UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, *et al.*, Plaintiffs, v. KIRSTJEN M. NIELSEN, *et al.*, Defendants.	Case No. 18-cv-00068

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The United States agrees with the State of Texas and other Plaintiffs that the policy known as Deferred Action for Childhood Arrivals (DACA) is unlawful. Indeed, the Attorney General of the United States has concluded that DACA, like the policy known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) before it, is unlawful, and the United States Department of Homeland Security (DHS) has rescinded the DACA policy.

As this Court is aware, DHS issued a memorandum in June 2012 establishing DACA. Over two years later, in November 2014, DHS issued a new memorandum expanding the parameters of DACA and creating a new policy called DAPA. Soon thereafter, this Court issued a preliminary injunction barring implementation of DAPA and expanded DACA nationwide. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (*Texas I*). The Fifth Circuit affirmed, concluding that DAPA and expanded DACA exceeded DHS's authority under the Immigration and Nationality Act (INA) and violated the notice-and-comment requirements of the Administrative Procedure Act (APA). *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (*Texas I*). An equally divided Supreme Court affirmed that decision. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam). After the Secretary of Homeland Security rescinded the memo that created the DAPA policy, Texas and several other States threatened to challenge the original DACA policy.

On September 4, 2017, the Attorney General sent a letter to then-Acting Secretary of Homeland Security Elaine Duke summarizing his view that DACA was an "open-ended circumvention of immigration laws," and therefore was unlawful. He also advised that DACA "likely" would be invalidated in the impending challenge because it suffered from the same legal defects that the courts had recognized with respect to the DAPA memorandum.

The next day, the Acting Secretary directed an orderly wind down of DACA. As she explained, "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings," as well as the "letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." Thus, "[i]n the exercise of [her] authority in establishing national immigration policies and priorities," DHS began an orderly wind-down of the policy. DHS immediately stopped accepting initial DACA requests and advised that it would only accept renewal DACA requests for an additional thirty days, and only from those whose DACA was set to expire within the next six months.

Despite the Attorney General's conclusion that DACA is unlawful and DHS's efforts to end DACA on an orderly timeline, district courts in California and New York entered preliminary injunctions ordering Federal Defendants to continue (most of) the DACA policy on a nationwide basis. Another district court in Washington, D.C. entered an order (currently stayed) that would have the effect of vacating the rescission memorandum in its entirety, and could require DHS to accept DACA requests from individuals who have never previously received DACA starting in July 2018. While Federal Defendants are currently obligated to comply with the New York and California orders, they are pursuing expedited appeals of the New York and California orders, going even so far as to seek direct review in the Supreme Court, given the public interest in and urgency of the issues in those cases.

Although the United States agrees that DACA is unlawful, here, the erroneous nationwide injunctions issued by district courts in the Eastern District of New York and Northern District of California would conflict with a preliminary injunction—and especially a nationwide one—in this case, subjecting the United States to inconsistent obligations. This brings into stark relief the problem with nationwide injunctions, which the United States vigorously opposed before the

Second and Ninth Circuits in part for this very reason. If this Court nevertheless determines that an injunction is warranted here, it should stay such order for 14 days so the United States can seek stays of *all* the DACA injunctions in the respective courts of appeals and the Supreme Court.

BACKGROUND

A. DACA and DAPA

On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano announced the policy now known as DACA. *See* Compl. ¶ 52; Ex. 1 to Compl. (DACA Memo). DACA made deferred action—a temporary postponement of the removal of individuals unlawfully present in the United States—available to "certain young people who were brought to this country as children" in violation of the immigration laws. DACA Memo at 1. After completion of a background check, successful requestors would receive deferred action for a period of two years, subject to renewal. *Id.* at 2-3. The DACA Memo stated that deferred action was an "exercise of prosecutorial discretion," *id.* at 1, and that requests would "be decided on a case by case basis," *id.* at 2. The Memo thus provided that DACA "confer[red] no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights." *Id.* at 3.

