



November 29, 2021

To: U.S. Citizenship and Immigration Services, Department of Homeland Security
Re: Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736 (proposed Sept. 28, 2021), Docket No. USCIS-2021-0006

The Institute for Policy Integrity at New York University School of Law¹ (“Policy Integrity”) respectfully submits the following comments to the Department of Homeland Security (“DHS” or the “Department”) regarding its proposed rule to preserve and fortify the existing policy of Deferred Action for Childhood Arrivals, or “DACA” (“Proposed Rule”).² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decision-making through advocacy and scholarship in the fields of administrative law, economics, and public policy.

The Department appropriately considers various benefits and costs of the Proposed Rule, including the income earned by employed DACA recipients and the costs of applying for DACA status. DHS also responds to various arguments against the Proposed Rule. In this comment, Policy Integrity writes to encourage DHS to both supplement its Regulatory Impact Analysis (“RIA”) and more thoroughly address several arguments that it previously offered against the DACA program in its rescission memos.³ In particular, DHS should:

- Make further use of existing scientific and economic research to quantify and monetize key unquantified benefits in the RIA;
- Offer more evidence that the DACA program has no significant effect on legal or illegal immigration, in light of concerns raised by the U.S. District Court for the Southern District of Texas and in the Nielsen Rescission Memo; and
- More thoroughly address several policy arguments that it previously offered as justification to rescind the DACA program.

¹ This document does not purport to present the views, if any, of New York University School of Law.

² Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736 (proposed Sept. 28, 2021).

³ Memorandum from Acting Secretary Elaine C. Duke on the Rescission of DACA (Sept. 5, 2017) [hereinafter “Duke Rescission Memo”]; Memorandum from Secretary Kirstjen M. Nielsen on the Rescission of Deferred Action for Childhood Arrivals (DACA) (June 22, 2018) [hereinafter “Nielsen Rescission Memo”].

I. DHS Should Further Assess Key Unquantified Benefits of the Proposed Rule Using Available Scientific and Economic Research

In the Proposed Rule, DHS identifies a number of significant quality-of-life benefits of DACA status: a reduction in fear and anxiety, an increased sense of acceptance and belonging to a community, an increased sense of family security, and an increased sense of hope for the future.⁴ DHS also qualitatively describes other benefits such as the value of advance parole, ancillary uses of employment authorization documents, and streamlined enforcement encounters.⁵ The Department acknowledges the difficulties of quantification in these areas and solicits public comment on overcoming these challenges.⁶ Here, we offer scientific and economic research that will aid the Department in quantifying and in some cases monetizing these benefits. While this research may not enable DHS to quantify these benefits with exacting specificity, it will help the Department to more clearly identify the magnitude of the Proposed Rule’s benefits.

A. Improvements in Mental Health, Including Decreased Fear and Anxiety

While the Department properly recognizes that the Proposed Rule would improve the mental well-being of program beneficiaries including through a decrease in fear and anxiety, it should use available evidence to corroborate, quantify, and monetize this impact.

Scientific research supports the Department’s conclusion that the Proposed Rule would reduce fear and anxiety among program beneficiaries.⁷ One recent study looking at sleep behaviors (which are directly affected by stress) found that DACA-eligible immigrants after 2012 significantly improved their sleep duration, but the beneficial effects of DACA status on sleep behavior tended to dissipate starting in 2016.⁸ The study theorized that this dissipation stemmed from the rising uncertainty surrounding the continuation of DACA, due in part to threats by then-candidate Donald Trump to end the program.⁹ The study authors reasoned that the uncertainty around the DACA program may have undermined its positive impact on health and well-being, and, in turn, on sleep.¹⁰ Other studies have similarly concluded that DACA status has had a positive impact on the mental health and well-being of program beneficiaries and their children.¹¹

⁴ Proposed Rule, 86 Fed. Reg. at 53,742.

⁵ *Id.* at 53,797.

⁶ *Id.*

⁷ Broadly, uncertainty regarding legal status has been shown to contribute to stress levels. *See, e.g.,* Luz M. Garcini et al., *Health-Related Quality of Life Among Mexican-Origin Latinos: The Role of Immigration Legal Status*, 23 ETHNICITY & HEALTH 566, 578 (2018) (finding significant differences in health-related quality of life across immigration legal status subgroups and noting that increased stress was one factor that diminished wellbeing for undocumented immigrants); Karen Hacker et al., *The Impact of Immigration and Customs Enforcement on Immigrant Health: Perceptions of Immigrants in Everett, Massachusetts, USA*, 73 SOC. SCI. MED. 586, 586 (2011) (“[d]ocumented and undocumented immigrants reported high levels of stress due to deportation fear, which affected their emotional well-being and their access to health services.”).

⁸ Osea Giuntella, et al., *Immigration Policy and Immigrants’ Sleep. Evidence from DACA*, 182 J. ECON. BEHAV. & ORG. 1, 1–2 (2021).

⁹ *Id.* at 6.

