Nos. 18-485, 18-488

In the United States Court of Appeals
for the Second Circuit

MARTÍN JONATHAN BATALLA VIDAL; MAKE THE ROAD NEW YORK, on behalf of itself, its members, its clients, and all similarly situated individuals; ANTONIO ALARCON; ELIANA FERNANDEZ; CARLOS VARGAS; MARIANO MONDRAGON; CAROLINA FUNG FENG, on behalf of themselves and all other similarly situated individuals;
Plaintiffs-Appellees,
(*Caption continued on inside cover.*)

On Appeal from the U.S. District Court for the Eastern District of New York

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, Public Advocate of the United States, English First, English First Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, The Senior Citizens League, Policy Analysis Center, Restoring Liberty Action Committee, and 60 Plus Foundation in Support of Defendants-Appellants and Reversal

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March 14, 2018

v.

KIRSTJEN M. NIELSEN, Secretary of Homeland Security; JEFFERSON B. SESSIONS III, Attorney General of the United States; DONALD J. TRUMP, President of the United States;

Defendants-Appellants.

STATE OF NEW YORK; STATE OF MASSACHUSETTS; STATE OF WASHINGTON; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF IOWA; STATE OF NEW MEXICO; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF COLORADO;

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, Secretary of Homeland Security; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; and the UNITED STATES OF AMERICA;

Defendants-Appellants.

DISCLOSURE STATEMENT

The corporate *amici curiae* herein, Citizens United, Citizens United Foundation, Public Advocate of the United States, English First, English First Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, The Senior Citizens League, Policy Analysis Center, Restoring Liberty Action Committee, and 60 Plus Foundation, through their undersigned counsel, submit this Disclosure Statement pursuant to Rules 26.1(a) and 29(c), Federal Rules of Appellate Procedure. All of these *amici curiae* (except Restoring Liberty Action Committee, which is an educational organization) are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

/s/ William J. Olson
William J. Olson

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INTEREST OF *AMICI CURIAE*[1]

Amici Citizens United, Citizens United Foundation, Public Advocate of the United States, English First, English First Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, The Senior Citizens League, Policy Analysis Center, and 60 Plus Foundation are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Restoring Liberty Action Committee is an educational organization. Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.

Some of these *amici* filed three *amicus curiae* briefs in two cases addressing issues relating to the Deferred Action for Childhood Arrivals ("DACA") policy:

- Arizona Dream Act Coalition v. Brewer, Brief *Amicus Curiae* of English First Foundation, *et al.*, U.S. Court of Appeals for the Ninth Circuit (May 31, 2016).
- Brewer v. Arizona Dream Act Coalition, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, U.S. Supreme Court (May 1, 2017).
- Department of Homeland Security v. Regents of the University of California, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Supreme Court (February 2, 2018).

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[1] No party's counsel authored this brief in whole or in part. No person, including a party or a party's counsel, other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. All parties have consented to the filing of this Brief *Amicus Curiae*.

Some of these *amici* filed *amicus curiae* briefs in the lawsuit challenging the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") policy:

- Texas v. United States, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Court of Appeals for the Fifth Circuit (May 11, 2015).
- United States v. Texas, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Supreme Court (Apr. 4, 2016).

Some of these *amici* also filed *amicus curiae* briefs in support of the State of Arizona's authority to enforce federal immigration laws:

- Arizona v. United States, Brief *Amicus Curiae* of U.S. Border Control, *et al.*, U.S. Supreme Court, in support of petition for certiorari (Sept. 12, 2011).
- Arizona v. United States, Brief *Amicus Curiae* of U.S. Border Control, *et al.*, U.S. Supreme Court, on the merits (Feb. 13, 2012).

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY APPLIED THE THRESHOLD TEST AS TO WHETHER PLAINTIFFS WOULD LIKELY SUCCEED ON THE MERITS.

In its decision, the district court summarized the three grounds upon which it based its decision that the Trump Administration acted arbitrarily and capriciously to rescind the Obama Administration's DACA program. *See* Vidal v. Nielsen, 2018 U.S. Dist. LEXIS 23547, *14-15 (E.D. NY 2018). None of the

stated grounds withstands analysis, much less serves as a foundation for granting the Plaintiffs' motion for a preliminary injunction.

