

No. 18-587

---

---

IN THE  
**Supreme Court of the United States**

---

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 PROFESSORS—  
DEAN RONALD A. CASS,  
CHRISTOPHER C. DEMUTH, SR., AND  
JAMES L. HUFFMAN—AS *AMICI CURIAE*  
IN SUPPORT OF NEITHER PARTY**

---

RONALD A. CASS  
*Counsel of Record*  
CASS & ASSOCIATES, PC  
10560 Fox Forest Drive  
Great Falls, VA 22066-1743  
(703) 438-7590  
roncass@cassassociates.net  
*Counsel for Amici Curiae*

August 23, 2019

---

---

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT.....	11
I. Judicial Review Should Not Intrude on Discretion Granted to Administrators by Law .....	11
A. Courts’ Review of Discretionary Agency Action under the APA Is Strictly Limited.....	11
1. The APA Provides Limited Review of Discretionary Actions for which Review Is Not Excluded .....	11
2. Discretionary Actions Based on Policy Considerations Are Subject to Narrow Review for Specific Decision-Making Failures.....	13
B. The Scope of Review for Discretionary Agency Actions Is Identical for Initial Decisions on an Issue or Changes in Agency Policy Respecting an Issue .....	18
II. Courts Should Not Inquire into, or Base Decisions on, Administrators’ Motives for Actions Challenged under the APA .....	25
A. Review of Agency Action under the APA Focuses on Lawfulness Judged by the Reasons Given, Not Motives ....	25

TABLE OF CONTENTS—Continued

	Page
B. Inquiries into Officials’ Motives Intrude on Spheres of Action Committed to Co-Equal Branches of Government and Invite Litigation Based on Political or Personal Predilections.....	28
CONCLUSION .....	33

## TABLE OF AUTHORITIES

CASES	Page(s)
<i>American Trucking Associations v. United States</i> , 344 U.S. 298 (1953).....	12
<i>American Trucking Assns., Inc. v. Atchison, T. &amp; S. F. R. Co.</i> , 387 U. S. 397 (1967).....	23-24
<i>Baltimore Gas &amp; Electric Co. v. Natural Resources Defense Council, Inc.</i> , 462 U.S. 87 (1983).....	17
<i>Barnhart v. Walton</i> , 535 U.S. 212 (2002).....	18
<i>Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.</i> , 419 U. S. 281 (1974).....	4, 13, 23
<i>Camp v. Pitts</i> , 411 U.S. 138 (1973).....	28, 29
<i>Caperton v. A.T. Massey Coal Co., Inc.</i> , 556 U.S. 868 (2009).....	29
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984) ( <i>Chevron</i> ).....	5, 15
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971).....	17, 18
<i>City of Arlington v. Federal Communications Commission</i> , 133 S. Ct. 1863 (2013) .....	16
<i>Cuozzo Speed Technologies, LLC v. Lee</i> , 136 S. Ct. 2131 (2016).....	5, 15, 16

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Department of Agriculture v. Moreno</i> , 413 U.S. 528 (1973).....	8, 26, 27
<i>Department of Commerce v. New York</i> , 588 U.S. ___ (2019) .....	<i>passim</i>
<i>Encino Motorcars, LLC v. Navarro</i> , 136 S. Ct. 2117 (2016).....	24
<i>Federal Communications Commission v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009).....	<i>passim</i>
<i>Federal Communications Commission v. National Citizens Committee for Broadcasting</i> , 436 U.S. 775 (1978).....	12
<i>FERC v. Electric Power Supply Assn.</i> , 577 U. S. ___ (2016) .....	7, 24
<i>Free Enterprise Fund v. Public Company Accountability Oversight Board</i> , 561 U.S. 477 (2010).....	20, 21
<i>Gibson v. Berryhill</i> , 411 U.S. 564 (1973).....	29, 30
<i>Gregoire v. Biddle</i> , 177 F.2d 579 (2d Cir. 1949) .....	7-8, 9, 25, 30
<i>Gundy v. United States</i> , 588 U.S. ____ (2019).....	14
<i>Gutierrez-Brizuela v. Lynch</i> , 834 F.3d 1142 (10th Cir. 2016).....	5, 16
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985).....	<i>passim</i>

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.