

1 CHAD A. READLER
 Acting Assistant Attorney General
 2 BRIAN STRETCH
 United States Attorney
 3 BRETT A. SHUMATE
 Deputy Assistant Attorney General
 4 JENNIFER D. RICKETTS
 Branch Director
 5 JOHN R. TYLER
 Assistant Branch Director
 6 BRAD P. ROSENBERG (DC Bar #467513)
 Senior Trial Counsel
 7 STEPHEN M. PEZZI (DC Bar #995500)
 KATE BAILEY (MD Bar #1601270001)
 8 Trial Attorneys
 9 United States Department of Justice
 Civil Division, Federal Programs Branch
 10 20 Massachusetts Avenue, NW
 Washington, DC 20530
 11 Telephone: (202) 514-3374
 12 Facsimile: (202) 616-8460
 13 E-mail: brad.rosenberg@usdoj.gov
 14

15 *Attorneys for Defendants*

16 **UNITED STATES DISTRICT COURT FOR THE**
 17 **NORTHERN DISTRICT OF CALIFORNIA**

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

21 Plaintiffs,

22 v.

23 UNITED STATES DEPARTMENT OF
 24 HOMELAND SECURITY and KIRSTJEN
 25 M. NIELSEN,¹ in her official capacity as the
 Secretary of Homeland Security,

26 Defendants.

No. 3:17-cv-05211-WHA

DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR JUDICIAL
NOTICE AND TO SUPPLEMENT THE
RECORD

Judge: Honorable William Alsup
 Hearing: February 8, 2018, 8:00 a.m.
 Place: San Francisco U.S. Courthouse,
 Courtroom 12, 19th Floor

27 ¹ Pursuant to Federal Rule of Civil Procedure 25(d), Kirstjen M. Nielsen, in her official capacity
 28 as the Secretary of Homeland Security, has been substituted as a defendant in all of these matters
 (Nos. 17-5211, 17-5235, 17-5329, 17-5380, 17-5813) for Elaine C. Duke.

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2 STATE OF CALIFORNIA, STATE OF
3 MAINE, STATE OF MARYLAND, and
4 STATE OF MINNESOTA,

5 Plaintiffs,

6 v.

7 U.S. DEPARTMENT OF HOMELAND
8 SECURITY, KIRSTJEN M. NIELSEN, in her
9 official capacity as Secretary of Homeland
10 Security, and the UNITED STATES OF
11 AMERICA,

12 Defendants.

No. 3:17-cv-05235-WHA

13 CITY OF SAN JOSE, a municipal
14 corporation,

15 Plaintiff,

16 v.

17 DONALD J. TRUMP, President of the United
18 States, in his official capacity, KIRSTJEN M.
19 NIELSEN, in her official capacity as
20 Secretary of Homeland Security, and the
21 UNITED STATES OF AMERICA,

22 Defendants.

No. 3:17-cv-05329-WHA

23 DULCE GARCIA, MIRIAM GONZALEZ
24 AVILA, SAUL JIMENEZ SUAREZ,
25 VIRIDIANA CHABOLLA MENDOZA,
26 NORMA RAMIREZ, and JIRAYUT
27 LATTHIVONGSKORN,

28 Plaintiffs,

v.

UNITED STATES OF AMERICA,
DONALD J. TRUMP, in his official capacity

No. 3:17-cv-05380-WHA

1 as President of the United States, U.S.
2 DEPARTMENT OF HOMELAND
3 SECURITY, and KIRSTJEN M. NIELSEN,
4 in her official capacity as Secretary of
5 Homeland Security,

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9 Defendants.

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11 COUNTY OF SANTA CLARA and
12 SERVICE EMPLOYEES INTERNATIONAL
13 UNION LOCAL 521,

14 Plaintiffs,

15 v.

No. 3:17-cv-05813-WHA

16 DONALD J. TRUMP, President of the United
17 States, in his official capacity; JEFFERSON
18 BEAUREGARD SESSIONS, Attorney
19 General of the United States, in his official
20 capacity; KIRSTJEN M. NIELSEN, Secretary
21 of Homeland Security, in her official capacity;
22 and the U.S. DEPARTMENT OF
23 HOMELAND SECURITY,

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28 Defendants.

**DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION
FOR JUDICIAL NOTICE AND TO SUPPLEMENT THE RECORD**

1
2 Plaintiffs in these five related lawsuits have filed a Motion for Judicial Notice and to
3 Supplement the Record (“Pls.’ Mot.”), ECF No. 227.² In their motion, Plaintiffs refer to a
4 December 29, 2017 tweet, in which President Trump said:

5
6 The Democrats have been told, and fully understand, that there can be no DACA
7 without the desperately needed WALL at the Southern Border and an END to the
horrible Chain Migration & ridiculous Lottery System of Immigration etc. We must
protect our Country at all cost!