¹⁰ *Id.*

¹¹ *See, e.g.,* Caitlin Patler et al., *Uncertainty About DACA May Undermine Its Positive Impact on Health for Recipients and Their Children*, 38 HEALTH AFFAIRS 738, 738 (2019) (finding self-reported well-being among DACA-eligible immigrants and their children improved between 2012 and 2015, but that those gains began to

As detailed below, the Department could use such research to quantify or qualitatively elaborate upon the economic and welfare impact of DACA’s mental health benefits. This includes calculating the cost of general fear and anxiety by looking at physical symptoms, academic performance, and the cost of self-help remedies; the cost of treating anxiety orders; and the broader healthcare costs of anxiety.

Quantifying Anxiety Generally: It is well documented that anxiety has serious consequences to one’s physical wellbeing, such as increased blood pressure, heart disease, and insomnia.¹² While it may be difficult to calculate the resulting costs from these physical symptoms, as it could be challenging to isolate the incidence of these conditions as a result of immigration-related anxiety in particular, DHS could incorporate the physical symptoms of stress into its discussion of the Proposed Rule’s benefits.

Chronic fear and anxiety also have detrimental effects on adolescents’ performance in school. Anxiety affects children’s ability to concentrate and excel in the classroom, and therefore impacts their academic success and professional prospects.¹³ Thus, preserving the DACA program could help recipients and their relatives to finish school, and thus reduce the achievement gap and dropout rate.¹⁴ DHS could look to quantifying anxiety in terms of loss in future earning potential stemming from anxiety-produced difficulties in school, for both DACA-eligible individuals themselves and their children or other family members.

The Department can also quantify the value of decreased anxiety by looking at individuals’ purchases. Millions of individuals make use of smartphone applications for the treatment of anxiety.¹⁵ A comparative study of how different apps designed to help users decrease anxiety attempted to monetize their product noted that three quarters of apps available to the U.S. market included either a download fee, a subscription fee, or in-app purchases.¹⁶ A review of the prices of such apps and the number of downloads could help monetize people’s

recede after 2015 as the political climate underscored the “politically-contingent” nature of the program); Atheendar S. Venkataramani et al., *Childhood Arrivals (DACA) Immigration Programme: A Quasi-Experimental Study*, 2 LANCET PUB. HEALTH 175(e), 175(e) (2017) (finding DACA-eligible individuals experienced a decrease in psychological distress with the introduction of the policy).

¹² See Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 CAL. L. REV. 1423, 1445 n.141(2014) (discussing how chronic stress has been linked to negative lifestyle behaviors, like smoking and weight-gain, as well as depression, heart disease, gastrointestinal problems, weakened immune system, insomnia, weight gain, and cognitive impairment).

¹³ Serap Akgun & Joseph Ciarrochi, *Learned Resourcefulness Moderates the Relationship Between Academic Stress and Academic Performance*, 23 EDUC. PSYCH. 287, 287 (2003) (“[A]cademic stress [is] negatively associated with academic performance”).

¹⁴ See Dana Carsley et al., *The Importance of Mindfulness in Explaining the Relationship Between Adolescents’ Anxiety and Dropout Intentions*, 9 SCH. MENTAL HEALTH 78, 78 (2017) (explaining that anxiety demonstrated a low significant positive association with dropout intentions among ninth grade students); Cathrine F. Hjorth et al., *Mental Health and School Dropout Across Educational Levels and Genders: A 4.8-Year Follow-Up Study*, 16 BMC PUB. HEALTH 1 (2016) (finding poor mental health to be significantly associated with dropout rates in vocational and higher education).

¹⁵ Akash R. Wasil et al., *A Review of Popular Smartphone Apps for Depression and Anxiety: Assessing the Inclusion of Evidence-Based Content*, 123 BEHAV. RESEARCH & THERAPY 1, 1 (2019).

¹⁶ Adam C. Powell et al., *The Monetization Strategies of Apps for Anxiety Management: an International Comparison*, 4 J. TECH. BEHAV. SCIS. 67, 68-9 (2019).

desire to decrease anxiety. However, any calculation using this methodology will be a lower-bound estimate, given that many individuals with anxiety do not seek an app for treatment, and the purchase of the app does not eliminate all anxiety.

Cost of Treating Anxiety Disorders: It has also been shown that DACA status improves not just general stress levels, but also rates of anxiety disorders. One study looked at the rates of mental illness—with a particular focus on anxiety—in the children of immigrants in the United States and found that the U.S.-born children of those who were not eligible for DACA status were more than twice as likely to be diagnosed with adjustment and anxiety disorders than those whose parents had DACA’s protections—a 7.8% rate compared to 3.3%.¹⁷ The study theorized that this drop was due to the fact that these children no longer feared that their parents would be deported or suffer other adverse legal consequences due to their immigration status.¹⁸

DHS can use this evidence of a decrease in anxiety rates in the children of DACA recipients, together with the average cost of treatment for an anxiety disorder, to better estimate the benefits of the DACA program. As DHS notes, over a quarter million children of DACA recipients have been born in the United States.¹⁹ Moreover, the per-person cost of treating an anxiety disorder for one year is \$6,475.²⁰ Putting these two figures together—along the 4.5% decrease in anxiety disorders among the children of DACA recipients²¹—the Department can estimate a quality-of-life benefit of over \$69.5 million each year.²² Though likely an underestimate—both because this figure does not include any decrease in anxiety among DACA recipients themselves, nor does it consider the monetized harm of anxiety beyond treatment itself—this figure would at least give an approximation of a low-end monetized benefit estimate.

