

Consolidated Case Nos. 18-15068, 18-15069, 18-15070, 18-15071, 18-15072, 18-15128, 18-15133, 18-15134

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,
Plaintiffs-Appellees,

v.

U.S. DEP'T OF HOMELAND SECURITY, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:15-cv-02281-WHA

**BRIEF OF 102 COMPANIES AND ASSOCIATIONS AS *AMICI CURIAE*
IN SUPPORT OF APPELLEES**

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Amici curiae submit their corporate disclosure statements, as required by Fed. R. App. P. 26.1 and 29(c), in Appendix B.

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TABLE OF CONTENTS

INTEREST OF AMICI.....1

INTRODUCTION.....1

ARGUMENT.....3

I. DACA’S RESCISSION WILL INFLICT SIGNIFICANT HARM ON U.S. COMPANIES AND THE ENTIRE ECONOMY.....3

 A. Dreamers Contribute Directly To Our Nation’s Economic Growth.....4

 B. Dreamers Help Grow The Economy By Filling Jobs For Which There Otherwise Would Not Be A Sufficient Supply Of Workers. 7

 1. Permitting Dreamers to participate in the workforce expands, rather than reduces, the number of jobs.7

 2. Dreamers fill critical labor shortages.....9

 C. Rescinding DACA Will Inflict Enormous Harm On Individuals, Companies, And The Economy.....13

II. THE DECISION TO RESCIND DACA IS INVALID, BECAUSE IT IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW...17

 A. Rescission of DACA Is Subject To Review Under The APA...18

 B. Rescission Of DACA Is Arbitrary And Capricious And Contrary To Law.....22

CONCLUSION30

APPENDIX A.....A-1

APPENDIX B.....B-1

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Arizona v. United States</i> , 567 U.S. 387 (2012)	24
<i>Barahona-Gomez v. Reno</i> , 236 F.3d 1115 (9th Cir. 2001)	20
<i>Bonilla v. Lynch</i> , 840 F.3d 575 (9th Cir. 2016)	21
<i>Bowrin v. INS</i> , 194 F.3d 483 (4th Cir. 1999)	20
<i>Burlington Truck Lines v. United States</i> , 371 U.S. 156 (1962)	22, 28
<i>Edison Elec. Inst. v. EPA</i> , 996 F.2d 326 (D.C. Cir. 1993)	21
<i>Fornalik v. Perryman</i> , 223 F.3d 523 (7th Cir. 2000)	20
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985)	18, 20
<i>Hotel & Rest. Emps. Union, Local 25 v. Smith</i> , 846 F.2d 1499 (D.C. Cir. 1988) (en banc)	24
<i>ICC v. Bhd. of Locomotive Engineers</i> , 482 U.S. 270 (1987)	22
<i>INS v. St. Cyr</i> , 533 U.S. 289	20
<i>Johns v. DOJ</i> , 653 F.2d 884 (5th Cir. 1981)	26

Kenney v. Glickman,
96 F.3d 1118 (8th Cir. 1996)21

Kucana v. Holder,
558 U.S. 233 (2010)21

Mach Mining, LLC v. EEOC,
135 S.Ct. 1645 (2015)21

Montana Air Chapter No. 29 v. Fed. Labor Relations Auth.,
898 F.2d 753 (9th Cir. 1990)21

Motor Vehicle Mfrs. Ass’n v. State Farm Ins. Co.,
463 U.S. 29 (1983)28

Nat’l Wildlife Fed’n v. EPA,
980 F.2d 765 (D.C. Cir. 1992)21

Reno v. American Arab Anti-Discrimination Committee,
525 U.S. 471 (1999)19, 24

Safe Air For Everyone v. EPA,
488 F.3d 1088 (9th Cir. 2007)23

SEC v. Chenery Corp.,
318 U.S. 80 (1943)23

Texas v. United States,
809 F.3d 134 (5th Cir. 2015)20, 29

Transitional Hosps. Corp. of La. v. Shalala,
222 F.3d 1019 (D.C. Cir. 2000)23

Statutes, Regulations, and Rules

5 U.S.C. § 70118

5 U.S.C. § 70623

6 U.S.C. § 20226

8 C.F.R. § 274a.1227

8 U.S.C. § 110326

8 U.S.C. § 115427

8 U.S.C. § 125219

8 U.S.C. § 1324a28

49 U.S.C. § 3030127

Fed. R. App. P. 29..... 1

National Defense Authorization Act for Fiscal Year 2004, Pub.
L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392 (2003)27

USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).....27

Violence Against Women Act of 1994, Pub. L. No. 103-322, Tit.
V, 108 Stat. 109227

Other Authorities

44 Fed. Reg. 43,480 (July 25, 1979)27

51 Fed. Reg. 39385 (Oct. 28, 1986).....28

Alan Nelson, *Legalization and Family Fairness: An Analysis*
(Oct. 21, 1987), in 64 No. 41 Interpreter Releases 119125

Alexander Casey, *An Estimated 123,000 ‘Dreamers’ Own
Homes and Pay \$380M in Property Taxes*, Zillow Research
(Sept. 20, 2017), <https://goo.gl/SxQzuW>6

Am. Farm Bureau Fed’n, *Agricultural Labor – Immigration
Reform* (Oct. 2016), <https://goo.gl/WUAz3e>.....13

American Immigration Council, *Executive Grants of Temporary
Immigration Relief, 1956-Present* (Oct. 2014),
<https://goo.gl/Q87gqn>.....24

Andorra Bruno et al., CRS, *Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* App’x (July 13, 2012), <https://goo.gl/deiGYz>25

Ben Gitis & Jacqueline Varas, *The Labor and Output Declines From Removing All Undocumented Immigrants*, Am. Action Forum (May 5, 2016), <https://goo.gl/UAt3dJ>17

Bob Davis, *The Thorny Economics of Illegal Immigration*, Wall St. J. (Feb. 9, 2010), <https://goo.gl/j4dd7J>16

Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees*, Ctr. for Am. Progress (Nov. 16, 2012), <https://goo.gl/ZSmRLq>.....15

Brad Smith, *DREAMers Make our Country and Communities Stronger* (Aug. 31, 2017), <https://goo.gl/kJYDT3>11

Buttonwood, *Keep on Trucking*, The Economist (Feb. 11, 2012), <https://goo.gl/x8vqaL>8, 9

CHARLES GORDON ET AL., 6-72 IMMIGRATION LAW AND PROC. (Matthew Bender, rev. ed. 1993)24

Ctr. for Am. Progress, *Results of Tom K. Wong, United We Dream, National Immigration Law Center, and Center for American Progress National Survey* (2016), <https://goo.gl/pe2i17>.....11

David Bier, *Ending DACA Will Impose Billions in Employer Compliance Costs*, Cato Institute (Sept. 1, 2017), <https://goo.gl/1FMidk>.....15

David Bier, *Five Myths About DACA*, Cato Inst. (Sept. 7, 2017), <https://goo.gl/y1e8gb>8

David Kenny, *Kenny: One Dreamer, Weathering Two Storms*, Houston Chronicle (Dec. 3, 2017), <https://goo.gl/562Pme>12

Donald Neufeld, USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* (June 15, 2009), <https://goo.gl/SHaCVZ>.....26

Economics A-Z Terms Beginning with L, *The Economist*, <https://goo.gl/BvRwKU>8

Francesc Ortega et al., *The Economic Effects of Providing Legal Status to DREAMers* 18 IZA Discussion Paper No. 11281 (Jan. 2018), <http://ftp.iza.org/dp11281.pdf>.....9

FWD.us, *The Impact of DACA Program Repeal on Jobs* (2017), <https://goo.gl/gJQHnn>.....14

Giovanni Peri, *The Effect of Immigrants on U.S. Employment and Productivity*, Fed. Reserve Bank of San Francisco Econ. Letter (Aug. 30, 2010), <https://goo.gl/jK17fc>8, 12

H.R. Rep. No. 111-157 (2009)26

I Felt Like a Normal American Kid . . . Then Everything Changed, THINKPolicy Blog (Oct. 9, 2017), <https://goo.gl/oV9P7h>.....12

