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15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**

17 THE REGENTS OF THE UNIVERSITY OF  
18 CALIFORNIA and JANET NAPOLITANO,  
19 in her official capacity as President of the  
20 University of California,

21 Plaintiff,

22 v.

23 UNITED STATES DEPARTMENT OF  
24 HOMELAND SECURITY and ELAINE  
25 DUKE, in her official capacity as Acting  
26 Secretary of the Department of Homeland  
27 Security,

28 Defendants.

Case No. C 17-05211 WHA  
Case No. C 17-05235 WHA  
Case No. C 17-05329 WHA  
Case No. C 17-05380 WHA  
Case No. C 17-05813 WHA

Hearing Date: December 20, 2017, at 8 a.m.

**AMICUS CURIAE BRIEF OF THE  
IMMIGRATION REFORM LAW  
INSTITUTE IN SUPPORT OF  
DEFENDANTS AND DISMISSAL**

Judge: Honorable William Alsup

1 **I. ARGUMENT**

2 Plaintiffs’ claims against rescission of the Deferred Action for Childhood Arrivals  
3 (“DACA”) program depend on the assumption that the program both is substantively lawful and  
4 was implemented in a procedurally lawful manner. Neither assumption is true. Since DACA  
5 was both substantively and procedurally invalid, plaintiffs’ complaint challenging the decision of  
6 the Department of Homeland Security (“DHS”) to rescind the program should be dismissed.  
7

8 A. Because DACA Was Invalid, This Court May Not Reinstate It, And Plaintiffs Lack  
9 Standing.

10 As explained below, the DACA program was invalid. For that reason, it would be  
11 nonsensical for this Court either to declare that DHS may not rescind it or to enjoin its rescission.  
12 On the contrary, courts must hold unlawful, rather than give effect to, invalid regulations. 5  
13 U.S.C. §§ 706(2)(A), (C) (“The reviewing courts shall . . . hold unlawful and set aside agency  
14 action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or  
15 otherwise not in accordance with the law . . . [or] in excess of statutory jurisdiction, authority, or  
16 limitations, or short of statutory right . . . .”); *Transohio Sav. Bank v. Dir., Office of Thrift*  
17 *Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) (“Agency actions beyond delegated authority  
18 are *ultra vires*, and courts must invalidate them.”) (internal citation and quotations marks  
19 omitted).  
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22 If this Court were to invalidate the rescission of DACA, the effect would be to reinstate  
23 the rule previously in force—but only if that previous rule were valid. *See Paulsen v. Daniels*,  
24 413 F.3d 999, 1008 (9th Cir. 2005) (holding that “[t]he effect of invalidating an agency rule is to  
25 reinstate the rule previously in force,” but refusing to reinstate a previous rule under that standard  
26 because it was itself invalid); *Arrington v. Daniels*, 516 F.3d 1106, 1116 (9th Cir. 2008) (finding  
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1 a rule invalid and refusing to reinstate any in a series of previous, invalid rules). Thus, because  
2 DACA was invalid, the invalidation of its rescission cannot revive it.

3 Indeed, because DACA was invalid, and because the effect of invalidating its rescission  
4 would be to reinstate the last lawful state of applicable regulations, the remedy plaintiffs seek  
5 would only result in the restoration of the *status quo* pre-DACA. For this reason, at the  
6 minimum, plaintiffs' claimed injuries are non-redressable, and their claims should be dismissed  
7 for lack of standing under Federal Rule of Civil Procedure 12(b)(2). *See Lujan v. Defs. of*  
8 *Wildlife*, 504 U.S. 555, 561 (1992).  
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11 B. DACA Was Invalid.

12 DACA was invalid both because it was *ultra vires* and because DHS failed to follow the  
13 notice and comment requirement of the Administrative Procedure Act ("APA").

14 1. The Immigration and Nationality Act does not authorize DACA.

15 In reviewing an *ultra vires* claim, courts examine statutory language to determine  
16 whether Congress intended the agency to have the power that it exercised when it acted. *Univ. of*  
17 *the D.C. Faculty Ass'n/NEA v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 163 F.3d 616,  
18 620 (D.C. Cir. 1998). A reviewing court must reasonably be able to conclude that the grant of  
19 authority contemplated the regulations issued. *Chrysler Corp. v. Brown*, 441 U.S. 281, 308  
20 (1979).  
21

22 Analyzing DACA by this standard reveals that it has no statutory foundation and is a  
23 broad stroke of executive power not on the executive's own canvas, but on Congress's.  
24 Therefore, it is *ultra vires* and a nullity, and this Court should not reinstate it even if it finds its  
25 rescission invalid. *See Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S.  
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1 129, 134 (1936) (“A regulation which . . . operations to create a rule out of harmony with the  
2 statute, is a mere nullity”).

