Nos.18-587, 18-588, AND 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.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND LATINOJUSTICE PRLDEF IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus **NAACP Legal Defense and Educational Fund, Inc. ("LDF")** is a non-profit, non-partisan law organization established under the laws of New York to assist Black people and other people of color in the full, fair, and free exercise of their constitutional rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation. For nearly eighty years, LDF has fought to enforce the constitutional guarantee of equal protection for all persons. LDF represented Black parents and their children in *Brown v. Board of Education*, 347 U.S. 483 (1954), the historic case that dismantled the "separate but equal" doctrine established under *Plessy v. Ferguson*, 163 U.S. 537 (1896), which relegated Black people, by law, to a position inferior to white citizens. Today, LDF continues to work to combat discrimination and pernicious racial stereotyping against people of all backgrounds. In 2016, LDF argued *Buck v. Davis*, 137 S. Ct. 759, 778 (2017), in which this Court condemned defense counsel's introduction of the "toxin" of racial bias into Mr. Buck's capital sentencing hearing. That same year, LDF also filed an amicus brief in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868, 870 (2017),

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel for *amicus curiae* state that both parties have filed blanket consent to the filing of *amicus briefs*.

in which this Court recognized that a juror's statements assigning pernicious racial stereotypes to a Mexican American defendant could, if left unchecked, result in the wrongful exercise of power by the State.

Consistent with amicus curiae's opposition to all forms of discrimination, LDF has a strong interest in ensuring that the federal government abides by fundamental equal protection principles in its policies related to immigrants. LDF filed an amicus brief in *Jean v. Nelson*, 472 U.S. 846 (1985), explaining that the Court of Appeals had misapplied this Court's precedent in concluding that a federal immigration policy tainted by racial discrimination was not subject to judicial review.[2] Most recently, in January 2018, LDF filed *NAACP v. United States Department of Homeland Security*, on behalf of organizational plaintiffs challenging on equal protection grounds the Department of Homeland Security's decision to rescind Temporary Protected Status ("TPS") for Haitians in the United States. No. 1:18-cv-00239-DKC (D. Md. Jan. 24, 2018).

Amicus **LatinoJustice PRLDEF**, founded in 1972 as the Puerto Rican Legal Defense & Education Fund, is a national not-for-profit civil rights legal defense fund that has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law. LatinoJustice champions an equitable society through advancing Latinx civil engagement, cultivating leadership, and protecting civil rights and equality in the areas of criminal

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[2] *See* Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. In Support of Petitioners, *Jean v. Nelson*, 472 U.S. 846 (1985) (No.84-5240), 1985 WL 670075 at *4.

justice, education, employment, fair housing, immigrants' rights, language rights, redistricting and voting rights. LatinoJustice vehemently opposes the Petitioner's unlawful actions to rescind the Deferred Action for Childhood Arrivals ("DACA") program, which has provided deferred status for thousands of Latinx students and DREAMers across the country. Thus, LDF and LatinoJustice have the experience and expertise to assist the Court in its review of this important case.

INTRODUCTION AND SUMMARY OF ARGUMENT

On June 15, 2012, then-Secretary of Homeland Security ("DHS") Janet Napolitano issued a memorandum establishing the DACA program.[3] Under DACA, individuals who were brought to the United States as children and meet specific criteria may request deferred action for a period of two years, subject to renewal. DACA designees must undergo rigorous screening, including biometric screening and criminal background checks, in order to be eligible for the program. In establishing DACA, DHS recognized that there are "certain young people who were brought to this country as children and know only this country as home[,]" and that federal immigration laws are not "designed to remove productive young people to countries where they may not have lived or even speak the language." DACA Memo. at 1-2. The

[3] Memorandum from Janet Napolitano, Sec'y of Homeland Sec. to David V. Aguilar et al. (June 15, 2012) https://www.dhs.gov/sites/default/files/publications/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [hereinafter DACA Memo].

program has allowed nearly 700,000 young people, mostly Latinos and persons of Mexican heritage, to come out of the shadows, study and work without fear of removal.

On September 5, 2017, DHS abruptly rescinded DACA by announcing that it would cease to accept new applications. It also announced it would only issue renewals for grantees whose deferrals expire before March 5, 2018, and only if they applied for renewal within one month of DHS's announcement.[4] Respondents challenged the rescission of DACA under the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., and on constitutional grounds. The district courts for the Northern District of California and Eastern District of New York denied in relevant part the Government's motion to dismiss Respondents' APA and constitutional claims, and those courts granted Respondents' motions for a preliminary injunction based on their APA claims.[5] In addition, the District of Columbia district court denied in relevant part the Government's motion for summary judgment and vacated the rescission of DACA.[6]

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[4] *See* Memorandum from Att'y Gen. Sessions to Acting DHS Sec'y Duke (Sept. 5, 2017) (https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf) [hereinafter DACA Rescission Memo].

[5] *See Regents of Univ. of Calif. v. U.S. Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018); *Regents of Univ. of Calif. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018).