A. The Court Contrived Its Own Test to Determine whether Plaintiffs Would Succeed on the Merits.

The lower court would have this Court believe that its opinion and order met the high standards governing preliminary injunctions. To that end, the court dutifully recited the rule that the "'extraordinary and drastic remedy'" of a preliminary injunction requires the movant, "'by a clear showing, [to] carr[y] the burden of persuasion' ... 'that he is likely to succeed on the merits.'" *Id.* at *42. However, the court utterly failed to apply that test. Instead, beginning with its statement, and throughout its entire opinion, the court treated the case before it as a run-of-the-mill judicial review of an errant government agency under the Administrative Procedure Act ("APA"). Buried and camouflaged in a footnote, the judge reveals his self-appointed role as patron of the plaintiffs and their law-breaking cohorts — interposing his voice of reason in the name of the law on their behalf to avert the rescission of the Obama Administration's DACA program, lest the new President "impose staggering personal, social, and economic costs" upon the country. *Id.* at *14. Thus, the district court stated both in its premise and conclusion that:

> The question before the court is thus not whether Defendants could end the DACA program, but whether they offered legally adequate reasons for doing so. [*Id.* at *14.]

Because of the perceived gravity of the Trump Administration's alteration and abandonment of the Obama DACA program, the district court shifts the burden from the plaintiffs to the defendants. No longer do the plaintiffs have the "burden of persuasion" to make a "clear showing" that they are "likely to succeed on the merits," but rather the defendants must put forth "legally adequate reasons" for the Trump change of policy that satisfies the judge. According to the lower court, those reasons all have been found to be wanting.

Although the court purported to apply the test requiring the plaintiffs to show they were likely to succeed on the merits, it did anything but. Instead, it posed only the naked question of whether "Plaintiffs, not Defendants, are substantially likely to be **correct**." *Id*. at *44 (emphasis added). But the "likelihood of success" is not measured by an inquiry into what that district judge believes or prefers, but whether there is evidence that other judges — especially those on the appellate and Supreme Court benches — have decided like cases on principles supportive of the position of the plaintiffs in this case.

The lower court did just the opposite here. For example, in its discussion of whether discontinuing the DACA program was based upon a legal, not a policy,

decision, it found the "analysis" of the District Court for the Southern District of Texas "unpersuasive," not supportive of its decision that DACA, like DAPA, was a legislative rule requiring APA notice and comment. *See id.* at *55-56. Additionally, the court took the side of the dissenting judge on the Fifth Circuit to reinforce its claim that it was arbitrary and capricious for defendants to rely on the two Texas decisions "for the proposition that the DACA program ... was illegal because it was not made through notice-and-comment rulemaking...." *Id*. at *57. Finally, the lower court criticized the Fifth Circuit opinion insofar as it ruled "that the DACA program conflicts with the INA," finding the Fifth Circuit's reasoning "unpersuasive." *Id.* Capping its negative assessment of the Texas decisions, the court boldly declared that, in the case before it, the "Defendants acted arbitrarily and capriciously by ending the DACA program based on the erroneous legal conclusion that DACA is either unconstitutional or 'has the same legal and constitutional defects that the courts recognized as to DAPA.'" *Id*. at *60-61.

The lower court, if anything, has actually demonstrated that plaintiffs' claim would **not** succeed on the merits, at least in the District Court for the Southern District of Texas and the Court of Appeals for the Fifth Circuit. Although there may have been other judicial circuits and districts that the court could have referenced in support of its arbitrary and capricious claims, the district court made

little effort to rely on any, confining them to a brief paragraph in its procedural history section of the opinion and support for a nationwide injunction. *See id.* at *20 and *37-42.

B. The Attorney General's Action Was Not Arbitrary and Capricious.

In its review of the arbitrary and capricious standard governing judicial review of agency action under the APA, the lower court claimed that it was placed "in the formalistic, even perverse, position of setting aside action that was clearly within the responsible agency's authority, simply because the agency gave the wrong reasons for, or failed to adequately explain, its decision." *Id*. at *13. In other words, according to the lower court, the DACA rescission decision would have been lawful — if the defendants had only made it for the right or sufficiently articulated reasons. As it turned out, the court collared the Attorney General as the culprit whose wrongly reasoned letter allegedly put the court into a legal strait jacket, forcing it to conclude that the Attorney General had acted arbitrarily and capriciously.

This claim is utterly nonsensical. Had the judge approached the issue impartially, he would have noted that, even if the Attorney General had mistakenly rested the rescission decision upon "constitutional defects" in the DAPA program

(*id.* at *33), more importantly, he had correctly stated that he had relied on the fact that:

> The related [DAPA] policy was enjoined on a nationwide basis in a decision affirmed by the Fifth Circuit on the basis of **multiple legal grounds** and then by the Supreme Court by an equally divided vote. [*Id*. at *33-34 (emphasis added).]

