

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*

**BRIEF OF FORMER SERVICE SECRETARIES,
MODERN MILITARY ASSOCIATION OF AMER-
ICA, AND MILITARY AND VETERAN ADVO-
CACY ORGANIZATIONS AS *AMICI CURIAE* IN
SUPPORT OF RESPONDENTS**

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DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., *PETITIONERS*,

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE, ET AL., *RESPONDENTS*.

*ON WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

KEVIN K. MCALEENAN, ACTING SECRETARY OF
HOMELAND SECURITY, ET AL., *PETITIONERS*,

v.

MARTÍN JONATHAN BATALLA VIDAL, ET AL.,
RESPONDENTS.

*ON WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

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INTERESTS OF *AMICI CURIAE*¹

The *amici curiae* are Secretary Eric Fanning, Secretary Deborah Lee James, Secretary Ray Mabus, the Modern Military Association of America (MMAA), the National Veterans Legal Services Program (NVLSP), Jewish War Veterans of the USA (JWV), Blue Star Families, Minority Veterans of America (MVA), and Swords to Plowshares. *Amici* share a common interest in policies that enhance the U.S. military's readiness and protect the interests of service members and their families.

Secretary Eric K. Fanning served as the 22nd U.S. Secretary of the Army. As Secretary, he had statutory responsibility for all matters related in the United States Army, including manpower, personnel, and reserve affairs. Previously, he served as Chief of Staff to the Secretary of Defense, as Acting Secretary of the Air Force, as Under Secretary of the Air Force, and as Deputy Under Secretary of the Navy/Deputy Chief Management Officer. He is the only person to have held senior appointments in all three military departments and the Office of the Secretary of Defense.

Secretary Deborah Lee James served as the 25th U.S. Secretary of the Air Force. Previously, she served in the Pentagon as the Assistant Secretary of Defense for Reserve Affairs, where she was the Secretary of Defense's Senior Advisor on National Guard

¹ This brief is filed with the consent of the parties pursuant to Supreme Court Rule 37.3(a). In accordance with Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for any party authored this brief in whole or in part, and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

and Reserve personnel. As a professional staff member on the House Armed Services Committee, she served as Senior Advisor to the Military Personnel and Compensation Subcommittee, the NATO Burden Sharing Panel, and the Chairman's Member Services team.

Secretary Ray Mabus served as the 75th U.S. Secretary of the Navy from 2009 to 2017, the longest to serve as leader of the Navy and Marine Corps since World War I. Throughout his tenure, he focused on four key priorities—People, Platforms, Power, and Partnerships—that enabled the Navy and Marine Corps' unique ability to maintain the global presence that reassures our allies and deters our adversaries. Among his achievements, he spearheaded the “21st Century Sailor and Marine” initiative, which was designed to build and maintain the most resilient and ready force possible and to prepare service members and their families for the high-tempo operations of today's military.

MMAA is one of the country's largest non-profit, non-partisan legal services, policy, and watchdog organizations serving lesbian, gay, bisexual, transgender, and queer (LGBTQ) military personnel, veterans, military spouses, family members, and allies, as well as individuals living with HIV. MMAA was formed through the merger of the American Military Partner Association and OutServe-SLDN, Inc., and it has over 75,000 members and supporters. MMAA has a unique understanding of the challenges faced by the populations it serves. Since 1993, MMAA and its predecessor entities have assisted over 12,500 clients.

MMAA regularly engages in high-profile litigation and participates as *amicus curiae* to challenge policies that target, stigmatize, or otherwise negatively affect service members and their families—reducing morale and diminishing military readiness by inhibiting the military’s efforts at recruiting and retention. For example, MMAA has filed lawsuits challenging laws and regulations that discriminate against and stigmatize LGBTQ service members, including: the former “Don’t Ask, Don’t Tell” law requiring that lesbian, gay, and bisexual service members conceal their sexual orientation; regulations prohibiting same-sex military spouses from receiving spousal benefits; the current ban on openly transgender people serving in the U.S. military; and regulations negatively affecting service members with HIV. MMAA has a strong interest in advocating for its members who may be affected by DACA’s rescission as well as an interest in advocating for a ruling in this case that would affirm the need for government agencies to consider how their policy choices would harm the military by stigmatizing and otherwise negatively affecting service members and their families.

NVLSP is an independent nonprofit organization that has worked since 1981 to ensure that our nation’s 22 million veterans and active duty personnel receive the federal benefits they have earned through service to our nation. NVLSP advocates before federal agencies, courts, and Congress to protect service members and veterans irrespective of whether they joined the military as citizens or non-citizens. NVLSP has represented thousands of individual service members and veterans, served as counsel for certified classes of veteran-plaintiffs, and participated as

amicus curiae in support of service members and veterans in numerous agency and court actions.

JWV, organized in 1986 by Jewish veterans of the Civil War, is the oldest active national veterans' service organization in America. Incorporated in 1924, and chartered by an act of Congress in 1983, *see* 36 U.S.C. § 110103, JWV's objectives include to "encourage the doctrine of universal liberty, equal rights, and full justice to all men," *id* § 110103(5), "combat the powers of bigotry and darkness wherever originating and whatever the target", *id* § 110103(6), and "preserve the spirit of comradeship by mutual helpfulness to comrades and their families," *id* § 110103(7).

JWV has long taken an interest in the right to serve in the military. Jewish immigrants and refugees have fought and died for America, particularly in World War II against the Nazis. Over one third of the Jews awarded the Congressional Medal of Honor were born in a foreign country.

