No. 17-1003

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 Petition for a Writ of Certiorari before Judgment to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This dispute concerns the policy of immigration enforcement discretion known as Deferred Action for Childhood Arrivals ("DACA"). In 2016, this Court affirmed, by an equally divided Court, a decision of the Fifth Circuit holding that two related Department of Homeland Security (DHS) enforcement policies, including an expansion of the DACA policy, were likely unlawful and should be enjoined. *See United States v. Texas*, 136 S.Ct. 2271 (*per curiam*). In September 2017, the former Acting Secretary of Homeland Security determined that the original DACA policy would likely be struck down by the courts on the same grounds and that the policy was unlawful. Accordingly, she instituted an orderly wind-down of the DACA policy.

The district court here concluded that respondents are likely to succeed in proving that the Acting Secretary's decision to rescind the DACA policy was arbitrary and capricious, and it enjoined DHS from rescinding it on a nationwide basis while this litigation proceeds.

The questions presented are as follows:

1. Whether the Acting Secretary's decision to wind down the DACA policy is judicially reviewable.

2. Whether the Acting Secretary's decision to wind down the DACA policy is lawful.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation founded in 1981. For more than thirty-five years, EFELDF has defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. In addition, EFELDF has consistently opposed unlawful behavior,

[1] *Amicus* files this brief with all parties' consent, with more than 10 days' written notice prior to the deadline for filing such briefs; the individual respondents have lodged their blanket consent with the Court, and *amicus* has lodged the other parties' written consent to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

including illegal entry into and residence in the United States. For all these reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Several states, state universities, and individuals sued federal immigration officials to challenge the rescission of the Deferred Action for Childhood Arrivals ("DACA") policy implemented by the prior administration, after that administration proved unable to convince Congress to enact legislation to address illegal aliens who arrived here as minors, such as those brought by parents who immigrated here illegally. In addition to providing deferred-action status with respect to deportation, the DACA program also provided its beneficiaries with work authorization.

On September 5, 2017, after reviewing the DACA situation, the new administration rescinded DACA, with a future effective date of March 5, 2018, to allow time for Congress to act. A major part of the rationale was that the successful state plaintiffs in *Texas v. U.S.*, 787 F.3d 733, 762-65 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S.Ct. 2271 (2016) ("*Texas*"), had announced plans to challenge DACA on the same grounds on which they challenged the similar policies in the *Texas* litigation.

By way of background, Congress has plenary power to regulate immigration, U.S. CONST. art. I, §8, cl. 4, which it has done in the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"). For its part, the Executive Branch has the duty to take care that the laws are faithfully executed. U.S. CONST.

art. II, §3. Except where Congress has delegated rulemaking authority to the Executive Branch, "[a]ll legislative Powers [are vested] in [the] Congress." U.S. CONST. art. I, §1.

The district court granted plaintiffs' motion for a preliminary injunction, based primarily on the district court's view that the rescission did not adequately state a rationale for departing from the prior administration's DACA policy, citing *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*MVMA*") and its progeny. The federal officials appealed the injunction to the Ninth Circuit and, at the same time, petitioned this Court for a writ of *certiorari* before judgment. EFELDF adopts the facts as stated in the petition (at 2-12).

SUMMARY OF ARGUMENT

The district lacked jurisdiction for a preliminary injunction not only under Article III but also under the waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), and INA's preclusion-of-review provision. 8 U.S.C. §1252(g). As to standing, DACA cannot serve as the basis for a judicially cognizable right because mere agency action cannot create a federal right, and the fact that the prior administration misled beneficiaries into applying for DACA does not support estoppel against the government (Section I.A). With respect to judicial review, §1252(g) displaces APA review for the immigration policies at issue here (Section I.B.1), and APA review is unavailable because rescission hit not one *but three* separate APA barriers: the actions are committed to agency

discretion, fall under the special statutory review under INA, and are non-final (Section I.B.2).