[6] *See Trump v. NAACP*, 298 F. Supp. 3d 209 (D.D.C. 2018).

Subsequently, the Ninth Circuit affirmed the California district court's decision on the motion to dismiss and the preliminary injunction on APA grounds. *Regents of the Univ. of Calif. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018). In a concurrence, Judge Owens explained that he would have held the APA claim to be not judicially reviewable, but that he would have remanded for consideration of whether the Plaintiffs' equal protection claim would support a preliminary injunction, noting that the claim appeared "promising" based on the Plaintiffs' allegations. *Id.* at 523-24 (Owens, J., concurring).

This Court granted certiorari on the questions of: (1) whether the DHS's decision to terminate DACA is judicially reviewable; and if so (2) whether the decision to terminate DACA is lawful. *Dep't of Homeland Security v. Regents of the Univ. of Calif.* (2019) (Nos. 18-587, 18-588, and 18-589).

For the reasons stated by Respondents, the district courts correctly granted preliminary injunctions under the APA. Because those injunctions are supported by statutory grounds, this Court need not reach Respondents' constitutional claims. *See, e.g., United States v. Locke*, 471 U.S. 84, 92 (1985). Nevertheless, because the Government has sought to limit judicial review of its racially discriminatory treatment of non-citizen U.S. residents, a response from amici is in order.

The Government contends this case involves a "discriminatory-enforcement claim," which it claims is "not cognizable in the immigration context." Pet'rs' Aug. 19, 2019 Br. at 53 [hereinafter Pet'rs' Br.]. Thus, according to the Government, the Administration's

decision to rescind a program that protects from removal 700,000 persons brought to the United States as children is not subject to judicial scrutiny even if the rescission was motivated by racial animus. That is a breathtaking argument. It would mean the Article III courts could not review DACA's rescission even if the Administration formally stated that the rescission was motivated by a desire to remove as many Latinos as possible from our country. Nor could the courts review an official federal policy to deport only non-citizens of color.

That is not, and cannot be, the law. The Fifth Amendment protects all persons living in the United States. If the equal protection component of that Amendment means anything, it means that racial discrimination must not infect federal policy judgments about whether to deport hundreds of thousands of individuals who came to the United States as children. And, as LDF pointed out over 30 years ago in *Jean*, and as this Court has recognized in other contexts, the harms from state-sponsored racial discrimination "extend[] beyond the direct victims" of the discrimination.[7] Such discrimination "corrupt[s] our governmental institutions, stigmatize[s] all members of the disfavored group and incite[s] further discrimination." *Id*. If unchecked by the courts, such discrimination will also undermine public confidence in the courts as neutral arbiters of the rule of law.

The Government insists that, even if this claim is reviewable, Respondents have not stated an equal protection claim. In the Government's view, this Court should ignore the facts that over ninety percent

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[7] *See* Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc., *supra* note 2, at *9.

of DACA's beneficiaries are Latino—the vast majority of whom are of Mexican heritage—and that the President has repeatedly made statements evincing his animus against Mexican and Latino immigrants. But this Court's precedent does not authorize the Government to disregard facts because they are detrimental. Instead, the President's alarming statements evincing animus against Latino immigrants and other immigrants of color; the influence he exerts over the members in his cabinet; the fact that the vast majority of DACA's beneficiaries are Latino; and the unusual procedures employed by the Administration in rescinding DACA, all support an inference that the Administration's rescission of DACA was motivated, at least in part, by racial discrimination. Therefore, to the degree this Court reaches the issue, it should recognize that Respondents' equal protection claims are "promising," as Judge Owens recognized. They are certainly plausible claims, the assertion of which was sufficient to defeat the Government's motion to dismiss.

ARGUMENT

I. Respondents' Intentional Racial Discrimination Claim is Cognizable.

The United States has taken the position that Respondents' equal protection challenge to the rescission of DACA is "not cognizable."[8] In essence, the Government argues that the Administration's policy change, the impact of which falls almost completely on Latinos and individuals of Mexican heritage, cannot be reviewed by the judiciary for

[8] Pet'rs' Br. at 53.

discriminatory intent. That argument runs contrary to our most fundamental constitutional principles and to the rule of law itself. No principle is more sacred to our democracy than the prohibition on racial discrimination in federal government policy. *See City of Richmond v. J.A. Croson Co.* 488 U.S. 469, 501 (1989) (citation omitted). The courts are tasked with ensuring that state-sponsored discriminatory policies are not allowed to stand.

The Government attempts to create a category of cases that would be immune from equal protection review by courts: challenges to immigration policies. This has never been true. It is well established that equal protection "provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886). The country's extensive history of racial classifications suggests that judicial deference to executive policies is not compatible with the constitutional promise of equal protection. *See Korematsu v. United States* 323 U.S. 214, 235-40 (1944) (Murphy, J., dissenting).

Though the executive has broad discretion in implementing immigration policy, that discretion is not so broad to allow the executive to engage in that which is "odious in all aspects," *Rose v. Mitchell*, 443 U.S. 545, 555 (1979), i.e., government-sponsored racial discrimination.

