.*<sup>17</sup> And it allows Dreamers to come out of the shadows and reveal their undocumented status without immediate fear of deportation. *Id.*

Together, these benefits have opened up vital new avenues for Dreamers to fund their education. Most significantly, DACA has enabled Dreamers to pay for their tuition with earnings from part-time employment, institutional work-study jobs, or paid internships. *DREAMing Big* at 486. Having a driver's license also means that DACA recipients can commute to work and school and select from a wider range of job prospects. *Two Years and Counting* at 3. Taken together, these tools have had a dramatic effect on Dreamers' ability to pay for college: 80% of DACA recipients report that DACA enabled them to earn more money to help pay for their tuition, Tom K. Wong et al., *2019 National DACA Study*, at 2 (Sept. 2019),<sup>18</sup> and 72.3% of DACA recipients enrolled in college now report that they have paid work experience, as compared with 28% of undocumented college students who are not DACA recipients, The UndocuScholars Project, Inst. for Immigration, Globalization, & Educ., Univ. of California, Los Angeles, *In the Shadows of the Ivory Tower: Undocumented Undergraduates and the Liminal State of*

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<sup>17</sup> <https://www.nilc.org/issues/drivers-licenses/daca-and-drivers-licenses/> (last updated May 31, 2015).

<sup>18</sup> <https://cdn.americanprogress.org/content/uploads/2019/09/18122133/New-DACA-Survey-2019-Final-1.pdf>.

*Immigration Reform* 9 (2015) [hereinafter, “*In the Shadows of the Ivory Tower*”].<sup>19</sup>

DACA has also improved Dreamers’ financial aid options. Although DACA recipients remain ineligible for federal student financial aid, they can now fill out the Free Application for Federal Student Aid and receive a calculation of their Estimated Family Contribution, which enables students to apply for need-based institutional aid that was previously unavailable. *Removing Barriers* at 12. Some States have changed their residency requirements to permit all undocumented students, or all DACA recipients, to qualify for in-state tuition or education grants. *Id.* In addition, some scholarship organizations have expanded their eligibility criteria to include DACA recipients. United We Dream, *A Portrait of Deferred Action for Childhood Arrivals Recipients: Challenges and Opportunities Three-Years Later* 22 (Oct. 2015) [hereinafter, “*Portrait of DACA Recipients*”].<sup>20</sup> This too has made an appreciable difference: Over 31% of DACA recipients have reported that DACA enabled them to qualify for education support, scholarships, and financial aid. *Id.* at 21.

DACA has also made private education loans a more viable option. Banks are far more willing to open bank accounts for individuals with a Social Security number. *Becoming DACAmented* at 1863.

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<sup>19</sup> <https://www.luminafoundation.org/files/resources/in-the-shadows.pdf>.

<sup>20</sup> <https://unitedwedream.org/wp-content/uploads/2015/10/DACA-report-final-1.pdf>.

And almost half of DACA recipients have obtained their first bank account since receiving DACA. *Id.*

DACA has improved Dreamers' opportunities while in college, as well. Because DACA recipients can legally work and drive, it is possible for them to pursue internships and other hands-on programs critical for academic success. Over 40% of DACA recipients have obtained internships, as compared to 16% of the non-DACA undocumented population. *In the Shadows of the Ivory Tower* at 10; *see also Becoming DACAmended* at 1863. In addition, most DACA recipients are now able to obtain driver's licenses and safely drive to and from campus, shortening their weekly commutes by an average of two hours. *In the Shadows of the Ivory Tower* at 10-11. DACA recipients can also study abroad without fear that on return to the United States they will be denied entry. *See* Am. Council on Educ., *Immigration Post-Election Q&A: DACA Students, "Sanctuary Campuses," and Institutional or Community Assistance* 4 (Dec. 2016).<sup>21</sup>

DACA has reduced the emotional toll of college enrollment for Dreamers, too. For the first time, many Dreamers can speak openly about their undocumented status, increasing their sense of belonging, and reducing the pressures and anxieties previously endemic to enrollment in college without legal status. *In the Shadows of the Ivory Tower* at 11; *Becoming DACAmended* at 1866.

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<sup>21</sup> <https://www.acenet.edu/Documents/ACE-Issue-Brief-Immigration-DACA-Sanctuary-Campus.pdf>.