8 Decl. of Jeffrey M. Davidson in Supp. of Pls.’ Mot. for Judicial Notice and to Supplement the
9 Record, Ex. A, ECF No. 227-2.

10 The Court should not take judicial notice of the tweet for purposes of their Administrative
11 Procedure Act claims because Plaintiffs cannot rely on material outside of the Administrative
12 Record (“AR”) to demonstrate that the rationale supporting the rescission of DACA was
13 pretextual. *See* Defs.’ Mem. in Opp’n to Pls.’ Mot. for Provisional Relief (“Defs.’ PI Opp.”),
14 ECF No. 204, at 21-22. Nor is the President’s tweet relevant to the question whether then-Acting
15 Secretary Duke—the only official vested with authority to make the decision—offered pretextual
16 reasons for rescinding DACA. *Id.* at 22-24.

17 In any event, the tweet—issued almost four months after the rescission—simply does not
18 “support[] the inference that defendants rescinded DACA not for the reasons [that] they stated,
19 but to create [a] bargaining opportunity.” Pls.’ Mot. at 2. The Administrative Record indicates
20 that DACA was rescinded due to litigation risk and concerns about the policy’s legality. *See* AR
21 254-55, ECF No. 64-1. As reflected in the appendix that Plaintiffs themselves submitted with
22 their motion for provisional relief, DACA was never intended to be anything more than “a
23 temporary stopgap measure” until Congress could address the issue, including the “need to pass
24 comprehensive immigration reform . . . that continues to improve our border security.” *Remarks*
25 *by President Obama on Immigration* (June 15, 2012), App’x in Supp. of Pls.’ Mot. for Prov.
26 Relief (Pls.’ App’x), Ex. Q, at 1739-40, ECF No. 121-1; *see also* Defs.’ PI Opp., ECF No. 204,
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28 ² All references to docket entries refer to the docket in *Regents of the University of California v. U.S. Dep’t of Homeland Sec.*, No. 3:17-cv-05211-WHA.

1 at 23. DACA’s rescission, however, was prompted by the *Texas* lawsuit and the litigation risk
2 that flowed therefrom. Nothing in the tweet—which is completely silent on DACA’s rescission—
3 says otherwise.

4 Nor does the tweet “underscore[] that the Rescission was fundamentally unfair and did
5 not further any compelling government interest” so as to violate substantive due process. Pls.’
6 Mot. at 3. As noted above, the tweet does not indicate that the rescission of DACA “was a tactic
7 used to gain leverage to enact the administration’s immigration agenda.” *Id.* (citation omitted).
8 The determination by the then-Acting Secretary of Homeland Security that DACA should be
9 rescinded is a separate question from the terms on which the President would support
10 congressional legislation. Nor can legislative negotiations “shock[] the conscience,” as Plaintiffs
11 suggest. *Id.* To the contrary, in a January 3, 2018 letter to congressional leadership, former
12 Secretary of Homeland Security (and named Plaintiff) Janet Napolitano explicitly recognized that
13 “successful implementation of DACA legislation . . . could include sensible increases in border
14 security funding,” and noted that “bipartisan legislation provides an opportunity to both
15 permanently protect these young people and further secure the border.” *See* Declaration of Brad
16 P. Rosenberg, Ex. A (attached hereto). Plaintiff Napolitano’s acknowledgement that securing the
17 border is a worthy legislative goal is, of course, a goal that is also referenced in the tweet upon
18 which Plaintiffs rely.³ And in any event, when faced with a policy that is likely to be invalidated
19 or one inherently temporary, it is entirely reasonable and appropriate for the political branches to
20 consider various legislative solutions.

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26 ³ Plaintiffs quibble over the contours of possible immigration legislation by referring to that
27 legislation as “harsh.” Pls.’ Mot. at 2. It is respectfully submitted that it is not this Court’s role
28 to evaluate the relative policy merits of various legislative proposals. To the extent that the
Plaintiffs have particular views on the form of proposed legislation, they can make their views
known to the legislative branch, as named Plaintiff Napolitano has already done.

1 Dated: January 5, 2018

Respectfully submitted,

2 CHAD A. READLER
Acting Assistant Attorney General

3 BRIAN STRETCH
4 United States Attorney

5 BRETT A. SHUMATE
Deputy Assistant Attorney General

6 JENNIFER D. RICKETTS
7 Branch Director

8 JOHN R. TYLER
Assistant Branch Director

9 */s/ Brad P. Rosenberg*
10 BRAD P. ROSENBERG (DC Bar #467513)
Senior Trial Counsel
11 STEPHEN M. PEZZI (DC Bar #995500)
12 KATE BAILEY (MD Bar #1601270001)
Trial Attorneys
13 United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W.
14 Washington, DC 20530
Phone: (202) 514-3374
15 Fax: (202) 616-8460
Email: brad.rosenberg@usdoj.gov

16 *Attorneys for Defendants*
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