Blue Star Families is a national, nonprofit organization that exists to support active-duty members, veterans, and their families from all ranks and services—including National Guard and Reserve. BSF strengthens military families and connects America to the Armed Forces through a robust array of morale, empowerment, education and employment programs. Additionally, BSF's annual Military Family Lifestyle Survey creates opportunities to support the health and sustainability of our all-volunteer Force by increasing dialogue and understanding between the military community and broader American society.

Blue Star Families exists to support military families, regardless of their documented legal status. We,

therefore, join with the MMAA in advocating for a ruling that would affirm the need for government agencies to consider how their policy choices would harm the military by stigmatizing and otherwise negatively affecting service members and their families.

MVA is a nonprofit organization dedicated to creating community belonging and advancing equality for minority veterans, including veterans of color, women veterans, LGBTQ veterans, and (non)religious minority veterans. MVA is built on four fundamental values: inclusivity, advocacy, allyship, and education. By advocating for the needs of veteran communities without a majority voice, MVA strives to improve the lives of veterans who may otherwise be forgotten.

Swords to Plowshares is a community-based not-for-profit organization that provides needs assessment and case management, employment and training, housing, and legal assistance to veterans in the San Francisco Bay Area. Swords to Plowshares promotes and protects the rights of veterans through advocacy, public education, and partnerships with local, state, and national entities.

STATEMENT

On September 5, 2017, the Government issued a brief memorandum rescinding the Deferred Action for Childhood Arrivals program (DACA). Since 2012, DACA, implemented by the Department of Homeland Security (DHS), has conferred life-changing benefits to nearly 800,000 non-citizens. In addition to DACA's promise of a reduced likelihood of removal, these benefits include numerous advantages under existing policies, such as the ability to obtain employment

lawfully. *See* 8 C.F.R. § 274a.12(c)(14). DACA has permitted its recipients to remain in the United States with their families and obtain a 91% employment rate, benefitting not only DACA recipients, but also strengthening and maintaining their families.

The American people also rely on DACA to enhance U.S. national security through military readiness. As of September 2017, when the Government rescinded DACA, over 800 DACA recipients were actively serving in the U.S. military under the Military Accessions Vital to the National Interest program (MAVNI). That program allows the military to recruit non-citizens who have skills “vital to the national interest,” including health care professionals and individuals with specific language and cultural skills. *See* 10 U.S.C. § 504(b)(2). The U.S. military has relied on the efforts of these non-citizens, including DACA recipients, to further such vital national interests that promote national security and protect Americans.

The Government overlooked such reliance interests when rescinding DACA. The rescission memorandum contains just one sentence explaining the Government’s rationale for changing its existing policy: “Taking into consideration the Supreme Court’s and the Fifth Circuit’s rulings in the ongoing litigation, and the September 4, 2017, letter from the Attorney General, it is clear that the June 15, 2012, DACA program should be terminated.” *Regents* Pet. App. 117a.

Numerous parties brought actions alleging that the Government’s decision to rescind DACA was unlawful on several grounds, including that the rescission was arbitrary and capricious under the Adminis-

trative Procedure Act (APA). Three of these cases are now before the Court: *Department of Homeland Security v. Regents of the University of California*, No. 18-587 (*Regents*), in the Ninth Circuit; *McAleenan v. Batalla Vidal*, No. 18-589 (*Batalla Vidal*), in the Eastern District of New York; and *Trump v. NAACP*, No. 18-588 (*NAACP*), in the District Court for the District of Columbia. The courts below have uniformly agreed to enjoin or vacate the Government's decision to rescind DACA.

In *Regents*, the Ninth Circuit affirmed a preliminary injunction requiring, among other things, that the Government "allow[] DACA enrollees to renew their enrollments." *Regents* Pet. App. 66a; *Regents* Pet. Supp. App. 45a-46a. The Eastern District of New York preliminarily enjoined the rescission of DACA on similar terms. *Batalla Vidal* Pet. App. 126-128a. Both courts concluded that the Government's rescission of DACA was likely arbitrary and capricious, determining that the Government's sole rationale for rescinding DACA relied on a legally erroneous premise. *Regents* Pet. App. 42a; *Batalla Vidal* Pet. App. 91a. In *Batalla Vidal*, the court further explained that the Government "acted arbitrarily and capriciously by ending [the DACA] program without taking any account of reliance interests that program has engendered." *Batalla Vidal* Pet. App. 113-117a.

In *NAACP*, the District Court for the District of Columbia granted partial summary judgment against the Government and vacated the rescission of DACA, holding that it violated the APA's substantive requirements. The court emphasized that the "Department's failure to give an adequate explanation of its legal judgment was particularly egregious here in light of the reliance interests involved," which "en-

gendered the reliance of hundreds of thousands of beneficiaries, many of whom had structured their education, employment, and other life activities on the assumption that they would be able to renew their DACA benefits.” *NAACP* Pet. App. 54a. The court stayed its mandate for ninety days “to allow the agency an opportunity to better explain its rescission decision.” *Id.* at 3a.

In response, on June 22, 2018, DHS Secretary Kirstjen M. Nielsen issued a second memorandum “declin[ing] to disturb the Duke memorandum’s rescission of the DACA policy.” *Regents* Pet. App. 121a. The Nielsen memorandum stated, “I am keenly aware that DACA recipients have availed themselves of the policy in continuing their presence in this country and pursuing their lives,” but concluded “I do not believe that the asserted reliance interests outweigh the questionable legality of the DACA policy and the other reasons for ending the policy discussed above.” *Id.* at 125a. Secretary Nielsen’s memorandum did not mention, much less address, the reliance interests of DACA family members, or how the U.S. military relies on DACA to advance national security, which in turn serves the interests of the American people.