Inst. on Taxation & Economic Policy, *State & Local Tax Contributions of Young Undocumented Immigrants* (Apr. 25, 2017), <https://goo.gl/Kifc9K>.....6

Jacqueline Varas, *How Immigration Helps U.S. Workers and the Economy*, Am. Action Forum (Mar. 20, 2017), <https://goo.gl/ovHQEh>9

Jose Magana-Salgado, Immigrant Legal Resources Center, *Money on the Table: The Economic Cost of Ending DACA* 4 (2016), <https://goo.gl/3ZwGVJ>.....13

Julia Boorstin, *Illegal Entrepreneurs: Maria Has No U.S. Visa, and Jose’s Expires Soon. Yet They Own a Profitable California Factory, Pay Taxes, and Create Jobs*, CNNMoney (July 1, 2005), <https://goo.gl/jq2Y1C>.....5

Kenneth Megan, *Immigration and the Labor Force*, Bipartisan Policy Ctr. (Aug. 25, 2015), <https://goo.gl/8p3SP8>..... 7

Logan Albright *et al.*, *A New Estimate of the Cost of Reversing DACA*, Cato Institute, Feb. 15, 2018, <https://goo.gl/pgNGKi> 5

ManpowerGroup, *2016/2017 Talent Shortage Survey: The United States Results*, <https://goo.gl/rJTKs6> 10

Mem. from Janet Napolitano to David V. Aguilar Regarding Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012)..... 2

Mem. from Elaine C. Duke, Acting Secretary, Dep’t of Homeland Security, on Rescission of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children” (Sept. 5, 2017) 18, 20, 29

Mem. from Gene McNary, Comm’r, INS, to Reg’l Comm’rs, *Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990), in 67 No. 6 Interpreter Releases 153..... 25

Mem. from Michael D. Croning, INS, for Michael A Pearson, INS, *VTVPA Policy Memorandum #2—“T” and “U” Nonimmigrant Visas* (Aug. 30, 2001), <https://goo.gl/8djjyJ> 25

Mem. from Paul Virtue, INS, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* (May 6, 1997), <https://goo.gl/YSU412> 25

Mem. Op. for the Sec’y of Homeland Security and the Counsel to the President, 38 Op. O.L.C. 1 (Nov. 19, 2014), <https://www.justice.gov/file/179206/download> 24

Michael A. Clemens & Lant Pritchett, *Temporary Work Visas: A Four-Way Win for the Middle Class, Low-Skill Workers, Border Security, and Migrants* 4, Ctr. for Glob. Dev. (Apr. 2013), <https://goo.gl/p9NLuc> 7

Michael A. Clemens, *Does Kicking Out Mexicans Create Jobs*,
 Politico Magazine (Feb. 15, 2017), <https://goo.gl/XwLj1x>16

Michael Greenstone & Adam Looney, *What Immigration Means for U.S. Employment and Wages*, The Hamilton
 Project (May 4, 2012), <https://goo.gl/bvC7AE>7

Mitra Toossi, *Consumer Spending: An Engine for U.S. Job Growth*, Monthly Labor Rev. 12 (Nov. 2002),
<https://goo.gl/iyTkDR>7

My American Dream, Minus the Paperwork, THINKPolicy Blog
 (Oct. 3, 2017), <https://goo.gl/876JDm>12

Nat’l Conference of State Legislatures, National Employment
 Monthly Update (March 19, 2018), <https://goo.gl/wZBJh8>.....9

Natalie Kitroeff & Geoffrey Mohan, *Wages Rise on California Farms. Americans Still Don’t Want the Job*, Los Angeles
 Times (Mar. 17, 2017), <https://goo.gl/r1cH9Z>13

Nicole Prchal Svajlenka et al., *A New Threat to DACA Could Cost States Billions of Dollars*, Ctr. for Am. Progress (July
 21, 2017), <https://goo.gl/7udtFu>13

Octavio Blanco, *The Worker Shortage Facing America’s Farmers*, CNN Money (Sept. 29, 2016),
<https://goo.gl/ZF2Tdx>.....13

P’ship for a New Am. Econ., *Open for Business: How Immigrants Are Driving Business Creation in the United
 States* (Aug. 2012), <https://goo.gl/3mFkVz>3

Paul Krugman, Opinion, *Lumps of Labor*, N.Y. Times (Oct. 7,
 2003), <https://goo.gl/GyYTG5>8

President Dwight Eisenhower, *Statement Concerning the Entry Into the United States of Adopted Foreign-Born Orphans*
 (Oct. 26, 1956), <https://goo.gl/BkztnZ>;24

President’s Council of Advisors on Science and Technology,
*Report to the President: Engage to Excel: Producing One
 Million Additional College Graduates with Degrees in
 Science, Technology, Engineering, and Mathematics* (Feb.
 2012), <https://goo.gl/v2YRVD>10

Rachel Unruh & Amanda Bergson-Shilcock, Nat’l Skills
 Coalition, *Missing in Action* (Feb. 2015),
<https://goo.gl/gokfJW>10

Sarah Bohn et al., *Do E-Verify Mandates Improve Labor
 Market Outcomes of Low-Skilled Native and Legal
 Immigrant Workers?* (May 2014), <https://goo.gl/7UihSE>16

Sarah Elizabeth Richards, *How Fear of Deportation Puts Stress
 on Families*, *The Atlantic* (Mar. 22, 2017),
<https://goo.gl/qDgeRf>14

Silva Mathema, *Assessing the Economic Impacts of Granting
 Deferred Action Through DACA and DAPA*, *Ctr. for Am.
 Progress* (Apr. 2, 2015), <https://goo.gl/wxxek1>.....5

Tiziana Rinaldi & Angilee Shah, *Immigration Limbo Is a ‘Tug
 of Emotions.’ It’s Also a Mental Health Issue*, *PRI’s The
 World* (Aug. 22, 2017), <https://goo.gl/WLXMZ4>14

Tom K. Wong et al., *DACA Recipients’ Economic and
 Educational Gains Continue to Grow*, *Ctr. for Am. Progress*
 (Aug. 28, 2017), <https://goo.gl/dYJV1s>5

Tom K. Wong et al., *Results from 2017 National DACA Study*,
<https://goo.gl/nBZdP2>4, 5, 6, 11

Tony Romm, *IBM CEO Ginni Rometty Is in D.C. Urging
 Congress to Save DACA* (Sept. 19, 2017),
<https://goo.gl/NQeJUc>.....11

U.S. Citizenship & Immigration Servs. (“USCIS”), *Interim
 Relief for Certain Foreign Academic Students Adversely
 Affected by Hurricane Katrina: Frequently Asked Questions
 (FAQ)* (Nov. 25, 2005), <https://goo.gl/MvBmGP>25

U.S. Const. art. II, § 3	26
U.S. Dep’t of Labor, Bureau of Labor Statistics, Job Openings and Labor Turnover Survey Highlights August 2017 (Oct. 11, 2017), https://goo.gl/H28XkL	10
U.S. Dep’t of Labor, Bureau of Labor Statistics, Job Openings and Labor Turnover Survey, https://goo.gl/g4n9Ag	9
The UndocuScholars Project, <i>In the Shadows of the Ivory Tower: Undocumented Undergraduates and the Liminal State of Immigration Reform</i> (2015), https://goo.gl/sEpx1K	11
World Health Org. & Int’l Labour Org., <i>Mental Health And Work: Impact, Issues and Good Practices 1</i> (2000), https://goo.gl/ecH1Ut	14

INTEREST OF AMICI

Amici are 102 U.S. companies and associations that collectively contribute trillions of dollars in annual revenue to the American economy. Many *amici* employ Dreamers—the young people who, under the Deferred Action for Childhood Arrivals (DACA) program, are able to live and work in the country that has been their home for most of their young lives. In addition, *amici*'s customers and end users are Dreamers; and *amici*'s businesses benefit from Dreamers' contributions to the overall economy through their tax payments, spending, and investments. Accordingly, *amici* have a strong interest in Dreamers' continued ability to work and participate in our country's economy and in society generally. A list of the *amici* is set forth in Appendix A.¹

INTRODUCTION

The intangible benefits of the DACA program are undeniable and substantial: nearly 800,000 young people (Dreamers) who “were brought to this country as children and know only this country as home” were for the first time able live in America and participate fully in all aspects of our

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for amici certify that counsel for the other parties have consented to the filing of this brief. Amici state that no party's counsel authored this brief in whole or in part, and that no person other than amici or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

society without the constant and crippling fear of deportation. Mem. from Janet Napolitano to David V. Aguilar Regarding Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012). DACA is a concrete and essential example of America fulfilling its centuries-old promise to welcome people from around the world seeking a better and a freer life.