A. Respondents' Equal Protection Claim Challenges a General Policy Decision, Which Should Be Reviewed Under the *Arlington Heights* Framework.

The Government argues that Respondents' equal protection challenge is, in actuality, a selective-prosecution claim, and the race discrimination alleged by Respondents is not sufficiently "outrageous" to warrant review under the selective-prosecution standard. *See* Pet'rs' Br. at 54. As each lower court to address the issue found, this argument is without merit. *First*, Respondents do not raise a selective-enforcement claim subject to a higher pleading standard, but instead raise an equal protection challenge to the executive's policy judgment about how to apply the nation's immigration laws, which should be analyzed under the *Arlington Heights* framework. *Second*, even if this were a selective-prosecution challenge, discrimination on the basis of race is the epitome of "outrageous" government conduct that presents a judicially cognizable claim.

The Government's argument relies on *Reno v. American-Arab Anti-Discrimination Committee*, in which this Court stated that selective-enforcement claims are rarely viable in the deportation context. 525 U.S. 471, 488–91 (1999) [hereinafter *AADC*]. In that case, non-citizens claimed that, although they had violated the immigration laws, the Government had impermissibly targeted and chosen them for deportation because of their affiliation with an alleged terrorist group. The Court rejected their claims, noting that selective-enforcement defenses to

deportation proceedings are ill-suited for judicial review. *See id*. at 490–91.

Respondents' challenge to the DACA rescission, however, is not raised "as a defense against [ ] deportation" and is not a claim of "selective enforcement." *Id*. Further, as Respondents note, some of the plaintiffs in this case are states, and their claims plainly do not implicate selective enforcement principles. Br. of New York, et al. at 56. Therefore, the necessary predicate for the application of *AADC*'s heightened standard is not applicable, and its concerns about "invad[ing] a special province of the Executive" do not apply. *Id*. at 489.

Respondent's equal protection allegation is a freestanding claim that the Administration, motivated by race discrimination, made a sweeping policy decision to rescind protections to all approximately 700,000 immigrants brought here as children. It is not a challenge to a case-by-case decision made by DHS as to which immigrants should have their cases prosecuted and which should not, but a challenge that the Government has made a fundamental policy judgment about how to apply our nation's immigration laws in a manner infected by racial discrimination. In short, the "substantial concerns that make the courts properly hesitant to examine" individual prosecutorial decisions do not obtain here. *Id*. at 490 (quoting *Wayte v. United States*, 470 U.S. 598, 607-08 (1985)).

Indeed, key factors the *AADC* Court identified as making courts hesitant to review selective-prosecution claims have no application when, as here, the challenge is to a categorical (and public) government policy decision as to how to apply our

immigration laws. *See id.* (referring to the "strength of the case," the "prosecution's general deterrence value," potentially "revealing the Government's enforcement policy," and the risk of chilling law enforcement by subjecting a prosecutor's motives to outside inquiry, as reasons why courts should be hesitant in reviewing selective-enforcement claims).

The Government's argument that this is a case of prosecutorial "discretion" fails on the plain meaning of that word. Under the DACA policy "'discretion' was exercised favorably in all cases of a certain kind and then, after repeal of the regulation, unfavorably in each such case." *U.S. ex rel Parco v. Morris*, 426 F. Supp. 976, 984 (E.D. Pa 1977). This is not discretion; it is a policy concerning a category of people. The DACA rescission may eventually lead to the prosecution and removal of undocumented immigrants, who may challenge the decision to prosecute their case in lieu of others, but that day is not today. Today, Respondents are challenging whether the Administration's categorical decision to end a nationwide immigration program was motivated by race discrimination.

The Government also makes the half-hearted suggestion that judicial review of the Administration's discriminatory rescission of DACA would "'[impact] foreign relations.'" Pet'rs' Br. at 54 (citation omitted). But the Government has never explained what "foreign relations" interest is implicated by judicial review of Respondents' claim that the rescission of DACA was motivated by racial discrimination. In rescinding DACA, the Administration made no mention of foreign relations as a basis for its decision. Notably, this case does not

involve decisions about foreign nationals entering the United States; indeed, the only beneficiaries of DACA are longstanding residents of this country who have a Fifth Amendment right not to be subject to racial discrimination by the federal government.

Each lower court correctly rejected the Government's attempt to import *AADC*'s heightened selective prosecution standard to the DACA rescission.[9] As one court explained, "Plaintiffs' claims cannot fairly be characterized as selective-prosecution claims because they do not 'implicate the Attorney General's prosecutorial discretion—that is, in this context, his discretion to choose to deport one person rather than another among those who are illegally in this country.'" *Regents of the Univ. of Calif. v. U.S. Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304, 1314 n.3 (N.D. Cal. 2018) (quoting *Kwai Fun Wong v. United States*, 373 F.3d 952, 970 (9th Cir. 2004)). Rather, Respondents "allege[d] that the agency's decision to end a nationwide deferred action program was motivated by racial animus towards a protected class[,]" an allegation subject to review under the traditional *Arlington Heights* framework. *Id.*

B. Respondents' Claim of Intentional Racial Discrimination Meets the "Outrageous" Requirement of *AADC*.

Even if this were a selective prosecution case (and it is not), that would not end the Court's inquiry.

