

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 FOR RESPONDENTS**  
**THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,**  
**JANET NAPOLITANO, AND THE CITY OF SAN JOSÉ**

---

Jeffrey M. Davidson  
David Watnick  
COVINGTON & BURLING LLP  
415 Mission Street, Suite 5400  
San Francisco, CA 94105-2533  
(415) 591-6000

Charles F. Robinson  
Margaret Wu  
Sonya Sanchez  
University of California  
Office of the General Counsel  
1111 Franklin Street, 8th Floor  
Oakland, CA 94607  
(510) 987-9800

Robert A. Long  
*Counsel of Record*  
Lanny A. Breuer  
Mark H. Lynch  
Alexander A. Berengaut  
Megan A. Crowley  
Ivano M. Ventresca  
COVINGTON & BURLING LLP  
One CityCenter  
850 Tenth Avenue, NW  
Washington, DC 20001  
(202) 662-6000

*Counsel for The Regents of the University of California  
and Janet Napolitano*

(Additional Captions and Counsel Listed On Inside Cover)

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.

MARTIN JONATHAN BATALLA VIDAL, ET AL.  
*Respondents.*

---

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

---

Justin T. Berger  
Brian Danitz  
Tamarah Prevost  
COTCHETT, PITRE & MCCARTHY, LLP  
840 Malcolm Road, Suite 200  
Burlingame, CA 94010  
(650) 697-6000  
*Counsel for City of San José*

## QUESTIONS PRESENTED

1. Whether the decision of the Acting Secretary of Homeland Secretary to rescind the Deferred Action for Childhood Arrivals (DACA) policy is subject to judicial review under the Administrative Procedure Act.
2. Whether the decision to rescind the DACA policy was arbitrary and capricious.

**TABLE OF CONTENTS**

INTRODUCTION..... 1

STATUTORY AND REGULATORY  
PROVISIONS INVOLVED..... 2

STATEMENT ..... 2

SUMMARY OF ARGUMENT ..... 14

ARGUMENT ..... 17

I. The Rescission Of DACA Is Reviewable. .... 17

    A. Acting Secretary Duke’s Decision Is  
    Reviewable..... 18

    B. The Nielsen Memorandum Does Not  
    Alter The Reviewability Analysis. .... 26

II. The Rescission Of DACA Was Arbitrary  
And Capricious..... 30

    A. The Rescission Of DACA Was Not  
    Adequately Explained. .... 31

        1. The Duke Memorandum Fails To  
        Adequately Explain The  
        Rescission. .... 32

        2. The Nielsen Memorandum Does  
        Not Cure The Defects In The Duke  
        Memorandum. .... 37

- 3. The Agency Failed To Give Adequate Consideration To Reliance Interests. .... 40
- B. DACA Is Lawful. .... 44
  - 1. DACA Is A Lawful Exercise Of Authority Conferred By The INA. .... 44
  - 2. The Government’s Arguments That DACA Is Unlawful Lack Merit. .... 49
  - 3. “Litigation Risk” Is Not A Valid, Independent Basis For Rescinding DACA. .... 53
- C. This Court Should Not Rule For The Government Without A Complete Administrative Record, Particularly Given The Evidence Of Pretext. .... 55
  - 1. The Administrative Record Is Incomplete. .... 55
  - 2. There Is Evidence That DHS’s Explanation Is Pretextual. .... 56
- CONCLUSION ..... 58
- APPENDIX.....1a

# 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.