The Department can also look at overall costs to the healthcare system by using “cost of illness” studies. Groups like the Centers for Disease Control and Prevention endorse these studies, which calculate overall costs of particular illnesses by looking at cost of diagnostic tests, physician office visits, and drugs and medical supplies.²³ In 1996, one cost of illness study estimated the annual cost of anxiety disorders in the United States at \$47 billion, while another, in 1999, estimated that this cost at \$42 billion.²⁴ More recently, a 2013 study estimated the societal cost of anxiety disorders to be \$48.72 billion.²⁵ The Department could extrapolate total

¹⁷ Jens Hainmueller et al., *Protecting Unauthorized Immigrant Mothers Improves Their Children’s Mental Health*, 357 SCI. 1041, 1042 (2017).

¹⁸ *Id.*

¹⁹ Proposed Rule, 86 Fed. Reg. at 53,813.

²⁰ Martin D. Marciniak et al., *The Cost of Treating Anxiety: The Medical and Demographic Correlates That Impact Total Medical Costs*, 21 DEPRESSION & ANXIETY 178, 179 (2005). It is important to note that this estimate is based on the average cost in 1999, and thus likely undervalues the annual cost of anxiety due to inflation.

²¹ See *supra* note 17 and accompanying text.

²² To arrive at this figure, we multiplied the average annual cost of treating an anxiety disorder (\$6,475) by the estimated number of children of DACA recipients (250,000) and the rate of decrease in anxiety disorders among this population (4.3%, or 0.043). The product of these three numbers is \$69,606,250.

²³ *Cost of Illness*, CTRS FOR DISEASE CONTROL AND PREVENTION (Oct. 20, 2021), <https://www.cdc.gov/policy/polaris/economics/cost-illness/index.html>.

²⁴ Ronald C. Kessler & Paul E. Greenberg, *The Economic Burden of Anxiety and Stress Disorders*, in NEUROPSYCHOPHARMACOLOGY: THE FIFTH GENERATION OF PROGRESS 990 (Kenneth L. Davis et al. eds., 2002).

²⁵ Elaheh Shirneshan, *Cost of Illness Study of Anxiety Disorders for the Ambulatory Adult Population of the United States*, Theses and Dissertations, University of Tennessee Health Science Center (2013) <https://dc.uthsc.edu/cgi/viewcontent.cgi?article=1370&context=dissertations>.

costs by prorating the relevant population to the number of DACA recipients with anxiety disorders and making further adjustments accordingly.

Physical Health Effects: Another way to measure the benefit of DACA status in terms of decreased fear and anxiety is an increase in willingness to seek medical attention. Many immigrants who suffer from anxiety about their legal status avoid the healthcare system altogether for fear of being reported to government authorities.²⁶ This phenomenon can further burden society. First, those who do not get care for infectious diseases are much more likely to transmit infections to others.²⁷ Second, individuals who defer screenings or early treatments may have to seek care at hospitals and emergency departments when their condition worsens, which is substantially more expensive than primary care.²⁸ DHS could thus look to any increased emergency care costs and overall increased healthcare costs from infectious diseases. There are studies that monetize the costs of infectious diseases which, if adjusted to the population size of DACA recipients, would give an indication of that decrease in cost.²⁹ The Environmental Protection Agency, for instance, has previously estimated the cost of numerous illnesses such as various cancers, developmental illnesses, disabilities, and other conditions.³⁰

Relatedly, the Proposed Rule is likely to increase the quality of healthcare for DACA recipients. A survey from the Center for American Progress found that nearly 66% of DACA recipients surveyed obtained health insurance during the first four years of the program.³¹ Not only does this denote a greater degree of social inclusion for DACA recipients and medical security for their families, but it also evidences that DACA status allows for more individuals to obtain healthcare and the better health associated with it. DHS can incorporate a discussion of this phenomenon into a larger analysis of the Proposed Rule's health benefits.

B. Increased Belonging and Hope for the Future

The Department's recognition that the DACA program results in an increased feeling of hope and belonging for program beneficiaries is also supported by scientific research. One study, which surveyed a group of college students, found that students with DACA status reported increased feelings of belonging in American society and optimism with respect to their future

²⁶ Jan Hoffman, *Sick and Afraid, Some Immigrants Forgo Medical Care*, N.Y. Times, June 26, 2017, <https://www.nytimes.com/2017/06/26/health/undocumented-immigrants-health-care.html>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See, e.g., Sarah A. Collier et al., *Estimate of Burden and Direct Healthcare Cost of Infectious Waterborne Disease in the United States*, 27 EMERGING INFECTIOUS DISEASES 140 (2021), Peter Ndeboc Fonkwo, *Pricing Infectious Disease: The Economic and Health Implications of Infectious Diseases*, EMBO Reports, 9 SCI. & SOC. 13 (2008).