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[9] *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018); *CASA de Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758 (D. Md. 2018); and *Regents of the Univ. of Calif. v. U.S. Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304 (N.D. Cal. 2018).

AADC does not support the Government's broad assertion that Respondents' claims are "not cognizable" if they are deemed a selective-enforcement challenge. Pet'rs' Br. at 53.

The Court in *AADC* stated that in many cases "deportation is sought simply because the time of permitted residence in this country has expired . . ." and held that the government "does not offend the Constitution by deporting [a non-citizen] for the additional reason that it believes him to be a member of an organization that supports terrorist activity." *AADC*, 525 U.S. at 491-92. Yet, the Court left open "the possibility of a rare case in which the alleged basis of discrimination is so outrageous" that a selective-enforcement claim could be maintained. *Id.* at 491.

In addressing the selective-enforcement claim in *AADC*, this Court drew heavily on its prior case law analyzing selective-prosecution claims in the criminal law context. And, in that context, this Court has expressly recognized that a "prosecutor's discretion is subject to constitutional constraints." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal quotation marks omitted). A prosecutor's discretion may not be "based on an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* (internal quotation marks omitted); *see also Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008) (stating if immigration laws were selectively enforced against petitioners because of their religion, ethnicity, gender, and race, "selective prosecution based on an animus of that kind would call for some remedy") (internal citation removed).

Racial animus represents the paradigmatic example of "outrageous" discrimination that requires judicial review even under *AADC*. Indeed, this Court has used that very term to describe racially motivated prosecutions. *See City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1966) ("If, as they allege, [petitioners] are being prosecuted on baseless charges solely because of their race, then there has been an outrageous denial of their federal rights, and the federal courts are far from powerless to redress the wrongs done to them."). As this Court has long recognized, "[d]iscrimination on the basis of race [is] odious in all aspects," and "was the primary evil" at which the Reconstruction Amendments, including the Equal Protection Clause, "were aimed." *Rose*, 443 U.S. at 554, 555. The Fifth Amendment's due process clause means the same principles prohibiting racial discrimination by state officials apply to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 499-50 (1955). Indeed, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" not to engage in racial discrimination. *Id*. at 500.

Further, as LDF pointed out in *Jean v. Nelson*, the harms from official acts of racial discrimination extend beyond the direct victims of that discrimination. State-sponsored discrimination on the basis of race or ethnicity "corrupt[s] our governmental institutions, stigmatize[s] all members of the disfavored group and incite[s] further discrimination."[10] As Justice Harlan recognized long ago, racially discriminatory government policies send

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[10] *See* Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc., *supra* note 2, at *9.

a message that people of color "are . . . inferior and degraded" so as to justify the discrimination. *Plessy v. Ferguson*, 163 U.S. at 560 (Harlan, J., dissenting). If left unchecked by the courts, such discriminatory policies consign people of color to an inferior status and reinforce racist ideas about them. *See also Miller-El v. Dretke*, 545 U.S. 231, 237-8 (recognizing that, when a prosecutor discriminates against prospective jurors on the basis of race, the harm is not only to the excluded juror or the defendant; rather, people of color "are harmed more generally, for prosecutors drawing racial lines in picking juries establish 'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice[.]'") (citation omitted). Thus, when the Government is motivated by racial discrimination in publicly canceling a program that protects hundreds of thousands of people from removal, it sends an unmistakable message of racial hierarchy to society as a whole.

That message of racial hierarchy has particular resonance given the overt racism that has long plagued our nation's immigration and naturalization laws. In 1790, the country's first immigration law restricted the ability to become naturalized citizens to "free white person[s]."[11] It was not until 1870 that Black people were permitted to naturalize as citizens, despite having been brought to the United States as slaves beginning in 1619.[12] The notorious Chinese Exclusion Act of 1882 forbade people of Chinese

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[11] Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103 (repealed by act of Jan. 29, 1795, ch. 20; however, this act also limited the ability to be naturalized as a citizen to "free white person[s]).
[12] Act of July 14, 1870, ch. 254, §7, 16 Stat. 254, 256.

heritage from entering the country entirely,[13] and the Immigration Act of 1917 expanded that prohibition to encompass immigrants from most of Asia.[14] In the notorious *Chinese Exclusion Cases*, this Court sanctioned such blatant discrimination, holding that no court could review the federal government's determinations that "foreigners of a different race in this country" were "dangerous" and would not "assimilate with us" (the "us" clearly referring to white Americans).[15]

Plaintiffs allege the rescission of DACA is grounded in the same kind of bigotry that long characterized our immigration and naturalization laws. Such allegations are entitled to judicial review. This is particularly true here, because DACA recipients have a substantial interest in not being deported and maintaining their DACA protections, and because the Government's interests are "less pronounced than in *AADC*," given it has not alleged any threat to safety and security considerations. *See Ragbir v. Homan*, 923 F.3d 53, 73 (2d Cir. 2019) (noting factors that support a claim of "outrageous" discrimination).

