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

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL., PETITIONERS
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS
v.
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS
v.
MARTIN JONATHAN BATALLA VIDAL, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE D.C., NINTH, AND SECOND CIRCUITS

BRIEF FOR *TEXAS V. UNITED STATES* DEFENDANT-INTERVENORS DACA RECIPIENTS AND STATE OF NEW JERSEY IN SUPPORT OF RESPONDENTS

GURBIR S. GREWAL
ATTORNEY GENERAL
STATE OF NEW JERSEY

JEREMY M. FEIGENBAUM
ASST. ATTORNEY GENERAL
25 Market Street
Trenton, NJ 08625

Counsel for New Jersey

NINA PERALES
Counsel of Record
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
110 Broadway, Ste. 3000
San Antonio, TX 78205
(210) 224-5476
nperales@MALDEF.org

DOUGLAS HALLWARD-DRIEMEIER
ROPES & GRAY LLP
2099 Pennsylvania Avenue NW
Washington, DC 20006

Counsel for DACA Recipients

Additional counsel on inside cover

GLENN J. MORAMARCO
ASST. ATTORNEY GENERAL
25 Market Street
Trenton, NJ 08625

Counsel for New Jersey

EMERSON SIEGLE
RAISHAY LIN
PAUL BENNETCH
ROPES & GRAY LLP
2099 Pennsylvania Avenue NW
Washington, DC 20006

MARK CIANCI
ROPES & GRAY LLP
800 Boylston Street
Boston, MA 02199

PHILIP EHRLICH
ROPES & GRAY LLP
191 North Wacker Drive
Chicago, IL 60606

Counsel for DACA Recipients

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INTEREST OF AMICI CURIAE[1]

Amici are defendant-intervenors in *Texas* v. *United States*, No. 1:18-cv-00068, a case in the United States District Court for the Southern District of Texas, in which several States brought direct challenges to the legality of the Deferred Action for Childhood Arrivals (DACA) memorandum (*Texas* DACA litigation).[2] Because the Department of Homeland Security (DHS) declined to defend DACA in the *Texas* litigation, amici stepped in to defend DACA.[3] The question of DACA's lawfulness is also a central issue, albeit indirectly and in

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[1] All parties have provided blanket consent to the filing of amicus curiae briefs. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The *Texas* DACA litigation is distinct from *Texas* v. *United States*, 809 F.3d 134 (5th Cir. 2015), aff'd by an equally divided court, 136 S. Ct. 2271 (2016) (per curiam), an earlier case that concerned the legality of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) (*Texas* DAPA litigation). Notably, in the earlier *Texas* DAPA litigation, the government "did not seek an evidentiary hearing," 809 F.3d at 175-176, and the evidentiary record was underdeveloped, *Texas* v. *United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015). The DHS rescission of DACA at issue in this case mistakenly equated DAPA and DACA, and assumed that certain findings in the *Texas* DAPA litigation meant that DACA itself was unlawful. This brief explains the key factual errors underlying that assumption.

[3] Twenty-two individual DACA recipients intervened to defend DACA's lawfulness. These individual defendant-intervenors are listed in Appendix A hereto. The State of New Jersey also intervened to defend DACA in light of the many benefits the State has enjoyed on account of DACA, including through the many contributions within New Jersey that have been made by DACA recipients.

a different procedural posture, in the present consolidated cases concerning the purported rescission of DACA.

While the present consolidated cases and the *Texas* DACA litigation concern certain overlapping issues, the *Texas* DACA litigation, unlike the cases at bar, has involved discovery at both the preliminary injunction and merits phases. Through this ongoing discovery, amici have compiled a substantial evidentiary record demonstrating that immigration officers' evaluation of DACA applications involves considerable discretion on the part of the officers. The discovery that amici have compiled to date—including official governmental documents, such as DHS internal guidelines and leadership correspondence regarding the decision to defer action for certain childhood arrivals, which are subject to judicial notice by this Court—is directly relevant to the questions before the Court in these consolidated proceedings. As the DHS materials show—and as testimonial evidence from depositions and declarations filed in the *Texas* DACA litigation confirms—the DACA Memorandum, as applied, leaves United States Citizenship and Immigration Services (USCIS) officers free to exercise discretion when deciding whether to defer action in the case of a particular DACA applicant.

Amici respectfully submit that the evidence developed through discovery in the *Texas* DACA litigation shows that the reasoning in the DHS memorandum rescinding DACA (the Rescission Memorandum)—to the effect that the initial issuance of the DACA Memorandum was unlawful because the operation of DACA was categorical, rather than on an individualized basis—was

based on a flawed premise, as the decisions below correctly recognized.