Despite the correlation, the court below parsed the Attorney General's undated letter, weeding out one specific statement, leaving only the more general reference, and thus providing a platform from which the court could triumphantly proclaim that the Attorney General's factual "premise is flatly incorrect" — the two Texas case decisions having "expressly declined to reach the plaintiffs' constitutional claim[s]." *Id*. at *61. That "error alone," the court concluded, "is grounds for setting aside Defendants' decision" as arbitrary and capricious. *Id.*

To the contrary, it is the district court which acted arbitrarily and capriciously, skipping past that part of the Attorney General's letter explaining that the Texas proceedings were resolved on "multiple legal grounds." *Id*. at *33-34.

C. The Rationale for the DACA Rescission Is Not Internally Contradictory.

In its zeal to make the DACA rescission decision appear as irrational as possible, the court below opined that the Attorney General's statement that the

original Obama DACA program was unconstitutional contradicted the decision by the Acting Secretary of Homeland Security decision to phase out the program. First, the court identified the problem:

> Rather than terminating the program **forthwith** ... Acting Secretary Duke directed her subordinates to begin a phased "wind-down of the program".... The means by which Defendants ended the DACA program thus appear to conflict with their stated rationale for doing so. [Vidal at*63-64 (emphasis added).]

Then, he chortled at the dilemma:

> If the DACA program was, in fact, unconstitutional, the court does not understand (nor have Defendants explained) why Defendants would have the authority to continue to violate the Constitution, albeit at a reduced scale and only for a limited time. [*Id.* at *64.]

The answer is easy. In Brown v. Board of Education of Topeka, 349 U.S. 294 (1955), the Supreme Court found no contradiction between the Court's holding that state-enforced racial segregation in schools was unconstitutional, and its remedial power ordering schools to desegregate, not "forthwith," but "with all deliberate speed." *Id.* at 300-01. As the Brown Court, in the exercise of its equitable judicial powers, tailored its decision to the many different needs of individual communities, so it is here: the Acting Secretary tailored the DACA phase-out to accommodate different individual needs in the exercise of executive

powers, under the President's vested power to take care that the laws be faithfully executed. There is no contradiction.

II. THE OPINION BELOW DOES NOT RESPECT THE CONSTITUTIONAL SEPARATION OF POWERS.

A. The Court Below Correctly Declined to Enjoin the President, but for the Wrong Reason.

This case is one of at least three decided cases in which illegal aliens and/or their associated interest groups have sued the Trump Administration for its decision to terminate the DACA program. *See also* Regents of the University of California v. Department of Homeland Security, 2018 U.S. Dist. LEXIS 4036 (N.D. Cal. 2018) (five consolidated cases); Casa De Md. v. United States Dep't of Homeland Sec., 2018 U.S. Dist. LEXIS 35373 (D. Md. 2018). Of the five California cases, three originally named President Trump as a defendant in his official capacity. (3:17-cv-05380-WHA; 3:17-cv-05813-WHA; 3:17-cv-05329-WHA). However, the consolidated case in the U.S. District Court for the Northern District of California dropped President Trump as a defendant. Likewise Judge Alsup's January 9, 2018 order listed only the Department of Homeland Security and Secretary Nielsen as defendants. *See* 2018 U.S. Dist. LEXIS 4036. There was good reason to drop President Trump as a defendant. As the Ninth Circuit had previously ruled:

> [g]enerally, we lack 'jurisdiction of a bill to enjoin the President in the performance of his official duties.' ... We conclude that Plaintiffs' injuries can be redressed fully by injunctive relief against the remaining Defendants, and that the extraordinary remedy of enjoining the President is not appropriate here.... We therefore vacate the district court's injunction to the extent the order runs against the President.... [Hawaii v. Trump, 859 F.3d 741, 788 (9th Cir. 2017).[2]]

Similarly, in a related case, the Fourth Circuit also determined that:

> [i]n light of the Supreme Court's clear warning that such relief should be ordered only in the rarest of circumstances we find that the district court erred in issuing an injunction against the President himself. We therefore lift the injunction as to the President only. [Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 605 (4th Cir. 2017).]

