18-485 (L)

18-488 (Con.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Case Nos. 16-CV-4756 (NGG) (JO) (E.D.N.Y.), 17-CV-5228 (NGG) (JO) (E.D.N.Y.)

MARTÍN JONATHAN BATALLA VIDAL; MAKE THE ROAD NEW YORK, on behalf of itself, its members, its clients and all similarly situated individuals; ANTONIO ALARCON; ELIANA FERNANDEZ; CARLOS VARGAS; MARIANO MONDRAGON; CAROLINA FUNG FENG, on behalf of themselves and all similarly situated individuals; STATE OF NEW YORK; STATE OF MASSACHUSETTS; STATE OF WASHINGTON; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF IOWA; STATE OF NEW MEXICO; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF COLORADO;

Plaintiffs-Appellees,

(Caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE PLAINTIFFS-APPELLEES

Muneer I. Ahmad, Esq.
Michael J. Wishnie, Esq.
JEROME N. FRANK LEGAL SVCS. ORG.
P.O. Box. 209090
New Haven, CT 06520
Phone: (203) 432-4800

Joshua A. Rosenthal, Esq.
NATIONAL IMMIGRATION LAW CENTER
P.O. Box 34573
Washington, DC 20043
Phone: (202) 216-0261

Trudy S. Rebert, Esq.
NATIONAL IMMIGRATION LAW CENTER
PO Box 721361
Jackson Heights, NY 11372
Phone: (646) 867-8793

Karen C. Tumlin, Esq.
Mayra B. Joachin, Esq.
Jessica R. Hanson, Esq.
NATIONAL IMMIGRATION LAW CENTER
3450 Wilshire Blvd. #108-62
Los Angeles, CA 90010
Phone: (213) 639-3900

Justin B. Cox, Esq.
NATIONAL IMMIGRATION LAW CENTER
PO Box 170208
Atlanta, GA 30317
Phone: (678) 279-5441

v.

DONALD J. TRUMP, President of the United States, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, KIRSTJEN M. NIELSEN, Secretary of Homeland Security, JEFFERSON B. SESSIONS III, United States Attorney General,

Defendants-Appellants.

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INTRODUCTION

The district court properly enjoined the government's abrupt decision to terminate the Deferred Action for Childhood Arrivals ("DACA") program, which was based on unexplained, erroneous, and post hoc reasoning. Since DACA was first implemented in 2012, it has enabled nearly 800,000 young people to work, study, own homes, start families, flourish, and remain in the only country they have known as home. But on September 5, 2017, Defendants-Appellants ("Defendants") terminated the DACA program in an unreasoned, evasive, and conclusory five-page memorandum (the "Duke Memo"), which contained no analysis explaining why the program was being terminated, relied on obvious errors, and ignored the devastating consequences of termination on individuals and families across the nation. As the district court found, Defendants' actions are both reviewable and failed to clear the minimal arbitrary and capricious standard for agency action, in violation of the Administrative Procedure Act ("APA"). This Court should find that the district court did not abuse its discretion and affirm its preliminary injunction.

The APA requires courts to hold agencies accountable when they fail to act rationally, deliberately, and openly, so as to protect the interests of individuals from the abuse of administrative power. This is especially important when, as here, an agency seeks to reverse a policy on which hundreds of thousands of individuals have relied for over five years to organize the most fundamental aspects of their lives. Defendants have tried at every turn to evade judicial review of their ill-considered termination of DACA,

advancing specious arguments that this affirmative agency action is immune from judicial review. But such agency action falls squarely within the strong presumption of judicial review under the APA. Defendants cannot overcome that presumption and their termination of DACA cannot survive this Court's review.

The district court correctly rejected the government's meritless attempts to evade judicial review and rightly concluded that Defendants' decision to terminate DACA (the "DACA Termination") was arbitrary and capricious for multiple reasons. The Duke Memo relied on obvious legal and factual errors, ignored the harms the DACA Termination would have on individuals and families, and is undermined by continuously shifting, post-hoc rationalizations that reflect a lack of reasoned decision-making. But the Court need not even reach those questions in order to affirm the preliminary injunction, because Defendants have utterly failed to provide any reasoned explanation whatsoever for why they made the decision to end DACA—and under the APA, that failure alone is sufficient to find the agency action arbitrary and capricious and set it aside.

This Court should uphold the district court's finding that the DACA Termination was reviewable, affirm its preliminary injunction, and find that the district court did not abuse its discretion. It is plainly within the Court's power to review a decision of this magnitude to ensure that it is both reasonable and reasonably explained, and to preliminarily enjoin it where, as here, Plaintiffs-Appellees ("Plaintiffs") are likely to succeed on their claim that it is neither.

STATEMENT OF FACTS

I. OVERVIEW AND HISTORY OF DACA

A. Deferred Action and the DACA Program

Deferred action—the exercise of administrative discretion to "temporarily defer the removal of an alien unlawfully present in the United States," JA 227—has been a principal feature of the immigration system for more than half a century. Understanding that "[t]here simply are not enough resources to enforce all of the [immigration] rules and regulations presently on the books," JA 1325, Congress has directed the Executive Branch to "[e]stablish[] national immigration enforcement polices and priorities," 6 U.S.C. § 202(5). The creation and administration of deferred action programs reflect this practical reality.

The Department of Homeland Security ("DHS") and its predecessor agency have regularly exercised their authority to create enforcement policies and priorities. JA 229-32. Since at least 1956, the Executive has made discretionary relief available to various categories of noncitizens, including survivors of domestic violence, survivors of trafficking, and widows and widowers of U.S. Citizens. *Id.* For example, in 1990, it implemented the Family Fairness program, which made approximately 1.5 million spouses and children of certain visa-holders eligible to have their removal deferred. JA 229-30. Most deferred action programs remained in place until Congress passed legislation regularizing the class's status.

Consistent with this tradition, then-Secretary of Homeland Security Janet Napolitano issued a memorandum in 2012 creating the Deferred Action for Childhood Arrivals program (the "2012 DACA Memo"). JA 213. The memorandum established a process for "certain young people who were brought to this country as children and know only this country as home" to apply for deferred action for renewable two-year terms if they met specified eligibility criteria.[1] *Id.*

Like other deferred action programs, DACA does not confer immigration status, but rather advises DHS officials to consider those individuals who meet the threshold eligibility criteria for a favorable exercise of discretion. JA 217. As such, DHS officials sometimes deny deferred action to those who meet all the eligibility criteria. *See* JA 214.[2] Under longstanding regulations promulgated under the INA, individuals granted deferred action (through DACA or otherwise) can apply for work authorization, 8 C.F.R. § 274a.12(c)(14), and "advance parole," which allows deferred action recipients

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[1] Eligibility for deferred action through DACA is limited to individuals who: (1) were under age sixteen when they came to the United States; (2) have continuously resided here since June 15, 2007, and were present in this country both on June 15, 2012 and the day they requested deferred action; (3) are in school, have graduated from high school, have obtained a GED, or have been honorably discharged from the U.S. military or Coast Guard; (4) meet certain criminal record requirements and are not a threat to national security or public safety; (5) are under the age of 31 as of June 15, 2012; and (6) do not have lawful immigration status. JA 213. Individuals applying through USCIS must also be at least fifteen years old. JA 214-15.

[2] Defendants have admitted in this litigation that DHS exercised its discretion to deny deferred action to some individuals who met the DACA eligibility criteria. JA 833. The Duke Memo claimed the opposite. JA 465 n.1.

to apply to travel abroad, 8 C.F.R. § 212.5(f). As of June 30, 2017, DACA has provided work authorization and relief from deportation to nearly 800,000 people. JA 1572.

B. The Government's Continued Support for DACA

For years after implementing DACA, the federal government consistently maintained the program was lawful. In litigation challenging Arizona's decision to deny driver's licenses to DACA recipients, the Department of Justice ("DOJ") defended DACA as "a valid exercise of the Secretary's broad authority and discretion to set policies for enforcing the immigration laws, which includes according deferred action and work authorization to certain . . . [cases that] warrant deferral rather than removal." Br. for United States as Amicus Curiae at 1, *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017) (No. 15-15307), 2015 WL 5120846, at *1; *see also* Br. for Petitioner at 43, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 836758, at *43 ("Executive officials have regularly exercised . . . discretion by . . . deferring action . . . on the basis of aliens' membership in defined categories."). Similarly, in a memo that has never been withdrawn, the Office of Legal Counsel ("OLC") concluded that DACA was a permissible exercise of executive authority. JA 233 n.8.

Even after presidential administrations changed, DACA remained in place for over seven months. In February 2017, then-Secretary of Homeland Security John Kelly specifically left the DACA program in place. JA 442. As late as June 15, 2017, the Trump Administration actively decided to maintain DACA even as it terminated the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program.