By contrast, the Government's sweeping interpretation of *AADC* would prohibit a court from reviewing an executive branch decision relating to immigration, even if that decision displayed blatant race discrimination. For example, under the Government's view, even if the Administration were to create a policy prioritizing the deportation of Black

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[13] Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, 22 Stat. 58.

[14] Ch. 29, § 3, 39 Stat. 874, 875-76 (repealed 1952).

[15] *See Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

non-citizens based solely on their race, that decision would not be reviewable by any court. *But cf. Nino v. Johhnson*, No. 16-CV-2876, 2016 WL 6995563, at *5 (N.D. Ill. Nov. 30, 2016) (citing *LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998) ("Suppose the [Board of Immigration Appeals] ordered an alien deported on the basis of a criminal conviction that it knew had been vacated, but it didn't care because the alien was black. We have expressed doubt that Congress intended to forbid such orders to be challenged in court")).

The Government's position is at war with the plain text of the Fifth Amendment, and the basic principles of the rule of law that underlie our constitutional democracy. It must be rejected, and forcefully so.

II. The Lower Courts Correctly Concluded that Respondents Plausibly Alleged an Equal Protection Claim Under *Arlington Heights*.

The lower courts correctly held that Respondents plausibly alleged that the rescission of DACA violated the equal protection component of the Fifth Amendment's Due Process Clause. *See Regents of the Univ. of Calif. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018); *Regents of Univ. of Calif. v. U.S. Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018). In the Ninth Circuit decision, Judge Owens wrote a concurrence recognizing that Respondents' allegations of unconstitutional race discrimination were "promising" and would likely succeed on remand if the Government failed to rebut the presumption of

unconstitutional animus. *Regents*, 908 at 523-24 (Owens, J., concurring). The Ninth Circuit majority noted that it "[did] not disagree" with this assessment, stating Respondents' equal protection claim was an alternative ground for affirming the injunction. *Id.* at 520, n.31.

In holding Respondents plausibly alleged equal protection claims, these courts, applying the *Arlington Heights*[16] framework, relied on three key factors. Those factors strongly support an inference that the rescission of DACA was motivated, at least in part, by racial discrimination.

A. The Factors Supporting an Inference of Discrimination.

First, the lower courts emphasized that rescission of DACA would disproportionately impact Latinos and individuals of Mexican heritage. *See Regents*, 908 F.3d at 518-19; *Regents*, 298 F. Supp. 3d at 1314; *Batalla*, 291 F. Supp. 3d at 274-75. Indeed, Latinos account for at least 93 percent of DACA recipients. *Regents*, 908 F.3d at 518.

Second, the courts highlighted Respondents' allegations that before and after the election, the President made statements evincing animus towards Latinos and persons of Mexican ancestry. *See Regents*, 908 F.3d at 518-19; *Regents*, 298 F. Supp. 3d at 1314; *Batalla*, 291 F. Supp. 3d at 276. For example, the President called Mexican immigrants "criminals, drug dealers, and rapists"; the President derided people who protested at one of his rallies as "thugs

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[16] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

who were flying the Mexican flag";[17] the President stated a federal judge of Mexican descent could not fairly preside over a lawsuit in which he was a party because "[h]e's a Mexican" despite the fact that the judge is American[18]; and the President has repeatedly labeled Latino immigrants "criminals, 'animals,' and 'bad hombres.'" *Batalla*, 291 F. Supp. 3d at 276 (citation omitted).

Indeed, beyond these examples, President Trump has repeatedly stated a preference for white immigrants over immigrants of color. In August 2016, then-candidate Trump expressed his desire to return to the 1924 quota system to maintain "historical norms."[19] The 1924 system was, in the words of its proponent, then-Senator Reed of Pennsylvania, "a scientific plan for keeping America American,"[20] by sharply limiting non-white immigration.[21] As

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[17] David Sherfinski, *Donald Trump: Protesters outside rally 'thugs who were flying the Mexican flag,'* Wash. Times (May 25, 2016), https://www.washingtontimes.com/news/2016/may/25/trump-protesters-rally-thugs-waving-mexican-flag/.

[18] *See* Z. Byron Wolf, *Trump's attacks on Judge Curiel are still jarring to read*, CNN (Feb. 27, 2017), https://www.cnn.com/2018/02/27/politics/judge-curiel-trump-border-wall/index.html (providing an excerpt of the President's interview during which he made the remark).

[19] *See, e.g.*, Jugal K. Patel, *Trump Wants Big Changes to Legal Immigration, Too — How Big?*, NY Times (Oct. 18, 2016), https://www.nytimes.com/interactive/2016/10/18/us/politics/trump-legal-immigration.html.

[20] A. Warner Parker, The Quota Provisions of the Immigration Act of 1924, 18 AM. J. INT'L L. 737, 740 (1924).