On August 3, 2018, the *NAACP* court concluded the Nielsen memorandum did not alter the court’s earlier conclusions. *NAACP* Pet. App. 80a-109a. The Government petitioned for writs of certiorari in all three cases. The Court granted certiorari and consolidated the cases for briefing and oral argument.

SUMMARY OF ARGUMENT

This Court should affirm the decisions below, which correctly enjoined or vacated the Government’s decision to rescind DACA on the basis of arbitrary

and capricious agency action in violation of the APA. The Government provided a legally deficient rescission rationale because, among other reasons, it failed to address how “longstanding [DACA] policies may have engendered serious reliance interests that must be taken into account.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). For example, the Government did not adequately consider the “serious reliance interests” of DACA beneficiaries who have enlisted in the military and are pursuing a path to citizenship, the interests of military family members who are direct or indirect beneficiaries of DACA, and the interests of the American people, who rely on a military that has been significantly strengthened by the DACA program.

ARGUMENT

The courts below have uniformly—and correctly—preliminarily or permanently set aside the Government’s rescission of DACA on the basis of arbitrary and capricious agency action. This Court should affirm.

I. The Government Must Consider Serious Reliance Interests When Changing Existing Policy.

The APA directs that arbitrary and capricious Government actions be set aside as unlawful. 5 U.S.C. § 706(2)(A). While “[a]gencies are free to change their existing policies,” they must “provide a reasoned explanation for the change.” *Encino*, 136 S. Ct. at 2125. If the explanation for the policy change “entirely fail[s] to consider an important aspect of the problem,” it will not survive arbitrary-and-capricious review. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

To survive such review, the Government must demonstrate it is “cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.” *Encino*, 136 S. Ct. at 2126. The Government also must explain its reason “for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

In *Encino*, this Court set aside a policy change for failure to consider serious reliance interests. There, the Court recognized that the retail automobile and truck industry had “significant reliance interests” in an agency’s prior position that service advisors were exempt from certain overtime pay provisions. 136 S. Ct. at 2126. These significant reliance interests included the compensation plans negotiated between dealerships and service advisors, which the Court recognized “could necessitate systemic, significant changes” under the agency’s revised policy. *Ibid.* The Court also observed that dealerships who failed to compensate their service advisors under the revised policy could face significant liability. *Ibid.*

Where, as in *Encino*, significant reliance interests are present, the agency must provide “a more reasoned explanation for its decision to depart from its existing enforcement policy.” *Ibid.* And where an agency’s proffered rationale “[a]ll[s] short of the agency’s duty to explain why it deemed it necessary to overrule its previous position,” the agency’s change in position is arbitrary and capricious and therefore unlawful under the APA. *Id.* at 2126-27.

II. DACA Engendered Serious Reliance Interests on the Part of Non-Citizens Enlisted in the Military, Their Families, and the American People.

DACA offers more than deferred removal, and the program affects more than its direct beneficiaries. DACA recipients and their families benefit from numerous pre-existing policies, which they would not have access to but for DACA. DACA recipients are eligible for employment authorization documents, commonly known as work permits, and recipients with specialized medical or linguistic and cultural skills are eligible to enlist through MAVNI. For those who have enlisted, the military offers the opportunity to serve their adopted country and a path to citizenship. This policy keeps families with non-citizens together and, as explained in depth below, offers the possibility of deferred action or parole in place regardless of DACA eligibility.

For the American people, DACA has facilitated the military readiness on which the country depends, such as enabling the military to approach its recruiting and retention goals by leveraging immigrant and minority communities with unique skills vital to the national interest. DACA has promoted these expectations for more than five years.

A. Foreign-Born Recruits Are Integral to the U.S. Military and Vital to Its Mission.

The United States has long relied on foreign-born recruits to protect our country. From the Revolutionary War through the 1840s, half of the U.S. military's

recruits were foreign born.² During the Civil War, approximately 300,000 foreign-born members of the military served in the Union Army. *Ibid.* These and other foreign-born recruits account for half a million of our country’s veterans, more than 700 of whom have received Medals of Honor. *Ibid.*³

Our country’s reliance on foreign-born recruits—and specifically, non-citizens—has persisted in recent decades. Between 1999 and 2010, “some 80,000 non-citizens enlisted across all four services, accounting for 4 percent of all accessions” among the Army, Navy, Air Force, and Marine Corps.⁴ As of June 2010 alone, approximately 16,500 non-citizens were actively serving in the military. *Id.* at 39. Another 5,255 non-citizens first enlisted in the military in 2016.⁵

In light of our military’s seasoned reliance on the foreign born, it is not surprising that our Government has repeatedly recognized the importance of non-citizen recruits to the U.S. military. Nearly two dec-

² Jie Zong & Jeanne Batalova, *Immigrant Veterans in the United States* (May 16, 2019), <https://www.migrationpolicy.org/article/immigrant-veterans-united-states>.

³ See also U.S. Citizenship and Immigration Servs., *USCIS Facilities Dedicated to the Memory of Immigrant Medal of Honor Recipients*, <https://www.uscis.gov/about-us/find-uscis-office/uscis>

-facilities-dedicated-memory-immigrant-medal-honor-recipients (last updated Jan. 24, 2014).

⁴ Dep’t of Def., *Population Representation in the Military Services: Fiscal Year 2010 Summary Report*, at 41, available at <https://www.cna.org/pop-rep/2010/summary/PopRep10summ.pdf>.