JA 448. DAPA was an entirely separate program applying to a different category of individuals, which a district court in Texas preliminarily enjoined, culminating in *Texas v. United States*, 809 F.3d 134, 168 (5th Cir. 2015), *aff'd by an equally divided court*, *United States v. Texas*, 136 S. Ct. 2271 (2016).

C. Defendants' Termination of DACA

On September 5, 2017, Defendants abruptly changed course. That day, Attorney General Sessions held a press conference to announce that DACA would be terminated, claiming, without offering support, that DACA "contributed to a surge of unaccompanied minors on the southern border" and "denied jobs to hundreds of thousands of Americans." JA 998. Later that day, Defendants released a one-page letter that Attorney General Sessions had sent then-Acting Secretary of Homeland Security Elaine Duke (the "Sessions Letter") the day before, advising her to terminate DACA. JA 463. The Sessions Letter claimed, without analysis, that DACA was "an unconstitutional exercise of authority by the Executive Branch," and incorrectly asserted that DACA "has the same legal and constitutional defects that the courts recognized as to DAPA." *Id.* Finally, the Attorney General opined that if DACA were not terminated, it was "likely that potentially imminent litigation" would lead to an injunction of the program. *Id.* He recommended "an orderly and efficient wind-down process" to mitigate "the costs and burdens that will be imposed on DHS associated with rescinding this policy." *Id.*

The same day as the press conference, then-Acting Secretary Duke released the five-page Duke Memo formally terminating DACA. JA 464-68. Two pages of the memo rehearse factual background on DACA and litigation brought by the state of Texas and other states concerning DAPA. JA 465-66. After reciting this background, and referencing the conclusions of the Sessions Letter, the memo states: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." JA 467. No further explanation is provided.

The Duke Memo directs DHS to categorically reject all initial DACA applications received after September 5, 2017, and all renewal applications filed by individuals whose deferred action expired after March 5, 2018. *Id.* It provides a one-month window, until October 5, 2017, for the 154,000 individuals whose deferred action expires on or before March 5, 2018 to submit renewal applications. *Id.*; *see also* JA 1002 (explaining that approximately 21,000-22,000 individuals eligible to renew their deferred action under DACA failed to submit applications by the October 5 deadline).

The Administrative Record belies any claim that the decision to terminate DACA was made through reasoned deliberation. DHS's first internal meeting on the matter took place in mid- to late-August 2017, JA 2435 (Hamilton Dep. 98:11-17, Oct. 20, 2017), and the agency reached its decision after two hours of meetings and a few subsequent conversations, JA 1830-33; 1882-85; 1888-90 (McCament Dep. 72:22-75:17,

124:22-128:13, 130:2-132:7, Oct. 17, 2017); JA 2435-50 (Hamilton Dep. 98:6-113:15, Oct. 20, 2017). The only two documents drafted about terminating DACA—the Sessions Letter and the Duke Memo—appear to be dated within two days of the Termination. JA 464, 466; SA 17 n.5.

D. Consequences of the DACA Termination

Prior to March 5, 2018, an average of 122 individuals lost deferred action through DACA each day. JA 475. Absent the preliminary injunctions issued in this case and in parallel litigation in California, at least 24,950 individuals who now have deferred action through DACA would have lost their protections. Quarterly Summary Report at 3, *Regents of Univ. of California v. U.S. Dep't of Homeland Sec.*, No. 3:17-cv-05211 (N.D. Cal. Apr. 2, 2018), ECF No. 272-2. That number would have risen dramatically after the March 5, 2018 end-date for renewal eligibility under the Duke Memo. JA 476.

Without deferred action, young people who benefitted from DACA will lose their employment authorization, their jobs, and their ability to support their families. They will also lose educational opportunities and any protection from being subject to removal proceedings. For example, DACA enabled Plaintiff Eliana Fernandez to become a homeowner and to obtain a driver's license, allowing her to drive her two U.S.-citizen children to the doctor, one of whom has asthma. JA 1614-15, 1617. Without the DACA program, Ms. Fernandez would be unable to afford her mortgage, would lose her employer-provided health insurance, and would be unable to provide for her U.S.-citizen children. JA 1617; *see also* JA 1587 (seventy three percent of

individuals who received deferred action through DACA have a at least one U.S. citizen child, spouse, or sibling). Employers will also significantly suffer. For example, Plaintiff Make the Road New York ("MRNY") will be forced to fire numerous skilled and culturally competent DACA-recipient staff members who cannot be adequately or easily replaced. JA 1621, 1631-37.

II. PRIOR PROCEEDINGS IN THE DISTRICT COURT AND THIS COURT

Plaintiffs—six DACA recipients and MRNY, an organization with members, clients, and employees with DACA—challenge the DACA Termination on the grounds that it violated the Administrative Procedure Act ("APA"); the Regulatory Flexibility Act; and the Fifth Amendment's guarantees of equal protection and due process. SA 19.

Defendants have twice sought review from this Court over the district court's proceedings prior to the instant appeal. First, Defendants petitioned for a writ of mandamus to relieve them of the Administrative Record and discovery obligations ordered by the district court. Pet. for Writ of Mandamus, *In re Nielsen*, No. 17-3345 (2d Cir. Oct. 23, 2017). This Court deferred ruling on the mandamus petition until the district court "considered and decided expeditiously issues of jurisdiction and justiciability." Order 2, *In re Nielsen*, No. 17-3345 (2d Cir. Dec. 27, 2017). On December 27, 2017, after the district court denied Defendants' motion to dismiss on jurisdiction and justiciability grounds, SA 102-03, this Court issued a unanimous opinion denying the government's mandamus petition, Order 4, *In re Nielsen*, No. 17-3345 (2d Cir. Dec.

27, 2017). Second, on January 16, 2018, Defendants filed an interlocutory appeal of the district court's order on jurisdiction and justiciability with this Court. Pet. to Appeal, *Nielsen v. Batalla Vidal*, No. 18-122 (2d Cir. Jan. 16, 2018). This Court held that appeal in abeyance pending the district court's decision on Plaintiffs' motion for injunctive relief and Defendants' motion to dismiss. Order, *Nielsen v. Batalla Vidal*, No. 18-122 (2d Cir. Jan. 31, 2018).

After briefing and argument from the parties, on February 13, 2018, the district court partially enjoined the DACA Termination nationwide and directed Defendants to begin processing DACA renewal applications. SA 6-7. The district court held that Plaintiffs were likely to succeed on the merits of their claim that the DACA Termination was arbitrary and capricious. SA 6. The district court also found Plaintiffs faced irreparable harm as a result of the DACA termination, and that, because Defendants "pursued various dilatory tactics throughout this litigation" and "have yet to produce a plausible administrative record," a preliminary injunction pending "a full adjudication on the merits" was in the public interest. SA 50.[3] Finally, the district court found that a

[3] As the district court emphasized, however, its preliminary injunction neither requires Defendants to grant deferred action to anyone nor prevents them from revoking anyone's previously-granted period of deferred injunction. SA 7.

nationwide injunction was appropriate because any narrower relief would not adequately protect Plaintiffs' interests. SA 54.[4]

SUMMARY OF THE ARGUMENT

The government abruptly terminated the DACA program without reasoned analysis, ignoring the nearly 800,000 individuals who have relied on deferred action to work, study, and live in the only country they have ever known as home. Disregarding bedrock APA requirements, Defendants terminated DACA in a conclusory memorandum that obfuscated any reasons they may have had for ending the program. Since then, Defendants have attempted to evade judicial review, hiding behind post-hoc rationalizations and the erroneous argument that federal courts are powerless to review the DACA Termination. The district court correctly held that the decision to terminate DACA is reviewable, and did not abuse its discretion in holding that Plaintiffs are likely to succeed on their arbitrary and capricious claim.

There is a strong presumption of judicial review under the APA. *Salazar v. King*, 822 F.3d 61, 75 (2d Cir. 2016) (citing *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015)). Courts have the power to hear APA claims "except to the extent that" a statute "preclude[s] judicial review," 5 U.S.C. § 701(a)(1), or "agency action is committed to agency discretion by law," *id.* § 701(a)(2). Neither exception applies. Contrary to the

[4] On March 29, 2018, the district court issued an order granting in part and denying in part Defendants' motion to dismiss Plaintiffs' claims raised in their Third Amended Complaint. Supp. A. 1-33.

government's argument, 8 U.S.C. § 1252(g) does not apply here because the challenged agency action is not a decision "to commence proceedings, adjudicate cases, or execute removal orders." *Reno v. American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 482 (1999).