Finally, DACA has improved Dreamers' job prospects upon graduation. It has made it newly possible for Dreamers to receive occupational licensing. In many States, DACA recipients are now eligible to become members of the legal bar, to be certified as teachers, and to be licensed as physicians—all avenues previously closed to them. *See* Silva Mathema, *What DACA Recipients Stand to Lose—and What States Can Do About It*, Ctr. for Am. Progress (Sept. 13, 2018) [hereinafter, "*What DACA Recipients Stand to Lose*"].<sup>22</sup> And, of course, Dreamers can now work legally when they graduate postsecondary school, enabling them to take full advantage of their degrees and move upward on the social and economic ladder.

The bottom-line effect of these improvements has been dramatic. The percentage of DACA recipients enrolled in postsecondary school is reportedly almost 40%, up from approximately 20% of DACA-eligible students at the time the policy was announced. *See* 2019 *National DACA Study* at 5; Am. Council on Educ., *Protect Dreamers Higher Education Coalition: Who Are the Dreamers?*.<sup>23</sup> The percentage of DACA recipients with associate's, bachelor's, or master's degrees has also markedly increased, with one study reporting that as many as 60% of DACA recipients have postsecondary degrees, as compared to 8% of the DACA-eligible population in 2012. 2019 *National DACA Study* at 6. Indeed, a staggering 95% of

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<sup>22</sup> <https://www.americanprogress.org/issues/immigration/reports/2018/09/13/458008/daca-recipients-stand-lose-states-can/>.

<sup>23</sup> <https://www.acenet.edu/Policy-Advocacy/Pages/Immigration/Protect-Dreamers-Higher-Education-Coalition.aspx>.

DACA recipients report that they intend to pursue more education because of DACA, or have already done so. *Id.* at 5.

Colleges and universities have reaped innumerable benefits from the markedly increased presence of Dreamers on their campuses. As Princeton President Christopher Eisgruber has explained, “DACA recipients are among our most accomplished and respected students.” Letter from President Eisgruber and Microsoft President Smith to Congress Regarding the Deferred Action for Childhood Arrivals (DACA) Program (Jan. 11, 2018).<sup>24</sup> “Colleges and universities have seen these remarkable people up close, in our classrooms and as our colleagues and friends. Despite the challenges they face, they have made incredible contributions to our country and its economy and security.” Letter from More than 800 Colleges and Universities to Speaker Ryan et al., at 1 (Oct. 19, 2017).<sup>25</sup>

Countless stories bear out that statement. Sheila, a DACA recipient, graduated *summa cum laude* and at the top of her class at Rutgers, and went on to work as a digital strategist at IBM. TheDream.US, *2018 Progress Report*, at 3 (2018).<sup>26</sup> Jin Park, a Harvard senior with a concentration in molecular biology, became the first DACA recipient to win a

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<sup>24</sup> <https://president.princeton.edu/blogs/letter-president-eisgruber-and-microsoft-president-smith-congress-regarding-deferred-action>.

<sup>25</sup> <https://www.acenet.edu/Documents/Letter-to-Congress-on-DACA-Oct-2017.pdf>.

<sup>26</sup> <https://www.thedream.us/impact/ourdata/>.

Rhodes Scholarship. Alexandra A. Chaidez & Sanjana L. Narayana, *Harvard Senior Becomes First DACA Recipient to Win Rhodes Scholarship*, Harvard Crimson (Nov. 19, 2018). Carlos Mendez-Dorantes, who was brought to the United States from Mexico when he was ten years old, is a PhD student and Ford Foundation Fellow studying cancer treatments at the City of Hope Comprehensive Cancer Center in Duarte, California. Evelyn Valdez-Ward, *The End of DACA Would Be a Blow to Science*, *Sci. Am.: Voices* (Dec. 12, 2018).<sup>27</sup>

These stories could easily be multiplied. *See Protect Dreamers Higher Education Coalition: Faces of Dreamers*, Am. Council on Educ.: Higher Educ. Today (Oct. 5, 2017) (collecting stories of Dreamers and their accomplishments)<sup>28</sup>; TheDream.US, *Featured Scholar Stories* (collecting stories of DACA recipients who have received academic scholarships)<sup>29</sup>; Nat'l Immigration Law Ctr., *Stories in Defense of Deferred Action for Childhood Arrivals* [hereinafter, "*Stories in Defense of DACA*"] (collecting additional stories of DACA recipients).<sup>30</sup> President Pat McGuire of Trinity Washington University—a school at which 70% of Dreamers have Latin honors, and where Dreamers make up more than half of the

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<sup>27</sup> <https://blogs.scientificamerican.com/voices/the-end-of-daca-would-be-a-blow-to-science/>.