In addition to these invaluable intangible benefits, DACA has produced—and is continuing to produce—important benefits for America’s companies and for our economy as a whole. Most notably, DACA makes Dreamers eligible for work authorization, thereby enabling them to obtain jobs.

Employment of Dreamers expands work opportunities for everyone, because employment is not a zero-sum game. Dreamers are filling vacancies at companies that cannot find enough workers for open positions. And Dreamers’ wages lead to higher tax revenues and expansion of our national GDP—producing new jobs for all Americans.

DACA’s rescission will inflict serious harm on U.S. companies, all workers, and the American economy as a whole. Indeed, our national GDP will lose between \$351 and \$460.3 billion, and tax revenues will be reduced by \$92.9 billion, over the next decade.

But those dire consequences should never come to pass because DACA's rescission should not be permitted to stand. The Department of Homeland Security (DHS) rescinded DACA based entirely on its legal conclusion that it exceeds the agency's statutory authority. That legal conclusion is both subject to judicial review and wrong. Courts consistently review agency action—including exercises of discretion—that rest on legal determinations. DACA closely resembles deferred action programs adopted in the past, and complies fully with the applicable statute.

ARGUMENT

I. DACA'S RESCISSION WILL INFLICT SIGNIFICANT HARM ON U.S. COMPANIES AND THE ENTIRE ECONOMY.

Since the nation's founding, immigrants have been an integral part of the fabric of our country, enhancing the lives and prosperity of all Americans. Immigrants' contributions to the U.S. economy are well-recognized: For example, the businesses they own generate over \$775 billion in revenue and employ one out of every 10 workers.²

DACA enabled Dreamers—immigrants who were brought to the U.S. as children—to come out of the shadows, participate in the economy, and

² P'ship for a New Am. Econ., *Open for Business: How Immigrants Are Driving Business Creation in the United States* 12, 14 (Aug. 2012), <https://goo.gl/3mFkVz>.

contribute to U.S. companies, which benefits all of us. Rescinding DACA harms not only individual Dreamers and their families, friends, and co-workers; but also the many U.S. businesses that count on them to help fuel continued innovation and economic growth.

A. Dreamers Contribute Directly To Our Nation's Economic Growth.

In the over five years since DACA was implemented, Dreamers have become essential contributors to American companies and the American economy. Prior to the DACA program, these young people—who have obtained at least a high school degree and, in many cases, have finished college and graduate school—would have been unable to obtain work authorization, and therefore unable to put their education and skills to use. DACA changed that, and as a result over 91 percent of Dreamers are employed and earn wages commensurate with their skill levels.³ Permitting Dreamers to stay and work in the country in which they grew up not only benefits those individuals, but also benefits American companies and the American economy as a whole.

First, Dreamers directly contribute to the success of numerous U.S. companies. At least 72 percent of the top 25 Fortune 500 companies

³ Tom K. Wong et al., *Results from 2017 National DACA Study 3-4* (“Wong 2017 Results”), <https://goo.gl/nBZdP2>.

employ Dreamers—including IBM, Walmart, Apple, General Motors, Amazon, JPMorgan Chase, Home Depot, and Wells Fargo, among others. Those companies alone generate almost \$3 trillion in annual revenue.⁴

Many Dreamers are entrepreneurs who have created their own businesses: According to one survey, five percent of Dreamers started their own businesses after receiving DACA status. Among those respondents 25 years and older, the figure is eight percent—well above the 3.1 percent for all Americans.⁵ These businesses create new jobs and provide goods and services that expand the economy.⁶

Second, Dreamers pay taxes to federal, state, and local governments.⁷ The Cato Institute estimated that over 10 years, DACA recipients will increase federal tax revenues by \$93 billion⁸; they will

⁴ Tom K. Wong et al., *DACA Recipients' Economic and Educational Gains Continue to Grow*, Ctr. for Am. Progress (Aug. 28, 2017), <https://goo.gl/dYJV1s>.

⁵ Wong 2017 Results, *supra* n.3, at 3.

⁶ See Julia Boorstin, *Illegal Entrepreneurs: Maria Has No U.S. Visa, and Jose's Expires Soon. Yet They Own a Profitable California Factory, Pay Taxes, and Create Jobs*, CNNMoney (July 1, 2005), <https://goo.gl/jq2Y1C>.

⁷ See Silva Mathema, *Assessing the Economic Impacts of Granting Deferred Action Through DACA and DAPA*, Ctr. for Am. Progress (Apr. 2, 2015), <https://goo.gl/wxxek1>.

⁸ Logan Albright et al., *A New Estimate of the Cost of Reversing DACA* 1, Cato Institute, Feb. 15, 2018, <https://goo.gl/pgNGKi>.

contribute many billions more in state and local taxes.⁹ These tax dollars help fund public goods like schools, firefighters, roads, and bridges. For example, Dreamers pay approximately \$111 million and \$81 million in property taxes in California and Texas alone, respectively, which is “enough to cover the annual salaries of roughly 1,500 elementary school teachers in each of those states.”¹⁰

Third, Dreamers have used their earnings—and the increased stability and security resulting from their DACA status—to make purchases and investments that grow our nation’s economy. Nearly two-thirds of Dreamers reported buying their first car in 2017, and 16 percent reported purchasing a first home.¹¹ These and other types of personal consumption expenditures are important drivers of the economy: they

⁹ Inst. on Taxation & Economic Policy, *State & Local Tax Contributions of Young Undocumented Immigrants* (Apr. 25, 2017), <https://goo.gl/Kifc9K> (estimating that DACA-eligible immigrants contribute approximately \$2 billion a year in state and local taxes)

¹⁰ Alexander Casey, *An Estimated 123,000 ‘Dreamers’ Own Homes and Pay \$380M in Property Taxes*, Zillow Research (Sept. 20, 2017), <https://goo.gl/SxQzuW>.

¹¹ Wong 2017 Results, *supra* n.3, at 3.

“account[] for the largest share of GDP [and] are the main generator of employment in the economy.”¹²

B. Dreamers Help Grow The Economy By Filling Jobs For Which There Otherwise Would Not Be A Sufficient Supply Of Workers.

These benefits to the U.S. economy do not come at the expense of U.S.-born workers. Studies have consistently found that immigrants do not displace U.S.-born workers. They instead help grow the economy and create more opportunities for U.S.-born workers by filling positions that otherwise would remain vacant because of a shortage of qualified workers.¹³

1. Permitting Dreamers to participate in the workforce expands, rather than reduces, the number of jobs.

“[O]ne of the best-known fallacies in economics” is the “lump of

¹² Mitra Toossi, *Consumer Spending: An Engine for U.S. Job Growth*, Monthly Labor Rev. 12 (Nov. 2002), <https://goo.gl/iyTkdR>.

¹³ See Michael Greenstone & Adam Looney, *What Immigration Means for U.S. Employment and Wages* 1-2, The Hamilton Project (May 4, 2012), <https://goo.gl/bvC7AE>; Kenneth Megan, *Immigration and the Labor Force*, Bipartisan Policy Ctr. (Aug. 25, 2015), <https://goo.gl/8p3SP8>; Michael A. Clemens & Lant Pritchett, *Temporary Work Visas: A Four-Way Win for the Middle Class, Low-Skill Workers, Border Security, and Migrants* 4, Ctr. for Glob. Dev. (Apr. 2013), <https://goo.gl/p9NLuc>.

labour fallacy.”¹⁴ Economists from across the policy and political spectrum have discredited the notion that “there is a fixed amount of work to be done—a lump of labour”—such that an increase in the number of workers reduces the number of available jobs.¹⁵ Rather, the clear reality is that jobs beget more jobs. “When people work for a living, they earn money. They spend that money on goods and services that are produced by other people.”¹⁶ The greater demand for goods and services creates new jobs.