SUMMARY OF THE ARGUMENT

A key issue in this case is whether DACA "grant[s] deferred action * * * on a class-wide basis" or as a matter of individualized discretion. Pet. Br. 11; *Texas* v. *United States*, 809 F.3d 134, 184 n.197 (5th Cir. 2015), aff'd by an equally divided court, 136 S. Ct. 2271 (2016) (per curiam) (*Texas* DAPA litigation) (quoting 38 Op. O.L.C. at 18 n.8 (Nov. 19, 2014)[4]); Dkt. 9,[5] Ex. 19 at App. 1192 n.8 (OLC Memorandum Opinion, Nov. 19, 2014), (contrasting forms of deferred action that are "automatic[]" and "class-wide" with those that "evaluate each application * * * on a case-by-case basis").

But in rescinding DACA, DHS did not actually consider any evidence regarding whether, and to what extent, officers are making discretionary decisions, as opposed to merely implementing a class-wide rule, when they evaluate DACA applications. To the contrary, DHS simply assumed that the Fifth Circuit's holding and rationale regarding Deferred Action for Parents of Americans (DAPA) in *Texas*, 809 F.3d 134, applied equally to the original DACA Memorandum.[6]

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[4] The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. 1 (2014).

[5] App. in Supp. of Pls.' Mot. for Prelim. Inj. (Pls.' PI App.) Vol. 4 (May 2, 2018). Throughout this brief, references to the docket or citations to "Dkt." refer to the docket in amici's case, *Texas* v. *United States*, No. 1:18-cv-00068 (S.D. Tex. May 1, 2018).

[6] See Pet. Br. 52 ("DHS made clear that it agrees with the robust analysis in the Fifth Circuit's [DAPA] decision and that it sees

Subsequent discovery in the *Texas* DACA litigation has demonstrated plainly that this premise underlying DHS's reliance on the Fifth Circuit's decision in the earlier DAPA litigation and its characterization of the extent of officers' discretion in considering DACA applications was in error. Indeed, the very district court that previously enjoined DAPA has found—based on evidence developed through discovery with respect to DACA—that the record in fact may be "indicative of a discretionary standard" and that the States challenging DACA "have not made a 'clear showing' that those processing DACA applications are not free to exercise discretion." *Texas* v. *United States*, 328 F. Supp. 3d 662, 733-734 (S.D. Tex. 2018).

There were good reasons for that conclusion. In the *Texas* DACA litigation, amici have compiled substantial evidence demonstrating that DACA is, and has always been, administered as an exercise of prosecutorial discretion by immigration officers, and that the final decision on whether to defer action continues to involve the application of discretion by individual adjudicators, on a case-by-case basis. Of course, it is no surprise that the evidence would confirm the exercise of discretion by immigration officers in individual cases. On its face, the memorandum in which then-Secretary of DHS Janet Napolitano explained DACA (the DACA Memorandum)

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no meaningful distinctions between the lawfulness of those policies and the lawfulness of the original DACA policy."); *id.* at 56 ("the Attorney General informed the Acting Secretary that he had concluded that the policy was unlawful based in significant part on the Texas litigation invalidating the DAPA and expanded DACA policies").

requires USCIS adjudicators to exercise discretion when evaluating DACA applications.

Further official documentation confirms that individual officers were informed of their continued authority and discretion. DHS's own training materials, guidance documents, operating procedures, and internal communications produced in discovery in the *Texas* DACA litigation consistently describe DACA as setting forth discretionary criteria for a favorable exercise of discretion through deferred action, rather than establishing any binding standards or conferring any substantive rights.

Discovery in the *Texas* DACA litigation also shows that USCIS adjudicators actually *exercise* the discretion required by the DACA Memorandum. During the first two quarters of fiscal year 2018, adjudicators denied about 20% of requests for initial grants of deferred action under DACA, including denying applications where the criteria indicative of a favorable exercise of discretion were satisfied. Moreover, testimonial evidence from the *Texas* litigation confirms that USCIS adjudicators understand that the DACA guidelines empower them to make discretionary, case-by-case decisions that are informed, but not *bound*, by the stated DACA criteria.

Accordingly, the premise underlying the Rescission Memorandum is belied by the evidence—evidence available to DHS, but that it did not consider. This Court should thus reject the premise of petitioners' challenge—that DACA unlawfully established a categorical rule.

ARGUMENT

DACA, As Written And Implemented, Requires The Exercise Of Prosecutorial Discretion, And Is Thus Entirely Lawful

Contrary to petitioners' argument that DHS correctly concluded DACA is unlawful, Pet. Br. 43-50, DACA is not a class-wide grant of deferred action and in fact requires DACA adjudicators to exercise individualized discretion. Discovery from the *Texas* DACA litigation shows both that DHS materials, like the DACA Memorandum itself, require USCIS adjudicators to exercise discretion and that adjudicators in practice actually do engage in discretionary, case-by-case review when deciding whether to defer action with respect to individual requestors. The same district court that previously enjoined DAPA, when reviewing this evidence in the *Texas* DACA litigation, concluded it may be "indicative of a discretionary standard" and that the States challenging DACA "have not made a 'clear showing' that those processing DACA applications are not free to exercise discretion." *Texas* v. *United States*, 328 F. Supp. 3d 662, 733-734 (S.D. Tex. 2018).