3 First, the Immigration and Nationality Act (“INA”) does not provide a statutory  
4 foundation for the DACA program. On the contrary, DACA is a programmatic refusal by DHS  
5 to enforce Congress’s clear statutory mandate. Under the INA, any alien who entered the  
6 country illegally is an applicant for admission. 8 U.S.C. § 1225(a)(1). And 8 U.S.C.  
7 § 1225(b)(2)(A) mandates that if an applicant for admission “is not clearly and beyond a doubt  
8 entitled to be admitted, the alien *shall* be detained” for removal proceedings under 8 U.S.C. §  
9 1229a (emphasis added). “Congress did not place the decision as to which applicants for  
10 admission are placed in removal proceedings into the discretion of the Attorney General, but  
11 created mandatory criteria.” *Succar v. Ashcroft*, 394 F.3d 8, 10 (1st Cir. 2005). “[W]hile the  
12 President has broad authority in foreign affairs, that authority does not extend to the refusal to  
13 execute domestic laws.” *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007).

14 True, three provisions of the INA provide broad, general grants of authority to DHS. 8  
15 U.S.C. § 1103(a)(3) (“[The Secretary] . . . shall establish such regulations; prescribe such forms  
16 of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as  
17 he deems necessary for carrying out his authority under the provisions of this chapter.”); 8  
18 U.S.C. § 1103(g)(2) (“The Attorney General shall establish such regulations, prescribe such  
19 forms of bond, reports, entries, and other papers, issue such instructions, review such  
20 administrative determinations in immigration proceedings, delegate such authority, and perform  
21 such other acts as the Attorney General determines to be necessary for carrying out this  
22 section.”); 6 U.S.C. § 202(5) (“The Secretary . . . shall be responsible for . . . [e]stablishing  
23 national immigration enforcement policies and priorities.”). The first two of these, 8 U.S.C. §§  
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1 1103(a)(3) and 1103 (g)(2), clearly fail to authorize DACA, which is not “necessary to carry out”  
2 any part of the INA. In any event, only if the authority of DHS to “deem[]” or “determine[]” that  
3 an action is so “necessary” were unlimited and unreviewable could these provisions grant  
4 authority for DACA, but in that case, they would grant DHS a limitless authority over how it  
5 carries out its duties, making the innumerable other provisions of the INA that detail how DHS is  
6 to carry out its duties meaningless. *See, e.g.*, 8 U.C.S. §§ 1158(d)(5) (providing requirements for  
7 asylum procedure), 1228(a)(3) (providing that expedited proceedings “shall be” initiated for  
8 aliens incarcerated for aggravated felonies), 1229a (providing procedural requirements for  
9 removal proceedings).

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12 Title 6 U.S.C. § 202(5)’s grant of authority to “[e]stablish[] national immigration  
13 enforcement policies and priorities” also fails to authorize DACA. This provision could only  
14 authorize DACA based on its apparently open-ended authorization to DHS to establish  
15 enforcement “policies.” (Its authorization to DHS to set “priorities” does not authorize DACA,  
16 which, as explained below, goes far beyond making removable aliens that meet its criteria low  
17 priorities for removal.) But if this language were as open-ended as that, it would allow DHS to  
18 establish a policy, for example, of removing only removable aliens who were violent felons, or  
19 only those who had been in the country less than two months, or only those who lacked a high-  
20 school education—and it would be patently unreasonable to suppose that Congress intended  
21 DHS to have such sweeping authority under the INA.  
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24 Second, DACA is not a valid form of “deferred action.” True, faced with limited  
25 resources, an agency has discretion to implement the mandate of Congress as best as it can, by  
26 setting priorities for action. *See City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977)  
27 (holding that when a statutory mandate is not fully funded, “the agency administering the statute  
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1 is required to effectuate the original statutory scheme as much as possible, within the limits of  
2 the added constraint.”).