On the merits, the 2012 DACA policy is void *ab initio* because it was issued in violation of APA notice-and-comment requirements by virtue of its creating rights and cabining discretion in a sufficiently binding manner to exceed its mere enforcement-discretion justification (Section II.A). Alternatively, if viewed as a mere statement of policy, DACA did not create any rights or even constitute final agency action because such policies are not final, but become final only on a case-by-case basis when applied (Section II.B). In any event, DACA's unlawfulness under *Texas* and a pause to allow congressional action provided ample *MVMA* rationales for rescission (Section II.C).

In addition to the foregoing, the unusual step of granting *certiorari* before judgment is justified here for two reasons, in addition to those pressed by the petitioners. First, review would help curb the overuse of nationwide injunctions, which both thwart the orderly percolation of legal issues through the circuits and defeat the procedural protections for class-action defendants (Section III.A). Second, regrettably, judicial review of the Trump administration's policies has begun to have the appearance of having crossed the fine line between independent judicial review of the Executive Branch and open judicial resistance to the 2016 election, thus warranting this Court's exercising its supervisory authority over the lower federal courts (Section III.B).

ARGUMENT

Before addressing the justiciability and merits of DACA's rescission, *amicus* EFELDF first addresses

the "whack-a-mole" issue[2] here, *Rasul v. Myers*, 563 F.3d 527, 534 (D.C. Cir. 2009), whereby the Obama administration defended DACA as purportedly not binding on agency discretion and creating no rights – and thus not requiring an APA rulemaking – but now DACA reappears in this litigation as somehow providing settled expectations that cannot be rescinded without APA procedures. *Amicus* EFEDLF respectfully submits that one or the other premise is flawed: Either DACA created no rights or – *if it did* – DACA required an upfront APA rulemaking and is thus void *ab initio* for lacking that rulemaking. In either case, plaintiffs lack a judicially cognizable right to enforce in this litigation, although the second prong relies on a merits argument to defeat plaintiffs' Article III standing. When standing and the merits "intertwine," federal courts must resolve the jurisdictional and merits issues together. *See Land v. Dollar,* 330 U.S. 731, 735 (1947).

I. THIS COURT SHOULD VACATE THE INJUNCTION BECAUSE PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE.

A federal court must have jurisdiction to issue a preliminary injunction, *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983), and this Court has the duty to examine jurisdiction, even if the parties conceded the issue. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 105 (1998). If jurisdiction is lacking, this Court should remand with an order to dismiss.

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[2] In the arcade game whack-a-mole, the player uses a mallet to hit a toy mole, which keeps reappearing in different holes.

Although jurisdiction merges or intertwines with the merits to some degree, *Land,* 330 U.S. at 735, the plaintiffs lack a justiciable claim, and this Court should grant review – and vacate the injunction – based on these important issues of federal-court jurisdiction, which "relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen v. Wright,* 468 U.S. 737, 750 (1984) (*quoting Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). The preliminary injunction violates both the separation of powers and principles of democratic self-government, *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1636-37 (2014), and must be vacated.

A. All plaintiffs lack a judicially cognizable injury because DACA could not and did not create any rights.

Under Article III, a plaintiff's standing is assessed under a tripartite test: judicially cognizable injury to the plaintiff, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). For at least one of several possible reasons, plaintiffs here lack a bare threshold injury that is judicially cognizable.

First, agency officers like petitioners – as well as their predecessors from the prior Administration – cannot create rights. Of course, "Congress may create a statutory right … the alleged deprivation of which can confer standing," *Warth v. Seldin,* 422 U.S. 490, 514 (1975), but mere agencies cannot create rights. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577

n.18 (1979). As Justice Scalia colorfully explained, "Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). If the prior administration had wanted to create rights, it needed either to work with Congress to enact new legislation or, at least, to act using the APA rulemaking authority that Congress has delegated for agencies to create regulatory rights in furtherance of rights that Congress already created by statute. Having taken neither of these two acceptable routes, DACA did not create any rights that plaintiffs can enforce in court.[3]

Second, and relatedly, to the extent that plaintiffs and the district court complain about unfairness, they are complaining to the wrong branch of government:

> SIPC and the Trustee contend that the result we reach sanctions injustice. But even if that were the case, the argument is made in the wrong forum, for we are not at liberty to legislate.