A. The DACA Memorandum Itself Makes Clear That USCIS Adjudicators Should Exercise Case-By-Case Discretion When Deciding Whether To Grant Deferred Action

The DACA Memorandum, by its plain language, disclaims any intent to bind DHS. The memorandum requires adjudicators considering whether to grant deferred action to exercise discretion on an individualized

basis for requestors who meet certain preliminary criteria. Dkt. 6,[7] Ex. 1 at App. 0002-0004. The memorandum makes clear that the specified criteria "should be satisfied *before an individual is considered* for an exercise of prosecutorial discretion pursuant to this memorandum." *Id.* at App. 0002 (emphasis added). In other words, the criteria do not *preclude* discretion, but instead *precede* the exercise of discretion. The criteria listed are:

> - came to the United States under the age of sixteen;
> - has continuously resided in the United States for [at] least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
> - is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
> - has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
> - is not above the age of thirty.

Ibid.

In addition to the discretion to be applied after ascertaining that the criteria have been satisfied, deciding

[7] Pls.' PI App. Vol. 1 (May 2, 2018).

whether certain of the above criteria are met inherently *requires* the adjudicator to exercise individual discretion. For example, determining whether a person "*otherwise* poses a threat to national security," or whether a prior misdemeanor conviction is a "significant" one, involves the exercise of discretionary judgment by individual USCIS adjudicators. See Dkt. 6, Ex. 7 at App. 0586-0587 (emphasis added). Furthermore, the DACA Memorandum requires that, even once these criteria are satisfied, requestors must undergo a complete background check and, in some cases, a personal interview. *Id.*, Ex. 1 at App. 0003; *id.*, Ex. 7 at App. 0585, App. 0589. As a result, adjudicators have a substantial body of information upon which to base their individualized decision whether to defer action in a particular case.

The DACA Memorandum further emphasizes that "requests for relief pursuant to this memorandum are to be decided on a case by case basis," Dkt. 6, Ex. 1 at App. 0003, and concludes:

> This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, *to set forth policy for the exercise of discretion* within the framework of the existing law. I have done so here.

Id. at App. 0004 (emphasis added).

As a result, no person has any substantive entitlement to have action deferred under the DACA Memo-

randum, and the Executive retains discretion to terminate deferred action at any time. See *Texas* v. *United States*, 809 F.3d 134, 148 (5th Cir. 2015) (recognizing that "'[l]awful presence' is not an enforceable right to remain in the United States and can be revoked at any time"). Indeed, despite historical efforts by applicants to sue after being denied deferred action under prior frameworks, this Court recognized that Congress sought to limit "judicial constraints upon [this] prosecutorial discretion." *Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 & n.9 (1999).

The DACA Memorandum therefore both clarifies how an agency vested with discretion plans to use that power and confirms that agents still have the authority to decide each case on an individual basis. The DACA Memorandum sets forth relevant criteria and considerations, and adjudicators consider these criteria and more, on an individualized basis, when rendering a decision to grant or deny deferred action. See also *Crane* v. *Johnson*, 783 F.3d 244, 254-255 (5th Cir. 2015) ("The [DACA Memorandum] makes it clear that the Agents shall exercise their discretion in deciding to grant deferred action, and this judgment should be exercised on a case-by-case basis.").

B. Evidence Developed In The *Texas* DACA Litigation Confirms That DACA Adjudicators Are Informed Of, And Exercise, Their Discretion

In contrast to the cases presently before the Court, the *Texas* DACA litigation is developing a full record regarding the legality of DACA. Cf. Regents Br. in Opp. 18 ("[M]ultiple courts have held that the administrative

record is likely incomplete."). The record developed thus far in the *Texas* litigation—largely comprised of DHS's internal materials and communications—includes ample evidence demonstrating that adjudicators, in practice, exercise the discretion required by the DACA Memorandum. Testimonial evidence from the *Texas* litigation provides further confirmation of individual officers' exercise of discretion. Together, this new evidence undercuts the assumptions regarding discretion upon which petitioners now rely (and which were the basis of the Fifth Circuit ruling upon the legality of DAPA). See note 6, *supra*.