Contrary to law and common sense, the illegal alien plaintiffs and organizations in this case continued to "make it personal," once again naming President Trump as a defendant. Vidal v. Nielsen, 279 F. Supp. 3d 401, 2018 U.S. Dist. LEXIS 23547 (E.D. NY 2018). This is consistent with strategies and tactics taught by Saul D. Alinsky, the subject of Hillary Clinton's Wellesley College thesis, who counseled: "*[p]ick the target, freeze it, personalize it, and polarize*

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[2] When that Ninth Circuit case returned to the Hawaii district court for consideration of the President's newly issued September 15, 2017 Proclamation, the district court did not again enjoin the President (even though the President was again named a defendant), this time confining its temporary restraining order to the Secretaries of State and Homeland Security. *See* Hawaii v. Trump, 265 F. Supp. 3d 1140, 1160 (D. Hi. 2017).

it.... [A] target ... must be a personification, not something general and abstract...." S. Alinsky, Rules for Radicals (Vintage Books: 1971) at 130, 133.

In its legal analysis below, the court did not appear to heed the counsel of the Fourth and Ninth Circuits, neglecting to apply the unambiguous words of the Supreme Court: "this court has no jurisdiction ... to enjoin the President in the performance of his official duties...." Mississippi v. Johnson, 71 U.S. 475, 501 (1866). Rather, in a footnote, the court claimed that it decided not to enjoin President Trump "[b]ecause the APA does not permit direct review of Presidential decisionmaking...." Vidal at *10 n.1. Of course, even if Congress in the APA **had** permitted judicial review of executive decisionmaking, the district court still would not have been permitted to enjoin President Trump. The absence of judicial power over the executive does not rest upon the lack of congressional legislation. Rather, it is grounded in the structure of the Constitution itself. As Justice Scalia cautioned, judges who think they can control and order the President's official acts represent "a commentary upon the level to which judicial understanding — indeed, even judicial awareness — of the doctrine of separation of powers has fallen...." Franklin v. Massachusetts, 505 U.S. 788, 826 (1992).

One might wonder what difference the reason makes, so long as the court below did not enjoin President Trump. But if a judge can reject the actions of

executive officials who did the right thing for the wrong reason,[3] then this Court at least should make clear that Judge Garaufis reached the right result in not enjoining the President for the wrong reason.

B. President Trump Would Be within His Constitutional Powers as Executive to Ignore the Court's Nationwide Injunction.

In overruling the second iteration of the Trump travel ban, yet vacating the district court's injunction as it applied to the President, the Fourth Circuit expressed its hope that "[e]ven though the President is not 'directly bound' by the injunction, we 'assume it is substantially likely that the President ... would abide by an authoritative interpretation' of Section 2(c) of the Second Executive Order." Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 605 (4th Cir. 2017) (quoting Franklin v. Massachusetts at 803). Likewise here, the lower court may have simply assumed that President Trump would abide by its order.

Of course, just as the opinion of one district or circuit court amounts to only persuasive (rather than binding) authority in any other district or circuit,[4] the question arises as to whether the President should always accept a district court

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[3] *See* Vidal at *13-14.

[4] Indeed, in this case, the court below rejected the considered judgment of the U.S. District Court for the Southern District of Texas, claiming that "[t]he court respectfully finds the Southern District of Texas's analysis unpersuasive." *Id*. at 55.

ruling, even if plainly wrong and beyond the judge's authority, for he is the head of a co-equal branch of government.

Were the President to evaluate the district court opinion below for its persuasiveness, he may consider any of a variety of factors. First, he may note that recently a Maryland district court has come to precisely the opposite conclusion. Casa De Md. v. United States Dep't of Homeland Sec., 2018 U.S. Dist. LEXIS 35373 (D. Md. 2018). He might find persuasive the reasoning in the Maryland opinion, that "it is not the province of the judiciary to provide legislative or executive actions when those entrusted with those responsibilities fail to act." *Id.* at 44. He might find more intellectually honest an opinion written by a judge who, although he disagrees with the policy, he will follow the law. *Id.* at 44-45.

Next, President Trump might find more persuasive the reasoning of the Fifth Circuit in Texas v. United States, 787 F.3d 733 (5th Cir. 2015), which overturned the "materially indistinguishable" DAPA program. *See* Govt. Br. at 2. He might also note that the Supreme Court affirmed that decision. United States v. Texas, 136 S.Ct. 2271 (2016) (affirmed by an equally divided Court). And President Trump might not agree with the court below that DACA and DAPA are materially different. President Trump might note that Judge Garaufis never really appears to identify any concrete difference between the two programs — but

instead repeatedly and baldly asserts that he simply finds the Fifth Circuit reasoning applied to DAPA "**unpersuasive**." Vidal at *55, 59, 60 (emphasis added).