The facts are indisputable. “From 1970 to 2017, the U.S. labor force doubled. Rather than ending up with a 50 percent unemployment rate, U.S. employment doubled.”¹⁷ Another study showed that countries with high employment levels of older workers also had high employment levels of young workers; in other words, high employment levels in one group

¹⁴ Economics A-Z Terms Beginning with L, *The Economist*, <https://goo.gl/BvRwKU>.

¹⁵ *Id.*; see also Paul Krugman, Opinion, *Lumps of Labor*, N.Y. Times (Oct. 7, 2003), <https://goo.gl/GyYTG5>.

¹⁶ Buttonwood, *Keep on Trucking*, *The Economist* (Feb. 11, 2012), <https://goo.gl/x8vqaL>; see also Megan, *supra* n.13 (“[A] breadth of research indicates that immigration can be complementary to native born employment, as it spurs demand for goods and services”); Giovanni Peri, *The Effect of Immigrants on U.S. Employment and Productivity*, Fed. Reserve Bank of San Francisco Econ. Letter (Aug. 30, 2010), <https://goo.gl/jK17fc>.

¹⁷ David Bier, *Five Myths About DACA*, Cato Inst. (Sept. 7, 2017), <https://goo.gl/y1e8gb>.

benefited the other group, rather than depriving the other of employment opportunities.¹⁸ And yet other studies have shown that increased immigration levels in the U.S. in the past have had largely *positive* impacts on the employment levels and income of U.S.-born workers.¹⁹

These findings hold true today. The unemployment rate has been halved since 2012, when DACA was created.²⁰ The number of total job openings has increased.²¹ And studies have found that DACA has not had any significant effect on the wages of U.S.-born workers.²²

2. Dreamers fill critical labor shortages.

The jobs being filled by Dreamers post-DACA are largely jobs for which there is a shortage of qualified workers—*not* the jobs that are or could be filled by U.S.-born workers. In a recent survey of U.S. employers, 46 percent of respondents reported difficulty filling jobs—particularly in

¹⁸ Buttonwood, *supra* n.16.

¹⁹ See Jacqueline Varas, *How Immigration Helps U.S. Workers and the Economy*, Am. Action Forum (Mar. 20, 2017), <https://goo.gl/ovHQEh>.

²⁰ See Nat'l Conference of State Legislatures, National Employment Monthly Update (March 19, 2018) (“NCSL Employment Update”), <https://goo.gl/wZBJh8>.

²¹ U.S. Dep’t of Labor, Bureau of Labor Statistics, Job Openings and Labor Turnover Survey, <https://goo.gl/g4n9Ag> (last accessed March 18, 2018).

²² Francesc Ortega et al., *The Economic Effects of Providing Legal Status to DREAMers* 18, IZA Discussion Paper No. 11281 (Jan. 2018), <http://ftp.iza.org/dp11281.pdf>.

skilled labor positions, such as teachers, accounting and finance staff, nurses, and engineers.²³ Almost a quarter of employers reported a lack of available applicants; another 34 percent cited a shortage of applicants with necessary skills.²⁴ In 2012, the President’s Council of Advisors on Science and Technology warned that within ten years, the U.S. could face a shortfall of nearly one million professionals in the science, technology, engineering, and mathematics (STEM) fields.²⁵ Even putting aside the skills mismatch, it is unlikely that there are enough available workers to fill the openings: The U.S. unemployment rate is currently quite low, and the number of job openings is high.²⁶

Dreamers help fill this gap. They all have a high school degree or equivalent—and a large percentage of Dreamers are pursuing or have

²³ See ManpowerGroup, *2016/2017 Talent Shortage Survey: The United States Results* (“ManpowerGroup 2016/2017”), <https://goo.gl/rJTKs6>; see also Rachel Unruh & Amanda Bergson-Shilcock, Nat’l Skills Coalition, *Missing in Action* 3-4 (Feb. 2015), <https://goo.gl/gokfJW>.

²⁴ ManpowerGroup 2016/2017, *supra* n.23.

²⁵ President’s Council of Advisors on Science and Technology, *Report to the President: Engage to Excel: Producing One Million Additional College Graduates with Degrees in Science, Technology, Engineering, and Mathematics* 1 (Feb. 2012), <https://goo.gl/v2YRVD>.

²⁶ See NCSL Employment Update, *supra* n.20; U.S. Dep’t of Labor, Bureau of Labor Statistics, Job Openings and Labor Turnover Survey Highlights August 2017 charts 1 & 2 (Oct. 11, 2017), <https://goo.gl/H28XkL>.

received college or post-college degrees and therefore qualify for highly-skilled jobs.²⁷ In 2016, almost a quarter of Dreamers were employed in the educational or health services industry.²⁸ Many others work in technology, science, and finance,²⁹ and more still are majoring in STEM fields.³⁰ *Amici's* experiences confirm this: For example, Microsoft employs 27 Dreamers as “software engineers with top technical skills; finance professionals driving [its] business ambitions forward; and retail and sales associates connecting customers to [its] technologies.”³¹ IBM has identified at least 31 Dreamers within the company who work in areas such as software development and client support.³² One IBM Dreamer provided

²⁷ Wong 2017 Results, *supra* n.3, at 7-8.

²⁸ Ctr. for Am. Progress, *Results of Tom K. Wong, United We Dream, National Immigration Law Center, and Center for American Progress National Survey 4* (2016), <https://goo.gl/pe2i17>.

²⁹ *Id.*

³⁰ The UndocuScholars Project, *In the Shadows of the Ivory Tower: Undocumented Undergraduates and the Liminal State of Immigration Reform 8* (2015), <https://goo.gl/sEpx1K>.

³¹ Brad Smith, President and Chief Legal Officer, Microsoft, *DREAMers Make our Country and Communities Stronger* (Aug. 31, 2017), <https://goo.gl/kJYDT3>.

³² See Tony Romm, *IBM CEO Ginni Rometty Is in D.C. Urging Congress to Save DACA*, Recode.net (Sept. 19, 2017), <https://goo.gl/NQeJUc>; *My American Dream, Minus the Paperwork*, THINKPolicy Blog (Oct. 3, 2017), <https://goo.gl/876JDm>; *I Felt Like a Normal American Kid . . . Then Everything Changed*, THINKPolicy Blog (Oct. 9, 2017), <https://goo.gl/oV9P7h>.

critical remote technical support to ensure continuity of IBM’s Cloud services when Hurricane Harvey flooded Houston.³³ Lyft employs at least one Dreamer as a software engineer, who serves as one of the tech leads of the team driving critical data projects.³⁴

Dreamers with lesser-skilled jobs are also filling positions for which there is an insufficient labor supply. “Among less-educated workers, those born in the United States tend to have jobs in manufacturing or mining, while immigrants tend to have jobs in personal services and agriculture.”³⁵ The latter industries in particular “face[] a critical shortage of workers every year, as citizens are largely unwilling to engage in these . . . physically . . . demanding activities”³⁶—even when companies increase wages the maximum amount financially feasible.³⁷

³³ See David Kenny, *Kenny: One Dreamer, Weathering Two Storms*, Houston Chronicle (Dec. 3, 2017), <https://goo.gl/562Pme>.

³⁴ See Decl. of Emily Nishi ¶ 4, SER841-45.

³⁵ Peri, *supra* n.16.

³⁶ Am. Farm Bureau Fed’n, *Agricultural Labor – Immigration Reform* (Oct. 2016), <https://goo.gl/WUAz3e>; see also Clemens & Pritchett, *supra* n.13, at 3 (predicting that increase in low-skill jobs in the care industry will be more than the total increase in the age 25-54 labor force).