[21] *See* Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159 (repealed 1952) (tying immigration quotas to the total number of people of each nationality in the United States as of the 1890

President, upon learning that 15,000 Haitians and 40,000 Nigerians had received visas to enter the United States, Mr. Trump reportedly exclaimed that Haitians "all have AIDS," and that, upon seeing the United States, Nigerians would never return to their "huts" in Africa.[22] Then, during a meeting with several U.S. Senators, the President disparaged a draft immigration plan that protected people from Haiti, El Salvador, and some African countries, asking, "Why are we having all these people from shithole countries come here?"[23] At the same meeting, President Trump expressed his preference for more immigrants from places like Norway.[24] The President has even gone so far as to suggest that members of Congress who are women of color are not real Americans. In August of 2019, at a public rally, President Trump said that four United States congresswomen of color could "go back" to the countries "from which they came," despite the fact that all four women are (of course) U.S. citizens.[25]

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census, thereby sharply limiting quotas for non-white immigrants).

[22] Michael Shear, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, NY Times (Dec. 23, 2017), https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html.

[23] Josh Dawsey, *Trump derides protections for immigrants from 'shithole' countries*, Wash. Post (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.b56f11cc896f.

[24] *Id.*

[25] Bianca Quilantan & David Cohen, *Trump tells Dem congresswomen: Go back where you came from*, POLITICO (July

The Trump Administration's policies are consistent with the President's persistent rhetoric employing odious stereotypes to describe immigrants of color, and the countries from which they emigrated, and questioning the citizenship of non-white public officials. In addition to rescinding DACA, the Administration rescinded Temporary Protected Status ("TPS")—which provides legal status for nationals from other countries to remain in the United States as a result of natural disasters, war, or other extraordinary conditions in their home countries—for nationals of El Salvador, Haiti, Nicaragua, Sudan, Nepal and Honduras. As several courts have recognized, plaintiffs challenging these TPS rescissions have plausibly alleged that the Administration was motivated by racial discrimination.[26] In one of those cases, after a 4-day bench trial, the district court granted a preliminary injunction and observed the following with respect to the rescission of Haitian TPS:

> As President John Adams once observed, "Facts are stubborn things; and

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14, 2019, 09:15 AM), https://www.politico.com/story/2019/07/14/trump-congress-go-back-where-they-came-from-1415692.

[26] *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1098 (N.D. Cal. 2018) (TPS plaintiffs plausibly stated claim that terminations were motivated by racial animus); *Saget v. Trump*, 345 F. Supp. 3d 287, 303 (E.D.N.Y. 2018) (same); *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 413 (D. Mass. 2018) (same); *CASA de Maryland, Inc. v. Trump*, 355 F. Supp. 3d 307, 326 (D. Md. 2018) (same); *Nat'l Ass'n for the Advancement of Colored People v. U.S. Dep't of Homeland Sec.*, 364 F. Supp. 3d 568, 578 (D. Md. 2019) (same).

> whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." Based on the facts on this record, and under the factors prescribed by *Arlington Heights*, there is both direct and circumstantial evidence [that] a discriminatory purpose of removing non-white immigrants from the United States was a motivating factor behind the decision to terminate TPS for Haiti.

Saget v. Trump, 375 F. Supp. 3d 280, 374 (E.D.N.Y. 2019).

The Administration has also implemented widely condemned family separation policies that resulted in thousands of children of tender age—many of them babies and toddlers—being forcibly removed from their parents and held in detention centers, where conditions have been described by official observers as "unsanitary" and "dangerous[ly] overcrowd[ed]."[27] The immigrants affected by these policies are overwhelmingly from Mexico and Central American countries, and the Administration has unapologetically admitted that these policies were designed to deter these families from seeking refuge

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[27] Madeline Joung, *What Is Happening at Migrant Detention Centers? Here's What to Know*, TIME, https://time.com/5623148/migrant-detention-centers-conditions/ (last updated July 12, 2019).

in the United States.[28] In sum, the statements pointed to by the courts below represent only a portion of the President's statements expressing animus against immigrants of color, and his Administration has implemented a variety of policies reflecting that animus.

Third, the lower courts pointed to the "unusual history" leading up to the Government's decision to rescind DACA. *See Regents*, 908 F.3d at 519; *Regents*, 298 F. Supp. 3d at 1315. Namely, "DACA received reaffirmation by [the Department of Homeland Security] as recently as three months before the rescission, only to be hurriedly cast aside on what seems to have been a contrived excuse (its purported illegality)." *Regents*, 908 F.3d at 519 (quotation marks omitted).

These facts together strongly support an inference that the Trump Administration's rescission of DACA violated the Fifth Amendment because it was motivated, at least in part, by racial discrimination against non-white immigrants.

B. The Government Cannot Rely on *Ipse Dixit* to Defeat an Inference of Discrimination.

The Government challenges the lower courts' rulings on three grounds. *See* Pet'rs' Br. at 52-57. First, it tries to diminish the import of the disparate impact that the rescission of DACA has on Latinos and persons of Mexican heritage by arguing that

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[28] *See* Memo. for Federal Prosecutors Along the Southwest Border from the Att'y Gen. Sessions to Fed. Prosecutors Along the Sw. Border (Apr. 6, 2018) (https://perma.cc/H5JB-LFG9).