In 2014, then-Secretary of Homeland Security Jeh Johnson issued a memorandum expanding DACA and creating a new, similar policy known as DAPA. *See* Compl. ¶ 64; Ex. 3 to Compl. (DAPA Memo). DAPA made deferred action available to certain unlawfully present aliens who were "parents of U.S. citizens or lawful permanent residents." DAPA Memo 3. The DAPA Memo also expanded DACA by adjusting the date-of-entry requirement from June 2007 to January 2010, removing the age cap, and extending the DACA renewal period from two to three years. *Id.* at 3-4.

B. The Original *Texas v. United States* Litigation

The DAPA Memo—including its expansion of DACA—was challenged in this Court by a coalition of 26 States, including all seven of the Plaintiff States in this action. Affirming this Court, the Fifth Circuit upheld a nationwide preliminary injunction barring implementation of DAPA and expanded DACA. *Texas*, 809 F.3d at 147-48. Like this Court, the Fifth Circuit held that the DAPA Memo failed to comply with the APA's notice-and-comment requirement, but emphasized that "DAPA is much more than a nonenforcement policy," and that "a traditional nonenforcement policy would not necessarily be subject to notice and comment." *Id.* at 178 n.156. The Fifth Circuit also held that DAPA was "manifestly contrary" to the INA because DAPA and expanded DACA awarded deferred action "to persons who have never had a legal status and may never receive one." *Id.* at 184, 186 (footnotes omitted). That decision was affirmed by an equally divided Supreme Court, 136 S. Ct. 2271, which later denied the government's request for a rehearing upon confirmation of a ninth Justice, 137 S. Ct. 285 (2016), leaving this Court's preliminary injunction order in place.

Faced with the threat of continued litigation over a policy that had been enjoined by the courts, DHS rescinded the DAPA Memo on June 15, 2017, including its expansion of DACA. *See* Compl. ¶ 170; Ex. 5 to Compl. On June 29, 2017, Texas and several other States threatened to amend their complaint to challenge the DACA Memo directly, noting that it suffers from the same legal flaws that the courts had identified in expanded DACA and DAPA. *See* Compl. ¶¶ 175-78.

C. The Rescission of DACA

On September 4, 2017, the Attorney General sent a letter to then-Acting Secretary Duke advising her that DACA should be rescinded. *See* Exhibit 1, Letter from Attorney General Sessions to Acting Secretary of Homeland Security Duke,

https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf. In his judgment, DACA was an unlawful "open-ended circumvention of immigration laws" that "likely" would be invalidated in the imminent litigation because it contained the same legal defects that the courts had recognized with respect to the DAPA memorandum. The next day, the Acting Secretary issued a memorandum directing a wind down of the DACA policy in an orderly fashion. *See* Compl. ¶ 186; Ex. 7 to Compl. (Rescission Memo). As she explained, "[t]aking 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." Rescission Memo at 4. Invoking her "authority in establishing national immigration policies and priorities," she rescinded the DACA Memo, *id.* at 4, and instructed that deferred action going forward should be provided "only on an individualized[,] case-by-case basis," *id.* at 2.

At the same time, to facilitate an orderly transition, the Rescission Memo provided that:

- *For current DACA recipients*, DHS "[w]ill not terminate the grants of previously issued deferred action or revoke Employment Authorization Documents solely based on the directives in this memorandum for the remaining duration of their validity periods." *Id.* at 4.