³⁰ ENV'T PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES, 7-33 to 7-35 (2010), <https://www.epa.gov/sites/default/files/2017-09/documents/ee-0568-07.pdf>.

³¹ TOM K. LONG ET AL., RESULTS OF TOM K. WONG, UNITED WE DREAM, NATIONAL IMMIGRATION LAW CENTER, AND CENTER FOR AMERICAN PROGRESS NATIONAL SURVEY 3 (2016) https://americanprogress.org/wp-content/uploads/2016/10/2016-daca_survey_draft_updated-FINAL2.pdf. The survey did not ask respondents whether they had health insurance prior to receiving DACA. However, the number of respondents with pre-existing healthcare is likely very low considering that undocumented immigrants are ineligible to purchase plans through the HealthCare.gov Marketplace. HEALTH COVERAGE FOR IMMIGRANTS, <https://www.healthcare.gov/immigrants/coverage/> (last visited Nov. 22, 2021).

prospects.³² These feelings led to more full participation in school and a desire to contribute civically to society.³³ The same study found that students with DACA status were overwhelmingly likely to indicate they would apply for American citizenship if eligible, and were more likely to indicate this desire than students without DACA status.³⁴

DHS should grapple with the broader economic implications that come with this increased sense of belonging and hope for the future. A person who feels secure in their legal status and views the future with hope, security, and optimism may be more willing to make financial investments, such as taking out loans for education or a home or making other large purchases. This phenomenon can be seen with DACA recipients in particular. For example, studies have shown that after receiving DACA status, recipients pursued higher levels of education, got driver's licenses, and opened their first bank accounts.³⁵ The Center for American Progress survey of recipients noted that 54.1% of those surveyed purchased their first cars after receiving DACA status, with an average cost of \$24,303 for new cars and \$10,637 for used cars, and 12.1% bought a home, with an average cost of \$167,596.³⁶ Also tied to hope and a positive outlook for the future is trust in institutions, which has been shown to be a necessary prerequisite for economic growth.³⁷ The Department can provide this evidence to demonstrate the benefits of increased belonging and hope for the future.

C. Advance Parole

The Department recognizes advance parole, which grants individuals the ability to travel outside of the United States, as an additional benefit of DACA status.³⁸ DHS qualitatively describes the value of advance parole and seeks recommendation on how such a benefit should be analyzed and quantified. Here too, DHS can turn to economic data to augment its analysis of this benefit. In addressing the value of advance parole to the DACA population, the Department should consider data on travel spending. In 2019, spending by Americans traveling abroad totaled \$182.4 billion.³⁹ If we divide this number by the total U.S. population and multiply by the number of DACA recipients, we can estimate the total benefit of advance parole for DACA recipients as about \$347.2 million.⁴⁰

The Department could also look at data measuring average spending on travel as a function of household income. Assuming the average income of a DACA recipient is around

³² ROBERT T. TERANISHI ET AL., IN THE SHADOWS OF THE IVORY TOWER: UNDOCUMENTED UNDERGRADUATES AND THE LIMINAL STATES OF IMMIGRATION REFORM 11–12 (2015), <https://escholarship.org/uc/item/2hq679z4>.

³³ *Id.*

³⁴ *Id.*

³⁵ LONG ET AL., *supra* note 31, at 3; Richard C. Jones, *A Time-Space Stream of DACA Benefits and Barriers Gleaned From the American Community Survey*, 42 HISPANIC J. BEHAV. SCIS. 143, 146 (2020).

³⁶ LONG ET AL., *supra* note 31, at 2.

³⁷ Yann Algan and Pierre Cahuc, *Inherited Trust and Growth*, 100 AM. ECON. REV. 260 (2010).

³⁸ Proposed Rule, 86 Fed. Reg. at 53,797.

³⁹ *Basic Tourism Statistics*, U.N. WORLD TOURISM ORGANIZATION, <https://www.unwto.org/statistic/basic-tourism-statistics> (last visited Nov. 23, 2021).

⁴⁰ This estimate uses the U.S. population of 329.5 million, and the “active DACA program population” given by DHS for 2020 of 647,278. Proposed Rule, 86 Fed. Reg. at 53,785. This estimate of the DACA population is a lower-bound, as the population grows at an average annual rate of 3.6%. *Id.* at 53,785. \$182.4 billion divided by 329.5 million, and then multiplied by 627,278 equals \$347.175 million.