⁵ Dep’t of Def., *Population Representation in the Military Services: Fiscal Year 2016 Summary Report*, at 41, available at <https://www.cna.org/pop-rep/2016/summary/summary.pdf>.

ades ago, President George W. Bush issued an Executive Order creating an incentive for non-citizens to serve in the military in exchange for expedited naturalization. Exec. Order 13,269, 67 Fed. Reg. 45287 (July 3, 2002). Under this program, as of 2018, the U.S. Citizenship and Immigration Services (USCIS) reports that “[s]ince Oct. 1, 2001, USCIS has naturalized 129,587 members of the military.”⁶ In 2008, the Secretary of Defense authorized the MAVNI program, designed to recruit non-citizens who have skills that are “vital to the national interest,” including health care professionals and individuals with specific language and cultural skills. *See* 10 U.S.C. § 504(b)(2).

Most recently, in 2014, the Department of Defense provided a pathway for DACA recipients to enlist in the military under MAVNI.⁷ As of September 2017, more than 800 highly skilled DACA recipients were serving in the U.S. military through MAVNI.⁸ Many more await final background checks so that they too can begin serving. These DACA recipients, along with other MAVNI service members, possess “critical skills” and are “vital” to protecting the American people.

⁶ U.S. Citizenship and Immigration Servs., *Military Naturalization Statistics*, <https://www.uscis.gov/military/military-naturalization-statistics> (last updated Dec. 6, 2018).

⁷ Memorandum from Jessica Wright, Undersecretary of Defense for Personnel and Readiness, *Military Accessions Vital to the National Interest Program Changes* (Sept. 25, 2014).

⁸ Jonah Bennett, *Pentagon: Fewer Than 900 DACA Recipients Are Currently Serving In The Military* (Sept. 6, 2017), <https://stream.org/pentagon-fewer-than-900-daca-recipients-are-currently-serving-in-the-military/>.

B. Enlistees Rely on DACA for Eligibility to be Employed by the Military and for a Path to Citizenship.

DACA opened a path for certain non-citizens to obtain work permits and to serve in the military if they possess a “critical skill or expertise” that is both “vital to the national interest” and useful to the armed forces on a daily basis. *See* 10 U.S.C. § 504(b)(2). For example, the military’s MAVNI recruiting program targets immigrants with critical medical skills or expertise in certain foreign languages and cultures.⁹ The program has recruited 10,400 immigrants from 2008 to 2016.^{10,11} In 2016 alone, 359 MAVNI recruits were talented immigrants who could not have participated in the program without DACA.¹²

⁹ Dep’t of Def., MAVNI Fact Sheet, 1, <https://dod.defense.gov/news/mavni-fact-sheet.pdf>.

¹⁰ U.S. Gov’t Accountability Office, *Immigration Enforcement: Actions Needed to Better Handle, Identify, and Track Cases Involving Veterans* 7 (2019).

¹¹ MAVNI recruiting was indefinitely suspended at the end of fiscal year 2016 pending the implementation of increased security protocols. *See* Dep’t of Homeland Security, *MAVNI Program Status for Fiscal Year 2017* (Dec. 2, 2016), <https://www.ice.gov/doclib/sevis/pdf/bcm-1612-02.pdf>. As discussed below, many MAVNI recruits still await the completion of their background checks so that they can begin serving.

¹² New American Economy, *Outside the Wire: How Barring the DACA-Eligible Population from Enlisting Weakens our Military* (Nov. 8, 2017), <https://research.newamericaneconomy.org/report/outside-the-wire-how-barring-the-daca-eligible-population-from-enlisting-weakens-our-military/>; *see also* Dep’t of Def., MAVNI Fact Sheet, 1.

DACA beneficiaries rely on military service to provide a path to citizenship. The United States has long granted citizenship to non-citizens in exchange for their military service. *See* Exec. Order 13,269, 67 Fed. Reg. 45287 (July 3, 2002). By permitting DACA beneficiaries to enlist in the military, the Government has provided them the opportunity to earn citizenship by serving honorably for one year under 8 U.S.C. § 1439(a), or by serving honorably on active duty for a shorter period under 8 U.S.C. § 1440(a).¹³ More than 129,000 immigrants earned their citizenship through military service between the attacks on September 11, 2001, and the end of last year. U.S. Citizenship and Immigration Servs., *Military Naturalization Statistics*.

DACA also enables its beneficiaries who have skills vital to the national interest an opportunity to serve in the U.S. military and to become lawful citizens of the country in which they were raised. Beneficiaries wanting to serve and undertake the benefits and responsibilities of citizenship enlisted. After enlisting, they organized their lives around the com-

¹³ On October 13, 2017, the Department of Defense announced that instead of requiring a single day of active-duty service it would require 180 days before certifying honorable service under 8 U.S.C. § 1440(a). Dep't of Def., *DoD Announces Policy Changes to Lawful Permanent Residents and the Military Accessions Vital to the National Interest (MAVNI) Pilot Program* (Oct. 13, 2017), <https://www.defense.gov/Newsroom/Releases/Release/Article/1342317/dod-announces-policy-changes-to-lawful-permanent-residents-and-the-military-acc/>. Citizenship granted under either 8 U.S.C. § 1439 or 8 U.S.C. § 1440 could be revoked if the soldier was “separated from the Armed Forces under other than honorable conditions before the person ha[d] served honorably for a period or periods aggregating five years.” 8 U.S.C. §§ 1439(f), 1440(c).

mitment to hold themselves constantly ready to serve as soon as their background investigations finished.