- *For initial DACA requests*, DHS "[w]ill adjudicate—on an individual, case-by-case basis—properly filed pending DACA initial requests and associated applications for Employment Authorization Documents that have been accepted by [DHS] as of" September 5, 2017, but "[w]ill reject all DACA initial requests and associated applications for Employment Authorization Documents filed after" that date. *Id.*

- *For DACA renewal requests*, DHS "[w]ill adjudicate—on an individual, case by case basis—properly filed pending DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries that have been accepted by [DHS] as of" September 5, 2017. Further, DHS will similarly adjudicate such requests and applications

> "from current beneficiaries whose [deferred action under DACA] will expire between [September 5, 2017,] and March 5, 2018[,] that have been accepted by the Department as of October 5, 2017." *Id.*

Like the DACA and DAPA Memos, the Rescission Memo noted that it "is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." *Id.* at 5. Accordingly, DHS will "continue to exercise its discretionary authority to terminate or deny deferred action at any time." *Id.* at 4.

On September 12, 2017, the parties to the original *Texas* litigation filed a joint stipulation of dismissal. *See* Exhibit 2, Stipulation of Dismissal, *Texas v. United States*, No. 14-cv-254 (S.D. Tex. Sept. 12, 2017), ECF No. 473.

D. The DACA-Rescission Litigation

In the weeks following the Acting Secretary's decision, 12 lawsuits challenging the Rescission Memo were filed in six federal district courts. The government has defended these lawsuits vigorously, including by filing two separate petitions with the Supreme Court. In two of the six jurisdictions, however, plaintiffs have succeeded in obtaining nationwide preliminary injunctive relief that significantly restricts DHS's ability to end DACA on the timeline contemplated by the Rescission Memo.

1. Northern District of California

Five lawsuits challenging the rescission of DACA were filed in the Northern District of California, with the lead case captioned as *Regents of the University of California v. Department*

of Homeland Security, No. 17-cv-5211-WHA (N.D. Cal.).[1] On January 9, 2018, the district court (Alsup, J.) entered a nationwide preliminary injunction requiring DHS to continue processing and granting DACA requests "on the same terms and conditions as were in effect before the rescission on September 5, 2017," with certain exceptions. *See Regents of Univ. of Cal. v. DHS*, 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018). That court's preliminary injunction order reads as follows:

> For the foregoing reasons, defendants **ARE HEREBY ORDERED AND ENJOINED**, pending final judgment herein or other order, to maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017, including allowing DACA enrollees to renew their enrollments, with the exceptions (1) that new applications from applicants who have never before received deferred action need not be processed; (2) that the advance parole feature need not be continued for the time being for anyone; and (3) that defendants may take administrative steps to make sure fair discretion is exercised on an individualized basis for each renewal application.

Id.

Federal Defendants immediately began taking steps to comply with the *Regents* order, and United States Citizenship and Immigration Services (USCIS) promptly issued public guidance with instructions on submitting DACA renewal requests pursuant to this court order. *See* Exhibit 3, USCIS.gov, *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction* (Jan. 13, 2018), https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction. As that guidance confirms, consistent with the *Regents* order, it is still the case that (1) "USCIS will not accept or approve advance parole requests from DACA recipients," and (2) "USCIS is not accepting requests from individuals who have never before been granted deferred action under DACA." *Id.* But, otherwise, USCIS is

[1] The related cases in that jurisdiction are *California v. Department of Homeland Security*, No. 17-cv-05235-WHA; *City of San Jose v. Trump*, No. 17-cv-05329-WHA; *Garcia v. United States*, No. 17-cv-05380-WHA; and *County of Santa Clara v. Trump*, No. 17-cv-05813-WHA.

currently processing DACA requests on the same terms as it was before the Rescission Memo was issued.