Touche Ross, 442 U.S. at 579. Neither this Court nor the district court has the power to alter plaintiffs' immigration status by enjoining Executive Branch officers. Instead, as the prior administration and current administration both have recognized, the only lawful solution here is action by Congress.

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[3] Failure to follow APA requirements renders the resulting agency action both void *ab initio* and unconstitutional. *Chrysler Corp. v. Brown,* 441 U.S. 281, 303 (1979); *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it"); *see* Section II.A, *infra*.

Third, even the district court admits that DACA represents an "expectation of (though not a right to) continued deferred action," Pet. App. 29a, which is not enough. Nor does the district court's repeated invocation of five years of reliance by 689,800 DACA beneficiaries, *see*, *e.g.*, *id.* 28a, affect the analysis. Most obviously, something that is "not a right" is also not a judicially cognizable right. But reliance is no basis to estop the federal government. *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 419-20 (1990) ("equitable estoppel will not lie against the Government"). What plaintiffs call an "expectation" was simply misplaced reliance on the administration that issued DACA:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

Fed'l Crop. Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947). Insofar as DACA beneficiaries feel misled, it was the prior administration that misled them. But under *Merrill* and its progeny, having been misled does not provide any rights to redress.

Fourth, third parties such as the institutional and state plaintiffs "lack[] a judicially cognizable interest in the prosecution *or nonprosecution* of another," which "applies no less to prosecution for civil [matters] … than to prosecution for criminal [matters]." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 204 (2000) (emphasis added, internal

quotations omitted). Similarly, it is a "fundamental restriction on [judicial] authority" that "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties," *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2663 (2013) (interior quotations omitted). Thus, the third-party institutional and state plaintiffs lack standing.

B. The amendment or rescission of mere enforcement policies – as distinct from rules or regulations – is unreviewable generally, and especially so in the immigration context at issue here.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dept. of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Moreover, such waivers are strictly construed, in terms of their scope, in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Thus, aside from lacking standing, plaintiffs also lack a waiver of sovereign immunity for this APA action under both INA and APA. As such, the district court lacked jurisdiction to hear these claims, much less to issue an injunction.

1. Judicial review of DACA's rescission is precluded by §1252(g).

As the government explains, §1252(g) requires all judicial review connected to removals to fall under INA. Pet. at 21-24. Indeed, this Court has recognized that §1252(g) was both "clearly designed to give some

measure of protection to 'no deferred action' decisions and similar discretionary determinations," *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999), and – for actions that "are reviewable at all" – to their "be[ing] made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." *Id.* The history of §1252(g)'s predecessor dates back to this Court's ill-fated decision in *Brownell v. We Shung*, 352 U.S. 180, 184-85 (1956), *abrogated by* PUB. L. NO. 87-301, §5(b), 75 Stat. 650, 653 (1961),[4] which allowed APA review for aliens detained at the border.

As the government also explains, §1252(g)'s focus on removal proceedings is not an invitation for aliens to file pre-enforcement APA actions preemptively, before removal proceedings commence. Pet. at 23-24. Only when preclusion-of-review statutes provide no opportunity whatsoever for review has the Court used equity to provide review. *Leedom v. Kyne,* 358 U.S. 184, 188-90 (1958). But that extraordinary relief is not available where – as here – Congress precludes pre-enforcement review, but allows review in enforcement proceedings. *Board of Governors of the Federal Reserve System v. MCorp Financial,* 502 U.S. 32, 43-44 (1991). That is the only review available here.

2. Judicial review of DACA's rescission falls outside the APA.

In the 1976 APA amendments to 5 U.S.C. §702, Congress "*eliminat[ed]* the sovereign immunity

[4] "Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made … may obtain judicial review of such order by habeas corpus proceedings and not otherwise." PUB. L. NO. 87-301, §5(b), 75 Stat. at 653.

defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.). But that waiver has several restrictions that preclude review.