Rescinding DACA undermines the reliance interests inherent in the life-changing demands of military service, as well as the path to citizenship offered through the MAVNI program. Like all non-citizens—including otherwise lawful permanent residents—DACA beneficiaries who enlisted are unable to begin basic training until their background investigations are completed.¹⁴ Less than two months before DACA's rescission, NPR reported that more than 4,000 MAVNI recruits were awaiting basic training.¹⁵ Without DACA's protection, DACA recruits awaiting training or who have not served long enough to apply for citizenship will lose their eligibility to participate in MAVNI. They also risk losing their work permits and a range of military employment benefits, including health care, home loans, and educational funds, that generally vest only after a recruit begins or completes a specified term of active-duty service. *See* 38 U.S.C. §§ 3311, 3702; 32 C.F.R. § 199.3. In addition to threatening enlistees' ability to access these benefits, DACA's rescission even threatens enlistees with the prospect of being deported.

This threat was not eliminated by the grandfathering provisions in the DACA rescission memorandum. DHS announced that it would not terminate previously issued deferred action determinations or

¹⁴ *See* Dep't of Def., *DoD Announces Policy Changes to Lawful Permanent Residents and the Military Accessions Vital to the National Interest (MAVNI) Pilot Program* (Oct. 13, 2017).

¹⁵ Tom Bowman, *Citizenship For Military Service Program Under Fire*, NPR (July 11, 2017), <https://www.npr.org/2017/07/11/536630223/citizenship-for-military-service-program-under-fire>.

work permits based on the rescission. *Regents* Pet. App. 118a. It also announced that, if requested within 30 days, it would consider a one-time renewal of DACA benefits for individuals whose periods of deferred action were set to expire within 180 days. *Ibid.* But DACA benefits last only two years. *Regents* Pet. App. 99-100a. Military background checks take up to three. *See* 10 U.S.C. § 513(b)(1)-(3). This means that DACA beneficiaries face a very real prospect that they will lose their DACA benefits before obtaining background clearance, getting scheduled for training, and freeing themselves of the need for DACA by completing the term of service necessary to obtain citizenship.¹⁶

This fear of deportation after DACA's rescission is not merely hypothetical. A recent report by the Government Accountability Office states that DHS has a system of policies in place for deporting veterans—and that the protections the system offers are not consistently observed. U.S. Gov't Accountability Office, *Immigration Enforcement*, 10-12. Although the data is incomplete, available records show that “approximately 250 veterans were placed in removal proceedings or removed from the United States from fiscal years 2013 through 2018.” *Id.* at 16. At the

¹⁶ *See, e.g.,* Alex Horton, *The military looked to ‘dreamers’ to use their vital skills. Now the U.S. might deport them.*, Washington Post (Sept. 7, 2017), <https://www.washingtonpost.com/news/checkpoint/wp/2017/09/07/the-military-looked-to-dreamers-to-use-their-vital-skills-now-the-u-s-might-deport-them/> (reporting on plight of recruits like Zion Dirgantara, a MAVNI recruit awaiting the completion of his background check who came to the United States at the age of 12, did not know he lacked lawful status until he applied for a driver's license, and now finds himself alongside “hundreds of others in a race against time to avoid deportation back to now unfamiliar nations”).

time of the study, about 115 of them had been ordered removed and only 25 had been granted relief or protection from removal. *Ibid.* Recruits who have not served are likely to receive less favorable treatment. Some have already fled the country to avoid deportation to countries where they believe their lives would be in danger.¹⁷

C. Enlistees’ Families Rely on DACA for the Possibility of Parole in Place or Deferred Action.

Enlistees’ families also have relied on DACA. In addition to families’ general interest in policies that protect their relatives from deportation—and consequently keep families together—DACA grants family members access to additional benefits as well.

USCIS offers consideration for parole in place or deferred action to the families of service men and women, with the goal of “[f]acilitating military morale and readiness and supporting DoD recruitment policies.” U.S. Citizenship and Immigration Services, *Adjudicator’s Field Manual*, Chapter 21.1(c). Parole in place is a one-year period of authorization to stay in the United States, subject to extensions as appropriate. *Id.* at Chapter 21.1(c)(1).

¹⁷ Alex Horton, *Foreign-born recruits, promised citizenship by the Pentagon, flee the country to avoid deportation*, Washington Post (July 17, 2017), <https://www.washingtonpost.com/news/checkpoint/wp/2017/07/17/foreign-born-recruits-promised-citizenship-by-the-pentagon-flee-the-country-to-avoid-deportation/> (telling story of Ranj Rafeeq, an Iraqi Kurd who translated for the U.S. military in 2005 and came to the United States in 2012 hoping to join the Army after earning a graduate degree in civil engineering but who fled to Canada in fear that his path to citizenship would fail and that he would become a target of the Islamic State if deported to Iraq).

Although a grant of parole in place is discretionary, the fact that an immediate family member serves in the U.S. military “ordinarily weighs heavily in favor of parole in place,” so that a grant of parole in place is generally appropriate absent a criminal conviction or other serious adverse factors. *Ibid.* Parole in place is available only to individuals who are not lawfully admitted to the United States. *Ibid.* Parolees are eligible to apply for work permits during the period of their parole. *Ibid.*

Deferred action for family members of service members is similar to parole in place, but it is available only to individuals who have been lawfully admitted to the United States and have overstayed their authorized period of admission. *Id.* at Chapter 21.1(c)(2)(A). Deferred action is available in two-year increments and, like parole in place, makes the recipient eligible to apply for work permits. *Id.* at Chapter 21.1(c)(2)(C). Deferred action determinations are “case-by-case, discretionary judgments based on the totality of the evidence.” *Id.* at Chapter 21.1(c)(2)(A).

Although being an immediate family member of a MAVNI recruit or other enlistee awaiting basic training is no guarantee of deferred action, it is considered a strong positive factor. *Ibid.* On the other hand, USCIS may terminate any period of deferred action awarded to the family members of an enlistee awaiting basic training who later becomes disqualified from military service. *Ibid.*

As explained above, DACA’s rescission placed enlistees at risk of becoming disqualified for employment and for participation in MAVNI. In so doing, it also placed family members of enlistees at risk of losing their work permits and even of being deported.