<sup>28</sup> <https://www.higheredtoday.org/2017/10/05/protect-dreamers-higher-education-coalition-faces-dreamers/>.

<sup>29</sup> <https://www.thedream.us/impact/our-scholar-stories-2/>.

<sup>30</sup> <https://www.nilc.org/issues/daca/daca-fifth-anniversary-stories/>.

Phi Beta Kappa class—put the point succinctly: “Dreamers set the bar very high academically, inspiring other students to reach higher as well.” *2018 Progress Report* at 10.

Attending school alongside Dreamers improves the education of their classmates in numerous ways. Dreamers invariably overcame daunting obstacles to reach campus: Their families fled poverty, violence, or persecution; they often grew up in households that spoke little English; they struggled with the legal and practical impediments endemic to life as an undocumented immigrant; and they had the courage to disclose their status in order to achieve their ambitions and attain a better life. Attending school with these remarkable individuals exposes other students to global challenges of which they may have been unaware, supplies them perspectives they never before encountered, and helps imbue in them values of tolerance, respect, and compassion. One Georgetown University student wrote:

I never interacted much with undocumented immigrants growing up, but since college I have. Several of my good friends at Georgetown University are undocumented, and I can never imagine all the fear and hurt their families have been through because of their status. \*\*\* I can't imagine what Georgetown would be like without them. Certainly a worse place to go to school.

*Stories in Defense of DACA.*

Finally, increasing enrollment of DACA recipients in colleges and universities has had positive effects for the U.S. economy at large. DACA recipients with postsecondary degrees have greater purchasing power: They are able to buy cars, take out mortgag-

es, and invest in the economy. *See 2019 National DACA Study* at 2. They are also more productive members of the U.S. workforce, filling better and higher-paying jobs. *See* Jie Zong et al., Migration Policy Inst., *A Profile of Current DACA Recipients by Education, Industry, and Occupation*, at 8 (Nov. 2017) (comparing job profiles of DACA recipients and other similarly aged undocumented immigrants).<sup>31</sup> In total, the Cato Institute has estimated that DACA will add \$60 billion in tax revenue and \$280 billion in economic growth over the next decade, in large part because it has enabled DACA recipients to build skills through college and graduate school. Ike Brannon & Logan Albright, *The Economic and Fiscal Impact of Repealing DACA*, Cato Inst.: Cato At Liberty (Jan. 18, 2017).<sup>32</sup>

#### **D. The Rescission of DACA Would Reverse the Gains the Program Has Enabled.**

If the rescission of DACA is permitted to go into effect, these gains would be reversed almost immediately, and our colleges and universities, their students, and the country at large would severely suffer.

First, DACA's rescission would irreparably damage the reputation of America's higher education system in the eyes of the world. DACA has been a symbol of tolerance and openness of our university campuses. It has shown other foreign-born students that they are welcome on our campuses, and that our colleges

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<sup>31</sup> <https://www.migrationpolicy.org/research/profile-current-daca-recipients-education-industry-and-occupation>.

<sup>32</sup> <https://www.cato.org/blog/economic-fiscal-impact-repealing-daca>.

and universities value and celebrate the contributions of those individuals who overcome adversity to come to this country. The rescission of DACA would serve as a profound symbol of exclusion, sending a message that the United States does not value even the most deserving and sympathetic foreign-born individuals within its own borders.

Rescinding DACA would also upset the lives of tens of thousands of DACA recipients who have relied on this program. DACA recipients reordered their lives with the legitimate expectation that they would be able to live and work in this country legally. These young people came out of the shadows, enrolled in school, took out private student loans, worked hard to earn advanced degrees, started jobs, started families, and made countless other life decisions of tremendous import, all in reliance on DACA. The rescission would subvert all of that. Many Dreamers would once again be rendered unable to pay for their education or pay off the private loans they have taken out. DACA recipients would immediately be disqualified from employment, the principal means by which most DACA recipients have paid tuition. DACA recipients would lose their access to in-state tuition rates in at least three States—Virginia, Massachusetts, and Ohio—and become categorically barred from attending public college in South Carolina and Alabama. *See What DACA Recipients Stand to Lose.*

Rescission would also result in the revocation of many Dreamers' driver's licenses. Only 13 States and the District of Columbia make driver's licenses available to undocumented immigrants who are not beneficiaries of some form of relief from deportation.