1. *DHS materials and internal communications consistently describe DACA as setting forth discretionary criteria for individualized, rather than class-wide, grants of deferred action*

Internal DHS documents produced by the United States in the *Texas* DACA litigation confirm that DACA does not confer any class-wide deferred action but rather provides for temporary deferral of action against individual undocumented immigrants. DHS's national standard operating procedures (SOPs) have consistently stated that DACA "does not confer any lawful status." See Dkt. 225-6,[8] Ex. 153 at 8 (2013 DACA Nat'l SOP); see also Dkt. 226-2,[9] Ex. 183 at 6 (2012 DACA Training Presentation) ("[DACA] does not *confer* any status," nor does it "*lead* to any status"; it "simply means that action

[8] App. in Supp. of Def.-Ints.' Opp. to Pls.' Mot. for Prelim. Inj. (Def.-Ints.' PI App.) Vol. 7 (July 21, 2018).

[9] Def.-Ints.' PI App. Vol. 9 (July 22, 2018).

to remove someone is deferred until a certain date and that the decision to pursue removal may be revisited at some point in the future").

DHS guidance documents require USCIS adjudicators to exercise discretion and do not bind adjudicators to defer action in the case of any given DACA application. See, *e.g.*, Dkt. 226-1,[10] Ex. 167 at 4 (USCIS Field Manual) ("As in all deferred action determinations, USCIS will make case-by-case, discretionary judgments based on the totality of the evidence. In doing so, USCIS will weigh and balance all relevant considerations, both positive and negative.").

Adjudicators' trainings, including refresher training, also emphasize the need to exercise discretion when reviewing DACA applications:

> As we prepare to attend DACA refresher training on Thursday, I just want to be sure everyone is clear on a couple things. First, *DACA can be denied if we determine that the person doesn't merit a favorable exercise of discretion*. One of the reasons we would determine that they don't merit a favorable exercise of discretion is based on possible public safety concerns *or the totality of the circumstances*.

Dkt. 215-1,[11] Ex. 38 at NJAPP0401 (DACA Email Guidance, Apr. 7, 2015) (emphasis added).

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[10] Def.-Ints.' PI App. Vol. 8 (July 22, 2018).

[11] App. to N.J. Br. in Opp. to Pls.' Mot. for Prelim. Inj. (N.J. PI App.) (July 21, 2018).

Other internal documents similarly indicate that USCIS supervisors require adjudicators to evaluate DACA applications on a case-by-case basis. For example, in USCIS DACA team meetings, officers were encouraged to "[t]ake the time and adjudicate *correctly*" and prioritize "quality over quantity." Dkt. 226-2, Ex. 194 at DEF00000228 (DACA Meeting Minutes, June 1, 2015); *id.*, Ex. 195 at DEF00000476 (DACA Meeting Minutes, June 30, 2015); see also Dkt. 227-1,[12] Ex. 234 at DEF00001730 (DACA Email Guidance, June 28, 2013) ("Every case has a different set of facts involved and all of the facts must be considered.").

Evidence produced in the *Texas* DACA litigation thus amply demonstrates that DHS training materials and internal guidance documents consistently and repeatedly urge USCIS adjudicators to exercise individualized, case-by-case discretionary judgment when considering whether to grant deferred action.

2. *USCIS adjudicators exercise individualized discretion by interpreting and sometimes deviating from the criteria set forth in the DACA Memorandum*

USCIS adjudicators in practice exercise discretion in interpreting the meaning of the criteria set forth in the DACA Memorandum. Adjudicators exercise particularly broad discretion in determining whether a requestor represents a threat to "public safety" or "national security." See Dkt. 225-6, Ex. 153 at 82, 90 (2013 DACA Nat'l SOP); see also Dkt. 215-1, Ex. 38 at NJAPP0401 (DACA Email Guidance, Apr. 7, 2015) ("[S]omeone could

[12] Def.-Ints.' PI App. Vol. 11 (July 22, 2018).

not meet the definition of [Egregious Public Safety] for a referral to ICE but still be considered a public safety concern for DACA."). Broadly, as one officer put it, when determining whether a requestor represents a threat to public safety, "[the] standard is whether or not you would want to live next door to the person." Dkt. 227-1, Ex. 233 at 1 (DACA Email Guidance, June 2, 2015). Of note, the district court presiding over the *Texas* litigation—which is the same court that previously concluded, in connection with DAPA, that USCIS officers did not genuinely exercise discretion—recognized that this guideline "would certainly be indicative of a discretionary standard" in the application of DACA. See *Texas*, 328 F. Supp. 3d at 733.[13]

Similarly, although the SOPs provide that requestors with a history of "significant misdemeanors" do not merit consideration for deferred action, the SOPs do not exhaustively define which misdemeanors qualify as "significant," requiring adjudicators to exercise discretion in determining whether applicants have committed a significant crime (and, therefore, do not merit a favorable exercise of discretion). See, *e.g.*, Dkt. 225-6, Ex. 154 at DEF00001779-DEF00001780 (2012 DACA FAQs) ("[T]he absence of the criminal history outlined above, or