3 With DACA, however, DHS did not “effectuate the original statutory scheme as much as  
4 possible” within the limits set by underfunding. DACA was not created because of lack of  
5 resources; the aliens protected by it were already rarely removed. Memorandum from Jeh  
6 Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to*  
7 *the United States as Children and with Respect to Certain Individuals Who are Parents of U.S.*  
8 *Citizens or Permanent Residents* 3 (Nov. 20, 2014) (explaining that DACA applies to individuals  
9 who “are extremely unlikely to be deported given [the] Department’s limited enforcement  
10 resources”).<sup>1</sup> Rather, the program reflects a policy judgment that these aliens should be free to  
11 live in the United States without fear of deportation. Far from “effectuat[ing] the original  
12 statutory scheme as much as possible,” this policy judgment is at odds with the INA and  
13 congressional intent. Not only has Congress rejected a legislative version of DACA repeatedly,  
14 it has found that “immigration law enforcement is as high a priority as other aspects of Federal  
15 law enforcement, and illegal aliens do not have the right to remain in the United States  
16 undetected and unapprehended.” H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.). Congress  
17 has also passed laws designed to reduce the incentives for illegal entry, and to incentivize self-  
18 deportation where enforcement is lacking. *Texas v. United States*, 86 F. Supp. 3d 591, 634-35  
19 (S.D. Tex. 2015), *aff’d Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (arguing that DAPA  
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26 <sup>1</sup> This statement is scarcely consistent with Secretary Napolitano’s bald assertion that “additional  
27 measures are necessary to ensure that our enforcement resources are not expended on these low  
28 priority cases but are instead appropriately focused on people who meet our enforcement priorities.”  
Memorandum from Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to*  
*Individuals Who Came to the United States as Children* 1 (June 15, 2012).

1 would disincentivize illegal aliens from self-deporting); Michael X. Marinelli, *INS Enforcement*  
2 *of the Immigration Reform and Control Act of 1986: Employer Sanctions During the Citation*  
3 *Period*, 37 Cath. U. L.R. 829, 833-34 (1988) (“Marinelli”) (“Congress postulated that  
4 unauthorized aliens currently in the United States would be encouraged to depart”) (citing H.R.  
5 Rep. No. 99-682, at 46 (1986)).  
6

7 In any event, the deferred-action justification, even if accepted, cannot help plaintiffs in  
8 this case, for two reasons. First, a prime feature of deferred action is that, as an exercise of  
9 discretion, it can be ended at any time. Indeed, the memo that created DACA emphasizes the  
10 reversible nature of the program. Memorandum from Janet Napolitano, *Exercising*  
11 *Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*  
12 (June 15, 2012) 3 (“DACA memo”) (“This memorandum confers no substantive right,  
13 immigration status or pathway to citizenship.”). Because of the discretionary, reversible nature  
14 of deferred action, it would be illogical for this Court to hold that DACA is not *ultra vires*  
15 because it is deferred action, but then forbid DHS to rescind it.  
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18 Second, DACA is not *only* deferred action; as part of the DACA program, DHS has  
19 granted work authorization to its beneficiaries. *Id.* at 3; Compl. ¶ 5. And it is not reasonable to  
20 conclude that Congress intended DHS to have the unrestricted power to grant work authorization  
21 to removable aliens, even “low-priority” ones. Congress, in making it illegal for illegal aliens to  
22 work, wished to discourage illegal entry and to encourage removable aliens to remove  
23 themselves, even if enforcement by removal is underfunded and slow to reach low-priority cases.  
24 *See Arizona v. United States*, 567 U.S. 387, 404 (2012) (“Congress enacted IRCA as a  
25 comprehensive framework for combating the employment of illegal aliens.”) (citation and  
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1 quotation marks omitted); *Texas v. United States*, 86 F. Supp. 3d at 634-35 (arguing that DAPA  
2 would disincentivize illegal aliens from self-deporting); Marinelli at 833-34.

3           8 U.S.C. § 1324a(h)(3) (defining an “unauthorized alien,” that is, an alien ineligible for  
4 employment, as an “alien [that] is not at that time either (a) an alien lawfully admitted for  
5 permanent residence, or (B) authorized to be so employed by this Act or by the Attorney  
6 General”) certainly does not grant DHS the needed authority. That provision, which does not  
7 address deferred action at all, is an “exceedingly unlikely” grant of power from Congress to  
8 authorize work, because what the provision does address is the *unlawful* employment of aliens.  
9 *Texas*, 809 F.3d at 182-83. Indeed, as the Ninth Circuit has held, “[8 U.S.C. § 1324a] merely  
10 allows an employer to legally hire an alien (whether admitted or not) while his application [for  
11 adjustment of status] is pending.” *Guevara v. Holder*, 649 F.3d 1086, 1095 (9th Cir. 2011). And  
12 if § 1324a(h)(3) permitted DHS to give work authorization to DACA beneficiaries, it could only  
13 be because that provision allowed DHS to authorize work for any class of alien it chose; the  
14 provision contains no limiting language. If Congress had granted the executive branch such vast  
15 discretion, it would have done so clearly, not through “vague terms or ancillary provisions—it  
16 does not, one might say, hide elephants in mouse holes.” *Whitman v. Am. Trucking Ass’ns*, 531  
17 U.S. 457, 468 (2001). It is not reasonable to suppose that Congress, without any clear statement  
18 that it was doing so, granted to DHS the unrestricted power to overthrow Congress’s own grants  
19 of work protection to American workers. *See, e.g.*, 8 U.S.C. §§ 1182(n), 1184(g), 1188  
20 (protecting American workers from competition from aliens); *Sure-Tan, Inc. v. Nat’l Labor*  
21 *Relations Bd.*, 467 U.S. 883, 893 (1984) (“A primary purpose in restricting immigration is to  
22 preserve jobs for American workers.”).