Finally, President Trump may be persuaded by the reasoning of former President Obama, who at least 22 times stated that he did not have authority to change the nation's immigration laws by himself[5] — before he apparently changed his mind and did just that, installing the DACA program that Congress had refused to authorize.

In short, there are excellent reasons for President Trump to conclude that the district court's opinion below is entirely unpersuasive. Indeed, as discussed in Section II.C, *infra*, President Trump has the constitutional power and duty to interpret both the law and the Constitution, independent from the other branches of government. Unlike the district court below, the district court in Maryland properly (and constitutionally) concluded that "reasonable minds may differ regarding [DAPA's] lawfulness." Casa De Md. at *9.

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[5] M. Wolking, "22 Times President Obama Said He Couldn't Ignore or Create His Own Immigration Law," Speaker Paul Ryan (Nov. 19, 2014) https://www.speaker.gov/general/22-times-president-obama-said-he-couldn-t-ignore-or-create-his-own-immigration-law.

President Trump has already noted his frustration with today's federal bench, which all too often appears to be populated with judges who reach decisions they favor, rather than opinions which the law requires. *See* Casa De Md. at *44 ("As Justice Gorsuch noted during his confirmation hearing, 'a judge who likes every outcome he reaches is probably a pretty bad judge, stretching for the policy results he prefers rather than those the law compels.'"). As a Presidential tweet has explained: "[i]t just shows everyone how broken and unfair our Court System is when the opposing side in a case (such as DACA) always runs to the 9th Circuit and almost always wins before being reversed by higher courts."[6]

The lower court's extraordinary, nationwide injunction in this case — compelling executive branch officials to provide indefinite amnesty to illegal aliens and essentially placing a class of lawbreakers into protected judicial receivership — could create a crisis of constitutional magnitude. Indeed, if he were to decide not to wait for this Court or the Supreme Court to correct the district court's serious legal errors, President Trump could simply order executive branch employees to stop approving DACA applications. Those executive branch employees would then be in quite a pickle. They would have two co-equal branches of government giving them conflicting orders. It is entirely possible,

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[6] https://twitter.com/realdonaldtrump/status/951094078661414912.

however, that they might choose inaction over action, deciding to obey their boss, the President of the United States, rather than a single unelected and unaccountable district court judge in New York, who holds his office only during periods of "good behavior." Article III, Section 1. As Alexander Hamilton noted in Federalist 78:

> the judiciary ... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. [A. Hamilton, Federalist No. 78, G. Carey & J. McClellan, The Federalist (Liberty Fund: 2001) at 402.]

Although it may be "emphatically the province and duty of the judicial department to say what the law is,"[7] the courts must be careful not to assume that whatever a judge says is law. The lower court's opinion is light on law, and instead chock-full of bald assertions that the judge "finds unpersuasive" the opinion of anyone who disagrees with him. Such an opinion runs a high risk that one day, this nation's chief executive may likewise decide he simply finds such an opinion unpersuasive, and decline to follow it.

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[7] Marbury v. Madison, 5 U.S. 137, 177 (1803).

C. The District Court's Opinion Usurps Both Executive and Legislative Powers.

In prohibiting the Trump Administration's abandonment of the DACA program based on the presupposition that it was illegal to begin with, the district court below usurped the constitutional duty of the President to "preserve, protect and defend the Constitution of the United States." Indeed, as discussed above, all three branches of government have equal and independent duties to interpret the Constitution. Although often an apologist for overwhelming executive power, Professor John C. Yoo nevertheless correctly observed that:

> [m]embers of each branch take an oath to the Constitution just as judges do. To fulfill their oath, federal officials must discern the meaning of the Constitution first. The President, for example, bears the responsibility to preserve, protect, and defend the Constitution. To defend the Constitution, the President must decide what offends it. [J. Yoo, "Judicial Supremacy Has Its Limits," 20 TEX. REV. L. & POL. 1, 4-5 (2015).]

Likewise, Professor David A. Strauss writes that:

> the executive branch must interpret the Constitution before it can decide what to do, and the executive branch might decide to disagree with the Court's interpretation.... Theoretically, the executive could assert the power to disagree with Supreme Court interpretations of the Constitution and act on its own view, even in cases that will end up in court. But as a practical matter, it very seldom does so. [D. A. Strauss, "Presidential Interpretation of the Constitution," 15 CARDOZO L. REV. 113, 114-15 (1993).]