[13] The district court in the *Texas* litigation observed: "Defendant-Intervenors produced a post-*Texas I* email from one instructor that, while talking about the established criteria, said that she liked to 'jokingly say our standard is whether or not you would want to live next door to the person.' While this Court will not opine on whether the 'neighbor' standard is one capable of refined precision or even whether it would be legally enforceable, if it were routinely being used, it would certainly be indicative of a discretionary standard." *Texas*, 328 F. Supp. 3d at 733 (citation omitted).

its presence, is not necessarily determinative, but is a factor to be considered in the unreviewable exercise of discretion.").[14] Officers thus determine, using their discretion, whether, *inter alia*, minor traffic violations, multiple non-significant misdemeanors, juvenile convictions, marriage fraud, expunged convictions, or deferred prosecution indicate that a requestor does not merit discretionary relief based on the totality of the evidence. See *id.*, Ex. 153 at 83-85 (2013 DACA Nat'l SOP).[15] In other cases, officers are required to go beyond the information conveyed by a RAP sheet or criminal record to exercise their discretion. See *id.* at 89.[16]

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[14] See also Dkt. 226-2, Ex. 198 (DHS Email Chain – "204(c) and DACA," Aug. 19, 2015); Dkt. 226-3, Def.-Ints.' PI App. Vol. 10 (July 22, 2018), Ex. 208 (Meeting Minutes – "DACA Roundtable Notes," Sept. 9, 2015); *id.*, Ex. 220 (Meeting Minutes – "Rap Session Notes," Feb. 27 & 28, 2013); Dkt. 227-1, Exs. 231-235 (DACA Email Guidance); *id.*, Dkt. 227-3, Def.-Ints.' PI App. Vol. 13 (July 22, 2018), Ex. 252 (2015 Training Presentation – "How to Deconflict DACA").

[15] See also Dkt. 227-1, Ex. 236 at 4-5 (DACA BCU Picnic Rap Session Agenda and Notes, May 16, 2018); *id.*, Ex. 242 (DACA Email Guidance – "Guidance on legal terminology," May 4, 2017); Dkt. 225-6, Ex. 153 at 90 (2013 DACA Nat'l SOP) (providing examples of types of conduct that might rise to a public safety threat without resulting in a criminal conviction).

[16] See also Dkt. 227-1, Ex. 236 at 2 (DACA BCU Picnic Rap Session Agenda and Notes, May 16, 2018); Dkt. 227-2, Def.-Ints.' PI App. Vol. 12 (July 22, 2018), Ex. 244 (DACA Email Guidance – "Domestic Violence for DACA Purposes," Sept. 15, 2014); Dkt. 225-6, Ex. 155 at DEF00003638 (DACA Internal Adjudicator FAQs); Dkt. 227-1, Ex. 241 at 1 (Internal FAQ – "Wobbler Offenses"); Dkt. 227-3, Ex. 262 at DEF00004597 (Newsletter – "DACA Matters").

Even where there is no conviction, an officer may still consider the underlying factors of the criminal activity when determining whether favorable discretion is warranted. See Dkt. 227-1, Ex. 239 at 30 (DACA BCU Criminality Training, Feb. 2017) ("DACA is a discretionary program and does not necessarily require a conviction for the adjudicator to consider the underlying factors of the criminal activity when determining whether or not favorable discretion is warranted.").

Additionally, in looking at the totality of the circumstances, USCIS adjudicators can deny DACA applications not only based on the conduct of the applicant, but also because of the applicant's questionable affiliations. See, *e.g.*, Dkt. 215-1, Ex. 37 at NJAPP0398 (DACA Email Guidance, Mar. 12, 2015) (Background Check Unit denies DACA requests "as a matter of discretion using the discretionary checkbox" when there are concerns of possible drug cartel affiliation).

As in the public safety context, USCIS adjudicators also exercise broad discretion in determining whether an applicant has met DACA's educational criteria, based on inquiries such as the following:

(i) Whether an applicant has graduated from or is enrolled in an educational establishment, Dkt. 225-6, Ex. 153 at 60-70 (2013 DACA Nat'l SOP);

(ii) Whether an applicant's privately funded training or vocational programs have been sufficient, *id.* at 66; and

(iii) Whether submitted institutions, homeschooling programs, or other programs are "diploma mills" or otherwise "suspect," see Dkt. 226-3,[17] Ex. 214 at DEF00000405-DEF00000408 (DACA Guidance on Diploma Mills); Dkt. 225-6, Ex. 153 at 60-70 (2013 DACA Nat'l SOP); Dkt. 226-3, Exs. 212-213 at DEF00000198-DEF00000199 (DACA Guidance – "Homeschooling").