This is true not only of family members who are direct beneficiaries of DACA, but also of family members who are beneficiaries of parole in place or of deferred action for families of service men and women. As the USCIS Adjudicator’s Field Manual notes, “the family members of such recruits often lose their lawful statuses because their statuses depend on those of the recruits.” *Ibid.*

Immigrant families have sacrificed for the United States by supporting their relatives in enlisting for military service. They have counted on staying together and earning a living while their relatives were on duty. Whether directly or indirectly, they relied on DACA—and their reliance interests are serious.

D. The U.S. Military Relies on Non-Citizens, Including DACA Recipients, to Protect the American People.

The serious consequences of DACA’s rescission extend to the American people, who rely on having a strong, ready military to promote and defend U.S. national interests. Unraveling DACA will negatively affect the military’s ability to recruit and retain highly qualified service members, which in turn jeopardizes the protection of the American people.

1. The American people rely on a strong, ready U.S. military to promote and defend U.S. national interests. One critical component of a strong military is ensuring that the military is able to recruit and retain enough soldiers, sailors, airmen, Marines, and coast guardsmen to meet the myriad of challenges these men and women are asked to tackle every day. As a result, meeting annual accession goals is a critical component of ensuring military readiness.

In recent years, the U.S. military, and by extension its largest branch, the U.S. Army, has “struggl[ed] to find candidates who meet [its] requirements.”¹⁸ Because only 30% of potential recruits qualify to join the military, in 2017, the U.S. Army Recruiting Command was “forced to lower its recruiting standards in hopes of reaching its goal of 80,000 new soldiers.” *Ibid.* In 2016, 1.6% of Army recruits placed in the bottom third of military exams, *ibid.*—scores that typically lead the Army to deny enlistment— and only 56% of Army recruits were deemed “high-quality personnel.” Dep’t of Def., *Population Representation in the Military Services: Fiscal Year 2016 Summary Report*, at 3, 17. Yet as difficulties with military recruitment have risen, Congress has directed the Army to increase its number of active-duty soldiers. Fanning, *Immigration reform: An Army recruitment opportunity* (Jan. 8, 2018).

DACA recipients do not just add necessary numbers to the U.S. military; they also bring necessary skills. As a statutory prerequisite to enlistment as non-citizens without green cards, each of the hundreds of DACA recipients enlisted in the military must possess “critical skill[s] . . . vital to the national interest.” 10 U.S.C. § 504(b)(2). These and other MAVNI recruits serve an important role in the military’s ability to protect the American people. As explained by Air Force Maj. Carla Gleason, a Pentagon spokeswoman, “the unique skill sets these individuals bring is one of the reasons the U.S. military is the

¹⁸ Eric Fanning, *Immigration reform: An Army recruitment opportunity* (Jan. 8, 2018), <https://thehill.com/opinion/national-security/367839-immigration-reform-an-army-recruitment-opportunity>.

world’s premier fighting force.”¹⁹ Former Secretary of the Army Eric Fanning has likewise explained that MAVNI recipients serve an important role in forming “a skilled, diverse military force with high levels of integrity that can adapt to today’s emerging threats.” Fanning, *Immigration reform: An Army recruitment opportunity* (Jan. 8, 2018). Removing protections for these vital service members and subjecting such service members to discharge runs counter to American interests in protecting our country.

Research and practice have confirmed that non-citizen service members, such as DACA recipients, meet critical needs for the military. As the Center for Naval Analyses (CNA) observed, “noncitizens are [] an attractive recruiting resource” because “a substantial share of the recruitable U.S. non-citizen population comes from diverse backgrounds and potentially possesses language and cultural skills that are of strategic interest to the U.S. military.”²⁰ Recognizing the importance of such language and cultural skills, Former Secretary of the Air Force Deborah Lee James emphasized, “diversity of background, experience, demographics, perspective, thought and even organization are essential to our ultimate success.”²¹ Former Secretary of the Navy Ray Mabus echoed this

¹⁹ Lolita Baldor, *Problems for Pentagon’s immigrant recruit program*, AP NEWS (Sept. 30, 2018), <https://www.apnews.com/84530d3799004a0a8c15b3d11058e030>.

²⁰ Molly F. McIntosh et al., *Non-Citizens in the Enlisted U.S. Military*, at 57 (Nov. 2011), available at https://www.cna.org/CNA_files/PDF/D0025768.A2.pdf.

²¹ Memorandum from Deborah Lee James, Secretary of the Air Force, Air Force Diversity & Inclusion (Mar. 4, 2015), available at https://www.af.mil/Portals/1/documents/SECAF/FINALDiversity_Inclusion_Memo1.pdf.

sentiment, explaining “[a] more diverse force is a stronger force.”²² As succinctly stated by Secretary Fanning, “[o]ur nation’s military is stronger when it reflects the diversity it aims to defend.” Fanning, *Immigration reform: An Army recruitment opportunity* (Jan. 8, 2018). Today, the military continues to target recruits who are “more diverse linguistically and culturally than citizen recruits . . . [because they are] particularly valuable as the U.S. faces the challenges of the Global War on Terrorism.”²³

CNA projects that non-citizens likely will play a crucial role in meeting recruitment goals in coming years, and thus recommends that “the services should develop strategies to recruit non-citizens more effectively.” McIntosh et al., *Non-Citizens in the Enlisted U.S. Military*, at 2 (Nov. 2011). Notably, “non-citizen recruits are significantly and substantially less likely than citizen recruits to attrite in the first term.” *Ibid.* After three years, “attrition rates for non-citizens are between nine and 20 percentage points lower than those for white citizens, the largest demographic group in the military.” Air Force News, *The U.S. Military Helps Naturalize Non-Citizens* (2019). Other analysts have similarly estimated that the attrition rate for non-citizens is more than 10% lower than for

²² Chief of Naval Personnel Public Affairs, SECNAV Releases Updated Diversity, Inclusion Policy Statement (Feb. 25, 2016), available at https://www.navy.mil/submit/display.asp?story_id=93282.