First, as the government explains, Pet. at 16-21, APA exempts actions committed to agency discretion from APA review. 5 U.S.C. §701(a)(2). In addition to the arguments that the government makes, *amicus* EFELDF respectfully submits that this issue includes a whack-a-mole element. If DACA so cabined agency discretion as to lie beyond discretionary rescission, DACA required a rulemaking in the first place and thus is void *ab initio*. *See* Section II.A, *infra*.

Second, APA excludes APA review for "statutes [that] preclude judicial review" and ones with "special statutory review." 5 U.S.C. §§701(a)(1), 703. When a statute provides special statutory review, APA review is not available. *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984). *Amicus* EFELDF respectfully submits that INA review is exactly the type of statutory review that precludes APA review.[5]

Third, and finally, APA review applies only to agency action made reviewable by statute and *final agency action* for which no adequate remedy is available. 5 U.S.C. §704. To the extent that an

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[5] Insofar as APA is a statute that provides nonstatutory review, the term "nonstatutory" has become something of a "misnomer." *Air New Zealand Ltd. v. C.A.B.,* 726 F.2d 832, 836-37 (D.C. Cir. 1984) (Scalia, J.).

enforcement policy like DACA does not bind agency actors, the enforcement policy is not final agency action. *See* Section II.B, *infra*; *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Instead, the final agency action lies in the agency action to apply the policy in a specific case. *See* Section II.B, *infra*. As such, assuming *arguendo* that DACA's issuance did not impermissibly bind agency discretion without APA rulemaking, neither DACA's issuance nor its rescission is final agency action, *id.*, which places them outside APA review. 5 U.S.C. §704. On the other hand, if DACA's issuance *did* bind agency discretion so that its rescission now would qualify as final agency action, then DACA is void *ab initio* for failure to follow required APA rulemaking procedures in the first place. *See* Section II.A, *infra*.

For all three of these reasons, rescinding DACA fell outside of not only APA review but also APA's waiver of sovereign immunity.

II. THIS COURT SHOULD VACATE THE INJUNCTION BECAUSE PLAINTIFFS CANNOT PREVAIL ON THE MERITS.

Plaintiffs must show a likelihood of prevailing on the merits to establish entitlement to a preliminary injunction. *Winter v. Natural Resources Def. Council, Inc.,* 555 U.S. 7, 20 (2008). Because plaintiffs cannot make that showing for DACA's rescission, this Court should grant review in this important case.

A. As a legislative rule adopted without an APA rulemaking, DACA is void *ab initio*.

As the Fifth Circuit held and an equally divided panel of this Court affirmed, a procedurally identical form of DACA-like relief violated APA's notice-and-

comment rulemaking procedures. *Texas*, 787 F.3d at 762-65, *aff'd by an equally divided Court*, 136 S.Ct. 2271 (2016). So too with DACA, which is void *ab initio* on the merits.

Specifically, DACA's issuance violated APA's rule-making requirements as a legislative rule issued without complying with APA's notice-and-comment requirements, 5 U.S.C. §553(b), without eligibility for any exceptions to the requirement. *Id.* §553(b)(A)-(B). The exemption for policy statements and interpretive rules:

- Does not apply when agency action narrows the discretion otherwise available to agency staff, *Texas Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.,* 201 F.3d 551, 556 (5th Cir. 2001); *General Elec. Co. v. EPA,* 290 F.3d 377, 380 (D.C. Cir. 2002);
- Cannot be used to promulgate the regulatory basis on which to confer benefits, *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 908 (5th Cir. 1983); *Chrysler,* 441 U.S. at 302; and
- Cannot be used to promulgate new rules that effectively amend existing rules. *Am. Mining Congress v. Mine Safety & Health Admin.,* 995 F.2d 1106, 1112 (D.C. Cir. 1993); 5 U.S.C. §551(5) (defining "rule making" as the "agency process for formulating, *amending,* or repealing a rule") (emphasis added); *Shell Offshore Inc. v. Babbitt,* 238 F.3d 622, 629 (5th Cir. 2001).

DACA cannot meet these tests.