\$36,232,⁴¹ as one study reported, this population would spend around \$598 per household on travel each year, according to data from the U.S. Bureau of Labor Statistics.⁴² If multiplied by the size of the DACA population, the benefit of advance parole could be estimated as approximately \$375.1 million.⁴³ This particular method would yield an overestimate of international travel expenditure, since it includes domestic travel. However, any approximation using these methodologies also does not account for the unique value of international travel to DACA-eligible individuals, who likely have family abroad.

D. Ancillary Benefits of Employment Authorization Documents

While DHS quantifies the value of employment authorization documents from the perspective of the recipients' income, it leaves unquantified the ancillary benefits of the employment authorization documents themselves such as the ability to use the documents to obtain driver's licenses or other forms of identification.⁴⁴ To quantify the benefits beyond the immediate value of employment, the Department can start by looking at the cost of obtaining those documents. While costs and requirements of obtaining such forms of identification will vary from state to state, one survey calculated the average cost of a driver's license to be \$35 and the average cost of an identification card to be \$28.⁴⁵ The same survey found that 90% of DACA beneficiaries received a driver's license or state identification card after receiving DACA status. DHS could thus use the cost of these items as a lower bound on the willingness-to-pay measure to quantify the ancillary benefits of employment authorization documents. Any value calculated by this methodology will likely be a lower-bound estimate, considering the secondary benefits that accompany receipt of a driver's license or state identification card, such as increased mobility and access to benefits or services.

E. Streamlined Enforcement Encounters

The Department also lists streamlined enforcement encounters as a benefit of the DACA program and, accordingly, the Proposed Rule.⁴⁶ As the Department explains, the "prior vetting of DACA recipients" would provide DHS enforcement officers with a "baseline" to determine if the individual is an enforcement priority.⁴⁷ DHS could look to the time, labor, and material costs of enforcement encounters that would be streamlined in attempt to monetize the expected benefits of streamlined enforcement.

An example of how to monetize those cost savings can be found in the Department of Health and Human Services' ("HHS") 2020 rescission of the notice-and-tagline requirement for

⁴¹ *DACA Recipients' Economic and Educational Gains Continue to Grow*, CTR. FOR AMERICAN PROGRESS, Aug. 28, 2017, <https://www.americanprogress.org/article/daca-recipients-economic-educational-gains-continue-grow/>.

⁴² *Spotlight on Statistics: Travel 4*, U.S. BUREAU OF LAB. STAT. (July 2020) <https://www.bls.gov/spotlight/2010/travel/pdf/travel.pdf>. An income of \$36,232 would place an individual in the second income quintile, which corresponds to the average travel expenditure of \$598. *Household Income Quintiles*, TAX POLICY CENTER, <https://www.taxpolicycenter.org/statistics/household-income-quintiles..>

⁴³ The active DACA population given by DHS, 627,278, multiplied by \$598 equals \$375.11 million.

⁴⁴ Proposed Rule, 86 Fed. Reg. at 53,797.

⁴⁵ LONG ET AL., *supra* note 31, at 3.

⁴⁶ Proposed Rule, 86 Fed. Reg. at 53,752.

⁴⁷ *Id.*

medical service providers.⁴⁸ For that rule, HHS surveyed pharmaceutical companies subject to notice-and-tagline requirements to assess the cost of adding those notices and taglines in various languages.⁴⁹ To calculate those costs, HHS estimated the cost of mailing each additional sheet of paper the regulation required, the hourly wage of the clerks who compiled the documents for mailing, and the number of hours those clerks spent compiling the documents.⁵⁰

Given the Department's unique capability to calculate the amount of time and resources that DACA saves its personnel, monetizing such benefits, if possible, would be useful. Such information might include the salaries of DHS employees who work on the enforcement encounters in question, estimates of how much time they spend on those encounters, and what information they need to file subsequent to each encounter.

II. DHS Should Supply Additional Evidence for Its Claim that DACA Has No Substantial Effect on Legal or Illegal Immigration to Address the Concerns of the Southern District of Texas and the Nielsen Rescission Memo

The Department, in responding to concerns that it did not address various costs of legal and illegal immigration, asserts that it “does not perceive DACA as having a substantial effect on volumes of lawful and unlawful immigration,” as DACA does not have a significant “pull factor” in light of other, more significant, influences on global immigration trends.⁵¹ Existing data supports this position, and DHS should incorporate this information into a more thorough analysis of DACA's impact on immigration.

In *Texas v. United States*, the U.S. District Court for the Southern District of Texas enjoined the DACA program based on the court's view that the policy should have been issued through notice-and-comment rulemaking and that the policy went beyond DHS's statutory authority.⁵² At the end of its opinion, moreover, the court noted additional concerns for DHS to address should it reformulate the policy. While some of the concerns dealt with DACA's substantive legal viability, others concerned the impacts of the program, including the 1) effects of DACA on legal and illegal immigration, 2) secondary costs of DACA associated with any alleged increase in the number of illegal immigration, and 3) the effect of illegal immigration on human trafficking activities.⁵³

Similarly, the Department, in the Nielsen Rescission Memo, expressed concerns “that tens of thousands of minor aliens have illegally crossed or been smuggled across our border in recent years” as a consequence of “loopholes in our laws.”⁵⁴ To DHS, this reinforced the need to “project a message that leaves no doubt regarding the clear, consistent, and transparent

⁴⁸ Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,227, 37,229–30 (June 19, 2020).