Defendants' argument that the DACA Termination is an unreviewable action "committed to agency discretion by law" under § 701(a)(2) is also incorrect. That narrow exception applies only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Heckler v. Chaney*, 470 U.S. 821 (1985). There is clearly law to apply here, where the basis of the DACA Termination was legality of the program. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 783 F.2d 237, 245 (D.C. Cir. 1986) (It is "almost ludicrous to suggest that there is 'no law to apply' in reviewing whether an agency has reasonably interpreted a law") (citation omitted). Further, Defendants' attempt to fit this case within *Heckler v. Chaney* strains any proper reading of that case.

The district court also did not abuse its discretion in holding, for several independent reasons, that the decision to terminate DACA was arbitrary and capricious in violation of the APA. First, Defendants failed to adequately explain their decision to end DACA. The Duke Memo merely provided a single sentence claiming that "it is clear" that DACA "should be terminated," JA 467, which the Administrative Record does not illuminate. Second, the most discernable rationale for the Termination—that DACA is unlawful—is legally erroneous. Third, Defendants rely on a post-hoc rationale

that DACA was terminated to avoid potential litigation challenging the program. Even if this reason could be found in the Administrative Record, Defendants have not justified it in this case and on this Record. Instead, their rationale allows agencies to hide behind the risk of litigation following *any* agency decision, undermining judicial review under the APA. Finally, even if the government had provided legally defensible reasons for terminating DACA, its admitted failure to consider DACA recipients' enormous reliance interests—as required under *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009)—independently renders the agency's decision arbitrary and capricious. For these reasons, the district court was well within its discretion, particularly on the incomplete Administrative Record Defendants have thus far produced, to find a substantial likelihood that the DACA Termination was arbitrary and capricious.

Finally, the district court was well within its discretion to preliminarily enjoin the DACA Termination nationwide. The APA prescribes that an arbitrary and capricious agency action "shall" be held "unlawful and set aside." 5 U.S.C. § 706. "A preliminary injunction is *always* appropriate to grant intermediate relief of the same character as that which may be granted finally." *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945); *see also* 5 U.S.C. § 705 (granting courts the authority to issue "all necessary and appropriate process" to postpone the effective date of an agency action to prevent irreparable injury). A nationwide remedy that enjoins the government from taking unlawful action is particularly appropriate in this case because the DACA Termination

unleashed system-wide harm against hundreds of thousands of DACA recipients, their families, employers, and communities.

STANDARD OF REVIEW

The district court has wide discretion to grant a preliminary injunction, and this Court reviews only for abuse of discretion. *Almontaser v. New York City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008). Under this standard, this Court "will overturn the preliminary injunction only if the district court made an error of law or a clearly erroneous finding of fact." *Red Earth LLC v. United States*, 657 F.3d 138, 144 (2d Cir. 2011). The district court's order should be affirmed if the "district court reached a reasonable conclusion on a close question of law." *Id.* at 145.

Additionally, "[i]t is well settled that arguments not presented to the district court are considered waived and generally will not be considered for the first time on appeal." *Anderson Group, LLC v. City of Saratoga Springs*, 805 F.3d 34, 50 (2d Cir. 2015). This Court is especially reluctant to consider forfeited arguments when "those arguments were available to the parties below and [the parties] proffer no reason for their failure to raise the arguments" to the district court. *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) (quotation marks and internal citations omitted).

ARGUMENT

I. THE DISTRICT COURT APPROPRIATELY EXERCISED JURISDICTION

This Court "begin[s] with the strong presumption that Congress intends judicial review of administrative action," *Bowen v. Mich. Academy of Family Physicians*, 476 U.S.

667, 670 (1986), including in the immigration context, *see INS v. St. Cyr*, 533 U.S. 289, 298 (2001). The APA provides for judicial review of final agency action "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Despite this strong presumption, Defendants contend that the DACA Termination, regardless of its legality, is immunized from judicial review by 8 U.S.C. § 1252(g) and 5 U.S.C. § 701(a)(2). The district court correctly rejected these arguments. SA 75-86.

A. Section 1252(g) Does Not Bar Judicial Review

The jurisdiction-stripping provision 8 U.S.C. § 1252(g), which only bars judicial review of agency decisions to "[1] commence proceedings, [2] adjudicate cases, or [3] execute removal orders," is inapplicable to the DACA Termination. As the Supreme Court has held, § 1252(g)'s "narrow" language "applies only to [the] three discrete actions" specified therein. *AADC*, 525 U.S. at 482; *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) ("[W]e read the language [of § 1252(g)] to refer to just those three specific actions." (plurality opinion) (citing *AADC*)). The DACA Termination does not fall into any of these categories.

Defendants assert § 1252(g) applies because the DACA Termination is "a preliminary step in the removal process," Defs.' Br. 31, and "an initial 'action'" in the commencement of removal proceedings, *id.* at 28. But as the district court correctly held, those contentions are factually incorrect and rest on an improper expansion of the statute. First, the decision to terminate DACA was neither a preliminary step nor an

initial action in the commencement of removal proceedings because the termination "did not trigger any specific enforcement proceedings," SA 84, and the preliminary injunction of the Duke Memo neither requires Defendants to give anyone deferred action nor prohibits them from revoking an individual grant thereof, SA 7. Second, *AADC* squarely rejected as "implausible" the notion that, by specifying three discrete actions, Congress intended in § 1252(g) to bar judicial review of the "many other decisions or actions that may be part of the deportation process." 525 U.S. at 482; *see also Jennings*, 138 S. Ct. at 841 (plurality) (§ 1252(g) does not "sweep in any claim that can technically be said to 'arise from' the three listed actions").[5]

The only cases Defendants cite that apply § 1252(g) involve non-citizens challenging individual denials of discretionary relief. Defs.' Br. 28-29 (citing *Vasquez v. Aviles*, 639 F. App'x 898, 901 (3d Cir. 2016), and *Botezatu v. INS*, 195 F.3d 311, 314 (7th Cir. 1999)). These cases cannot be applied to the DACA Termination. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991) (holding that statutes precluding review for individuals do not apply when individuals are challenging "a group of decisions or a practice or procedure employed in making decisions"). Defendants

[5] The other two district courts that have considered Defendants' argument that § 1252(g) applies to the DACA Termination have likewise rejected it. *Regents of Univ. of California v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1032 (N.D. Cal. 2018); *CASA de Maryland v. U.S. Dep't of Homeland Sec.*, 2018 WL 1156769, at *7 (D. Md. Mar. 5, 2018).

cannot identify a single case applying § 1252(g) to bar review of a programmatic policy decision. This case should not be the first.

Further, as the district court correctly observed, SA 86, even if § 1252(g) were to apply, it would not affect the injunction, as Plaintiff MRNY brings claims on behalf of itself, not just on behalf of its clients and members. JA 93. By its own terms, § 1252(g) applies only to claims brought "by or on behalf of any alien," and that language is strictly construed.[6] *See Kucana v. Holder*, 558 U.S. 233, 252 (2010) (holding that a statute restricting federal jurisdiction must be construed narrowly and precisely based on its stated language).

Finally, Defendants' argument, made for the first time on appeal, that 8 U.S.C. § 1252(b)(9) bars review, is wrong.[7] Defs.' Br. 29. That provision is inapplicable because Plaintiffs challenge a programmatic policy decision "unrelated to any removal action or proceeding." *Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009).

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[6] Contrary to Defendants' assertions, Defs. Br. 30-31, MRNY is within the APA zone of interests of the INA, as explained in the district court's recent opinion. Supp. A. 5 n.3.

[7] 8 U.S.C. §1252(b)(9) 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 . . . shall be available only in judicial review of a final order [of removal]."

B. The DACA Termination Is Not "Committed to Agency Discretion By Law"

The district court correctly concluded that the categorical decision to terminate the DACA program was not "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and therefore that Defendants failed to overcome the strong presumption of judicial review of agency action. SA 75-81. In light of that presumption, this Court should similarly reject the government's arguments, for two reasons: (1) they rely on an erroneously narrow interpretation of "law to apply;" and (2) they employ a rejected and overly expansive reading of *Heckler v. Chaney*, 470 U.S. 821 (1985), mischaracterizing the DACA Termination in order to fit their incorrect reading.

1. The APA Strongly Favors Judicial Review of Agency Actions

Where, as here, there is no "express statutory prohibition" on the exercise of judicial review, "the agency 'bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision.'" *Salazar*, 822 F.3d at 75 (alteration in original) (citation omitted); *see also Bowen*, 476 U.S. at 670-72.

Section 701(a)(2) precludes judicial review over decisions to the extent they are "committed to agency discretion by law," which applies only in "very narrow" and "rare" cases. *Heckler v. Chaney*, 470 U.S. at 830; *accord Salazar*, 822 F.3d at 76. "[N]ot every agency action that is in some sense discretionary is exempt from APA review."

Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv., 677 F.3d 1073, 1085 (11th Cir. 2012); *see also Chaney*, 470 U.S. at 829-30 (reasoning that some discretionary decisions must be reviewable because 5 U.S.C. § 706 requires courts to set aside agency action that is an "abuse of discretion"). Instead, § 701(a)(2) bars judicial review only when there is absolutely no "law to apply" that would provide a "meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830. The requisite law to apply can be provided by any of the broad range of materials typically considered in APA actions, such as applicable statutes, regulations, formal or informal agency guidance, or a settled course of agency adjudication. *See Salazar*, 822 F.3d at 76; *see also INS v. Yueh-Shaio Yang*, 519 U.S. 26, 31-32 (1996) (agency course of conduct can provide law to apply, even where the agency's discretion was "unfettered at the outset").

2. There Is Law To Apply To the DACA Termination

The district court found that the only discernable basis Defendants gave for terminating DACA was the "legal determination that the program was unlawful." SA 77. Accordingly, the "law to apply" is comprised of the same statutory and constitutional sources that the agency purportedly consulted in making the challenged decision. It is "almost ludicrous to suggest that there is 'no *law* to apply' in reviewing whether an agency has reasonably interpreted a *law*," as "[t]he judiciary is the final authority on issues of statutory construction." *United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 783 F.2d 237, 245 (D.C. Cir. 1986) (emphasis in original; quotation marks and citation omitted). Every court to rule on the DACA Termination

has found law to apply based on the government's legal conclusions. *See Regents*, 279 F. Supp. 3d at 1031 ("[T]here *is* law to apply. The main, if not exclusive, rationale for ending DACA was its supposed illegality. But determining illegality is a quintessential role of the courts." (emphasis in original)); *accord Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 2018 WL 1156769 at *7-*8 (D. Md. Mar. 5, 2018).

The task of assessing an agency's authority under, and compliance with, federal statutes and the Constitution is well "within [the courts'] traditional area of expertise," and not a matter that courts should readily assume Congress has instead left to unreviewable agency discretion. *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1045 (D.C. Cir. 1979). Courts have uniformly held legal questions to be reviewable and not precluded by § 701(a)(2), even if the legal question relates to a discretionary function or decision. *See, e.g.*, *Yale–New Haven Hosp. v. Leavitt*, 470 F.3d 71, 86–87 (2d Cir. 2006) ("[I]f the [agency's] action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law." (quoting *S.E.C. v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 94 (1943)) (alterations in original)); *Sea–Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998) ("An agency action, however permissible as an exercise of discretion, cannot be sustained 'where it is based not on the agency's own judgment but on an erroneous view of the law.'" (citation omitted)); *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) (holding agency's "Enforcement Policy Statement" reviewable because its "interpretation has to do with the substantive requirements of

the law"); *see also, e.g.*, *Texas v. United States*, 809 F.3d 134, 168-69 (5th Cir. 2015), *aff'd by an equally divided court*, *United States v. Texas*, 136 S. Ct. 2271 (2016) (holding § 701(a)(2) not to apply and DAPA program therefore reviewable); Defs.' Br. 19 (acknowledging and not contesting *Texas*'s reviewability holding).

Meaningful standards from which a court may properly review the decision to terminate DACA can also be supplied by other sources, such as the Immigration and Nationality Act ("INA"), other statutes, regulations authorizing deferred action, and previous legal opinions and policies of deferred action. *See* SA 77; *see also Salazar*, 822 F.3d at 76. For example, Congress has mandated that the Executive set enforcement priorities and has ratified the use of deferred action, which the government has used for over fifty years to provide group-based deferred action programs, none of which were terminated in this way. JA 233-34. Additionally, the Office of Legal Counsel's in-depth conclusion that DACA is legal still remains in effect. And given that the challenged action is the agency's termination of its own program, the 2012 DACA Memorandum itself supplies legal standards against which to measure the reversal. *See Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) ("Once an agency has declared that a given course is the most effective way of implementing the statutory scheme, the courts are entitled to closely examine agency action that departs from this stated policy."); *accord Regents*, 279 F. Supp. 3d at 1031.

Defendants incorrectly argue that meaningful standards for review may only arise from statutes and agency regulations.[8] This misstates the law. As this Court has held, reviewing courts may look at other sources, even including "informal agency guidance," in order to identify "judicially manageable standards." *Salazar,* 822 F.3d at 76; *see also Robbins,* 780 F.2d at 45 ("[T]he agency itself can often provide a basis for judicial review through the promulgation of regulations or announcement of policies"). It is only when the "statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised," that an agency decision is found to be committed to agency discretion by law. *Robbins,* 780 F.2d at 45. And indeed, Defendants have no trouble citing many of these same sources of law to support their view that the DACA Termination was reasonable on the merits. *See* Defs.' Br. 32-36.

3. Defendants' Attempt To Expand The Narrow Exception Set Forth In *Heckler v. Chaney* Should Be Rejected

Defendants claim that the DACA Termination is presumptively unreviewable under § 701(a)(2) as an "enforcement" decision, relying heavily on *Heckler v. Chaney*, 470 U.S. 821 (1985). As the district court correctly held, however, this case is a far cry from

[8] This case is unlike *Dina v. Attorney Gen. of U.S.*, 793 F.2d 473, 476 (2d Cir. 1986), which involved the exercise of discretion in an individual immigration case where there were no "guiding principles" by which the agency action could be judged. Moreover, this Court has explicitly recognized sources other than statutes and regulations that may provide "law to apply." *See Salazar,* 822 F.3d at 76.

Chaney, and there is no evidence that Congress intended to shield this programmatic decision to end a broad deferred action program from judicial review. SA 78-80.

Chaney involved eight prisoners sentenced to death by lethal injection who sued the Food and Drug Administration ("FDA") under the APA for failure to take specified enforcement actions. 470 U.S. at 823. The prisoners had petitioned the agency, alleging that using certain drugs to execute them would violate the Federal Food, Drug, and Cosmetic Act, and requested that the FDA take enforcement action to prevent the violation. *Id.* When the agency refused,[9] the prisoners sued under the APA to compel enforcement action, but the Supreme Court held that an agency's decision *not* to take an enforcement action is presumptively immune from judicial review under § 701(a)(2). *Id.* at 832-33. Defendants' attempt to apply *Chaney*'s narrow exception to reviewability relies on a misunderstanding of the contours of that exception.[10]

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[9] Contrary to Defendants' claim that the FDA non-enforcement decision was based on a perceived lack of jurisdiction, Defs.' Br. 23, the FDA in fact concluded that its "jurisdiction in the area was generally unclear[,] but in any event should not be exercised to interfere with this particular aspect of the state criminal justice systems." 470 U.S. at 824.

[10] *Chaney* was premised on the long tradition immunizing decisions "not to prosecute or enforce" from judicial review, which the Supreme Court held the APA was not intended to disturb. *See* 470 U.S. at 831-32. In subsequent cases, the Supreme Court has similarly held that Congress did not intend the APA to disturb, *sub silentio*, other traditions under which particular types of decisions have long been considered unreviewable. *See, e.g.*, *ICC. v. Bhd. of Locomotive Eng'rs* (*BLE*), 482 U.S. 270, 282 (1987) ("[A] similar tradition of nonreviewability exists with regard to refusals to reconsider for material error, by agencies as by lower courts; and we believe that to be another

The *Chaney* Court explained that non-enforcement decisions: (1) "often involve[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise, *id.* at 831; (2) are not actions that exert the state's "*coercive* power over an individual's liberty or property rights, and thus do[] not infringe upon areas that courts often are called upon to protect," in contrast to "when an agency does act to enforce," *id.* at 832 (emphasis in original); and (3) "share[] to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch," *id.* None of these factors are present here.

First, the decision to terminate DACA was not based on "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* at 831. Defendants did not, in fact, balance *any* policy factors, such as "how the agency's resources are best spent" or how the DACA Termination "fits with the agency's overall policies." Defs.' Br. 17. Rather, as the district court concluded, Defendants' decision was premised solely upon a legal determination concerning the agency's authority to act. *Chaney* itself acknowledged that, in such circumstances, judicial review could be available even where, unlike here, the presumption of nonreviewability

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tradition that 5 U.S.C. § 701(a)(2) was meant to preserve."); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion." (citations omitted)). Here, Defendants have not shown that there is a tradition of nonreviewability of decisions like the DACA Termination.

applies. 470 U.S. at 833 n.4 (noting *Chaney* was not a case where the agency acted "based solely on the belief that it lacks jurisdiction"); *see also id.* at 839 (Brennan, J., concurring).