³⁷ See, e.g., Natalie Kitroeff & Geoffrey Mohan, *Wages Rise on California Farms. Americans Still Don’t Want the Job*, Los Angeles Times (Mar. 17, 2017), <https://goo.gl/r1cH9Z>; Octavio Blanco, *The Worker Shortage Facing America’s Farmers*, CNN Money (Sept. 29, 2016), <https://goo.gl/ZF2Tdx>.

In sum, Dreamers are filling jobs that otherwise would remain vacant and are increasing demand for goods and services, which helps to grow the entire economy.

C. Rescinding DACA Will Inflict Enormous Harm On Individuals, Companies, And The Economy.

All of the above benefits—and more—will be lost if DACA’s rescission is permitted to stand. Over the next decade, our country’s GDP will lose between \$350 and \$460.3 billion; and federal tax revenue will drop over \$90 billion.³⁸

This economic contraction would result directly from Dreamers’ loss of work authorization. All of the hundreds of thousands of employed Dreamers would lose their jobs. If DACA’s rescission is permitted to go forward, in the first eight months alone, 300,000 would lose their jobs—an average of 1,700 people losing jobs every single business day.³⁹ In addition to the obvious harm to Dreamers themselves, the loss of so many workers will have severe repercussions for U.S. companies and workers.

³⁸ See Nicole Prchal Svajlenka et al., *A New Threat to DACA Could Cost States Billions of Dollars*, Ctr. for Am. Progress (July 21, 2017), <https://goo.gl/7udtFu>; Jose Magana-Salgado, Immigrant Legal Resources Center, *Money on the Table: The Economic Cost of Ending DACA* 4, 6-7 (2016), <https://goo.gl/3ZwGVJ>; see also Albright et al., *supra* n.8, at 1.

³⁹ FWD.us, *The Impact of DACA Program Repeal on Jobs* (2017), <https://goo.gl/gJQHnn>.

Already, the possibility that DACA's rescission might go into effect at any moment is impacting Dreamers and, by extension, the companies for which they work. Dreamers now live with the constant threat of job loss and being forced into a life in the shadows, unable to participate in society, and facing forced removal from the only country they have ever known. The fear for the future that is now a daily part of life for Dreamers and their families affects both physical and mental health.⁴⁰ That, in turn, negatively affects employee productivity and performance, illness and absenteeism, accidents, and turnover.⁴¹

If this Court were to uphold DACA's rescission and thereby permit Dreamers' work authorizations to expire, companies will face an estimated \$6.3 billion in costs to replace Dreamers—if they can even find new employees to fill the empty positions.⁴² Companies will forfeit the money

⁴⁰ See Tiziana Rinaldi & Angilee Shah, *Immigration Limbo Is a 'Tug of Emotions.' It's Also a Mental Health Issue*, PRI's The World (Aug. 22, 2017), <https://goo.gl/WLXMZ4>; Sarah Elizabeth Richards, *How Fear of Deportation Puts Stress on Families*, The Atlantic (Mar. 22, 2017), <https://goo.gl/qDgeRf>.

⁴¹ See World Health Org. & Int'l Labour Org., *Mental Health And Work: Impact, Issues and Good Practices* 1 (2000), <https://goo.gl/ecH1Ut>; Ortega, *supra* n.22, at 9-10.

⁴² See David Bier, *Ending DACA Will Impose Billions in Employer Compliance Costs*, Cato Institute (Sept. 1, 2017), <https://goo.gl/1FMidk>; see also Magana-Salgado, *supra* n.38, at 4.

they invested in training Dreamers, and will incur costs recruiting and training new employees, who will be less experienced and therefore less productive.⁴³ These costs are particularly burdensome for small businesses.

The numbers are relevant, but numbers alone do not come close to capturing Dreamers' contributions and the tremendous harm that will result from their loss. People are the heart of every business; and every company's goal is to create teams that work seamlessly together—teams in which colleagues support one another both within and outside the workplace. Ripping Dreamers out of their jobs hurts not only Dreamers, but other employees who lose friends and colleagues, and companies that lose trusted members of their teams.

History shows that forcing Dreamers out of the workforce and into the shadows will also reduce job growth and harm the U.S. economy. After Arizona passed the Legal Arizona Workers Act in 2007, which targeted the use of unauthorized workers, its population of undocumented workers dropped by 40 percent. Economic growth fell, reducing job opportunities: The state's total employment was 2.5 percent less than what it would have

⁴³ Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees*, Ctr. for Am. Progress (Nov. 16, 2012), <https://goo.gl/ZSmRLq>.

been without the law, and its GDP was reduced by an average of 2 percent a year between 2008 and 2015.⁴⁴

Similarly, in 1964, the U.S. expelled Mexican *braceros*, who were previously permitted to work temporarily in the U.S., mostly on farms. A recent study revealed that excluding the Mexican *braceros* “did not affect the wages or employment of U.S. farmworkers.”⁴⁵ Instead, farms responded by *eliminating* the jobs—often by moving production abroad or going out of business.⁴⁶

Removing Dreamers from the workforce is likely to have the very same negative effect on U.S. employment levels as companies are unable to fill critical jobs. That effect will be exacerbated as Dreamers are forced to shutter businesses that employ other workers and other companies lose

⁴⁴ See Bob Davis, *The Thorny Economics of Illegal Immigration*, Wall St. J. (Feb. 9, 2010), <https://goo.gl/j4dd7J>; see also Sarah Bohn et al., *Do E-Verify Mandates Improve Labor Market Outcomes of Low-Skilled Native and Legal Immigrant Workers?* 17-18, 21, 24-25 (May 2014), <https://goo.gl/7UihSE> (finding that employment rates of U.S.-born men dropped post-LAWA).

⁴⁵ Michael A. Clemens, *Does Kicking Out Mexicans Create Jobs?*, Politico Magazine (Feb. 15, 2017), <https://goo.gl/XwLj1x>.

⁴⁶ *Id.*

the income that has helped drive demand and production of goods and services provided by U.S.-born workers.⁴⁷

And the harm will be much more far-reaching: Just as DACA sent a powerful message of inclusion, its rescission tells the immigrants who have been integral to the growth and development of our society and economy for decades that they are no longer welcome here. As a result, DACA's rescission will reduce the future ability of U.S. companies to attract individuals from around the world to support America's continued economic growth and prosperity.

II. THE DECISION TO RESCIND DACA IS INVALID, BECAUSE IT IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW.

In deciding to rescind DACA, DHS did not consider any of the immense harms and costs that policy change would impose on U.S. companies and the economy; nor did it consider whether public safety or other policy considerations warranted a change in enforcement priorities

⁴⁷ Cf. Ben Gitis & Jacqueline Varas, *The Labor and Output Declines From Removing All Undocumented Immigrants*, Am. Action Forum (May 5, 2016), <https://goo.gl/UAt3dJ> (concluding that removing undocumented immigrants from the workforce would cause private sector employment to decline by 4 to 6.8 million workers, would reduce real private sector output by \$381.5 to \$623.2 billion, and would have further negative economic impacts through the loss of consumption, investments, and entrepreneurship).

with respect to Dreamers. Instead, as the district court correctly recognized, DHS rested its decision entirely on its legal conclusion that DACA “was effectuated . . . without proper statutory authority” and therefore “was an unconstitutional exercise of authority by the Executive Branch.” Mem. from Elaine C. Duke, Acting Secretary, Dep’t of Homeland Security, on Rescission of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children” (Sept. 5, 2017) (“DACA Rescission Memo”). That decision is subject to judicial review. It is also invalid, because it is arbitrary and capricious and contrary to law.

A. Rescission of DACA Is Subject To Review Under The APA.

There is no dispute that the rescission of DACA is subject to judicial review under the APA unless it falls within one of two narrow exceptions: “(1) statutes preclude judicial review; or (2) [the] agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a); *accord Heckler v. Chaney*, 470 U.S. 821, 828-29 (1985). The district court correctly held that neither exception applies.

First, there is no statute precluding judicial review of the rescission of DACA. The government argues that 8 U.S.C. § 1252(g)⁴⁸ bars review. U.S. Opening Brief (“U.S. Op. Br.”) 25-28. But the Supreme Court explained in *Reno v. American Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (“*AAADC*”), that § 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.’” *Id.* at 482 (emphases in original). Plaintiffs in these cases challenge no such action.