⁴⁹ *Id.* at 27,229.

⁵⁰ *Id.* at 27,229–31.

⁵¹ Proposed Rule, 86 Fed. Reg. at 53,803.

⁵² *Texas v. United States*, No. 1:18-CV-00068, 2021 WL 3025857, at *1 (S.D. Tex. July 16, 2021).

⁵³ *Id.* at *40–41.

⁵⁴ Nielsen Rescission Memo, *supra* note 3, at 3.

enforcement of the immigration laws against all classes and categories of aliens” which, in this case, meant more rigorous enforcement of immigration laws against DACA recipients.⁵⁵

The Department should directly respond to these concerns with data documenting DACA’s lack of significant impact on lawful or unlawful immigration trends. In the Proposed Rule, DHS refutes the premise that DACA has any notable effect on volumes of lawful or unlawful immigration and states that it is not aware of any data indicating that DACA affects rates of entry.⁵⁶ The Department has evidence at its disposal to bolster this refutation. No one entering the country now qualifies for DACA status (they would have had to reside in the country since June 2007), so there is good reason to suppose that DACA would have little incentive effect on anyone deciding whether to immigrate today.⁵⁷

Meanwhile, illegal immigration rates have declined over the period that DACA has been in effect.⁵⁸ Recent spikes of children crossing the border are driven by migration increases across all age groups from three countries specifically—Guatemala, Honduras, and El Salvador.⁵⁹ Over the same time period, these countries have experienced higher rates of violence and economic instability, driving people to migrate.⁶⁰ This skewed demographic undermines the argument that confusion around DACA eligibility has caused recent spikes of migrant children.

The Proposed Rule would thus benefit from a more detailed discussion of global immigration trends, which bolsters DHS’s claim that DACA does not have a significant impact on immigration rates.

III. The Department Should More Thoroughly Address Several Arguments That It Previously Offered Against DACA

It is well established that agencies are obligated to consider “all important aspect[s]” of a rule before it is codified.⁶¹ This requirement takes a different form when agencies consider whether to reverse, alter, or change a policy in a manner that is in tension with prior agency statements. In particular, when “an agency changes its existing position, it ‘need not always provide a more detailed justification than what would suffice for a new policy created on a blank

⁵⁵ *Id.*

⁵⁶ Proposed Rule, 86 Fed. Reg. at 53,803.

⁵⁷ *Id.* at 53,739.

⁵⁸ Mark Hugo Lopez et al., *Key Facts About the Changing U.S. Unauthorized Immigrant Population*, PEW RESEARCH CENTER, Apr. 13, 2021, <https://www.pewresearch.org/fact-tank/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population/> (showing that the number of unauthorized immigrants in the U.S. has steadily declined since 2007).

⁵⁹ David J. Bier, *DACA Definitely Did Not Cause the Child Migrant Crisis*, CATO INSTITUTE, Jan. 9, 2017, <https://www.cato.org/blog/daca-definitely-did-not-cause-child-migrant-crisis>.

⁶⁰ See Amelia Cheatham, *Central America’s Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS, July 1, 2021, <https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle>; Sarah Bermeo, *Violence Drives Immigration from Central America*, BROOKINGS, June 26, 2018, <https://www.brookings.edu/blog/future-development/2018/06/26/violence-drives-immigration-from-central-america/>; Tom K. Wong, *Statistical Analysis Shows that Violence, Not Deferred Action, Is Behind the Surge of Unaccompanied Children Crossing the Border*, CENTER FOR AMERICAN PROGRESS, July 8, 2014, <https://americanprogress.org/article/statistical-analysis-shows-that-violence-not-deferred-action-is-behind-the-surge-of-unaccompanied-children-crossing-the-border/>.

⁶¹ *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

slate.”⁶² The agency must, however, still “‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy.’”⁶³ An agency should ensure there are no unexplained inconsistencies and offer a “reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁶⁴

In the DACA rescission memos—the Duke Rescission Memo and the Nielsen Rescission Memo—as well as court filings defending that rescission, DHS briefly suggested several theories for why it thought that DACA is bad policy.⁶⁵ DHS should give an express response to those arguments in the current rulemaking and address any tension between the prior statements and the Proposed Rule.