Finally, USCIS adjudicators have the discretion to deny applications notwithstanding the applicants' meeting the criteria set forth in the DACA Memorandum. For instance, DHS's SOPs on DACA state clearly that "*[n]otwithstanding* whether [an applicant's] offense is categorized as a significant or non-significant misdemeanor, the decision whether to defer action in a particular case is an individualized, discretionary one that is made taking into account the totality of the circumstances." Dkt. 225-6, Ex. 153 at 83-84 (2013 DACA Nat'l SOP) (emphasis added). As such, USCIS adjudicators can and do grant or deny deferred action to applicants regardless of whether they have or have not strictly satisfied the criteria in the DACA Memorandum.

3. *The significant and increasing denial rate for deferred action likewise confirms this use of case-by-case, individualized discretion*

Through the first two quarters of fiscal year 2018, USCIS adjudicators denied about 20% of requests for initial grants of deferred action under DACA. Dkt. 224-

[17] Def.-Ints.' PI App. Vol. 10 (July 22, 2018).

2,[18] Ex. 25 at 1 (USCIS Data on Number of Form I-821D, Consideration of DACA). This denial rate is "consistent with other discretionary applications such as adjustment of status," and a high acceptance rate is based on "the high caliber of the DACA applications submitted to USCIS." Dkt. 225-3,[19] Ex. 69 at 7 (Decl. of Barbara Hines). Moreover, USCIS management has emphasized that discretionary denials are increasing, and even DACA renewals should not be automatic:

> I wanted to be sure to reiterate what I previously stated which is that *TSC now denies significantly more DACA cases based on our view of discretionary denials* shifting to be more in line with HQ. * * * *Every case is different* so we have to review the totality of the circumstances of each case. * * * If we wouldn't approve it now as an initial, we shouldn't approve it now just because it's a renewal.

Dkt. 215-1, Ex. 38 at NJAPP0400 (DACA Email Guidance, June 2, 2015) (emphasis added).

Lower initial rates of DACA rejections and denials[20] were not indicative of a lack of adjudicator discretion,

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[18] Def.-Ints.' PI App. Vol. 1 (July 21, 2018).

[19] Def.-Ints.' PI App. Vol. 4 (July 21, 2018).

[20] Rejections and denials are distinct. Rejections occur when it appears on the face of the application that the applicant is not eligible for the discretionary initiative (*e.g.*, she does not meet the age requirement), or when the application is missing required materials (*e.g.*, the required fee, component forms, or a signature). Denials occur when an application is sent to an adjudicator, and the adjudicator exercises his or her discretion not to grant deferred action to

but were instead indicative of the quality of the applicants. As the Fifth Circuit recognized in the DAPA litigation, even where adjudicators are exercising discretion, a low initial denial rate for DACA would not be surprising because (1) "DACA involved issuing benefits to self-selecting applicants, and persons who expected to be denied relief would seem unlikely to apply," and (2) "[e]ligibility for DACA was restricted to a younger and less numerous population, which suggests that DACA applicants are less likely to have backgrounds that would warrant a discretionary denial." *Texas*, 809 F.3d at 173-174 (footnote omitted).

Additionally, early DACA applications had a better chance of being approved, because "[w]hen DACA was announced, non-profit organizations, immigration clinics, immigrant advocacy organizations and private attorneys mobilized to provide free or low cost legal advice to DACA eligible individuals, using workshops and clinic models," and "[t]hese efforts screened out individuals whose applications were likely to be denied by USCIS if they had applied." Dkt. 225-3, Ex. 69 at 6 (Decl. of Barbara Hines).

Denial rates have since consistently risen, and were at approximately 13.4% in 2014, 17.4% in 2015, 17.8% in 2016, 16.4% in 2017, and 20.1% through the first two quarters of fiscal year 2018 for initial applications.[21]

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the applicant. Dkt. 6, Ex. 7 at App. 0586 (Decl. of Donald W. Neufeld).

[21] The percentages are based on USCIS data for fiscal years 2012-2018. See Dkt. 224-2, Ex. 25 at 1 (USCIS Data on Number of Form I-821D, Consideration of DACA). These calculations are based on applications that were either approved or denied in the

These denial rates simply do not support any contention that DACA applications have been "rubberstamped."

In sum, the evidence adduced in the *Texas* DACA litigation demonstrates that USCIS adjudicators exercise individualized discretion when determining whether to grant deferred action. This evidence demonstrates the use of individualized, case-by-case discretion and proves inaccurate the presumption in the Rescission Memorandum that DACA conferred a class-wide grant of deferred action and eliminated officers' discretion in individual cases.

4. *Testimonial evidence further confirms that USCIS adjudicators understand DACA to empower them to make discretionary decisions*

Testimonial evidence from the *Texas* DACA litigation—and the predecessor DAPA case—confirms that USCIS adjudicators consider themselves to be exercising discretion when deciding whether to grant or deny applications for deferred action.