The government’s attempt (U.S. Op. Br. at 26) to shoehorn the rescission of DACA into the category of decisions to “commence proceedings” stretches that term beyond its limit and risks turning § 1252(g) into a “zipper clause” precluding judicial review unless expressly provided for in the statute—a reading of § 1252(g) that the Supreme Court expressly *rejected* in *AAADC*, 525 U.S. at 482. It is no wonder then that courts have repeatedly found that § 1252(g) does not bar judicial review of

⁴⁸ Section 1252(g) provides that, subject to certain exceptions, “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.”

actions that are prior to or distinct from a decision or action to commence *an individual proceeding*.⁴⁹

Second, the rescission of DACA is not committed to agency discretion. The rescission decision did not rest on a fact-specific exercise of enforcement discretion, as in *Heckler v. Chaney*, 470 U.S. 821 (1985). Rather, revocation is predicated on the legal conclusion that DACA “was effectuated . . . without proper statutory authority” and therefore “was an unconstitutional exercise of authority by the Executive Branch.” DACA Rescission Memo, *supra*.

This Court and others have held that agency action resting solely on such a legal determination is reviewable. These agency actions do not implicate the “complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise,” nor do they present a situation where there is “no law to apply.” *Chaney*, 470 U.S. at 831. There

⁴⁹ See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 293 & 311 n.34 (2001) (§ 1252(g) did not apply to challenge to “Attorney General[s] interpret[ion]” of statutes); *Texas v. United States*, 809 F.3d 134, 165 (5th Cir. 2015) (§ 1252(g) did not apply to challenge to DAPA); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1118-19 (9th Cir. 2001) (§ 1252(g) did not apply to challenge to directives issued by the BIA Chairman and the Chief Immigration Judge that were based on legal interpretations); *Bowrin v. INS*, 194 F.3d 483, 488 (4th Cir. 1999) (“§ 1252(g) does not apply to agency interpretations of statutes”); *Fornalik v. Perryman*, 223 F.3d 523, 532 (7th Cir. 2000) (habeas petition filed before INS filed initial filing in removal case was not request for “relief from a decision to commence proceedings”).

accordingly is no basis for disregarding the “strong” and “well-settled” presumption favoring review of executive determinations like the rescission of DACA. *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645, 1651 (2015); *Kucana v. Holder*, 558 U.S. 233, 241 (2010).⁵⁰

The government concedes that the rescission of DACA “was based on legal analysis.”⁵¹ U.S. Op. Br. at 13. It argues, however, that DHS’s

⁵⁰ See, e.g., *Bonilla v. Lynch*, 840 F.3d 575, 587 (9th Cir. 2016) (holding reviewable BIA’s decision not to exercise its sua sponte authority to open the petitioner’s motion to reopen his order of removal where the BIA did not deny the motion “as an exercise of discretion,” but rather based on the “conclu[sion] that it lacked the authority to reopen”); *Montana Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990) (holding that *Chaney* does not apply to decisions “based on a belief that the agency lacks jurisdiction” or “an agency’s statutory interpretations made in the course of nonenforcement decisions”); *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) (“[I]nterpretation [of] the substantive requirements of the law . . . is not the type of discretionary judgment concerning the allocation of enforcement resources that [*Chaney*] shields from review.”); *Nat’l Wildlife Fed’n v. EPA*, 980 F.2d 765, 773 (D.C. Cir. 1992) (holding reviewable EPA’s nonenforcement decision where plaintiff challenged agency’s “statutory interpretation embodied in [the regulation], and does not contest a particular enforcement decision”); see also *Chaney*, 470 U.S. at 833 n.4 (suggesting exception would not apply if case involved “a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction”); *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996) (interpreting *Chaney* as applying “to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards”).

⁵¹ The government elsewhere in its brief asserts that the decision to rescind DACA was based on the agency’s concern about becoming “enmeshed in litigation.” U.S. Op. Br. at 13-14, 29. As the district court correctly found, this asserted rationale is merely a post-hoc rationalization

reliance on legal interpretations is “immaterial,” relying entirely on a single line from *ICC v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 283 (1987) (“*BLE*”) that because an “agency gives a reviewable reason for otherwise unreviewable action’ does not mean that ‘the action becomes reviewable.’” *Id.* at 13, 23. But that statement was dicta, and inapposite dicta at that: *BLE* involved an individual agency enforcement decision, and not a general enforcement policy; and the agency’s decision was not predicated on its determination that it lacked legal authority. By contrast, DHS’s decision involved a general enforcement policy and was predicated on its belief that the Executive lacked authority to implement DACA. Courts including this one have consistently held that such decisions are reviewable. *See* n.50 *supra* (collecting cases). The rescission of DACA is likewise reviewable.

B. Rescission Of DACA Is Arbitrary And Capricious And Contrary To Law.

Because DACA’s rescission rests solely on a legal determination—the interpretation of statutes and the Constitution—DHS’s decision stands or falls on the correctness of that determination. If DHS got the law

that is not entitled to any weight. C.D. Cal. No. 17-cv-05211, Dkt. 234 at 38; *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *see* p.28 *infra*.

wrong, its action is not supported by a valid justification and therefore is arbitrary and capricious in violation of the APA. *See* 5 U.S.C. § 706(2)(A); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (“[I]f the [agency] action is based upon a determination of law . . ., an order may not stand if the agency has misconceived the law.”); *Safe Air For Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007) (“Because [EPA’s flawed legal interpretation] is fundamental to EPA’s determination that [the State] did not contravene [the Clean Air Act], EPA’s outcome on those statutory interpretation questions is ‘arbitrary, capricious, or otherwise not in accordance with law’ for the purposes of our review.”); *Transitional Hosps. Corp. of La. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000). DHS was clearly wrong in determining that DACA is beyond the Executive Branch’s legal authority.

DACA affords recipients two principal benefits: deferral of government action to remove the individual from the United States (known as “deferred action”) and the ability to apply for work authorization. Both benefits have long been recognized in U.S. immigration law.

First, granting “deferred action” is a long-established practice engaged in by Administrations of both parties and expressly recognized by

the Supreme Court. *See AAADC*, 525 U.S. at 483-85 (describing “regular practice” of “deferred action”).⁵² U.S. Presidents since 1956 have implemented formal programs deferring government action to remove individuals present in the United States—thereby enabling over two million otherwise-removable aliens to remain temporarily in the country.

In the 1950s, President Eisenhower authorized the admission of (“paroled”) almost 1,000 foreign-born children into the United States; and he and Presidents Kennedy, Johnson, and Nixon later paroled another 600,000 Cubans.⁵³ In the 1970s and 1980s, the Ford and Carter Administrations granted “extended voluntary departure,” which “temporarily suspend[ed] enforcement” of deportation, to “particular group[s]” of immigrants.⁵⁴ The Reagan Administration introduced the

⁵² *See also Arizona v. United States*, 567 U.S. 387, 396 (2012) (“A principal feature of the removal system is the broad discretion exercised by immigration officials.”); CHARLES GORDON ET AL., 6-72 IMMIGRATION LAW AND PROC. § 72.03 (Matthew Bender, rev. ed. 1993); Mem. Op. for the Sec’y of Homeland Security and the Counsel to the President, 38 Op. O.L.C. 1, 12-20 (Nov. 19, 2014), <https://www.justice.gov/file/179206/download>.

⁵³ *See* President Dwight Eisenhower, *Statement Concerning the Entry Into the United States of Adopted Foreign-Born Orphans* (Oct. 26, 1956), <https://goo.gl/BkztnZ>; American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present* (Oct. 2014), <https://goo.gl/Q87gqn>.

⁵⁴ *Hotel & Rest. Emps. Union, Local 25 v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (en banc); Andorra Bruno et al., CRS, *Analysis of June 15*,

“Family Fairness” program, which deferred removal actions against minor children whose parents were in the process of obtaining legal status but who did not themselves qualify for legal status.⁵⁵ President George H.W. Bush then extended the program in 1990 to cover qualified spouses.⁵⁶ And on at least four additional occasions, immigration officials have extended deferred action to specified classes of individuals.⁵⁷

None of these programs had explicit statutory authorization. Instead, the power to grant deferral of removal proceedings and other similar discretionary relief has long been recognized to be an exercise of

2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children App’x (July 13, 2012), <https://goo.gl/deiGYz>.