A. Litigation Risk

In the Duke Rescission Memo, Nielsen Rescission Memo, and subsequent court filings, DHS cited the risk of litigation as one basis for rescinding DACA, focusing on the risk of DACA being struck down as unlawful or enjoined from enforcement.⁶⁶ Before the Supreme Court, the Department argued that “once Texas and other States announced their intention to challenge DACA, it was more than reasonable for DHS to determine that it was better to wind down DACA in an orderly fashion rather than incur the time, expense, and legal and practical risks of continuing to defend it.”⁶⁷ This argument amplified similar reasoning in the Nielsen Rescission Memo, which stated that the DHS Secretary believed that “the DACA policy’s legality is too questionable to warrant continuing the policy” regardless of “whether the courts would ultimately uphold it or not.”⁶⁸

DHS’s prior stance that DACA was bad policy because of litigation risk is inconsistent with the current Proposed Rule, which finds that the benefits of the rule exceed its costs. In order to address this inconsistency and give a “reasoned explanation” for “facts and circumstances” in the rescission, DHS should address the risk of litigation in its Proposed Rule. It may do so by 1) explaining how the prior rescission incorrectly analyzed litigation risk; and 2) concluding that the Proposed Rule is justified even when litigation risk is properly accounted for.

DHS may address the first point by demonstrating that its prior rescission did not adopt a coherent framework for analyzing litigation risk. Any reasonable framework would have had to, at a minimum, identify the benefits of the DACA program as a baseline against which to compare the costs of litigation risk. That is, an agency that reasonably believes there is a risk of litigation cannot say that risk is determinative without first considering the value of the program. One article published in the *New York University Law Review* that analyzed precisely the issue

⁶² *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (quoting *FCC v. Fox Television Station, Inc.*, 556 U.S. 502, 515 (2009)).

⁶³ *Id.* at 2126 (quoting *Fox Television Station*, 556 at 515).

⁶⁴ *Id.* (quoting *Fox Television Station*, 556 at 515–16).

⁶⁵ The rescission memos also argued DACA was unlawful, but the Proposed Rule already addresses the legality of the program in detail.

⁶⁶ *See, e.g.*, Brief for the Petitioners at 27, 33–37, *Dep’t of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (No. 18-587).

⁶⁷ *Id.* at 33.

⁶⁸ Nielsen Rescission Memo, *supra* note 3, at 2.

of litigation risk in the context of DACA’s rescission identified four key factors for the Department to consider: 1) the “benefits that would be forgone by the change”; 2) “the probability of a disruptive injunction”; 3) “the additional costs of that injunction”; and 4) the “contrary litigation risk” that an agency’s rescission of the existing policy will be “halted by the courts.”⁶⁹

DHS’s prior rescission did not carefully analyze any of these relevant factors. While DHS suggested that litigation risk served as a trump to a broader assessment of costs and benefits, it failed to identify the benefits of the DACA program, explain the severity of litigation risks, and demonstrate why the risks would supersede other factors. Rather, it merely cited in the Duke and Nielsen Rescission Memos the existence of Fifth Circuit and Supreme Court decisions on DAPA and the expanded form of DACA.⁷⁰ In court filings, the Department argued that it should wind down the program rather than “incur the time, expense, and legal and practical risks of continuing to defend it,” but did not quantify these costs.⁷¹ In the same brief, DHS feared that a “court-ordered shutdown” would take the “terms and timing” of the program’s end outside of the agency’s control, arguing that Secretary Nielsen made a reasonable decision to end the program on her own terms rather than risk the courts doing it haphazardly.⁷²

None of these rationales comprehensively addressed any of the key factors presented above. In fact, the same article that proposed the four-factor test found that if DHS had considered these factors in its prior rescission, it very well may have determined that the risk of litigation was insufficient to justify rescinding the DACA program. Regarding the first factor, the article details the benefits of the DACA program as the Department does in the Proposed Rule.⁷³ Regarding the second factor, the article discusses not only the bases for DACA’s legality, but also the potential that the doctrine of laches would prohibit a disruptive injunction.⁷⁴ Moreover, pointing to the broad remedial powers of federal courts, the article appropriately recognizes that “[e]ven if a court ordered an injunction, it would be unlikely to order an immediate and disruptive one.”⁷⁵ Regarding the third factor, the article highlights that while the costs of a disruptive injunction “are likely to be at least somewhat higher than that of a gradual rescission, they are unlikely to be that high when multiplied by the probability that a such disruptive injunction would be upheld.”⁷⁶ And on the last factor, the article recognizes that rescinding DACA poses its own substantial litigation risk.⁷⁷

⁶⁹ Timothy G. Duncheon, *Litigation Risk as the Justification for Agency Action*, 95 N.Y.U. L. REV. 193, 207–14 (2020).

⁷⁰ Duke Rescission Memo, *supra* note 3 (“Taking into consideration the Supreme Court’s and the Fifth Circuit’s rulings [on DAPA and an expanded form of DACA] 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.”); Nielsen Rescission Memo, *supra* note 3, at 2 (“[Secretary Nielsen] lack[s] sufficient confidence in the DACA policy’s legality to continue this non-enforcement policy, whether the courts would ultimately uphold it or not [T]he threat of burdensome litigation [] distracts from the agency’s work.”)

⁷¹ Brief for the Petitioners, *supra* note 66, at 33.