See Gilbert Mendoza & Chesterfield Polkey, *States Offering Driver's Licenses to Immigrants*, Nat'l Conference of State Legislatures (July 25, 2019).<sup>33</sup> Those driver's licenses cannot qualify as REAL IDs under federal law, and so are of limited use; starting in October 2020, for example, they will not permit recipients to board commercial airlines. See *REAL ID Frequently Asked Questions*, Dep't of Homeland Sec.<sup>34</sup> With limited geographic mobility, many DACA recipients would once again be unable to complete school, continue their jobs, or fulfill many day-to-day tasks.

Rescission would also dramatically devalue the education Dreamers have worked diligently to attain. Dreamers with advanced degrees—doctors, lawyers, scientists, engineers, MBAs, teachers, and more—would be unable to work legally in this country and unable to qualify for occupational licenses in most States. See *What DACA Recipients Stand to Lose*. Years of education would be squandered. Many Dreamers would once again be forced to return to low-paying, low-quality jobs, often in service industries or jobs requiring manual labor. See *Becoming DACAmented at 1854, 1863*.

One DACA recipient wrote that, if DACA is revoked, “all the hard work I have put into my goals would be for nothing, and I would be back to the bottom where I started.” TheDream.US, *In Their*

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<sup>33</sup> <http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx>.

<sup>34</sup> <https://www.dhs.gov/real-id-frequently-asked-questions> (last updated Aug. 14, 2018).

*Own Words: Higher Education, DACA, and TPS*, at 8 (Oct. 2018).<sup>35</sup> Said another: “I will have to go back to hiding in the shadows. I will not be able to work, drive, or go to school. I will not be able to feed myself. I will not be able to continue my pursuit of happiness, essentially, I will not have [a] part in the American Dream.” *Id.* at 13.

Rescission would also tear at the fabric of our academic communities. Many students would understandably be demoralized if their peers were forced to leave campus, or faced the risk of being apprehended and deported at any moment. Individuals who have become leaders on campus—student body presidents, Rhodes Scholars, political activists—would immediately face the Hobson’s choice of returning to the shadows or exposing themselves to the threat of removal from the only country they have ever known.

Rescission would radiate negative consequences throughout the U.S. economy, as well. The wholesale revocation of employment authorization for nearly 700,000 individuals, many of them now highly educated and highly sought-after by their employers, would cause industries to suffer economic and fiscal shocks. *Id.* at 5. And the country as a whole would lose approximately a quarter of a trillion dollars in economic growth and tens of billions of dollars in tax revenue over the next decade. *The Economic and Fiscal Impact of Repealing DACA*.

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<sup>35</sup> <https://www.thedream.us/wp-content/uploads/2018/10/TheDream.US-In-Their-Own-Words-Report-Oct-2018-1-2.pdf>.

## II. THE RESCISSION IS REVIEWABLE.

In light of the profound harms that DACA's rescission would inflict, it is critical that the Court subject that decision to full judicial scrutiny. Yet the Government has advanced the remarkable proposition that the decision is entirely unreviewable.

This claim is particularly concerning to the higher education community for reasons that extend beyond this litigation. Administrations often attempt to enact sweeping policies of great significance to colleges and universities through documents denominated as enforcement decisions. For instance, both the current Administration and prior administrations have issued "Dear Colleague" letters that effectively state the government's legal position on a question of education policy, backed by the threat of legal sanctions or funding revocations. Courts have regularly reviewed these policies. *See, e.g., United Student Aid Funds, Inc. v. DeVos*, 237 F. Supp. 3d 1 (D.D.C. 2017); *Gill v. Paige*, 226 F. Supp. 2d 366 (E.D.N.Y. 2002). It is vital that the Court not immunize actions of this nature from judicial scrutiny.