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given year, and do not include requests that were rejected *ab initio*. Nor do they include requests that were submitted but were still awaiting decision at the end of the given year (labelled as "pending" on the chart). For 2014, there were 20,987 denials and 136,101 approvals. For 2015, there were 19,070 denials and 90,629 approvals. For 2016, there were 11,396 denials and 52,708 approvals. For 2017, there were 9,250 denials and 47,298 approvals. And through the first two quarters of fiscal year 2018, there were 3,839 denials and 15,294 approvals. The percentage of denials noted above was calculated by dividing the number of denials by the total of approvals plus denials.

In particular, Donald Neufeld, the Associate Director for USCIS Service Center Operations, testified that USCIS officers adjudicate DACA applications using their discretion, on a case-by-case basis, informed—but not bound—by the stated DACA eligibility criteria. Neufeld was personally in charge of all four USCIS Service Centers that adjudicated DACA requests, which encompassed responsibility for all policy, planning, management, and execution at the Service Centers. Dkt. 6, Ex. 7 at App. 0578-0595 (Decl. of Donald W. Neufeld). Neufeld stated that requestors who meet the guidelines in the DACA Memorandum "are not automatically granted deferred action under DACA. Rather, each initial DACA request is individually considered, wherein an adjudicator must determine whether a requestor meets the guidelines and whether there are other factors that might adversely impact the favorable exercise of discretion." *Id.* at App. 0584-0585. Requestors must pay for and submit to a background check, and "[i]nformation discovered in the background check process is also considered in the overall discretionary analysis." *Id.* at App. 0585. Adjudicators also may submit a "Request for Evidence" seeking additional information from an applicant, as well as contacting employers, educational institutions, or other government agencies to verify information submitted on an application. *Id.* at App. 0588-0589. Likewise, in-person interviews are sometimes scheduled for the requestor. *Ibid.* Due to the breadth of information available for consideration, adjudicators exercise discretion in determining what information to credit and prioritize.

Adjudicators deny requests not only when the guidelines are not met, but also when the adjudicator

herself determines that deferred action is not appropriate for other reasons. Dkt. 6, Ex. 7 at App. 0586-0591 (Decl. of Donald W. Neufeld). These discretionary denials have been made "on the basis that deferred action was not appropriate for other reasons not expressly set forth in [the] 2012 DACA Memorandum." *Id.* at App. 0591. Neufeld provided examples of denials of deferred action under DACA "even when all the DACA guidelines, including public safety considerations, have been met." *Id.* at App. 0587. For example, USCIS has denied deferred action when a requestor is suspected of gang affiliation. *Id.* at App. 0591. Discretionary denials have also been made for requestors who submitted false statements as part of the application process, even though the requestors actually satisfied all of the guidelines, including public safety considerations. *Id.* at App. 0587. Likewise, USCIS issued a discretionary denial when a requestor had prior removals and had previously falsely claimed to be a United States citizen. *Id.* at App. 0587-0588.

Deposition testimony from former USCIS union president Michael Knowles further confirms that USCIS adjudicators perceive themselves to be engaging in a highly discretionary analysis when handling DACA applications. Knowles testified that USCIS adjudicators "bristled at the thought" that anyone would think they "rubber-stamped" DACA requests. See Dkt. 291-1,[22] Ex. 151 at 24:19-21, 25:24-26:3 (Tr. of Depo. of Michael Knowles); see also *id.* at 23:9-24, 24:9-26:10, 32:11-25,

[22] Def.-Ints.' Supp. App. in Supp. of Opp. to Pls.' Mot. for Prelim. Inj. (Aug. 4, 2018).

67:10-68:24. Indeed, USCIS adjudicators use their discretion to assess fraud, continuous presence, educational qualifications, and criminal records. *Id.* at 26:11-27:16, 79:4-79:22. Per one USCIS adjudicator, of all the requests he had processed at Service Centers, DACA was "the one that required the most discretion." *Id.* at 25:24-26:3.

C. Evidence From The *Texas* DACA Litigation Thoroughly Discredits Petitioners' Reliance On The Fifth Circuit's Conclusions Regarding Discretion In The DAPA Litigation

Although a district court years ago concluded, in the context of ruling on DAPA—a separate initiative from DACA—that the DACA Memorandum's promise of discretion was "mere[] pretext," *Texas* v. *United States*, 86 F. Supp. 3d 591, 669 n.101 (S.D. Tex. 2015), and the Fifth Circuit found no clear error therewith, *Texas*, 809 F.3d at 172-176, that conclusion is no longer tenable in light of subsequent factual development and discovery described above. Contra Pet. C.A. Br. 29-30, *Regents of the Univ. of Cal.* v. *U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018) (No. 18-15068).