In a similar vein, the Constitution imposes the duty upon the president to "take Care that the Laws be faithfully executed." Article II, Section 3. This duty, as well, might from time to time necessitate his disagreement with the judgment of the courts, but it is especially important when the President believes a law (or in this case an executive policy) conflicts with the Constitution. To do as the New York and California judges have done here, and conclude that the executive branch **must** enforce a DACA policy that, in its independent judgment, it has determined to be unconstitutional, turns the separation of powers on its head. It does not matter if one, ten, or a hundred district court judges agree (as did the Maryland court) that President Trump can (or should) abandon DACA — all it takes is a single district court judge in New York to order him to continue an illegal and unconstitutional policy on a nationwide basis.

Finally, in ordering that the DACA show must go on, the court below has created a national immigration policy that neither of the other two branches of government support. Again, the lower court's opinion rest on the flawed assumption that, once a judge writes an opinion, it becomes law. On the contrary, a judge is not an oracle from on high. His legal opinion is just that — an opinion — or "evidence" of what the law is — but it is not law. *See* 1 Blackstone's Commentaries at 69-70. For two federal judges to require the DACA program to

continue based on a stroke of their pen creates a form of judicial amnesty, and usurps the legislative power of Congress to set the nation's immigration policy. Although Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), involved the limits of executive power, the principles are instructive as to the scope of judicial power. As the government has repeatedly noted, Congress has numerous times considered enacting the DACA program as legislation, but has consistently declined to enact it. Govt. Br. at 39. Former President Obama grumbled for years that he did not have the authority to implement DACA on his own, yet later decided that constitutional limits on his power did not really matter, and implemented it anyway. Now, President Trump's Administration has again concluded that there is no executive power to implement DACA without Congress, and has attempted to rescind the program. It could be said that, "[w]hen [a judge] takes measures incompatible with the expressed or implied will of [both] Congress [and the President], his power is at its lowest ebb...." Youngstown Sheet & Tube Co. at 637.

Presidents take an oath to "preserve, protect and defend the Constitution" and has a duty to "take Care that the Laws be faithfully executed." They never take an oath and have no constitutional duty to follow the orders of a district court judge in New York. Indeed, to the extent that a President believes that a lower

court's opinion conflicts with those duties, this or another President may well decide he has a duty to disobey it. Or, to paraphrase President Andrew Jackson's apocryphal statement, "[Judge Garaufis] has made his decision; now let him enforce it."

III. THE DISTRICT COURT'S NATIONWIDE INJUNCTION WAS NOT ONLY OVERBROAD, AS ARGUED BY THE APPELLANTS, BUT ALSO IT WAS UNAUTHORIZED BY LAW.

The government contends that, even if the plaintiffs' APA claim was reviewable, and even if the DACA rescission was arbitrary and capricious, "the court still erred in enjoining the rescission of DACA on a 'nationwide basis.'" Govt. Br. at 44; *see also id.* at 45-52. The government's contention is correct.

The lower court's injunction stated:

> the court ENJOINS Defendants from rescinding the DACA program, pending a decision on the merits of these cases. Defendants thus must continue processing DACA renewal requests under the same terms and conditions that applied before September 5, 2017.... [Vidal at *17.]

If it had not been clear from the terms of the injunction, the court clarified its scope: "[t]he court enjoins rescission of the DACA program on a universal or 'nationwide' basis." Vidal at *87. The court stated that it did "not do so lightly," (*id.*) but apparently out of felt necessity.

In doing so, the lower court granted relief to parties who were not before it as plaintiffs. It ignored longstanding rules that injunctions are to be no broader than necessary to remedy the problem presented, and that an injunction be narrowly tailored to fit the facts of the case. Moreover, the case before it was not a class action, but it treated it as though it were. The injunction reached into other jurisdictions, such as Maryland, essentially overruling a district court judge who determined that the President **does** have authority to rescind DACA. *See* Casa De Maryland v. U.S. Department of Homeland Security, No. 17-2942 (D. Md., Mar. 5, 2018). The injunction has the effect of depriving the U.S. Supreme Court of reviewing decisions issued by multiple Circuit Courts. The injunction encouraged forum shopping for that one judge who would grant nationwide relief to a plaintiff. All of these problems could have been avoided if the lower court limited the relief given to those plaintiffs before it. *See* Govt. Br. at 45-48.