While complying with the *Regents* order, Federal Defendants also promptly appealed—both to the Ninth Circuit under 28 U.S.C. § 1292(a)(1), and directly to the Supreme Court in the form of a petition for a writ of certiorari before judgment under 28 U.S.C. §§ 1254(1) and 2101(e). *See* Exhibit 4, *DHS v. Regents of Univ. of Cal.*, 17-1003 (U.S. Jan. 18, 2018), U.S. Pet. for a Writ of Cert. Before J. at 12. The Supreme Court denied the government's petition via the following order: "Petition for writ of certiorari before judgment denied without prejudice. It is assumed that the Court of Appeals will proceed expeditiously to decide this case." *DHS v. Regents of Univ. of Cal.*, 138 S. Ct. 1182 (Feb. 26, 2018). As a result, Federal Defendants' appeal continues in the Ninth Circuit on an expedited schedule. (The Ninth Circuit appeal also includes several other district court orders, including the partial denial of the government's motion to dismiss, which the district court certified (and the Ninth Circuit accepted) for interlocutory appeal under 28 U.S.C. § 1292(b).)[2] Briefing is now complete at the Ninth Circuit, and oral argument was held on May 15, 2018. *See Regents of the Univ. of Cal. v. DHS*, No. 18-15068 (9th Cir.).

2. Eastern District of New York

Two lawsuits challenging the rescission of DACA were filed in the Eastern District of New York: *Batalla Vidal v. Nielsen*, No. 16-cv-4756 (E.D.N.Y.), and *State of New York v. Trump*, No.

[2] One of the issues certified for interlocutory appeal by the district court in *Regents* involves the proper scope of the administrative record. That issue also generated substantial appellate litigation, in the form of petitions for a writ of mandamus filed with the Ninth Circuit and the Supreme Court. The Supreme Court ultimately vacated the Ninth Circuit's refusal to grant mandamus relief, and instructed the district court to first adjudicate Defendants' threshold justiciability arguments before ordering any further expansion of the record. *See In re United States*, 138 S. Ct. 443, 445 (2017).

17-cv-5228 (E.D.N.Y.). On February 13, 2018, the district court (Garaufis, J.) entered the following nationwide preliminary injunction:

> Defendants are . . . ORDERED to maintain the DACA program on the same terms and conditions that existed prior to the promulgation of the DACA Rescission Memo, subject to the following limitations. Defendants need not consider new applications by individuals who have never before obtained DACA benefits; need not continue granting "advanced parole" to DACA beneficiaries; and, of course, may adjudicate DACA renewal requests on a case-by-case, individualized basis.

Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 437 (E.D.N.Y. 2018). In other words, the scope of the Eastern District of New York order "conforms to that previously issued by the U.S. District Court for the Northern District of California." *Id.* at 409. Federal Defendants promptly appealed the entry of this second preliminary injunction to the Second Circuit, and expedited briefing on that order is complete.[3] A date for oral argument has not been set. *See Batalla Vidal v. Nielsen*, No. 18-485 (2d Cir.).

3. District of Columbia

Two lawsuits challenging the rescission of DACA were filed in the District of Columbia: *NAACP v. Trump*, No. 17-cv-1907-JDB (D.D.C.), and *Trustees of Princeton University v. United States*, No. 17-cv-2325-JDB (D.D.C.). On April 24, 2018, the district court (Bates, J.) entered an order that would have the effect of vacating the Rescission Memo—thus requiring DHS to process initial DACA requests in addition to renewals—but stayed that order for a period of 90 days to allow DHS an opportunity to offer additional explanation and justification for the decision to

[3] The district court in the Eastern District of New York also recently certified for interlocutory appeal, under 28 U.S.C. §1292(b), its March 29, 2018, order denying the government's motion to dismiss plaintiff's equal-protection claims. *See* Exhibit 5, *Batalla Vidal* ECF No. 269. The Second Circuit has not yet ruled on the government's petition for permission to appeal that certified order. Earlier in the New York litigation, the Second Circuit denied the government's petition for a writ of mandamus regarding the scope of the administrative record.

rescind DACA. *NAACP v. Trump*, 298 F. Supp. 3d 209, ___, 2018 WL 1920079 at *25 (D.D.C. 2018). The court called for a joint status report to be filed no later than July 27, 2018, "stating whether DHS has issued a new decision rescinding DACA and whether the parties contemplate the need for further proceedings in this case." *Princeton* ECF No. 69. Federal Defendants are currently evaluating the District of Columbia orders, which, unlike the New York and California orders, do not have any independent legal effect outside of that litigation at this time.