Defendants argue that because decisions *to* enforce "can" share some of the characteristics of decisions *not* to enforce—such as the need to balance complicated factors—the former should also be presumptively immune from review. *See* Defs.' Br. 16-17, 23. But this argument was foreclosed by *Chaney* itself, and it was squarely repudiated by this Court in *Salazar*, which "reject[ed]" this precise "attempt to expand *Chaney* beyond what its holding and reasoning can bear." 822 F.2d at 76.[11]

Second, unlike the non-enforcement decision at issue in *Chaney*, the DACA Termination subjects individuals to the coercive authority of the state, *see Chaney*, 470 U.S. at 831, as the district court found, SA 80. Defendants do not contest this. Instead, they repeatedly suggest that *Chaney* made presumptively unreviewable *any* decision that relates to enforcement discretion. Defs.' Br. 15-16, 23. But *Chaney* expressly confined the presumption of non-reviewability to decisions *not* to enforce. *See* 470 U.S. at 832 (limiting the holding to "an agency's decision not to take enforcement action," and distinguishing that decision from the one "to enforce," which "itself provides a focus for judicial review"). The Court came to this conclusion despite the FDA's forceful

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[11] *Compare Salazar*, 822 F.3d at 76 ("The DOE argues that the *Chaney* presumption against judicial review is implicated here, because it should be applied whenever an agency decision 'involve[s] a complicated balancing of factors peculiarly within its expertise, such as how best to expend its resources.'" (quoting the federal defendant's brief)), *with* Defs.' Br. 16-17 (repeating the argument *Salazar* rejected).

arguments that the Court should immunize *all* enforcement-related decisions.[12] *See* Br. for Petitioner at 16-18, *Heckler v. Chaney*, 470 U.S. 821 (1985) (No. 83-1878), 1984 WL 566056, at *16-*18.

Third, Defendants' attempts to equate the decision to terminate the categorical DACA program with the individualized non-enforcement decision in *Chaney* are unavailing. *See* Defs.' Br. 24. The *Chaney* Court only reviewed the FDA's decision to deny a particular petition seeking specified enforcement action for particular drugs. *See* 470 U.S. at 825 n.2 ("Respondents have not challenged the statement that all they sought were certain enforcement actions, and this case therefore does not involve [the broader policy of non-enforcement]"); *see also id.* at 838 (Brennan, J., concurring) ("Today the Court holds that individual decisions [of the FDA] not to take enforcement action . . . are presumptively not reviewable."). As courts have held, *Chaney*'s presumption of non-reviewability does not apply to agency enforcement *policies*—even where, unlike here, those policies concern non-enforcement. *See, e.g.*, *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676-77 (D.C. Cir. 1994) (distinguishing between a

[12] The out-of-circuit cases that Defendants cite, Defs.' Br. 21-22, are not to the contrary. Not only did all three involve individual discretionary decisions, but in each, the court made clear that to the extent affirmative enforcement was at issue, the threshold legal question about the agency's power to act was reviewable. *Morales de Soto v. Lynch*, 824 F.3d 822, 827(9th Cir. 2016) (noting that "questions of law" underlying "purely discretionary" enforcement decision are reviewable); *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 314 (4th Cir. 2008) (reviewing Secretary's authority to enforce); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 154-55 (D.C. Cir. 2006) (same).

presumptively unreviewable "single-shot nonenforcement decision" and a permissibly reviewable "general enforcement policy");[13] *OSG Bulk Ships, Inc. v United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (finding agency's broad policy not to enforce statutory provision against certain ships reviewable).

Defendants argue it is irrelevant that the Duke Memo "provided legal reasons to support [the] discretionary enforcement decision" to terminate DACA, because the Supreme Court held in *BLE* that an "otherwise unrevieweable action" is not made reviewable simply because the agency "gives a 'reviewable' reason" for it. Defs.' Br. 22 (quoting *ICC v. Bhd. Of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987)). But this merely begs the question of whether the DACA Termination is "otherwise unreviewable." *Id.* As discussed above, it is not. *See* SA 78 (correctly rejecting this argument as circular).

In the end, Defendants have no grounds on which to claim that the DACA Termination is committed to unfettered agency discretion. Defendants cite no cases that establish non-reviewability for claims challenging reversal of discretionary enforcement policies, and indeed, this Court has held to the contrary. *See, e.g., Noel v. Chapman*, 508 F.2d 1023, 1029 (2d Cir. 1975) (finding challenge to INS's restriction of extended voluntary departure policy, a discretionary form of relief like deferred action,

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[13] Defendants' efforts to limit *Crowley* fail, as that case nowhere suggested that general enforcement policies must reflect "a direct interpretation of a substantive statute" to fall outside the scope of *Chaney*. Defs.' Br. 25 n.7. In any event, the DACA Termination *was* based on Defendants' view of the Secretary's statutory authority.

judicially reviewable under the APA). If anything, Defendants' reliance on targeted statutory provisions that strip judicial review of certain discretionary decisions made by immigration officials, Defs.' Br. 27-30, illustrates that the DACA Termination is reviewable. Congress intentionally shielded specified types of immigration decisions from judicial review. *AADC*, 525 U.S. at 486 ("*[M]any* provisions of [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996] are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation." (emphasis added)). Congress would not have perceived such a need if these immigration enforcement decisions were already presumptively unreviewable under § 701(a)(2), suggesting that a broad programmatic policy not affected by those statutory stripping provisions is not subject to the exception in § 701(a)(2).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE PRELIMINARY INJUNCTION

A. Respondents Are Likely to Succeed on Their Arbitrary-and-Capricious Claims

The APA requires agencies to reveal and explain the bases of their actions so that agencies are "accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). This duty ensures that agencies "follow constraints even as they exercise their powers," including the constraint that agencies "find and formulate policies that can be justified by neutral principles." *Fox Television*, 556 U.S. at 537 (Kennedy, J., concurring). To ensure that

agencies do not evade accountability, the APA obligates courts to conduct a "thorough, probing, in-depth review" of agency reasoning. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). A reviewing court "shall" set aside agency action that is "arbitrary, capricious . . . or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Defendants' decision to terminate DACA utterly fails to satisfy these core APA requirements, for at least four independent reasons. First, the Duke Memo obfuscates any reasons for the DACA Termination and does not provide adequate explanation for Defendants' abrupt policy reversal. *See Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 86 (2d Cir. 2006) (holding that the reasons for agency action must "be clearly disclosed and adequately sustained" (quoting *Chenery I*, 318 U.S. at 94)). Second, Defendants' claim that DACA was unlawful was premised on both legal and factual errors. *See Sec. & Exch. Comm'n v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 94 (1943) ("[A]n order may not stand if the agency has misconceived the law."); *Mizerak v. Adams*, 682 F.2d 374, 376 (2d Cir. 1982) ("[A]n agency decision is arbitrary and must be set aside when it rests on a crucial factual premise shown by the agency's records to be indisputably incorrect."). Third, Defendants' claim of "litigation risk" is both a post-hoc rationalization not supported by the Administrative Record and an improper justification in itself. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (*State Farm*), 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action."); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir.

2015) ("If an agency could engage in rescission by concession, the doctrine requiring agencies to give reasons before they rescind rules would be a dead letter."). Finally, the government's policy reversal improperly ignored serious reliance interests. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *Fox Television*, 556 U.S. at 515.

1. Defendants Fail To Provide Adequate Explanation To Justify the DACA Termination

Defendants avoid supplying even a "minimal level of analysis," *Encino Motorcars*, 136 S. Ct. at 2125, to justify the DACA Termination, instead relying on vague statements in the Duke Memo that in no way resemble an adequate explanation. While a court must uphold an agency decision if its basis can "reasonably be discerned," *Bowman Transp., Inc. v. Ark.–Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974), that standard cannot be met by merely gesturing toward explanations and leaving the court "to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Sec. & Exch. Comm'n v. Chenery Corp.* (*Chenery II*), 332 U.S. 194, 197 (1947).

Defendants explain the DACA Termination in a single sentence: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." JA 467. This unelaborated conclusion merely states that three documents were considered, but the Duke Memo provides no explanation for why those documents led Defendants to their decision, or

even what findings and conclusions Defendants adopted from those documents. *See Encino Motorcars*, 135 S. Ct. at 2127 (rejecting agency reliance on public comments because the agency "did not explain what (if anything) it found persuasive in those comments").[14]

Since being sued, Defendants have invented new justifications for the DACA Termination that appear nowhere in the Administrative Record: they turned "litigation risk" into a new justification for terminating DACA, Defs.' Br. 33; they reframed the Fifth Circuit's decision on DAPA as applicable to DACA, Defs.' Br. 33-37; and, perhaps most audaciously, they painted the Administration's "orderly and efficient wind-down process," "[i]n light of the costs and burdens that will be imposed on DHS," JA 463, as an act of grace motivated by concern for DACA recipients, Dfs.' Br. 39. But, courts may not "accept appellate counsel's *post hoc* rationalizations for agency action," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); nor "supply a reasoned basis for the agency's action that the agency itself has not given," *Bowman*, 419 U.S. at 285-86. Defendants' various new explanations for the DACA Termination only underscore the inadequacy of their stated rationale in the Duke Memo.