⁵⁵ Alan Nelson, *Legalization and Family Fairness: An Analysis* (Oct. 21, 1987), in 64 No. 41 Interpreter Releases 1191 app. I.

⁵⁶ Mem. from Gene McNary, Comm’r, INS, to Reg’l Comm’rs, *Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990), in 67 No. 6 Interpreter Releases 153, app. I, at 164-65 (Feb. 5, 1990).

⁵⁷ See, e.g., Mem. from Paul Virtue, INS, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997), <https://goo.gl/YSU412>; U.S. Citizenship & Immigration Servs. (“USCIS”), *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* 1, 7 (Nov. 25, 2005), <https://goo.gl/MvBmGP>; Mem. from Michael D. Croning, INS, for Michael A. Pearson, INS, *VTVPA Policy Memorandum #2—“T” and “U” Nonimmigrant Visas* (Aug. 30, 2001), <https://goo.gl/8djyJ>; Mem. from Donald Neufeld, USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* (June 15, 2009), <https://goo.gl/SHaCVZ>.

prosecutorial authority that falls squarely within the Executive Branch's constitutional authority to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

And Congress has codified that discretion. Until 1940, "the deportation statute unyieldingly demanded that an alien illegally in the United States be deported." *Johns v. DOJ*, 653 F.2d 884, 890 n.12 (5th Cir. 1981). Now, however, the immigration laws specifically charge the secretary of Homeland Security with "establishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5), and with carrying out the "administration and enforcement of th[e INA] and all other laws relating to the immigration and naturalization of aliens," 8 U.S.C. § 1103(a); *see also* H.R. Rep. No. 111-157, at 8 (2009) ("[R]ather than simply rounding up as many illegal immigrants as possible, which is sometimes achieved by targeting the easiest and least threatening among the undocumented population, DHS must ensure that the government's huge investments in immigration enforcement are producing the maximum return in actually making our country safer."). Moreover, Congress has on several occasions recognized the legal authority to grant

deferred action by *expressly expanding* deferred action to certain categories of individuals.⁵⁸

Given this long historical practice and express congressional recognition, it is plain that the Executive Branch has broad authority to grant deferred action.

Second, permitting deferred action recipients to obtain work authorization has a similarly lengthy pedigree. A regulation promulgated in the 1980s provides that individuals who receive deferred action are eligible to apply for work authorization. *See* 8 C.F.R. § 274a.12(c)(14). This regulation codified the already-existing practice and procedure of granting employment authorization to such individuals. *See* 44 Fed. Reg. 43,480 (July 25, 1979). And in the almost forty years since, Congress has declined to limit this practice in any way.

⁵⁸ *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain aliens who self-petition for relief under the Violence Against Women Act of 1994, Pub. L. No. 103-322, Tit. V, 108 Stat. 1092, are eligible to request “deferred action”); USA PATRIOT Act, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (2001) (providing that certain family members of lawful permanent residents killed on September 11, 2001, or of citizens killed in combat, are “eligible for deferred action”); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694-1695 (2003) (same); *cf.* 49 U.S.C. § 30301 note (providing that certain states may issue driver’s licenses to aliens with “approved deferred action status.”).

To the contrary, in the face of a challenge to the Attorney General's authority to grant work authorizations to individuals who have been granted deferred action (*see* 51 Fed. Reg. 39385 (Oct. 28, 1986)), Congress ratified the Attorney General's authority, enacting a law prohibiting employers from hiring unauthorized aliens, but expressly excluded from that category individuals "authorized to be so employed by . . . the Attorney General." 8 U.S.C. § 1324a(h)(3).

The government does not seriously dispute any of this. Instead, it attacks a straw man, claiming that DHS was entitled to rescind DACA based on the desire to avoid "protracted litigation." U.S. Op. Br. at 29-38. But whether or not DHS *could* have rescinded DACA based on an evaluation of litigation costs and risks is irrelevant because that is not what DHS did. And this Court is constrained to evaluating DHS's action on the "same basis articulated . . . by the agency itself." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 43, 50 (1983). That basis was the belief that DACA "was effectuated . . . without proper statutory authority and . . . was an unconstitutional exercise of authority by the Executive Branch." DACA Rescission Memo, *supra*.

To be sure, DHS’s memo did reference litigation in the Fifth Circuit challenging a separate deferred action program, DAPA. But it did so as support for its conclusion that DACA suffered from the “same legal and constitutional defects that the courts recognized as to DAPA”—not in support of a conclusion that the cost and risk of litigation was intolerable. *Id.* And DHS’s conclusion that DACA suffered from the legal defects identified by the Fifth Circuit with respect to DAPA was wrong.

The plaintiffs in that earlier DAPA case did *not* challenge the authority of the Executive Branch to exercise its discretion to defer removal with respect to certain undocumented immigrants, even on a categorical basis. Instead, the dispute centered on a statement in the memorandum implementing DAPA that “for a specified period of time, an individual [covered by DAPA] is permitted to be lawfully present in the United States.” *See Texas*, 809 F.3d at 147-49, 166, 179-84. The claim was that DHS lacked the authority to confer “lawful[] presen[ce]”—particularly given the INA’s specification of a process for undocumented immigrants to derive legal status from their children’s immigration status—and the Fifth Circuit agreed. The memorandum establishing DACA contains no such language, and the INA provides no path to legal status for Dreamers; the Fifth Circuit’s rationale is therefore inapplicable.

CONCLUSION

This Court should affirm the district court's preliminary injunction and its order denying in part the government's motion to dismiss.

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Dated: March 20, 2018

APPENDIX A
LIST OF *AMICI CURIAE*

1. Amazon.com, Inc.
2. A Medium Corporation
3. Adobe Systems Incorporated
4. AdRoll Group
5. Airbnb, Inc.
6. Ampush LLC
7. Asana, Inc.
8. Atlassian Corp. Plc
9. Azavea Inc.
10. Ben & Jerry's Homemade, Inc.
11. Bigtooth Ventures
12. Braze
13. Brightcove Inc.
14. BSA | The Software Alliance
15. CareZone Inc.
16. Casper Sleep Inc.
17. Castlight Health, Inc.
18. Chegg, Inc.

19. Chobani, LLC
20. Civis Analytics, Inc.
21. Citrix Systems, Inc.
22. ClassPass Inc.
23. Cloudera, Inc.
24. Cloudflare Inc.
25. Codecademy
26. Color Genomics, Inc.
27. The Copia Institute
28. Cummins Inc.
29. DocuSign, Inc.
30. Dropbox, Inc.
31. eBay Inc.
32. Edmodo, Inc.
33. Electronic Arts Inc.
34. EquityZen Inc.
35. Exelon Corp.
36. Facebook, Inc.
37. Foosa LLC
38. General Assembly Space, Inc.

39. Google Inc.
40. Graham Holdings
41. Greenhouse Software, Inc.
42. Gusto
43. Hewlett Packard Enterprise
44. Homer Logistics, Inc.
45. HP Inc.
46. HR Policy Association
47. IBM Corporation
48. IDEO LP
49. Intel Corporation
50. IKEA North America Services LLC
51. Kargo
52. Knotel
53. Lam Research Corporation
54. Levi Strauss & Co.
55. Linden Research, Inc.
56. LinkedIn Corporation
57. Lyft, Inc.
58. Mapbox

59. Marin Software Incorporated
60. Medidata Solutions, Inc.
61. Microsoft Corporation
62. Molecule Software, Inc.
63. MongoDB, Inc.
64. National Association of Hispanic Real Estate Professionals
65. NETGEAR, Inc.
66. NewsCred, Inc.
67. NIO U.S.
68. Niskanen Center
69. Oath Inc.
70. Patreon, Inc.
71. Postmates Inc.
72. Quantcast Corp.
73. RealNetworks, Inc.
74. Reddit, Inc.
75. Redfin Corporation
76. Red Ventures
77. salesforce.com inc.
78. Scopely, Inc.