"given the United States' natural immigration patterns, the disparate impact of the rescission of DACA is neither surprising nor illuminating of the agency's motives." *Id.* at 54-55.

This argument defies both logic and precedent. Disparities do not become less significant because they mostly affect minorities. On the contrary, "particularly . . . in the case of governmental action," gross disparities such as those here are powerful evidence of discrimination because "normally [an] actor is presumed to have intended the natural consequences of his deeds." *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). That the Government could predict the rescission of DACA would overwhelmingly impact Latinos and persons of Mexican heritage bolsters the plausibility of Respondents' intentional discrimination claims—there was no question about which groups of immigrants the Government's actions would affect.

Next, the Government avers that the President's discriminatory "statements are equally irrelevant." Pet'rs' Br. at 55. This is so, claims the Government, because "the relevant decisionmakers were Duke and Nielsen [Secretaries of Homeland Security]." *Id.* It goes on to assert that the President's statements do not "even address[] DACA recipients," save for one that "reveals nothing more than the obvious fact that DACA has been an important part of legislative negotiations on immigration reform"—the President's tweet that "[t]he Democrats have been told, and fully understand, that there can be no DACA without the desperately needed WALL at the Southern Border." *Id.* The Government then suggests that the President's statements of animus against

immigrants of color do not matter because he "has repeatedly praised DACA recipients and urged Congress to 'legalize' their protection." *Id.* (citation omitted).

The Government's arguments collapse in on themselves. The Government in one breath says that the President was not the "relevant decisionmaker," and then in the next admits that he was leveraging the rescission of DACA as "part of legislative negotiations." The President has been very clear that he would end DACA if Congress did not accede to his demand to build a wall on the Southern Border, tweeting: "The Democrats have been told, and fully understand, that there can be no DACA without the desperately needed WALL at the Southern Border . . . ." *Regents*, 908 F.3d at 519 n.30. And in the face of evidence that the President was using DACA as a bargaining chip, it is certainly plausible that the President *was* the relevant decisionmaker.

In fact, the President's tweets, which are his official statements,[29] alleviate any doubt. On the morning of September 5, 2017, the very same day

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[29] *See, e.g.*, Def.'s Suppl. Submission and Further Resp. to Pl.'s Post-Briefing Notices, *James Madison Project v. Dep't of Justice*, No. 1:17-cv-00144-APM, (D.D.C. Nov. 13, 2017) (DOJ noting that the Government is treating the President's tweets "as official statements of the President of the United States"); Elizabeth Landers, *White House: Trump's Tweets are 'Official Statements'*, CNN (June 6, 2017), https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html (recounting the White House Press Secretary's announcing during a press briefing that the President's tweets are "considered official statements by the President of the United States").

DHS released its memorandum rescinding DACA,[30] the President tweeted: "Congress, get ready to do your job – DACA!"[31] And the next day, after the Administration announced that it was rescinding DACA, the President tweeted he would "revisit this issue" if Congress did not act to legalize DACA within six months.[32] These tweets reveal that the President was a driving force behind the rescission decision.

More generally, a president has immense influence over his cabinet. *See Humphrey's Executor v. United States*, 295 U.S. 602 (1935). And this President is widely known to wield particularly great influence over his cabinet.[33] Thus, President Trump's

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[30] DACA Rescission Memo.

[31] Mallory Shelbourne, *Trump to Congress: 'Get ready to do your job" on DACA*, The Hill (Sept. 5, 2017), https://thehill.com/homenews/administration/349173-trump-to-congress-get-ready-to-do-your-job-on-daca.

[32] Sophie Tatum, *Trump: I'll 'revisit' DACA if Congress can't fix in 6 months*, CNN, https://www.cnn.com/2017/09/05/politics/donald-trump-revisit-daca/index.html (last updated Sept. 6, 2017).

[33] For example, in *Saget*, the court found the President "exerted significant influence over [the Secretary of Homeland Security's] TPS decision." 375 F. Supp. 3d at 360. It is reported that the President also influenced the Department of Homeland Security's decision to implement a family separation policy. *See* Zack Budryk, *Trump's renewed push for family separations led to Nielsen's ouster: report*, The Hill (Apr. 8, 2019), https://thehill.com/latino/437830-trump-has-pushed-to-resume-child-separations-for-months-report. And a more recent example, after the National Weather Service contradicted the President's statement about Hurricane Dorian, the Secretary of Commerce reportedly threatened to fire the heads of the National Oceanic and Atmospheric Administration (NOAA), which led NOAA to disavow the earlier statement. *See*

stated animus towards Latinos and Mexican nationals is highly relevant and supports Respondents' intentional discrimination claims. *See generally McCreary County v. ACLU of Ky.*, 545 U.S. 844, 846 (2005) (a court cannot "turn a blind eye to the context in which [a] policy arose") (internal quotation marks and citation omitted).