4. District of Maryland

One lawsuit challenging the rescission of DACA was filed in the District of Maryland: *Casa de Maryland v. Department of Homeland Security*, No. 17-cv-2942-RWT (D. Md.), *appeal docketed*, No. 18-1522 (4th Cir. May 8, 2018). On March 5, 2018, the district court (Titus, J.) ruled "that the DACA Rescission Memo is valid and constitutional in all respects." March 5, 2018, Docket Text, *Casa de Maryland* ECF No. 43; *Casa de Maryland v. DHS*, 284 F. Supp. 3d 758 (D. Md. 2018). With respect to certain of plaintiffs' claims regarding USCIS's policy governing the sharing of information provided by DACA requestors, however, the court entered a permanent injunction against the government. *See id*. at 779. The parties later agreed on certain amendments to narrow and clarify the court's information-sharing order, and an amended order was issued on March 15, 2018, which prevents DHS from making any changes to the existing information-sharing policy. *See* Exhibit 6, March 15, 2018 Am. Order, *Casa de Maryland,* ECF No. 49. Both plaintiffs and Federal Defendants have filed notices of appeal from the district court's orders. The Fourth Circuit issued a briefing schedule on May 23, 2018, and briefing is scheduled to be completed on August 31, 2018.

5. Southern District of Florida

One lawsuit challenging the rescission of DACA was filed in the Southern District of Florida: *Diaz v. Department of Homeland Security*, No. 17-cv-24555-UU (S.D. Fl.). On December 20, 2017, the magistrate judge (O'Sullivan, M.J.) denied plaintiff's motion for a temporary restraining order, and set a briefing schedule for plaintiff's motion for a preliminary injunction. *See* Exhibit 7, *Diaz* ECF No. 11. Shortly thereafter, the parties filed a joint motion to stay all proceedings as long as the *Regents* preliminary injunction order remains in effect, because that order's nationwide effect allows the only plaintiff in *Diaz* to renew his DACA, which the district court (Ungaro, J.) granted, stayed the case in its entirety, and denied all pending motions without prejudice. *See* Exhibit 8, *Diaz* ECF No. 20.

6. Eastern District of Virginia

One lawsuit challenging the rescission of DACA was filed in the Eastern District of Virginia: *Park v. Sessions*, No. 17-cv-1332-AJT (E.D.Va.). On March 1, 2018, after the *Regents* order allowed each of the plaintiffs to file DACA renewal requests, the parties filed a joint stipulation of dismissal. *See* Exhibit 9, *Park* ECF No. 11.

F. The Current *Texas v. United States* Litigation

Plaintiffs, a group of seven States, filed this action on May 1, 2018. Compl., ECF No. 1. Plaintiffs argue that the DACA policy is unlawful for three reasons: (1) it violates the Take Care Clause of Article II, Section 3 of the United States Constitution; (2) it was not issued through the APA's notice-and-comment procedures, *see* 5 U.S.C. § 553; and (3) it conflicts with the INA and is therefore substantively unlawful under the APA. In their prayer for relief, Plaintiffs seek both (1) "[a]n order enjoining Defendants from issuing or renewing any DACA permits in the future" as well as (2) declaratory judgments that DACA violates the Take Care Clause and is procedurally

and substantively unlawful under the APA. On May 2, 2018, Plaintiffs filed a motion for a preliminary injunction, in which they seek to "enjoin the 2012 memorandum creating DACA" on a nationwide basis. Pls.' Mot. for Preliminary Injunction, ECF No. 5 ("Pls.' Mot.").

STATEMENT OF THE ISSUES

Before the Court is the question whether Plaintiffs are entitled to a preliminary injunction enjoining Federal Defendants from issuing or renewing deferred action under DACA. A party seeking preliminary injunctive relief must show: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1069 (2017).