At the time of the DAPA litigation, the district court relied on (i) the "declaration by Kenneth Palinkas, the president of the union representing the USCIS employees processing the DACA applications, that * * * DACA applications are simply rubberstamped"; (ii) the volume of DACA guidelines; and (iii) the denial rate of accepted DACA applications at the time. See *Texas*, 809 F.3d at 172-173 (summarizing district court findings) (internal quotations omitted). However, as detailed above, DHS's

own materials overwhelmingly point to case-by-case adjudicator discretion in connection with DACA applications, and the Fifth Circuit itself discussed reasons independent of discretion why DACA denial rates—now at much higher levels—might initially have been lower. *Id.* at 174.

Moreover, Palinkas's declaration has been shown by his recent testimony in the current *Texas* DACA litigation to have been unreliable, biased, and wrong. In the earlier DAPA litigation, Palinkas submitted a declaration stating that DACA applications were "rubberstamped." *Texas*, 809 F.3d at 172-173. In Palinkas's more recent deposition in the *Texas* DACA litigation, however, it became apparent that Palinkas did not have any firsthand knowledge of how DACA requests are adjudicated. Palinkas did not know anything about the training USCIS adjudicators receive or the procedures USCIS adjudicators follow. Dkt. 215-1, Ex. 16 at 88:4-16 (Tr. of Depo. of Kenneth Palinkas), ("I have no idea about a lot of details pertaining to it"); *id.* at 58-59 (no knowledge of the time required for continuous presence); *id.* at 60:7-13 (no knowledge about the use of biometrics); *id.* at 91-92 (no knowledge regarding detection of fraud in applications). Indeed, on the crucial question of whether adjudicators exercise discretion on a case-by-case basis, Palinkas flatly admitted that he was "not aware of the extent to which discretion is exercised." *Id.* at 95:3-9.

The deposition revealed not only that Palinkas lacked essential knowledge about how DACA applications are adjudicated, but also that he was extremely hostile to DACA. He repeatedly emphasized his belief that DACA applicants had broken the law and that they

should not receive a "reward" for their purportedly illegal conduct. See, *e.g.*, Dkt. 215-1, Ex. 16 at 43:20-21 ("DACA applicants broke the law."); *id.* at 51:14-16 ("I don't think that anybody should be given any preferential treatment after breaking the law. I have an inherent problem [with] that * * * ."); *id.* at 53:4-6 ("I don't think it's equitable to have them demand and be entitled to a path to citizenship * * * ."); *id.* at 55:20-24 ("DACA, it appears to me that, you know, it's a reward system for doing something you shouldn't have done. I mean, when are the parents going to take the responsibility for their children?").

In the *Texas* DACA litigation, the district court, in denying the motion for preliminary injunction, declined to rely on Palinkas's declaration and testimony, even though the same district court relied on Palinkas's testimony in the DAPA litigation. This time, the district court noted that Palinkas has never processed a DACA application, and that his declaration and testimony was either opinion or based upon hearsay. See 328 F. Supp. 3d at 733 n.105. The district court concluded that Texas had not demonstrated that adjudicators fail to use case-by-case prosecutorial discretion when deciding whether to grant or deny deferred action. See *id.* at 734.

That is plainly correct in light of the newly developed record, which shows, to the contrary, that USCIS adjudicators exercise case-by-case discretion when determining whether to grant or deny individual DACA applications. As such, DACA is lawful agency guidance regarding individualized, rather than class-wide, discretionary grants of deferred action. The Rescission Memorandum's reliance on a contrary conclusion was erroneous, and this Court should reject petitioners' invitation

to rule on the basis of a finding that is directly contrary to the available evidence.

CONCLUSION

For the foregoing reasons, the judgments of the United States District Court for the District of Columbia and the Court of Appeals for the Ninth Circuit, as well as the orders of the United States District Court for the Eastern District of New York, should be affirmed.

Respectfully submitted,

NINA PERALES
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

DOUGLAS HALLWARD-DRIEMEIER
MARK CIANCI
EMERSON SIEGLE
RAISHAY LIN
PAUL BENNETCH
PHILIP EHRLICH
ROPES & GRAY LLP

COUNSEL FOR DACA RECIPIENTS

GURBIR S. GREWAL
ATTORNEY GENERAL
STATE OF NEW JERSEY

JEREMY M. FEIGENBAUM
GLENN J. MORAMARCO
ASST. ATTORNEYS GENERAL

COUNSEL FOR NEW JERSEY

SEPTEMBER 2019

APPENDIX A

LIST OF INDIVIDUAL DEFENDANT-INTERVENORS

Karla Perez

Maria Rocha

Jose Magaña-Salgado

Nanci J. Palacios Godinez

Elly Marisol Estrada

Karina Ruiz De Diaz

Carlos Aguilar Gonzalez

Karla Lopez

Luis A. Rafael

Darwin Velasquez

Jin Park

Oscar Alvarez

Nancy Adossi

Denise Romero

Pratishtha Khanna

Jung Woo Kim

Angel Silva

Moses Kamau Chege

Hyo-Won Jeon

Elizabeth Diaz

Maria Diaz

Blanca Gonzalez