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1 For these reasons, the DACA program is *ultra vires* and should not be given effect by this  
2 Court.

3 B. The DACA Program Is A Substantive Rule That Did Not Go Through The Procedural  
4 Requirements Of 5 U.S.C. § 553.

5 Substantive rules issued by an agency that did not go through the notice and comment  
6 process are invalid. *NRDC v. United States Forest Serv.*, 421 F.3d 797, 810 n.27 (9th Cir. 2005);  
7 *Nat'l Ass'n of Mfrs. v. United States Dep't of Labor*, no. 95-0715, 1996 U.S. Dist. LEXIS  
8 10478, \*5 (July 22, 1996) (“Under section 706(2), this court must hold unlawful and set aside  
9 regulations promulgated without adequate notice and comment.”) (citation and internal quotation  
10 marks omitted). The Ninth Circuit has stated the test for whether an agency directive is a  
11 substantive rule as follows:  
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14 When a federal agency issues a directive concerning the future exercise of its  
15 discretionary power, for purposes of APA section 553, its directive will constitute  
16 either a substantive rule, for which notice-and-comment procedures are required,  
17 or a general statement of policy, for which they are not. The critical factor to  
18 determine whether a directive announcing a new policy constitutes a rule or a  
19 general statement of policy is the extent to which the challenged directive leaves  
20 the agency, or its implementing official, free to exercise discretion to follow, or not  
21 to follow, the announced policy in an individual case.

22 To the extent that the directive merely provides *guidance* to agency officials in  
23 exercising their discretionary power while preserving their flexibility and their  
24 opportunity to make individualized determinations, it constitutes a general  
25 statement of policy. In such cases, Congress has determined that notice-and-  
26 comment rulemaking would be of limited utility . . . .  
27 *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987) (internal citations and quotation  
28 marks omitted) (emphasis in original) (finding that an agency directive concerning the  
application of a deferred action policy in the immigration context left ample discretion to agency  
officials and thus did not constitute a substantive rule).

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1 By this standard, DACA is clearly a substantive rule. The DACA memo directs ICE  
2 agents to “exercise their discretion,” on a “case by case basis,” to grant deferred action for two  
3 years, subject to renewal, to aliens who meet the criteria set forth in the memo, for the purpose of  
4 “ensur[ing] that our enforcement resources are not expended on these low priority cases . . .” and  
5 to accept work authorization applications from those granted deferred action. It is difficult to see  
6 how any agent so charged would feel free *not* to grant deferred action in any given case,  
7 especially since the only purpose the agents are supposed to be fulfilling in implementing the  
8 memo is to prevent the removal of those meeting the criteria. *Compare Mada-Luna*, 813 F.2d at  
9 1017 (finding discretion where officials were permitted to grant deferred action based on  
10 “appealing humanitarian factors”). Thus, though couched in terms of agents’ discretion, the  
11 memo actually removes that discretion. Indeed, the form of words chosen is almost comedic; to  
12 order someone to “exercise his discretion” *only in a particular way*, as the DACA memo does, is  
13 to deny him the very discretion the order presupposes.  
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16 As a substantive rule, DACA was required to go through notice and comment; it never  
17 did. It therefore is an invalid rule; at most, this Court, exercising its equitable powers, could  
18 allow it to remain in effect while notice and comment was accomplished. But DACA will not,  
19 now, go through the notice and comment process, so there would be no occasion for this Court to  
20 allow it to remain in effect at all.  
21

## 22 **II. CONCLUSION**

23 For the forgoing reasons, this Court should grant the defendants’ motion to dismiss.  
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1 Dated this 1st of November, 2017.  
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3 /s/ Julie B. Axelrod

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that service of the foregoing motion and proposed brief will be delivered  
3 electronically on November 1, 2017, to counsel for Plaintiff and Defendants through the  
4 District's Electronic Case Filing System.  
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7 /s/ Julie B. Axelrod  
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