SUMMARY OF THE ARGUMENT

Federal Defendants agree that DACA is unlawful and that Plaintiffs could establish a basis for injunctive relief under controlling Fifth Circuit precedent if they can establish standing by providing a factual basis to conclude that DACA costs Plaintiffs' money in issuing drivers' licenses. As the Attorney General concluded, DACA is unlawful because it was an "open-ended circumvention of immigration laws" and suffered from the same legal defects that the courts had recognized with respect to the DAPA memorandum. An injunction in these circumstances, however, would conflict with the erroneous nationwide injunctions issued by the California and New York courts, subjecting the government to inconsistent obligations. If the Court nevertheless concludes that injunctive relief is appropriate, the Court should limit such an injunction to DACA recipients as to whom the Plaintiff States have sufficiently established Article III standing, and it

should stay such injunction for 14 days so the United States can seek stays of all the DACA injunctions in the respective courts of appeals and the Supreme Court.

ARGUMENT

I. DACA IS UNLAWFUL.

Plaintiffs and Federal Defendants agree—DACA is unlawful. The Fifth Circuit has squarely held that DAPA and expanded DACA are substantively unlawful because they are contrary to the INA. *Texas v. United States*, 809 F.3d 134, 178-86 (5th Cir. 2015); *see id.* at 147 n.11 (including the "DACA expansions" enjoined by the district court within the opinion's references to "DAPA"). That controlling precedent is both correct and dispositive here, because DACA is materially indistinguishable from DAPA and expanded DACA.[4]

In particular, the Fifth Circuit held that DAPA and expanded DACA were contrary to the INA because (1) "[i]n specific and detailed provisions," the INA already "confers eligibility for 'discretionary relief,'" including "narrow classes of aliens eligible for deferred action," *Texas*, 809 F.3d at 179; (2) the INA's otherwise "broad grants of authority" could not reasonably be construed to assign to the Secretary the authority to create additional categories of aliens of "vast 'economic and political significance,'" *id.* at 182-83; (3) DAPA and expanded DACA were inconsistent with historical deferred-action policies because they neither were undertaken on a "country-specific basis . . . in response to war, civil unrest, or natural disasters," nor served as a "bridge[] from one legal status to another," *id.* at 184; and (4) "Congress ha[d] repeatedly declined to enact the Development, Relief, and Education for Alien Minors Act ('DREAM Act'), features of which

[4] Binding Fifth Circuit precedent in the materially indistinguishable *Texas* litigation also controls many other issues in this case. *See generally Texas*, 809 F.3d 134.

closely resemble DACA and DAPA." *Id.* at 185 (footnote omitted). Every one of those factors plainly and equally applies to the original DACA policy.

Some courts have erroneously tried to distinguish DACA from DAPA on the ground that the INA provides alien parents of U.S. citizens with a pathway to lawful status but does not so provide for aliens who arrived as children. *See, e.g.*, *NAACP v. Trump*, 298 F. Supp. 3d 209, ___, 2018 WL 1920079, at *22 (D.D.C. 2018). That is fundamentally wrong for two related reasons. *First*, it gets matters precisely backwards. The Fifth Circuit pointed to particular statutory pathways to lawful presence merely as evidence that DAPA had unlawfully departed from "the INA's specific and intricate provisions" and "Congress's careful plan." *Texas*, 809 F.3d at 186; *see also id.* at 179-80. Accordingly, the fact that Congress has provided statutory pathways to lawful status only for certain individuals similarly situated to some DAPA recipients—but not DACA recipients—simply makes the sweeping grant of deferred action in DACA *more* inconsistent with the INA than even DAPA was. *Second*, that conclusion is confirmed by the fact that the Fifth Circuit itself invalidated DAPA and expanded DACA even as to aliens who lacked a pathway to lawful status. The INA does not provide alien parents of *lawful permanent residents* with a pathway to lawful status, and the Fifth Circuit expressly relied on that fact as a basis to invalidate, not uphold, DAPA's application to parents of LPRs. *Id.* at 180. Likewise, the aliens who could have requested expanded DACA did not have a pathway to lawful status, as they also arrived as children and were merely older or had shorter residence in this country than the aliens who can request DACA under the original DACA policy.