²³ Air Force News, *The U.S. Military Helps Naturalize Non-Citizens* (2019), <https://www.military.com/join-armed-forces/eligibility-requirements/the-us-military-helps-naturalize-non-citizens.html>.

citizens, “meaning that noncitizens are more likely to serve in the military for extended periods of time.”²⁴

The Department of Defense’s data has reinforced the significance of the American people’s interest in the military’s ability to recruit and retain non-citizens, including DACA recipients. In 2016, the Department of Defense reported that “the majority of non-citizen [non-prior service] accessions are high-quality recruits, with Tier 1 education credentials and an [Armed Forces Qualification Test] score in the top 50 percentiles.” Dep’t of Def., *Population Representation in the Military Services: Fiscal Year 2016 Summary Report*, at 42. In the Army, the Department of Defense observed that 4.8% of accessions in 2016 were non-citizens, and “[a] higher percentage of non-citizen accessions in the Army were high quality compared to citizen accessions (66 percent versus 54 percent).” *Id.* at 41-42. That same year, hundreds of DACA recipients newly enlisted in the Army. New American Economy, *Outside the Wire: How Barring the DACA-Eligible Population from Enlisting Weakens our Military* (Nov. 8, 2017).

The military’s reliance on programs such as DACA to protect the American people is not limited to those DACA recipients who currently serve in the military. Analysts have estimated that the military could target many more DACA recipients to improve military readiness. Of the 45 languages the military has deemed “vital to military success,” the New American Economy estimated that “[m]ore than 169,000 mem-

²⁴ Muzaffar Chishti, et al., *Immigrants in the Military: Evolving Recruitment Needs Can Accommodate National Security Concerns* (May 2019), <https://www.migrationpolicy.org/sites/default/files/publications/MPI-Noncitizens-Military-Final.pdf>.

bers of the DACA-eligible population—or more than one in seven of them—speak one of these languages at home.” *Ibid.* This organization further concluded that “a substantial portion of the DACA-eligible population has language or workforce training that could help address the military’s recruitment challenges.” *Ibid.* The authors thus concluded that “[t]here is a strategic advantage to having [DACA recipients] serve in the military, as they will have cultural and linguistic expertise which could be of critical importance.” *Ibid.*

Unraveling of DACA protections will likely dissuade these many qualified recipients from enlisting in the military due to the lengthy delays in accession and uncertainty surrounding shipment dates, making it difficult for the military to meet its recruiting goals. Upon rescission of DACA, the military is likely to find that a large number of potential high-quality recruits are ineligible for accession or have left the United States. Thus, a policy with the stated goal of improving the country’s national security is likely to undermine that goal by impairing military readiness.

2. In addition to recruitment and retention, another key component of a strong military is morale. As precedent has shown in other contexts, however, ignoring the reliance interests of DACA recipients could significantly damage the relationship of currently serving DACA recipients to the military, undermining their morale and negatively impacting unit cohesion, thus curbing the military’s ability to recruit and retain additional non-citizens and immigrants unaffected by DACA.

For example, history has shown that discriminatory policies such as Don’t Ask Don’t Tell (DADT)—

which prohibited military service by openly lesbian, gay, and bisexual people—diminished morale among active and prospective LGB service members. One analysis studying the negative effects of DADT estimated that in 2004 alone, “nearly 1,000 active duty LGB soldiers would have been retained if they had been able to serve and be open about their sexual orientation.”²⁵ Even more would have joined but for DADT. *See ibid.* And evidence suggests that discriminatory policies like DADT affected morale and recruitment and retention even among those who were not directly subject to it, such as service members or prospective service members with LGB relatives.²⁶ Repeal of DADT corrected this: As explained by then-Secretary of Defense Chuck Hagel upon DADT’s repeal, permitting service members to “serve openly, with full honor, integrity, and respect . . . makes our military and our nation stronger.”²⁷

A discriminatory policy like DACA rescission here would likely have the same detrimental effects on

²⁵ *See, e.g.,* Gary J. Gates, The Williams Inst., *Effects of “Don’t Ask, Don’t Tell” on Retention Among Lesbian, Gay and Bisexual Military Personnel* (2007), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-EffectsOfDontAskDontTellOnRetention-Mar-2007.pdf>; *accord*

²⁶ *See* Paul Vincent Courtney, *Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach*, 163 U. Pa. L. Rev. 1497, 1534 (2014-2015) (“[D]iscrimination harms not only the dignity of the immediate victim of the discriminatory act but also the dignity and autonomy of those who, fearing such discrimination, feel forced to comply with heterosexual norms.”).

²⁷ Dep’t of Def., *Remarks by Secretary Hagel at the Lesbian, Gay, Bisexual, Transgender Pride Month Event in the Pentagon Auditorium* (June 25, 2013), <http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5262>.

military morale as DADT did. The negative effects of rescission would spread to a broader population of non-citizens, immigrants, and others who simply seek to serve their Nation with honor and dignity, volunteering to face extreme hardships, endure lengthy deployments and separation from family and friends, and to willingly make the ultimate sacrifice of their lives.