79. Shutterstock, Inc.
80. Singularity University
81. The Software and Information Industry Association
82. SpaceX
83. Spokeo, Inc.
84. Spotify USA Inc.
85. Square, Inc.
86. Squarespace, Inc.
87. SurveyMonkey Inc.
88. Tesla, Inc.
89. Thumbtack, Inc.
90. TPG Capital
91. TripAdvisor, Inc.
92. Twilio Inc.
93. Twitter Inc.
94. Uber Technologies, Inc.
95. Udacity Inc.
96. Upwork Inc.
97. Verizon Communications Inc.
98. The Western Union Company

99. Work & Co.
100. Workday, Inc.
101. Yelp Inc.
102. Zendesk, Inc.

APPENDIX B

CORPORATE DISCLOSURES FOR *AMICI CURIAE*

1. Amazon.com, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
2. A Medium Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.
3. Adobe Systems Incorporated has no parent corporation and no publicly held corporation owns 10% or more of its stock.
4. AdRoll, Inc. d/b/a AdRoll Group has no parent corporation and no publicly held corporation owns 10% or more of its stock.
5. Airbnb, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
6. Ampush LLC has no parent corporation and no publicly held corporation owns 10% or more of its stock.
7. Asana, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
8. Atlassian Corp. Plc has no parent corporation and no publicly held corporation owns 10% or more of its stock.
9. Azavea Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
10. Ben & Jerry's Homemade, Inc. is a wholly-owned subsidiary of Unilever.
11. Bigtooth Ventures has no parent corporation and no publicly held corporation owns 10% or more of its stock.
12. Brightcove Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

13. Braze has no parent corporation and no publicly held corporation owns 10% or more of its stock.
14. BSA | The Software Alliance has no parent corporation and no publicly held corporation owns 10% or more of its stock.
15. CareZone Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
16. Casper Sleep Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
17. Castlight Health, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
18. Chegg, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
19. Chobani Global Holdings, LLC is the sole member of Chobani, LLC and no publicly held corporation owns 10% or more of the membership interest in either entity.
20. Civis Analytics, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
21. Citrix Systems, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
22. ClassPas Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
23. Cloudera, Inc. has no parent corporation and the following publicly held corporation owns 10% or more of its stock: Intel Corporation.
24. Cloudflare Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
25. Ryzac, Inc. d/b/a Codecademy has no parent corporation and Naspers, Ltd., a publicly held corporation, indirectly owns 10% or more of its stock.

26. Color Genomics, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
27. Floor64 Inc. d/b/a the Copia Institute has no parent corporation and no publicly held corporation owns 10% or more of its stock.
28. Cummins Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
29. DocuSign, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
30. Dropbox, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
31. eBay Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
32. Edmodo, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
33. Electronic Arts Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
34. EquityZen Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
35. Exelon Corp. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
36. Facebook, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
37. Foosa LLC has no parent corporation and no publicly held corporation owns 10% or more of its stock.
38. General Assembly Space, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

39. Google Inc. is a wholly owned subsidiary of Alphabet Inc. Alphabet Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
40. Graham Holdings has no parent corporation and no publicly held corporation owns 10% or more of its stock.
41. Greenhouse Software, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
42. ZenPayroll, Inc. d/b/a Gusto has no parent corporation and no publicly held corporation owns 10% or more of its stock.
43. Hewlett Packard Enterprise has no parent corporation and no publicly held corporation owns 10% or more of its stock.
44. HP Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
45. HR Policy Association has no parent corporation and no publicly held corporation owns 10% or more of its stock.
46. Homer Logistics, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
47. IKEA North America Services LLC is part of the IKEA Group of companies, whose ultimate parent is INGKA Holding B.V. No publicly owned company owns more than 10% of the stock of either entity.
48. International Business Machines Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.
49. IDEO LP's parent corporation is Kyu Investment, Inc., and the following publicly held corporation indirectly owns 10% or more of its stock: Hakuhodo DY Holdings Inc.

50. Intel Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.
51. Kargo has no parent corporation and no publicly held corporation owns 10% or more of its stock.
52. Knotel has no parent corporation and no publicly held corporation owns 10% or more of its stock.
53. Lam Research Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.
54. Levi Strauss & Co. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
55. Linden Research, Inc. d/b/a Linden Lab has no parent corporation and no publicly held corporation owns 10% or more of its stock.
56. LinkedIn Corporation's parent corporation is Microsoft Corporation, and the following publicly held corporation owns 10% or more of its stock: Microsoft Corporation.
57. Lyft, Inc. has no parent corporation, and Rakuten, Inc., a publicly held corporation traded on the Tokyo Stock Exchange, owns more than 10% of Lyft's outstanding stock through a subsidiary.
58. Mapbox, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
59. Marin Software Incorporated has no parent corporation and no publicly held corporation owns 10% or more of its stock.
60. Medidata Solutions, Inc. has no parent corporation and the following publicly held corporation owns 10% or more of its stock: BlackRock, Inc.
61. Microsoft Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

62. Molecule Software, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
63. MongoDB, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
64. National Association of Hispanic Real Estate Professionals is a 501(c)(6) organization.
65. NETGEAR, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
66. NewsCred, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
67. NIO U.S.A., Inc. is a wholly-owned subsidiary of NIO NEXTEV Limited, a Hong Kong company, which is a wholly-owned subsidiary of NIO Inc., a Cayman company.
68. Niskanen Center has no parent corporation and no publicly held corporation owns 10% or more of its stock.
69. Oath Inc.'s parent corporation is Verizon Communications, Inc., which owns 100% of its stock.
70. Patreon, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
71. Postmates Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
72. Quantcast Corp. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
73. RealNetworks, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
74. Reddit, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
75. Red Ventures has no parent corporation and no publicly held corporation owns 10% or more of its stock.

76. Redfin Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.
77. salesforce.com inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
78. Scopely, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
79. Shutterstock, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
80. Singularity Education Group d/b/a Singularity University has no parent corporation and no publicly held corporation owns 10% or more of its stock.
81. The Software and Information Industry Association has no parent corporation and no publicly held corporation owns 10% or more of its stock.
82. Space Exploration Technologies Corp. d/b/a SpaceX has no parent corporation and no publicly held corporation owns 10% or more of its stock.
83. Spokeo, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
84. Spotify USA Inc. is a wholly-owned subsidiary of Spotify AB, a company organized under the laws of Sweden. Spotify AB is a wholly-owned subsidiary of Spotify Technology S.A., a company organized under the laws of the Grand Duchy of Luxembourg. Spotify Technology S.A. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.
85. Square, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
86. Squarespace, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

87. SurveyMonkey Inc.'s parent corporation is SVMK Inc. and no publicly held corporation owns 10% or more of its stock.
88. Tesla, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
89. Thumbtack, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
90. TripAdvisor, Inc. has no parent corporation and the following publicly held corporation owns 10% or more of its stock: Liberty TripAdvisor Holdings, Inc.
91. TPG Capital has no parent corporation and no publicly held corporation owns more than 10% of its stock.
92. Twilio Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
93. Twitter Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
94. Uber Technologies, Inc. has no parent entity. SB Cayman 2 Ltd., a private company, owns more than 10% of Uber Technologies, Inc.'s outstanding stock. SB Cayman 2 Ltd. is a subsidiary of Softbank Group Corp, a publicly traded corporation.
95. Udacity Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
96. Upwork Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
97. Verizon Communications Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
98. The Western Union Company has no parent corporation, and Capital Research Global Investors and The

Vanguard Group each own more than 10% of the Western Union Company.

99. WorkAndCo International Inc. d/b/a Work & Co. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
100. Workday, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
101. Yelp Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.
102. Zendesk, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

STATEMENT OF RELATED CASES

Counsel for amici does not know of any case pending in this Court related to this one.

/s/ Andrew J. Pincus

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,469 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: March 20, 2018

/s/ Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2018, the foregoing brief was served electronically via the Court's CM/ECF system upon all counsel of record.

Dated: March 20, 2018 /s/ Andrew J. Pincus