In sum, as the Attorney General correctly advised DHS, DACA is unlawful because it is an open-ended circumvention of immigration laws that shares the same legal defects that DAPA

(and expanded DACA) did. *See* Letter from Attorney General Jefferson B. Sessions III, to Acting Secretary Elaine Duke (September 4, 2017).[5]

II. PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF.

A. STANDING

To establish Article III standing, Plaintiffs must demonstrate (1) an injury in fact (2) that is fairly traceable to the challenged conduct and (3) likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To obtain prospective injunctive relief, Plaintiffs must demonstrate that they face a "real and immediate threat" of future harm caused by the challenged policy. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

In reviewing the materially indistinguishable DAPA policy, the Fifth Circuit held that Texas had standing based on the "driver's-license rationale." *Texas*, 809 F.3d at 150. The Fifth Circuit explained that DAPA recipients in Texas would be able to apply for driver's licenses, which "would necessarily be [issued] at a financial loss" to the State. *Id.* at 155.

Here, Plaintiffs' Complaint suggests that Texas may suffer a similar financial injury from issuing driver's licenses to DACA recipients. Compl. ¶¶ 76 ("DACA's conferral of lawful presence also creates eligibility for various State benefits—including a driver's license in most States."), 225 ("DACA's conferral of lawful presence triggers eligibility for benefits—some of

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[5] Because DACA is substantively unlawful under the INA and this Court can so hold as a pure question of law, this Court need not address whether DACA is also procedurally unlawful for failure to undergo notice and comment under the APA, which would require a factual determination, *Texas*, 809 F.3d at 172-75. Likewise, in light of the statutory basis for relief, this Court need not address the constitutional question whether DACA violated the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, or whether any private cause of action exists to challenge actions under that Clause. *See Trembling Prairie Land Co. v. Verspoor*, 145 F.3d 686, 689 (5th Cir. 1998) ("Where a party raises both statutory and constitutional arguments in support of a judgment, ordinarily we first address the statutory argument in order to avoid unnecessary resolution of the constitutional issue.").

which are paid for by Plaintiff States."), 274 ("The congressional-created classification of 'lawful presence' confers eligibility for Social Security, Medicare, the Earned Income Tax Credit, a driver's license, and a host of other benefits."). Plaintiffs do not appear to rely on that rationale in their motion. If, however, Plaintiffs assert a financial injury from issuing driver's licenses, and, further, provide "evidentiary support" regarding "the cost of issuing driver's licenses to DACA's beneficiaries," *Crane v. Johnson*, 783 F.3d 244, 252 n.34 (5th Cir. 2015), then Plaintiffs would have standing here under binding Fifth Circuit precedent. *Texas*, 809 F.3d at 150, 155.

Many of the other theories that Plaintiffs put forth to support standing, however, have already been rejected by this Court and/or the Fifth Circuit. *See, e.g.*, *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (explaining that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government" on behalf of its citizens); *Texas*, 86 F. Supp. 3d at 628 (rejecting *parens patriae* theory of standing as unripe); *id.* at 634 (concluding that "indirect damages" were "not caused by DAPA" and that the "injunctive relief requested by Plaintiffs would not redress" them); *id.* at 640 (explaining that "the concept of state standing by virtue of federal abdication is not well-established"); *Texas I*, 809 F.3d at 150 (declining to address abdication theory as a possible ground for standing).

B. SCOPE OF INJUNCTIVE RELIEF

Plaintiffs request that this Court issue a preliminary injunction enjoining Federal Defendants from issuing or renewing DACA in the future. If Plaintiffs can establish their standing, then under Fifth Circuit precedent established in the related *Texas* litigation, they would ordinarily be entitled to relief because they have established: (1) DACA is unlawful on the merits for the same reason that DAPA is unlawful, *see Texas I*, 809 F.3d at 178-86; and (2) the public interest

and balance of equities likewise weigh in favor of such relief, *see id.* at 186-87, where, as here, the United States agrees that DACA is unlawful and should be rescinded.