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[14] Defendants cite to *National Black Media Coalition v. FCC*, 822 F.2d 277, 281 (2d Cir. 1987), for the proposition that agency action can be upheld with only "scant discussion" of an important topic. Defs.' Br. 35. Even in that case, however, the agency "did state [in the administrative record] its view of the relative importance" of the topic at issue, as compared to the other considerations they prioritized. *Nat'l Black Media*, 822 F.2d at 281.

Defendants need not—nor did the district court hold they were required to—write a "bench memo," Defs.' Br. 35, justifying their decision to terminate DACA. However, the Duke Memo's reasoning cannot be so bare and equivocal that their counsel must invent new justifications in litigation. Regardless of the DACA Termination's substantive reasonableness, Defendants' failure to provide an adequate justification renders the DACA Termination arbitrary and capricious.

2. Defendants' Rationale That DACA Is Unlawful Is Arbitrary and Capricious

To the extent that Defendants terminated DACA based on its conclusion that the program was unlawful—as the district court found, SA 24-26—it is premised on both factual and legal error. "[A]n agency decision is arbitrary and must be set aside when it rests on a crucial factual premise shown by the agency's records to be indisputably incorrect." *Mizerak*, 682 F.2d at 376; *see also State Farm*, 463 U.S. at 43 (noting that an agency acts arbitrarily and capriciously by "offer[ing] an explanation for its decision that runs counter to the evidence before the agency"). Nor may an agency's decision rest on a legal error, since "an order may not stand if the agency has misconceived the law." *Chenery I*, 318 U.S. at 94; *see also Massachusetts v. EPA*, 549 U.S. 497, 532 (2007); *Yale–New Haven Hosp.*, 470 F.3d at 86–87.

Defendants' conclusion that DACA was unlawful is erroneous for four separate reasons, each of which independently renders the decision to terminate DACA arbitrary and capricious. First, Defendants relied on the patently false statement that courts have

recognized "constitutional defects" in the DAPA program that apply equally to DACA. JA 463. Second, Defendants erroneously concluded without explanation, that DACA is unlawful. Third, Defendants ignored material legal and factual differences between DACA and DAPA to incorrectly conclude that the Fifth Circuit's preliminary injunction decision in *Texas*, which concerned only the DAPA program, applies to DACA. Finally, Defendants' argument that they have the authority to wind-down DACA over a six-month period despite concluding that the program is unconstitutional is internally contradictory.

First, the Duke Memo relies on a "flatly incorrect" statement. SA 36. The Duke Memo reprints the Attorney General's determination that DACA "has the same . . . constitutional defects that courts recognized as to DAPA." JA 466; *see also* JA 463. No court has ever held a deferred action program, including DAPA, to be unconstitutional. As the district court explained, this obvious misstatement of fact "alone is grounds for setting aside Defendants' decision" to terminate DACA. SA 36.

Defendants do not contest that the Attorney General's statement was wrong. Instead, now on appeal, they present a novel conjecture that the Acting Secretary independently reached the conclusion that DACA was unlawful. Defs.' Br. 41-43. Not only is this argument unpreserved for appeal and thus forfeited, it is also entirely unsupported by the Duke Memo. The Duke Memo does not discuss DACA's constitutionality apart from citations to the Sessions Letter. Nothing in the Administrative Record indicates that the Acting Secretary conducted independent

analysis, recognized the factual error the Attorney General had made, and nonetheless reached the same conclusion. In fact, there is no way she could have chosen which of the Attorney General's conclusions to consider. By law, all of the Attorney General's legal conclusions are binding on her. 8 U.S.C. § 1103(a)(1).

Nor do Defendants cite law to demonstrate that the error was harmless. "[T]he standard for demonstrating lack of prejudicial error is strict. 'Agency mistakes constitute harmless error [under the APA] only where they clearly had no bearing on the procedure used or the substance of decision reached.'" *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 334 n.13 (2d Cir. 2003) (alteration in original) (citation omitted). Here, the Administrative Record demonstrates that the factual error clearly had some bearing on the ultimate decision to terminate DACA. Nothing indicates that Defendants would have reached the same decision without such a determination.

Second, the DACA program is consistent with both the INA and the Constitution, meaning any rationale based on its illegality is legal error and therefore arbitrary and capricious. Granting deferred action is a valid exercise of the broad authority that Congress delegated to DHS to "[e]stablish[] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). Both Congress and the courts have expressly recognized DHS's authority to grant deferred action in the exercise of its discretion to set removal priorities. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II) (stating certain noncitizens are eligible for deferred action); 8 U.S.C. § 1227(d)(2) (allowing noncitizens to apply for deferred action even if their request for an administrative stay

is denied); *AADC*, 525 U.S. at 483-85 (noting the government has discretion to grant deferred action); *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017) ("[I]t is well settled that the Secretary [of Homeland Security] can exercise deferred action."). This authority is also reflected in the government's long-standing practice of granting deferred action to particular classes of noncitizens. For example, the Family Fairness program provided "indefinite voluntary departure" to undocumented spouses and children of noncitizens with legal status, a group potentially including 1.5 million people. JA 250. The Attorney General's one-page letter fails to explain why DACA, part of a long tradition of deferred action policies whose legality has been recognized for over sixty years, should now suddenly be deemed unlawful.

In fact, Defendants have long maintained the position that DACA is lawful. The Administrative Record contains the Office of Legal Counsel's opinion that DACA was lawful, an opinion that has not been withdrawn. JA 233 n.8; *see also* Br. for United States as Amicus Curiae at 1, *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017) (No. 15-15307), 2015 WL 5120846, at *1 (arguing for the lawfulness of DACA); *see also* Br. for Petitioner at 43, *United States v. Texas*, 136 Sup. Ct. 2271 (2016) (No. 15-674), 2016 WL 836758, at *43-*64 (same). Less than three months prior to the Duke Memo, Defendants affirmatively decided to maintain the DACA program, indicating that they believed DACA to be lawful. JA 448.

Nowhere in the Duke Memo or Sessions letter did Defendants acknowledge that terminating DACA based on its alleged illegality directly contradicted the 2014 OLC

opinion and the longstanding litigation position of DOJ and DHS. Nor did they explain why the OLC opinion was no longer relevant or persuasive. When an agency changes its interpretation of law, as it did here, it must provide an explanation. *See, e.g.*, *Mexichem Fluor, Inc. v. E.P.A.*, 866 F.3d 451, 461 (D.C. Cir. 2017) (requiring the agency to "explain the basis for its conclusion and explain its change in [statutory] interpretation); *Williams Gas Processing-Gulf Coast Co., L.P. v. F.E.R.C.,* 475 F.3d 319, 322, 328-29 (D.C. Cir. 2006) (unexplained change in agency's interpretation of statute was arbitrary and capricious). Merely gesturing at the ruling of a circuit court on another program is insufficient. *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 44 (D.C. Cir. 2004) (rejecting an agency explanation that named an Eleventh Circuit holding without "explain[ing] why it came to deem the Eleventh Circuit decision fatal").

Third, Defendants erroneously characterize DAPA and DACA as "materially indistinguishable," Defs.' Br. 2, and thus conclude that they suffer from the same potential legal defects. JA 463. As an initial matter, Defendants now argue for the first time that the Fifth Circuit found DAPA to be contrary to the INA based on several reasons, including the "specific and intricate provisions of the INA as a whole." Defs.' Br. 33-34, 36. This argument is post hoc, having no basis in either the Duke Memo or the Sessions Letter. The Duke Memo notes at most that *Texas* found DAPA was improperly promulgated without notice and comment procedures, JA 465, and the Sessions Letter does not describe any of *Texas*'s holdings, beyond erroneously suggesting that the Fifth Circuit found DAPA unconstitutional. JA 463. Neither

document mentions that the Fifth Circuit found DAPA contrary to the INA. These arguments—besides being unpreserved and forfeited—are post hoc rationalizations unsupported by the Record.