Fortunately, the law does not support the government's claim that its decision is exempt from judicial review. The Administrative Procedure Act ("APA") does not revoke judicial authority to scrutinize the rescission's compliance with the law. And the government's suggestion that the Immigration and Nationality Act ("INA") withdraws jurisdiction to consider such claims is baseless.

**A. The APA Does Not Make the Rescission Unreviewable.**

The government claims that the decision to rescind DACA is unreviewable under 5 U.S.C. § 701(a)(2) because it is “committed to agency discretion by law.” U.S. Br. 17. This Court has “read the § 701(a)(2) exception for action committed to agency discretion ‘quite narrowly,’” so as to “to give effect to the command that courts set aside agency action that is an abuse of discretion, and to honor the presumption of judicial review.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2567-69 (2019) (citation omitted). Review is unavailable under this provision, the Court has held, only where there is “no law to apply” and “no meaningful standard against which to judge the agency’s exercise of discretion.” *Id.* at 2568-69 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018)).

Here, there plainly is “law to apply.” Plaintiffs argue that the government’s decision to rescind DACA is arbitrary and capricious because it rests on the erroneous conclusion that DACA is unlawful. The prohibition on arbitrary and capricious decisionmaking is a foundational principle of administrative law. And determining whether DACA exceeds the scope of DHS’s statutory authority is a “familiar judicial exercise” well within this Court’s cognizance. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Resolving plaintiffs’ claims would thus involve reviewing a decision “for compliance with \* \* \* provisions of the [Immigration and Nationality] Act, according to the general requirements of rea-

soned agency decisionmaking.” *Dep’t of Commerce*, 139 S. Ct. at 2569. That is a decision “subject to judicial review.” *Id.* Indeed, this Court granted certiorari, received briefing, and heard argument on the legality of another broad deferred action policy four Terms ago. *See United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

The government nonetheless claims that review is unavailable on the strength of *Heckler v. Chaney*, 470 U.S. 821 (1985). In that case, this Court held that the “decision not to take enforcement action \* \* \* has traditionally been ‘committed to agency discretion,’” and that “the Congress enacting the APA did not intend to alter that tradition.” *Id.* at 832-833. In the government’s view, DACA is akin to a decision “not to institute enforcement actions,” the decision to issue that policy was thus unreviewable, and the decision to *revoke* that policy is therefore also an enforcement decision immune from judicial scrutiny. U.S. Br. 17. Each step of that analysis is faulty.

*First*, the *Chaney* Court identified a “tradition” of exempting *individual* non-enforcement decisions from judicial review. 470 U.S. at 832. It identified no comparable tradition of exempting *policies* of non-enforcement like DACA from judicial scrutiny; on the contrary, the Court suggested that “general polic[ies]” of non-enforcement are reviewable, at least where it is contended that those policies are an “abdication of [the agency’s] statutory responsibilities.” *Id.* at 833 n.4 (internal quotation marks omitted).<sup>36</sup> It was in part for this reason that the Fifth

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<sup>36</sup> The government suggests that the plaintiffs in *Chaney* challenged a “programmatic determination” not to enforce a

Circuit held—in a decision affirmed 4-4 by this Court—that a policy of granting deferred action was reviewable. *Texas v. United States*, 809 F.3d 134, 165-168 (5th Cir. 2015). If that reviewability holding was correct—and the government has said that it “agrees with the robust analysis in the Fifth Circuit’s \*\*\* decision,” U.S. Br. 52—then neither DACA nor its revocation is exempt from judicial review either.

*Second*, the logic and holding of *Chaney* have no purchase where, as here, an agency rests its decision on the view that it lacks legal authority. *Chaney* explained that “an agency decision not to enforce” is unreviewable principally because it “involves a complicated balancing of a number of factors which are peculiarly within its expertise.” 470 U.S. at 831. The Court reasoned that “[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.” *Id.* at 831-832. But evaluating an agency’s *legal conclusion* that it lacks authority to retain a deferred action policy does not involve “balancing \*\*\* factors” or “ordering \*\*\* priorities.” It entails a straightforward judicial task. Likely for that reason, *Chaney* itself indicated that its holding would not extend to “a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction.” *Id.* at 833 n.4; *see id.* at 839 (Brennan,

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statute. U.S. Br. 21. That is simply incorrect. In *Chaney*, the petitioners “requested the FDA to take various investigatory and enforcement actions” against the States of Oklahoma and Texas; when the FDA refused, they asked the courts for an order requiring FDA “to take the same enforcement actions requested in the prior petition.” 470 U.S. at 824-825.