In essence, when an agency fails to follow the procedures ordained by Congress, the resulting rule violates the core constitutional requirements for

making law, which "are *integral* parts of the constitutional design for the separation of powers." *INS v. Chadha,* 462 U.S. 919, 946 (1983) (emphasis added). Valid legislative rules must either satisfy bicameralism and presentment requirements, *Chadha,* 462 U.S. at 951, or they must fully satisfy the limited administrative exemption that APA provides. *FTC v. Morton Salt Co.,* 334 U.S. 37, 44-45 (1948) ("the burden of proving justification or exemption … generally rests on one who claims its benefits"). When acting within APA requirements, a federal agency *might* be on solid ground. When acting outside those requirements, however, a federal agency simply seeks to usurp congressional power.

Under APA, DACA plainly required notice-and-comment rulemaking. For example, employment authorization is a benefit that is "granted" to beneficiary aliens, 8 C.F.R. §274a.12(c)(14), under sixteen specific circumstances, 8 C.F.R. §274a.12(a)(1)-(16), none of which apply to the across-the-board DACA program. *Cf. U.S. v. Picciotto,* 875 F.2d 345, 346-49 (D.C. Cir. 1989) (agency cannot add new, specific, across-the-board conditions under general, case-by-case authority to consider changes). Under the foregoing APA criteria, DACA qualifies as a legislative rule, which agencies cannot issue by memoranda or interpretation.

Procedurally infirm rules are a nullity, *Avoyelles Sportsmen's League,* 715 F.2d 897, 909-10; *McLouth Steel Products Corp. v. Thomas,* 838 F.2d 1317, 1322-23 (D.C. Cir. 1988); *State of Ohio Dep't of Human Serv. v. U.S. Dept. of Health & Human Serv., Health Care Financing Admin.,* 862 F.2d 1228, 1237 (6th Cir.

1988); *North Am. Coal Corp. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor,* 854 F.2d 386, 388 (10th Cir. 1988), even if they would have been *substantively* valid if promulgated via notice-and-comment rulemaking. Thus, DACA is a nullity.

B. If DACA did not bind agency discretion, rescission would be a lawful exercise of the same discretion used to issue DACA.

Alternatively, assuming *arguendo* that DACA did not impermissibly bind agency discretion or confer benefits without a rulemaking, an "agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy." *Pacific Gas & Elec. Co. v. F.P.C.,* 506 F.2d 33, 38-39 (D.C. Cir. 1974). Accordingly, such statements are not entitled to deference when an agency relies on them to resolve a *future* substantive question because, logically, the future action (not the initial statement) is the final agency action. *Id.*; *accord Texaco, Inc. v. F.P.C.,* 412 F.2d 740, 744 (3d Cir. 1969); *Amrep Corp. v. FTC,* 768 F.2d 1171, 1178 (10th Cir. 1985); *Mada-Luna v. Fitzpatrick,* 813 F.2d 1006, 1013-14 (9th Cir. 1987). Thus, as an alternative to considering the APA notice-and-comment issue, this Court could simply find that DACA was a mere "general statement of policy" that the petitioners could change at any time without APA compliance.

C. Assuming *arguendo* that *MVMA* review is available, DACA's rescission meets that narrow test.

The district court found DACA's rescission to fail to provide a "'reasoned explanation' as to why she was 'disregarding facts and circumstances which underlay or were engendered by the prior policy.'" Pet. App. at 59a. (*quoting F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009)); *see also MVMA*, 463 U.S. at 43. The district court is wrong for several reasons, not only because DACA is illegal as the *Texas* litigation demonstrated but also because – even if DACA were lawful – it would have been supportable under *MVMA* for petitioners to prefer that Congress address the issue in the first instance. *See*, *e.g.*, *Schuette*, 134 S.Ct. at 1636-37 (legislated solutions are preferable to imposed solutions in matters of public policy). Quite simply, the district court overstates the degree of judicial second-guessing that the *MVMA* line of cases requires in this context.