A. The Reasons Given for Issuance of a "Universal" Injunction Are Unpersuasive.

The district court's explanation for the "universal" scope of his injunction was twofold. "First, it is hard to conceive of how the court would craft a narrower injunction" because it found that not only the individual plaintiffs, but also a nonprofit organization and plaintiff States had standing. *Id.* at *88. "Furthermore, there is a strong federal interest in the uniformity of federal immigration law." *Id*.

at *89. On both points, the lower court assumed, rather than reasoned, its way to its conclusions.

Briefly addressing the district court's second point first, an interest in "uniformity" of the application of federal law could support a nationwide injunction any time a federal law, regulation, or policy is challenged. And certainly, a policy favoring uniformity does not grant to a district judge additional powers beyond the power to resolve a "case" or "controversy" under Article III. It is not even clear whether the lower court ever considered the threshold issue whether it had authority under Article III to enter this nationwide injunction, but that is where its analysis should have begun.

The district court apparently assumed that it had Article III authority to enter a nationwide injunction because it had earlier, on November 9, 2017, determined that the State plaintiffs had standing to challenge the rescission of DACA. The sole basis for the finding of jurisdiction of the State plaintiffs was injury to their "proprietary interests" as employers of DACA recipients.[8] Special Appendix to Govt. Br. at 93-95. The court appeared to reason that the concerns raised by the State plaintiffs could only be remedied by a nationwide injunction.

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[8] The lower court never again mentioned the issue of the standing of the State plaintiffs or the basis for that earlier finding in its February 13, 2018 opinion.

An injunction could have been narrowed to apply only to individual DACA recipients working for the state, but the court did not do that.

Additionally, there is significant reason to believe that the court's initial decision to grant standing to the States and advocacy organizations was in error. *See* Memorandum of Law in Support of Defendants' Motion to Dismiss (Document 71, Oct. 27, 2017) at 19-21 ("It would be extraordinary to find Article III standing" where "a State is relying on the incidental effects of federal immigration policies — *i.e.*, alleged harms to their residents, employees, tax bases, health expenditures, and educational experiences at their universities" as "virtually any administration of federal law by a federal agency could have such effects.").

B. Irreparable Harm Was Never Demonstrated.

The district court identified three types of financial injury to the state, but none of them may serve the basis for a finding of irreparable harm.

First, it must be remembered that state standing had earlier been found based on one consideration only: "that the rescission of DACA would harm the states' proprietary interests as employers and in the operation of state-run colleges and universities." SA 94. That ruling on standing by the district court appears to directly contradict this Court's holding in Savage v. Gorski, 850 F.2d 64 (2nd Cir. 1988) which established that "[l]oss of employment does not in and of itself

constitute irreparable injury...." *Id*. at 67. The lower court apparently believed that asserting that the present case was "extraordinary" would allow it to ignore the holding in Savage. Vidal at *81. For this proposition, the decision below relied on a footnote in Sampson v. Murray, 415 U.S. 61, 92 n.68 (1974), where the Supreme Court found the showing made in an employment discharge case to be "far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction." *Id*. at 91-92. The Court added that footnote to observe that "cases may arise in which the circumstances surrounding an employee's discharge" may present an "extraordinary case" (*id*. at 92, n.68) supporting irreparable harm. That passing reference to a situation that could possibly arise is the weakest of possible reeds on which the lower court could rely. Indeed, if that Second Circuit case controls here, then the type of speculative financial injury to the state recognized by the lower court — the state's "inability to hire or retain erstwhile DACA recipients, affecting their operations..." — cannot provide the basis for either standing or a showing of irreparable harm.

The other types of alleged financial injuries to the state — additional costs for public health costs, lost tax revenue, etc — are wholly unrelated to the limited basis on which the state was granted standing — its status as an employer. Vidal at *80.

Lastly, there is a third category of harm relied upon by the lower court: loss of employment, homes, etc. *Id*. But these are types of harm that might be suffered by individuals, not by the state.

Therefore, every type of financial harm which allegedly would be suffered by the states identified by the court was illegitimate, as so was its nationwide injunction which was designed to remedy that supposed harm.