Here, however, district courts in the Second and Ninth Circuits have issued legally incorrect and overbroad nationwide preliminary injunctions requiring Federal Defendants to continue (most of) DACA nationwide. *Regents*, 279 F. Supp. 3d at 1048; *Batalla Vidal*, 279 F. Supp. 3d at 437. If this Court issues an injunction ordering Federal Defendants to end the DACA policy, Federal Defendants will face simultaneous conflicting court orders—which highlights the impropriety of issuing nationwide injunctions as a general matter. In similar situations, courts have typically held that the appropriate course is for a district court to refrain from issuing a conflicting injunction. *Feller v. Brock*, 802 F.2d 722, 727-28 (4th Cir. 1986); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987).

Nevertheless, if this Court decides that preliminary injunctive relief is appropriate, it should limit such an injunction to DACA recipients as to whom the Plaintiff States have sufficiently established Article-III standing. As the United States has long maintained, including in the various lawsuits over the rescission of DACA, nationwide injunctions that go beyond redressing any cognizable injuries of Plaintiffs are inappropriate. Although Federal Defendants acknowledge that the Fifth Circuit affirmed this Court's prior nationwide injunction against DAPA and expanded DACA, *Texas*, 809 F.3d at 187-88, the DACA litigation brings into sharp focus the problems with nationwide injunctions, and the United States continues to maintain that injunctions that are broader than necessary to redress the plaintiffs' own injuries are improper.[6] Indeed, had the district

[6] *See, e.g.*, *Batalla Vidal*, 279 F. Supp. 3d at 437-38 ("enjoin[ing] rescission of the DACA program on a universal or 'nationwide' basis" while recognizing the strength of the government's arguments to the contrary); *Regents*, 279 F. Supp. 3d at 1049 & n.29 (rejecting the government's position and issuing a "nationwide injunction"); Exhibit 4, *DHS v. Regents of Univ. of Cal.*, 17-

courts in the DACA-rescission litigation adhered to ordinary rules prohibiting nationwide injunctions, this case would not pose the risk of conflicting injunctions.

Finally, if this Court issues injunctive relief of any scope, it should stay that order for 14 days so the United States can seek emergency relief of the injunctions in *all* of the DACA cases in the respective courts of appeals and the Supreme Court to resolve its conflicting obligations. A stay would serve the public interest because it would be impossible for the United States to comply with conflicting injunctions, and a stay would facilitate the orderly resolution of the litigation over the DACA policy.

CONCLUSION

For the foregoing reasons, if the Court determines that injunctive relief is warranted notwithstanding the conflicting California and New York injunctions, the Court should limit any such injunction to DACA recipients as to whom Plaintiffs have demonstrated standing, and it should stay the injunction for 14 days so the United States can seek stays of all the DACA injunctions in the respective courts of appeals and the Supreme Court.

Dated: June 8, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

WILLIAM C. PEACHEY
Director, Office of Immigration Litigation
District Court Section

Attorneys for Federal Defendants

/s/ *Jeffrey S. Robins*
JEFFREY S. ROBINS
Attorney-in-Charge
Assistant Director
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Washington, DC 20044
Telephone: (202) 616-1246
Facsimile: (202) 305-7000
jeffrey.robins@usdoj.gov

1003 (U.S. Jan. 18, 2018), U.S. Pet. for a Writ of Cert. Before J. at 32 n.9 (discussing the "constitutional and equitable" problems with nationwide injunctions against DACA's rescission).

CERTIFICATE OF SERVICE

I certify that on June 8, 2018, this document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Jeffrey S. Robins*
JEFFREY S. ROBINS