Federal courts lack authority to set procedural hurdles for agencies, beyond the requirements that Congress imposed in APA. *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1207 (2015); *Fox*, 556 U.S. at 514-15. Accordingly, *MVMA* "neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance," and APA "makes no distinction … between initial agency action and subsequent agency action undoing or revising that action." *Fox*, 556 U.S. at 514-15. All that *MVMA* required was "a reasoned analysis for the change beyond that which may be required when an

agency *does not act* in the first instance." *Id.* at 514 (internal quotations omitted, emphasis in *Fox*). Insofar as no one – yet – has argued that petitioners and their predecessors were *compelled* to issue DACA, the *MVMA* threshold for an analysis over and above inaction is low indeed.

As indicated, DACA's unlawfulness under *Texas* and petitioners' desire for Congress – not federal bureaucrats – to set immigration policy easily meet the need for reasoned analysis, *see* Section II.A, *supra*; *Schuette*, 134 S.Ct. at 1636-37, even assuming *arguendo* that *MVMA* applies when an agency withdraws a purportedly non-binding enforcement policy, while leaving in place all of the underlying authority to issue the same type of relief in an appropriate removal proceeding.

III. THIS LITIGATION RAISES QUESTIONS OF EXTRAORDINARY IMPORTANCE.

In addition to the two questions presented in the petition, *amicus* EFELDF respectfully submits that two additional issues warrant the unusual step of a grant of *certiorari* before judgment: (1) the use of a nationwide injunction that unnecessarily extends beyond the specific plaintiffs who filed suit, and (2) the sheer volume of such injunctions, apparently designed to thwart initiatives of the Trump administration and thus to overturn the 2016 election.

A. Nationwide injunctions should not issue in these circumstances.

Nationwide injunctions effectively preclude other circuits from ruling on the constitutionality of the enjoined agency action. In addition to conflicting with the principle that federal appellate decisions are

binding only within the court's circuit, *see*, *e.g.*, *U.S. v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994), nationwide injunctions "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," which deprives this Court of the benefit of decisions from several courts of appeals. *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984). That practical harm is reason enough for this Court's involvement.

Similarly, injunctions that go beyond the parties before the court short-circuit procedural protections for class actions. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotations omitted). "To come within the exception, a party seeking to maintain a class action must affirmatively demonstrate his compliance with Rule 23." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal quotations omitted).

When plaintiffs purport to represent a class of similarly situated persons or entities, the law requires that the protected class is indeed similarly situated. FED. R. CIV. P. 23(a)(1)-(4) (requiring commonality and typicality, as well as numerosity and adequacy of representation). Thus, this Court has "repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co. of the SW. v. Falcon*, 457 U.S. 147, 156 (1982) (interior quotations omitted). The rules also contemplate subclasses, FED. R. CIV. P. 23(c)(5), which can even be required:

> Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses….

Amchem Prods. v. Windsor, 521 U.S. 591, 627 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831-32 (1999). For example, at least at the preliminary-injunction phase, the equities might balance differently under immigration law for DACA beneficiaries who either served in the military or graduated from college than they would balance for DACA beneficiaries who neither speak English nor graduated from high school. Indeed, DACA veterans and college graduates are often held out to represent all DACA beneficiaries, when they are actually a much smaller and non-representative subset of DACA beneficiaries.

B. This Court's supervisory authority requires action to avoid the appearance of lower-court "resistance" to the 2016 election.

Amicus EFELDF respectfully submits that this Court's supervisory authority over the lower federal courts warrants a grant of *certiorari* before judgment to review the increasing pace of injunctions from reliably liberal circuits – such as the Ninth Circuit here – against policies on which the prevailing party campaigned in the 2016 election. While independent judicial review is critical to the separation of powers under our tripartite branches of government, there is a fine line between unbiased and independent judicial review and an attempt to nullify the 2016 election. In order to preserve public respect for the former, *amicus*

EFELDF respectfully submits that this Court must pay attention to even the *appearance* of the latter, which would be profoundly dangerous to our system of government and Constitution.

CONCLUSION

The Court should grant the petition for a writ of *certiorari* before judgment.

February 2, 2018

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