Further, as the district court found, the government's reliance on the Fifth Circuit's analysis of DAPA is arbitrary and capricious because such analysis does not apply to DACA. SA 33-35. The Fifth Circuit held DAPA conflicted with the INA because the statute already included a process for parents to derive lawful status from their children. *Texas*, 809 F.3d at 178-86. No analogous provision exists in the INA for individuals who receive DACA.[15] Defendants incorrectly argue that the Fifth Circuit applied its arguments to specifically enjoin Expanded DACA.[16] Defs.' Br. 36. Although the *Texas* injunction preliminarily enjoined the 2014 DAPA Memo in its entirety, the court relied only on reasoning pertaining to DAPA. JA 426; Br. for Appellee at 43, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238), 2015 WL 2159116 at *44-*45. (addressing Expanded DACA only as evidence of the purportedly non-tentative

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[15] Defendants argue that the INA's lack of a path to lawful status for DACA recipients makes DACA more inconsistent with the INA. Defs.' Br. 36. Such reasoning is faulty. To accept Defendants' premise would require inverting a fundamental principle of administrative law that accords agencies deference to fill gaps left by congressional silence or ambiguity. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Further, this reasoning contradicts the government's argument that DAPA was unlawful because the INA already provided a path for parents to derive legal status from their children.

[16] The 2014 DAPA Memo included provisions expanding DACA by removing the age cap, extending work authorization to three-year periods, and adjusting the date of entry requirement. JA 251-52.

nature of the DAPA memo). The Fifth Circuit never found that expanded DACA, on its own, contravened the INA.

The government's reliance on *Texas* is also flawed because the Fifth Circuit based its reasoning on the immense scope of DAPA. The Fifth Circuit concluded that DAPA was a "policy of vast economic and political significance" that Congress would have explicitly authorized if it wanted to create such a program. *Texas*, 809 F.3d at 188. DAPA made approximately four million individuals eligible for deferred action—more than one-third of all undocumented individuals in the United States, *Id.* at 181. DACA, however, "is open to far fewer individuals than DAPA would have been." SA 34. Although Defendants claim DACA is still "a policy of 'vast economic and political significance'" foreclosed by the INA. Defs.' Br. 37 (citation omitted), it is similar in scale to past deferred action programs such as the Family Fairness program. *Compare Texas*, 809 F.3d at 174 n.138 (approximately 1.2 million are eligible for DACA), *with* JA 246 (approximately 1.5 million were eligible for Family Fairness program).[17] The relative sizes of DACA and the Family Fairness program, whose legality was never disputed,

[17] Defendants attempt to distinguish the Family Fairness program, which Presidents Ronald Reagan and George H.W. Bush implemented to protect a group that Congress left out of its 1986 immigration-reform legislation, because it was "interstitial to a statutory legalization scheme," Defs.' Br. 37 (citation omitted). This reasoning fundamentally ignores that DACA shared the same purpose. *See Remarks by the President on Immigration* (June 15, 2012), https://go.usa.gov/xnZFY (announcing the DACA program as a measure to protect individuals until Congress can provide permanent relief).

situate DACA within the government's longstanding history of offering "broader programs that make discretionary relief from removal available for particular classes of aliens." JA 229.

Moreover, the government's reliance on *Texas* is misplaced because the Fifth Circuit's decision relied on contested, and now outdated, evidence that DHS implemented DACA without discretion. As Defendants now concede, DHS has denied applications that met the threshold eligibility criteria for consideration for DACA on purely discretionary grounds. JA 833.

Fourth and finally, the district court correctly identified that the Duke Memo is "[i]nternally [c]ontradictory" to the extent it was justified by concluding DACA was unconstitutional. SA 37. Were DACA unconstitutional, it would be equally unconstitutional to continue the program for six additional months. Before the district court, the government "fail[ed] to acknowledge and explain the apparent conflict," SA 39, even though Plaintiffs pointed it out. Now, before this Court for the first time, the government argues it "ha[s] the authority to continue to violate the Constitution" while in the process of terminating the program. SA 38. Not only is this explanation forfeited, it is also unsupported by law. Defendants only cite cases in which *courts* issue remedies that allow unlawful programs to briefly continue for equitable reasons pursuant to Article III powers, not *agencies* continuing to administer a program they themselves have determined to be unlawful. *See* Defs.' Br. 43-44. To allow agencies to wield this

newfound ability would be a dramatic expansion of executive power, particularly given it was neither claimed nor even referenced in the Duke Memo.

Defendants' unreasoned conclusion that DACA was unlawful, which was based on factual and legal error therefore renders the DACA Termination arbitrary and capricious.

3. The Government's Litigation-Risk Justification is Both Impermissibly Post Hoc and Arbitrary and Capricious

Defendants' newly crafted argument that litigation risk motivated the agency to terminate DACA is unsupported by the Administrative Record. But even if it was, litigation risk is a substantively unjustifiable reason for changing policy, and Defendants fail to adequately explain its rationale in this instance. For these reasons, the purported claim that the DACA Termination is supported by litigation risk is arbitrary and capricious.

First, the district court correctly found the government's litigation risk theory to be a post-hoc rationalization. SA 41 ("Absent Defendants' post hoc explanations, the court would not have guessed that Defendants made their decision for this reason."); *see also Regents of Univ. of California v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1043 (N.D. Cal. 2018). A court may review only the reasons an agency provides in the administrative record, and may not substitute "what it considers to be a more adequate or proper basis" for the agency action. *Chenery II*, 332 U.S. at 196; *State Farm*, 463 U.S. at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis

articulated by the agency itself."); *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Protection*, 482 F.3d 79, 95 (2d Cir. 2006) (same).

The litigation-risk rationale cannot reasonably be discerned from the Duke Memo or the Administrative Record. Indeed, as the district court found, Defendants could identify only one sentence in the Administrative Record that arguably reflected a litigation risk theory: the Attorney General's conclusory statement that it was "likely that potentially imminent litigation would yield similar results [as in *Texas*] with respect to DACA." SA 40. But that conclusory statement is "too thin a reed to bear the weight of Defendants' 'litigation risk' argument." *Id.* Nor do Defendants' citations to isolated clauses from the "Background" section of the Duke Memo suffice. Defs.' Br. 39-40; *see also* SA 40-41. These selective quotations from a section that does no more than recount the procedural history of the *Texas* litigation do not reflect a meaningful identification, much less analysis, of litigation risk. The testimony of Gene Hamilton, a former senior DHS official and principal drafter of the Duke Memo, further belies Defendants' litigation-risk claim. Mr. Hamilton explained that "litigation risk" was the "craziest policy you could ever have," because otherwise an agency "could never do anything." JA 2542, 2544-45 (Hamilton Dep. 205:2-5, 207:20-208:11, Oct. 20, 2017).

Second, the litigation-risk rationale—even if it was the reason for the DACA Termination—is an indefensible justification. Nearly all high-profile agency actions are vulnerable to litigation. Allowing agencies to change policy based on litigation risk would empower the government to selectively evade judicial review by choosing which

litigants it would rather face. Thus, an agency that acts because of litigation risk "[a]t most, . . . deliberately trade[s] one lawsuit for another." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (en banc). This very case illustrates that tactic. The government now faces no fewer than ten lawsuits challenging the DACA Termination, ostensibly to avoid one. Defendants did not avoid litigation; they invited it.

Indeed, the government has not provided a single case in which a court deemed litigation risk a permissible reason for changing policy. On the contrary, several have rejected the rational. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) ("If an agency could engage in rescission by concession, the doctrine requiring agencies to give reasons before they rescind rules would be a dead letter."); *Int'l Union, United Mine Works of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 44 (D.C. Cir. 2004) (holding that litigation risk was not a legitimate reason for agency action).

Finally, even if litigation risk could be a legitimate rationale, the government has failed to justify its use in this case. The Duke Memo does not weigh the likelihood that terminating DACA would avoid future litigation or what harms would be caused by prematurely capitulating to litigation threats, instead of defending DACA in litigation. Nor do Defendants address why a court would immediately terminate DACA when an Article III court has the power to temporarily maintain the program in light of the equities involved, even if it deems the program unlawful. *See* Defs.' Br. 43-44 (citing cases in which courts permit the orderly wind-down of unlawful programs when

justified by equitable reasons). Defendants' failure to consider the factors relevant to the decision renders their decision arbitrary and capricious.

4. Defendants' Failure To Address Reliance Interests Renders the DACA Termination Arbitrary and Capricious

The termination of DACA was additionally arbitrary and capricious because Defendants failed to adequately explain their reversal in policy, especially in light of the reliance interests held by the nearly 800,000 young people who benefit from DACA. When a policy engenders serious reliance interests, an agency must attend to the "facts and circumstances that underlay or were engendered by the prior policy." *Fox Television*, 556 U.S. at 515-16; *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015); *Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 742 (1996). The district court reasonably held that ignoring these reliance interests "alone [was] sufficient to render [Defendants'] supposedly discretionary decision to end the DACA program arbitrary and capricious." SA 43.