J., concurring); *id.* at 841 n.1 (Marshall, J., concurring in judgment).

*Third*, the fact that a non-enforcement decision is unreviewable does not necessarily (or even usually) imply that the revocation of that decision is unreviewable, as well. In the ordinary course, decisions to enforce and not to enforce differ in the most fundamental respect—most notably, the enforcement of a statute entails the bringing to bear of the government’s coercive power. *See id.* at 832 (“when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner”). An enforcement decision may involve other intrusions on an individual’s liberty. Here, for instance, the revocation will have the consequence of withdrawing tangible benefits, including work authorization, from hundreds of thousands of undocumented immigrants, and disrupting the affairs of a wide swathe of American society. The government has identified no “tradition” of exempting decisions of this nature from judicial review.

The government invokes the principle that an otherwise unreviewable action does not “become[] reviewable” merely because the agency “gives a ‘reviewable’ reason” for its decision. U.S. Br. 23 (quoting *ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 283 (1987)). But that argument assumes as its starting premise that the decision to issue or retain a sweeping deferred action policy falls within the “tradition of nonreviewability” as described in *Chaney*. *See Locomotive Eng’rs*, 482 U.S. at 282. As the Fifth Circuit and at least four Justices evidently concluded in *Texas*, it does not. Furthermore,

*Chaney* itself made clear that the tradition of nonreviewability applicable to civil non-enforcement decisions does not extend to cases in which an agency’s “refusal \* \* \* to institute proceedings [is] based solely on the belief that it lacks jurisdiction.” 470 F.3d at 833 n.4. Far from retreating from that statement, subsequent decisions of this Court have reviewed the legal basis for agencies’ refusal to act. See, e.g., *Massachusetts v. EPA*, 549 U.S. 498, 527-528 (2007).

**B. The INA Does Not Withdraw Jurisdiction to Consider the Rescission.**

The government also suggests that principles of nonreviewability “apply with particular force” to this case because it involves “enforcement of the immigration laws.” U.S. Br. 20. That is incorrect. The only statutory provisions the government cites to support this statement are 8 U.S.C. § 1252(g) and (b)(9), and both are plainly inapplicable here.

Section 1252(g) channels jurisdiction over “any cause or claim by or on behalf of any alien arising from the decision or action \* \* \* to commence proceedings, adjudicate cases, or execute removal orders against any alien.” 8 U.S.C. § 1252(g). This provision is expressly limited to claims “by or on behalf of any alien.” *Id.* It is therefore inapplicable to claims brought by universities and States to vindicate their own interests. Moreover, the Court has held that Section 1252(g) “applies only to three discrete actions that the Attorney General may take: her ‘decision or action’ to ‘commence proceedings, *adjudicate* cases, or *execute* removal orders.’” *Reno v. Am.-Arab Anti-Discrimination Comm. (AADC)*, 525 U.S. 471, 482 (1999) (emphases in original). The revocation of a

broad policy of granting deferred action is plainly not one of the “three discrete actions” listed in *AADC*. Indeed, it is farther removed from the three listed actions than the examples the Court gave of decisions *not* covered by Section 1252(g), such as “open[ing] an investigation” and “surveil[ing] the suspected violator.” *Id.*

Section 1252(b)(9) is similarly irrelevant. That provision states that “[j]udicial review of all questions of law and fact \*\*\* arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.” 8 U.S.C. § 1252(b)(9). In two recent cases, the Court has rejected “expansive interpretation[s]” of this provision that would have “cramm[ed] judicial review” of any removal-related actions “into the review of final removal orders.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018); see *Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019). The Court clarified that this provision is inapplicable at least where aliens “are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined.” *Jennings*, 138 S. Ct. at 841; *Nielsen*, 139 S. Ct. at 962.