In any event, the Government's argument that the President was not the "relevant decisionmaker" is premature, given Respondents' allegations that the President himself ordered the rescission of DACA. *See Regents*, 298 F. Supp. 3d at 1315; *Batalla*, 291 F. Supp. 3d at 277. At this stage of the proceedings, this Court must accept those allegations as true. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.").

Christopher Flavelle, Lisa Friedman, and Peter Baker, *Commerce Chief Threatened Firings at NOAA after Trump's Dorian Tweets, Sources Say*, NY Times, https://www.nytimes.com/2019/09/09/climate/hurricane-dorian-trump-tweet.html (last updated Sept. 10, 2019). *See also* Karen Tumulty, *President Trump isn't a fan of dissent—inside or outside the government*, Wash. Post (Feb. 1, 2017), https://www.washingtonpost.com/politics/president-trump-seeks-to-quash-dissent-inside-the-government/2017/02/01/788bdefa-e7ed-11e6-b82f-687d6e6a3e7c_story.html; Z. Byron Wolf, *The kiss of death in Trump's cabinet is disagreeing with the boss*, CNN, https://www.cnn.com/2018/04/03/politics/trump-cabinet-kiss-of-death/index.html (last updated Apr. 3, 2018); Stephen Collinson, *The law or the President: The Trump appointees' dilemma*, CNN (Apr. 9, 2019), https://www.cnn.com/2019/04/09/politics/donald-trump-kirstjen-nielsen-immigration/index.html.

The Government's assertion that the President's remarks "praising" DACA recipients somehow neuters his numerous statements evincing animus against immigrants of color must be rejected. The President only made those "praising" statements while asserting the United States needs to build a wall across the Southern border to keep people from Central America out of the country. And racist remarks cannot be cured by feel-good bromides. The President cannot meaningfully say he "loves those kids," referring to DACA recipients (when most of them are adults), and then label people from the same countries the vast majority of DACA recipients come from as animals, drug dealers, rapists, and murderers. Simply, Respondents' allegations of the President's animus support the plausibility of their intentional discrimination claims.

Finally, the Government claims there was "nothing remotely 'unusual' about the history of the rescission" because shortly after DHS reaffirmed DACA, "the *Texas*[34] plaintiffs indicated their intent to challenge [DACA], and the Attorney General informed the Acting Secretary that he had concluded that the policy was unlawful . . ." Pet'r's Br. at 56.[35] The Government claims that these two "facts provide

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[34] *Texas v. United States*, 96 F. Supp. 3d 591 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).

[35] Attorney General Sessions also said in his remarks announcing that the Administration's stance that DACA was illegal that DACA "denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens." U.S. Dep't of Justice, Office of Pub. Affairs, *Attorney General Sessions Delivers Remarks on DACA* (Sept. 5, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca.

ample explanation for the policy change and its timing." *Id.* at 57.

However, the fact that the Government can give reasons for its decision to rescind DACA does not mean that the process leading up to that decision was not unusual. As the district court reasoned in *Regents*, the speed at which the Government rescinded DACA makes these purported justifications appear "contrived": the "strange about-face, done at lightning speed, suggests that the normal care and considerations within the agency was bypassed." *Regents*, 298 F. Supp. 3d at 1315. And the speed of this decision is extra curious given just how momentous it was. *Regents*, 908 F.3d at 493. The Government does not dispute Respondents' allegations that the decision to rescind DACA was abrupt, and the Government's justifications for that abruptness do not undercut the inference of discrimination at the pleadings stage.

The Census case recently decided by this Court exemplifies why Respondents' Equal Protection Clause claims cannot be dismissed at the pleadings stage. In that case, the Secretary of Commerce asserted that the Government was seeking to add a citizenship question to the census to better enforce the Voting Rights Act (VRA). *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). However, the evidence told a "story that did not match the explanation the Secretary gave for his decision." *Id.* The evidence revealed that the VRA explanation was "contrived" and "pretextual," because "the Secretary began taking steps to reinstate a citizenship question about a week into his tenure" with "no hint that he

was considering VRA enforcement in connection with that project." *Id.*

Respondents have plausibly alleged the Government's purported rationales for rescinding DACA—its illegality and potential litigation—are similarly "contrived" and "pretextual." *Id.* This likelihood is increased when considering the disparate impact the rescission had on Latinos and individuals of Mexican ancestry, which are groups the President has persistently evinced animus towards, and the unusual history behind DACA's rescission. Although the validity of Respondents' allegations must ultimately be tested at trial after they have an opportunity for discovery, they have easily met their burden at the pleading stage. Indeed, as Judge Owens recognized, their allegations that the Government's decision to rescind DACA was motivated by racial discrimination are "promising," and suggest an alternative basis to uphold the district courts' preliminary injunctions.

CONCLUSION

This Court should affirm the lower courts' decisions preliminarily enjoining the rescission of DACA. If the Court reaches Respondents' constitutional claims, it should hold that those claims

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