C. The Court Never Found the State Plaintiffs Were in the Protected Zone of Interests.

In order to make out an APA challenge relating to the INA, the plaintiffs must be found to be in the zone of interests protected by that law. *See* Govt. Br. at 50. In its earlier November 9, 2017, decision denying the government's motion to dismiss, where standing was found, the court below expressly declined to decide whether the state plaintiffs fell within the INA's zone of interests which would be required to sustain a claim under the APA. SA 102. *See* discussion in Govt. Br. at 11. Therefore, one would have imagined that the judge would make such a finding in his February 13, 2018 order. In fact, although not pointed out in the government's brief, there was no such finding. Indeed, the word "zone" does not even appear in that decision. Lacking a specific finding that the state plaintiffs were within the zone of interest of the INA, the court could not properly make a finding that the APA had been violated as to them, because they were not

aggrieved parties. *See* Govt. Br. at 50. Without aggrieved state plaintiffs, there was no basis whatsoever for a nationwide injunction, even as the court below viewed the law.

IV. THE DISTRICT COURT INCORRECTLY CONCLUDED THAT ENDING DACA WOULD HARM THE SOCIAL SECURITY TRUST FUNDS.

The district court acknowledged that it is within the government's authority to end DACA: "New Administrations may ... alter or abandon their predecessors' policies...." Vidal at *14. But then the court gratuitously addressed matters of policy, before turning to the legality of that decision. The court revealed its politics, stating policies may change, "even if these policy shifts may impose staggering personal, social, and economic costs." *Id*. The court acknowledged that this question was not before it, but it could not stop itself from providing its own policy views on DACA rescission.

To that end, the court noted "the costs of the DACA rescission over the next decade at ... $24.6 billion in lost Social Security and Medicare tax contributions." *Id*. at *14 n.4. For the estimate of $24.6 billion in lost Social Security and Medicare tax contributions, the court cited the amicus brief of 114 companies. That brief, in turn, cites to and relies exclusively on a policy brief of the Immigrant Legal Resource Center ("ILRC") on the "economic cost of ending DACA."

The ILRC policy brief arrives at its estimate of tax receipts based on the number of employed DACA recipients, average annual wages, and payroll taxes over the next 10 years. It limited its projection to 10 years because DACA recipients would not have been eligible to retire in that timeframe due to the DACA age requirements. However, this estimate is meaningless, because its methodology focuses only on income and ignores the expenses on Social Security that DACA recipients will impose on the Social Security Trust Fund in the future. Lower income workers, such as most of those benefitted by DACA, will receive disproportionately greater benefits relative to taxes paid than do higher income workers, causing a significant net drain on trust funds.[9] It also ignores the drain from the DACA recipients who may qualify for disability benefits now.[10]

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[9] An illegal alien born in 1995 granted lawful status under DACA who fell in the "low earnings" tier (career average earnings equal to $22,215) would receive annual Social Security benefits of $12,276 in wage-indexed 2017 dollars. On the other hand, a U.S. citizen born the same year in the "high earnings" tier (career average earnings equal to $78,985) would **pay 3.5 times the taxes** paid by the low income worker, but would receive annual Social Security benefits of $26,802 — **only 2.2 times the benefits paid** to the low income worker. *See* Office of the Chief Actuary, Social Security Administration, Actuarial Note No. 2017.9 (July 2017), "Replacement Rates for Hypothetical Retired Workers," Table C.

[10] *See* Congressional Research Service, "Social Security Benefits for Noncitizens" (Nov. 17, 2016) at 9.

Actually, it is DACA itself — not the recision of DACA — that has an adverse affect on the federal budget. Consider its effect on one other federal benefits program. Persons granted "lawful status" under DACA are no longer barred from receiving Social Security Disability Insurance and Retirement benefits. 8 U.S.C. § 1611(b)(2)-(3). Even without the addition of some number of DACA beneficiaries to the disability rolls, the trust funds from which those benefits are generally paid face a seriously troubled financial future. [11]

Decisions that would grow the future liabilities of the United States should be left to the branch with the power of the purse. Congress has developed a nuanced system of entitlement programs and immigration controls, including the payment of benefits only to certain persons. DACA upends that system, usurping the power of the purse from Congress and imposing new and untold liabilities on the United States, putting older Americans at increased financial risk, in ways that Congress to date has refused to sanction.

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[11] *See* 2017 Annual Report of the Trustees (July 13, 2017), pp. 2-3, https://www.ssa.gov/oact/tr/2017/tr2017.pdf.

CONCLUSION

For the foregoing reasons, the injunction of the district court should be lifted and the decision vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(g)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of Amicus Curiae of Citizens United, *et al.* in Support of Defendants-Appellants and Reversal complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 6,477 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using W ordPerfect version 18.0.0.200 in 14-point Times New Roman.

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Dated: March 14, 2018

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Citizens United, *et al.*, in Support of Defendants-Appellants and Reversal, was made, this 14th day of March 2018, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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