Respondents’ challenge to the DACA rescission falls into none of those buckets. They are not challenging an “order of removal.” They are not challenging a “decision to detain them \*\*\* or to seek removal.” And the DACA rescission is not “even \*\*\* part of the process by which their removability will

be determined”; it is a deferred action policy that has no bearing on “removability” at all, but rather addresses whom the government may *seek* to remove. Indeed, it is difficult to comprehend how the rescission policy could “aris[e] from any action \* \* \* to remove an alien,” given that it *precedes* the initiation of any removal action against a DACA recipient.<sup>37</sup>

Perhaps recognizing that its textual argument is meritless, the government quickly pivots to purpose: “[E]ven if those provisions do not directly preclude review here,” it writes, they “confirm[] the importance Congress placed on shielding DHS’s discretion decisions from review.” U.S. Br. 21. It scarcely needs repeating, however, that this Court does not “disregard clear language simply on the view that \* \* \* Congress ‘must have intended’ something broader.” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). That admonition applies with heightened force when it comes to limiting the courts’ authority to review agency action or to exercise jurisdiction. Limitations on judicial review must

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<sup>37</sup> Contrary to the government’s suggestion (at 21), the rescission also falls outside the construction of Section 1252(b)(9) espoused by Justice Thomas in his *Jennings* concurrence. Justice Thomas argued that Section 1252(b)(9) “must at least cover congressionally authorized portions of the deportation process that necessarily serve the purpose of ensuring an alien’s removal.” 138 S. Ct. at 854 (Thomas, J., concurring). The rescission of DACA, however, does not “necessarily serve the purpose of ensuring an alien’s removal”; on the contrary, it is undisputed that many former DACA recipients will *not* be removed or placed into removal proceedings. Nor is the rescission of DACA a “portion[] of the deportation process,” given that it precedes even “the decision[] to open an investigation” into an alien’s removability. *AADC*, 525 U.S. at 482.

be clearly expressed, not implied. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (describing the “‘strong presumption’ favoring judicial review of administrative action”). And as Justice Scalia wrote when rejecting a previous effort to strain Section 1252(g) beyond its textual limits: “It is implausible that [this provision] was a shorthand way of referring to all claims arising from deportation proceedings. Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting.” *AADC*, 525 U.S. at 482.

So too here, had Congress truly placed “importance \*\*\* on shielding” policies like this one from judicial review, it would have enacted a statute that accomplished that objective. It did not, and this Court should not shield this consequential and profoundly harmful policy decision from review based on vague inferences of congressional purpose.

**CONCLUSION**

For the foregoing reasons, the judgments in Nos. 18-587, 18-588, and 18-589 should be affirmed.

Respectfully submitted,

NEAL K. KATYAL

*Counsel of Record*

JESSICA L. ELLSWORTH

STEPHANIE J. GOLD

MITCHELL P. REICH

HOGAN LOVELLS US LLP

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-5600

neal.katyal@hoganlovells.com

*Counsel for Amici Curiae American Council on Education and 43 Other Higher Education Associations*

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## **ADDENDUM**

**ADDENDUM—LIST OF *AMICI CURIAE***

American Council on Education  
The Accreditation Council for Pharmacy Education  
Accrediting Commission for Community and Junior  
Colleges  
ACT  
American Association of Community Colleges  
American Association of Colleges of Nursing  
American Association of State Colleges and Universi-  
ties  
American Association of University Professors  
American Indian Higher Education Consortium  
American Speech-Language-Hearing Association  
Association of American Colleges and Universities  
Association of American Universities  
Association of Community College Trustees  
Association of Governing Boards of Universities and  
Colleges  
Association of Jesuit Colleges and Universities  
Association of Public and Land-grant Universities  
Coalition of Urban and Metropolitan Universities  
College and University Professional Association for  
Human Resources  
College Board  
Consortium of Universities of the Washington Met-  
ropolitan Area  
Council for Advancement and Support of Education  
Council for Christian Colleges & Universities  
Council for Opportunity in Education

Council of Graduate Schools  
Council of Independent Colleges  
Council on Social Work Education  
Educational Testing Service  
EDUCAUSE  
Higher Learning Commission  
Hispanic Association of Colleges and Universities  
Middle States Commission on Higher Education  
National Association for College Admission Counseling  
NAFSA: Association of International Educators  
National Association of College and University Business Officers  
National Association of Diversity Officers in Higher Education  
National Association of Independent Colleges and Universities  
National Association of Student Financial Aid Administrators  
National Collegiate Athletic Association  
New England Commission of Higher Education  
Northwest Commission on Colleges and Universities  
Phi Beta Kappa  
Student Affairs Administrators in Higher Education  
The University Risk Management & Insurance Association  
WASC Senior College and University Commission