Another insidious effect of declining morale and reduced recruitment and retention of non-citizens will be that fewer foreign-born service members will advance to senior-enlisted positions, resulting in a less diverse military leadership to the military's detriment. Ongoing concern over diversity in the military's leadership recently prompted Congress to establish what became the Military Leadership Diversity Commission (MLDC), an independent body comprised of current and former military officers, senior enlisted personnel, and civilians.²⁸ As the MLDC reported, "[i]ncluding a broad range of men and women from different backgrounds can increase the likelihood that the U.S. military 'knows the enemy' and is better able to work with international partners by adding to the cultural and linguistic knowledge base from which U.S. forces may draw." *Id.* at 17.²⁹

²⁸ *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military, Final Report xvi* (2011), <https://www.hsdl.org/?view&did=11390>.

²⁹ See also Dep't of Def., Defense Language Transformation Roadmap 3 (Jan. 2005) <https://apps.dtic.mil/dtic/tr/fulltext/u2/b313370.pdf> (describing the need for expertise on "less-commonly-taught languages" in order to sustain coalitions, pursue regional stability, and conduct multi-national missions.).

The U.S. military has shared MLDC's concerns over the importance of diversity to national security. In describing strategies imperative to military readiness, Secretary Mabus observed that "[o]rganizations that embrace myriad backgrounds and perspectives will attract the best talent and remain ready" to protect the American people. Chief of Naval Personnel, *SECNAV Releases Updated Diversity, Inclusion Policy Statement* (Feb. 25, 2016). Secretary Fanning likewise observed that "most importantly, [the U.S. military] need[s] teams of people who think differently from one another and yet are joined together in common cause."³⁰ He therefore advised that "we must harness the power of diverse teams and draw further from one of America's greatest advantages: our diverse population." *Ibid.* As Secretary James emphasized, "diversity and inclusion are not programs or initiatives; they are national security imperatives and critical force multipliers." Secretary James Memorandum (Mar. 4, 2015).

A reduction in the number of leaders acting as prominent immigrant role models in the military would create a negative feedback loop, further inhibiting the military's ability to recruit and retain future generations of foreign-born service members. But this population is critical for the future health of the U.S. military: Analysts have observed that immigrants are an important population to recruit in the military because "immigration is projected to be the only source of net growth in the U.S. population

³⁰ Eric Fanning, Secretary of the Army: America's Diversity is Our Army's Strength (Oct. 1, 2016), *available at* <https://www.ausa.org/articles/secretary-army-america%E2%80%99s-diversity-our-army%E2%80%99s-strength>.

among 18- to 24-year-olds in the coming decades.” McIntosh et al., *Non-Citizens in the Enlisted U.S. Military*, at 57. The number of potential recruits multiplies when considering children of immigrants. Nearly 1.9 million veterans are children of immigrants, accounting for 10% of all veterans. Zong & Batalova, *Immigrant Veterans in the United States*. Thus in coming years, “the segment of the population most likely to enlist[] will come entirely from immigrants and the children of immigration.”³¹

Rescinding policies such as DACA—which relinquish the protections of active and prospective service members based on their country of origin—will impede the military’s ability to retain quality service members for years to come. The immediate and future harms to the composition of the U.S. military adversely affects military readiness and frustrates it from reaching its goals, contrary to the interests of the American people.

III. The Government Violated the APA When It Rescinded DACA Without Considering Serious Reliance Interests.

Despite the breadth of reliance by DACA recipients, their families, and the military itself, the Duke memorandum contained a single sentence purportedly explaining the Government’s rationale for changing its existing policy: “Taking into consideration the Supreme Court’s and the Fifth Circuit’s rulings in the ongoing litigation, and the September 4, 2017, letter from the Attorney General, it is clear that the June

³¹ National Immigration Forum, *For Love of Country: New Americans Serving in our Armed Forces: Executive Summary* (Nov. 7, 2017), <https://immigrationforum.org/article/love-country-new-americans-serving-armed-forces-2/>.

15, 2012, DACA program should be terminated.” *Regents* Pet. App. 117a. No other analysis regarding the interests of those relying on the DACA program were provided. In short, the Government did not consider any reliance interests at all.

Secretary Nielsen’s memorandum, published more than nine months after the rescission, merely consists of post-hoc rationalizations that cannot overcome the inadequacies of the original rescission memorandum. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) (agency action may be “upheld, if at all, on the same basis articulated in the order by the agency itself”) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Even if the Nielsen memorandum were given weight, the D.C. District Court correctly noted that it failed to offer meaningful consideration of “DACA’s benefits to DACA recipients and to society at large.” *NAACP* Pet. App. 107a. The memorandum conveys only a blanket recognition “that DACA recipients have availed themselves of the policy in continuing their presence in this country and pursuing their lives.” *Regents* Pet. App. 125a. Nowhere does it consider the indirect beneficiaries of DACA, the sacrifice and service of currently enlisted DACA recipients and their families, or the serious risks posed to the American public if the military lost access to a significant number of non-citizen recruits.

DACA has engendered serious reliance interests for each of these stakeholders. Their interests deserved due consideration by the Government before deciding to rescind that policy.

The Government’s bases for rescinding DACA fall far short of the reasoned explanation the APA re-

quires. As in *Encino*, “[w]hatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all” for rescinding DACA. 136 S. Ct. at 2127. “In light of the serious reliance interests at stake, the [Government’s] conclusory statements do not suffice to explain its decision.” *Ibid.* The Government’s decision to rescind DACA is entitled to no deference and should be held unlawful under the APA.

CONCLUSION

For the foregoing reasons, the Supreme Court should affirm the judgments and orders below.

Respectfully submitted.

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