Defendants, arguing that "reliance interests are not an important aspect of the decision whether to retain DACA," Defs.' Br. 37 (quotation omitted), contend that agencies need not consider reliance interests when the underlying policy is subject to discretionary change. Defs.' Br. 37-38. However, that is not the law. *Encino Motorcars* makes clear that reliance interests accrue regardless of the form a policy takes: if those affected by an agency policy seriously rely on it, then reliance interests must be

considered before reversing the policy. 136 S. Ct. 2123, 2125-26 (finding car dealerships validly relied on informal agency opinion letter and Field Operations Handbook).

Nor was DACA a clearly temporary program that would not generate reliance interests. Recipients reasonably relied on the promise that they could apply for deferred action under DACA because the government assured them that they could.[18] The structure of the DACA program invited DACA recipients and their family members to "plan[] their lives around the program." SA 44 (Preliminary Inj. Order). The program's abrupt termination has thrown these plans into turmoil. While DHS granted deferred action under DACA for two-year periods, the 2012 DACA Memo provided for unlimited renewals, which the agency continued to grant until the arbitrary deadlines announced in the DACA Termination. JA 214-15, 475-76. In deciding to purchase a home, invest in education, or raise a family, young people who received deferred action through DACA relied on the ability to continue to renew their deferred action until Congress provided a legislative solution.

Finally, this Court should reject Defendants' newly-presented and unpreserved argument that reliance interests cannot be taken into account if an agency action is

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[18] President Obama's 2012 exhortation to Congress for legislative reform merely highlights the inherent limitations on deferred action for DACA recipients and the need for legislative action to grant other aspects of lawful status, including a pathway to citizenship, for DACA-eligible youth. *Remarks by the President on Immigration* (June 15, 2012), https://go.usa.gov/xnZFY. In this way, the DACA program is similar to other deferred action programs in the past, such as the Family Fairness program.

justified by legal interpretation. Defs.' Br. 38-39. In *Encino Motorcars*, the Department of Labor appeared to have justified its changed regulation as a matter of statutory interpretation. 136 S. Ct. at 2124. Nevertheless, the Supreme Court required consideration of the reliance interests engendered by the old policy. *Id.* at 2127.

Moreover, although reliance interests may not be sufficient to justify an agency's taking a plainly unlawful action, reliance interests can inform the ways agencies avoid actions they deem unlawful. The DACA program was never an unlawful action, but Defendants believed they had identified legal infirmities in the program. However, despite the enormous reliance interests at stake, Defendants completely failed to consider reasonable alternatives to wholly terminating the program. *Yale-New Haven Hosp.*, 470 F.3d at 80 (to survive arbitrary-and-capricious review, an agency must "consider reasonably obvious alternatives and, if it rejects those alternatives . . . give reasons for the rejection."). Even if Defendants believed that DACA was unlawful as it was currently administered, they were required to take into account the possibility that an alternative course, such as changing the adjudication process or undergoing notice and comment regarding the DACA program, would have a lesser effect on reliance interests.

B. The District Court's Findings on the Remaining Factors for Preliminary Injunction Were Not an Abuse of Discretion.

The District Court appropriately determined that a nationwide remedy was warranted. SA 54-55. Appellate court review is limited to "simply whether the issuance

of the injunction, in the light of the applicable standard, constituted an abuse of discretion." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *accord Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 (2010). The district court's partial preliminary injunction of the Duke Memo, requiring Defendants to accept renewal applications from DACA recipients, was well within its discretion. The APA authorizes broad relief, 5 U.S.C. § 705, and does not limit remedies to only individual plaintiffs or petitioners. *See, e.g.*, *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." (quotation omitted)). As the Supreme Court has long held, "[a] preliminary injunction is *always* appropriate to grant intermediate relief of the same character as that which may be granted finally." *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945) (emphasis added).

Defendants also claim that nationwide relief is inappropriate absent class certification. *See* Defs.' Br. 46-48.[19] However, the Supreme Court has declined to compel district courts to certify a class before issuing nationwide relief at the preliminary injunction stage. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080,

[19] As a preliminary matter, Defendants have forfeited any argument that class certification was a prerequisite for a nationwide injunction, as they never raised that argument at the district court, and in fact actively opposed Plaintiffs' motion for class certification.

2088 (2017) (upholding a nationwide preliminary injunction covering the respondents and "parties similarly situated to [them]" without class certification, and over the same objections Defendants raise here). Moreover, because Plaintiffs have demonstrated not only harm to themselves, but also harm nationwide, the district court had ample discretion to issue nationwide relief. DACA recipients live throughout the nation. *See* JA 1593-1612 (Wong Decl. at 23-42, ¶¶ 37-100). Defendants, not disputing that the DACA Termination has nationwide consequences, do not propose a workable alternative injunction that would take into account the irreparable harm faced by organizational Plaintiff MRNY and the sixteen States and the District of Columbia in the parallel case.

Defendants' arguments regarding foreclosing adjudication and departures from uniformity of relief fare no better. Contrary to Defendants' claims, Defs.' Br. 47-48, the injunction in this case has not foreclosed litigation of similar claims before other courts. *See, e.g.*, *Regents*, 279 F. Supp. 3d 1011. Nor is there a risk of conflict. Because a nationwide injunction has already been issued in the consolidated California cases, the District Court's injunction actually ensures uniformity of relief while parallel cases are litigated.

Defendants finally contend that deferred action is a departure from the uniform enforcement of immigration laws and as such, the nationwide injunction only increases the departure. Defs.' Br. 48-49. But Defendants chose in the Duke Memo to allow for continued DACA renewals nationwide. For Defendants to now argue that any

injunction should be localized and limited to certain individuals is audacious. Indeed, the government justified maintaining its arbitrary October 5 deadline for individuals affected by Hurricanes Harvey and Maria by claiming they desired to ensure "equal treatment for all individuals who are affected by the expiration of the DACA program," regardless of geography. Supp. A. 38:17-23. It strains credulity to now claim the opposite. Whatever principle of uniformity Defendants believe is relevant, *no line* has ever been drawn for access to deferred action based on the happenstance of geography within the United States. Although Defendants claim that a nationwide injunction is a departure from uniform enforcement of the immigration laws, compelling the district court to craft an injunction along geographic lines is the greater departure.

Finally, the district court properly exercised its authority over the remaining preliminary injunctive relief factors. The government does not dispute the district court's finding that Plaintiffs sufficiently demonstrated that DACA recipients and their employers would face irreparable harm absent a preliminary injunction. Nor could they. The government's arbitrarily imposed deadline of March 5, 2018, coupled with their "various dilatory tactics throughout this litigation," SA 50, made it impossible for Plaintiffs to obtain relief on the merits before suffering irreparable injury. Similarly, the government does not challenge the district court's conclusion that an injunction would serve the public interest, *id.* at 53, including the interests of 800,000 young people, their families, schools, employers, and communities.

CONCLUSION

The Court should affirm the district court's decision that it had jurisdiction to hear the case and its decision to grant a preliminary injunction.

Respectfully submitted,

/s/ Muneer I. Ahmad

Muneer I. Ahmad, Esq.
Michael J. Wishnie, Esq.
JEROME N. FRANK LEGAL SVCS. ORG.
Phone: (203) 432-4800

Joshua A. Rosenthal, Esq.
NATIONAL IMMIGRATION LAW CENTER
P.O. Box 34573
Washington, DC 20043
Phone: (202) 216-0261

Karen C. Tumlin, Esq.
Mayra B. Joachin, Esq.
Jessica R. Hanson, Esq.
NATIONAL IMMIGRATION LAW CENTER
3450 Wilshire Blvd. #108-62
Los Angeles, CA 90010
Phone: (213) 639-3900

Justin B. Cox, Esq.
NATIONAL IMMIGRATION LAW CENTER
PO Box 170208
Atlanta, GA 30317
Phone: (678) 279-5441

Trudy S. Rebert, Esq.
NATIONAL IMMIGRATION LAW CENTER
PO Box 721361
Jackson Heights, NY 11372
Phone: (646) 867-8793

Attorneys for Batalla Vidal *Plaintiff-Appellees*

April 4, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the word limit of Federal Rule of Appellate Procedure 21(d)(1) because the motion contains 12,557 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2017 in a proportionally spaced typeface, 14-point Garamond font.

/s/ Muneer I. Ahmad
MUNEER I. AHMAD

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. All counsel in this case are participants in the district court's CM/ECF system.

/s/ Muneer I. Ahmad
MUNEER I. AHMAD