⁷² *Id.* at 35.

⁷³ Duncheon, *supra* note 69, at 219–20.

⁷⁴ *Id.* at 220–21.

⁷⁵ *Id.* at 221.

⁷⁶ *Id.* at 227.

⁷⁷ *Id.* at 227–29.

DHS should incorporate this explanation for why its previous assertions about litigation risk are not dispositive here. In particular, DHS should explain how its previous attempt to rescind DACA failed to properly analyze the risks of litigation, and should put forth a more rational framework to analyze DACA's litigation risk.

B. Applying Enforcement Discretion on a Case-by-Case Basis

DHS also previously asserted that it is not appropriate to adopt broad non-enforcement policies and that it should instead use individual assessments, particularly for a program of DACA's scale.⁷⁸ In particular, DHS argued that "as a matter of policy, broad-based and controversial deferred-action policies like DACA and DAPA should proceed only with congressional approval and the political legitimacy and stability that such approval entails."⁷⁹ Although aspects of the Proposed Rule indirectly respond to this prior position, DHS should more directly address its prior concern in two parts of the Proposal Rule: 1) its discussion of the merits of broader exceptions; and 2) its discussion of previous deferred action programs.

The Merits of Broad Exemptions: The merits of a broad, easy-to-apply exception are manifold. As the Department explains in the Proposed Rule, resource limitations make it so that DHS can only arrest, detain, or prosecute a "fraction of those who are suspected of violating the law."⁸⁰ Thus, the agency must design enforcement priorities and it has reasonably chosen to focus on those who "pose the greatest risk to public safety, national security, and border security."⁸¹ As the Department recognizes in the Proposed Rule, the DACA program offers a broad exception that allows DHS officers to avoid "a full review of the DACA recipient's immigration and criminal history, in some circumstances."⁸² It allows DHS officers to avoid further investigations—efforts that "could involve multiple officers, with time costs ranging from minutes to hours."⁸³

In addition, as the Department also recognizes in the Proposed Rule, the "prior vetting" of DACA recipients "provides a baseline that can streamline an enforcement officer's review of whether a DACA recipient is otherwise an enforcement priority."⁸⁴ Even when dealing with DACA recipients, the encounters would be streamlined because Immigration and Customs Enforcement would only have to "review that person's history to ascertain if a disqualifying conviction has been rendered against them since the granting or renewal of DACA and proceed with an appropriate law enforcement resolution in each case."⁸⁵

These benefits are inherent to the broad scope of DACA and the ease with which the program can be applied. The Department should explicitly recognize that these benefits refute its previous assertions that DACA is unwisely broad.

⁷⁸ Brief for the Petitioners, *supra* note 68, at 38.

⁷⁹ *Id.*

⁸⁰ Proposed Rule, 86 Fed. Reg. at 53,751.

⁸¹ *Id.* at 53,751–52.

⁸² *Id.* at 53,752.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

Previous Deferred Action Programs: In the Proposed Rule, the Department describes the agency’s history of using deferred action programs and why Congressional actions do not bely an intent contrary to DHS’s codification of DACA.⁸⁶ With a slightly reframing, this discussion could explicitly rebut DHS’s previous assertion that it is unwise as a policy matter for an entity other than Congress to devise such a program.

As the Proposed Rule discusses, DHS has created deferred removal programs through more informal means in the past.⁸⁷ Specifically, the Department explains that “[s]ince at least 1956, DHS and the former INS have issued policies under which groups of individuals without lawful status may receive a discretionary, temporary, and nonguaranteed reprieve from removal, even outside the context of immigration proceedings.”⁸⁸ Some of these programs also encompassed large groups of individuals, such as one program that applied to the spouses and children of U.S. citizens and applied to over 1.5 million individuals.⁸⁹ This prior agency history serves to refute the Department’s prior assertion in the Duke Rescission Memo that deferred action programs should initiate in Congress. In fact, Congress later clarified, expanded, or adopted through statute many of the deferred action programs that originated with DHS or INS.⁹⁰ Rather than refute DHS’s ability to make such exceptions, Congress used them as a legislative springboard. This implies not only the legality of those programs, but also their political wisdom.

DHS should thus use this long history of creating deferred action programs to rebut its prior assertion that only Congress should adopt deferred action policies as a matter of policy.

Conclusion

In its Proposed Rule, the Department offers numerous compelling justifications for restoring and fortifying DACA. When it finalizes the rule, DHS should provide additional rationales for the regulation discussed in this comment letter, including providing further analysis of currently unquantified benefits, expanding upon its assertions regarding the effects of DACA on immigration volumes, and more explicitly rebutting its prior justifications for rescinding the DACA program.

Sincerely,

Laura Figueroa
Max Sarinsky
Emma Schwartz

⁸⁶ *Id.* at 53,745–60.

⁸⁷ *Id.* at 53,746.

⁸⁸ *Id.*

⁸⁹ *Id.* at 53,767.

⁹⁰ *Id.* at 53,768.