UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

A.C.R., J.G.V., E.A.R., C.V.R., Y.A.M., B.R.C., J.C.B., L.M.R., and S.M.M., on behalf of themselves and all others similarly situated; CENTRAL AMERICAN REFUGEE CENTER (CARECEN-NY); and CENTRO LEGAL DE LA RAZA,

Plaintiffs,

v.

KRISTI NOEM, Secretary, U.S. Department of Homeland Security (official capacity); UNITED STATES DEPARTMENT OF HOMELAND SECURITY; JOSEPH EDLOW, Director, United States Citizenship and Immigration Services (official capacity); UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; and ROSE KENDRICK, Acting Director, United States Citizenship and Immigration Services National Benefits Center (official capacity),

Defendants.

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW

Civ. Action No. 1:25-cv-03962-EK-TAM

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INTRODUCTION

As directed by the Court, Plaintiffs hereby submit supplemental argument addressing the following questions raised by the Court at the September 4, 2025, hearing:

1. Does the requirement set forth in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) that the government must consider "serious reliance interests" before reversing a prior policy still hold if the reason for the reversal is that the government believes that the prior policy was a violation of separation of powers? (Section I.A, *infra*).

2. What is the outer limit on agency action that can be taken without express statutory authority? Or, stated differently, where is the line between agency action that does not require express statutory authority and agency action that does require express statutory authority, and how does that apply to the 2022 SIJS Deferred Action Policy? (Sections I.B-I.D, IV, *infra*).

3. Does the "change in position" doctrine apply to policies not promulgated through a formal process under *FDA v. Wages and White Lion Investments, L.L.C.*, 145 S. Ct. 898, 901 (2025)? (Sections II, IV, *infra*).

4. Can agencies rely on non-public, intra-agency statements (e.g. the June 6, 2025 internal rescission memo) to justify agency action for purposes of arbitrary and capricious APA review? (Section III, *infra*).

ARGUMENT

I. The 2025 Rescission Policy Is Arbitrary and Capricious Even If the Government Believed the 2022 SIJS Deferred Action Policy Was Unlawful—and It Was Not Unlawful.

A. USCIS's Failure to Consider Reliance Interests Is Fatal to the Rescission Policy.

The Supreme Court in *Regents* squarely held that the Government *must* consider serious reliance interests when reversing a prior policy *even if* it also asserts that policy is unlawful. There, the Attorney General had declared DACA unlawful, and the Acting DHS Secretary had rescinded the program in response. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 12 (2020). But the Supreme Court expressly rejected the notion that the purported illegality of the program excused the Secretary's failure to consider reliance interests. *Id*. at 30–33. As the Court explained, while the agency "[m]ight conclude that reliance interests in benefits that it views as

unlawful are entitled to no or diminished weight[,]" it cannot ignore them entirely. *Id*. at 32. In other words, "nothing about [the illegality] determination foreclosed or even addressed . . . accommodating particular reliance interests. [DHS] should have considered those matters but did not. That failure was arbitrary and capricious in violation of the APA." *Id*. at 33.

Here, as in *Regents*, both SIJS beneficiaries and third parties had serious reliance interests in the 2022 SIJS Deferred Action Policy. In *Regents*, the Supreme Court recognized as "noteworthy" that DACA recipients had "'enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance' on the DACA program[,]" and that the "[c]onsequences of [DACA's] rescission . . . would 'radiate outward' to DACA recipients' families, . . . to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them," as well as to federal, state, and local governments losing critical tax revenue. *Id*., 591 U.S. at 31 (citations omitted). The Court required no showing that DACA recipients were somehow worse off by virtue of having pursued educational, familial, and career opportunities in reliance on the policy, but rather focused on how the termination of the policy would harm all those who had relied on it. *See id.* at 30 ("When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." (internal quotation marks omitted)); *see also Texas v. Biden*, 20 F.4th 928, 990 (5th Cir. 2021) ("*Texas II*"), *rev'd on other grounds*, 597 U.S. 785 (2022) (stressing that agencies must consider "even *weak* [reliance] interests") (citing *Regents*, 591 U.S. at 30–31).

This case involves the same—and additional—reliance interests as those in *Regents*. With respect to SIJS beneficiaries themselves, when USCIS adopted the Policy, it recognized that "approved SIJ petitioners have a reliance interest in being provided with employment authorization

. . . without having to wait years before a visa is available." ECF No. 1-1 at 4. USCIS's subsequent failure to even acknowledge these interests in the 2025 Rescission Policy alone renders it arbitrary and capricious. *See Texas II*, 20 F.4th at 990 (finding DHS's policy rescission arbitrary and capricious where the parties' prior agreement "underscore[d] the reliance interests at play—and DHS's awareness of them[,]" yet DHS failed to consider those interests).

SIJS beneficiaries, like the DACA recipients in *Regents*, also relied on the 2022 Policy to shape their lives. *First*, many chose to permanently give up other forms of relief from deportation and abandon other legal strategies in their immigration cases. *See* ECF No. 9-12 ¶ 31 (explaining that many SIJS beneficiaries chose not to apply for asylum, which must be filed within one year of arrival, and gave up procedural challenges); ECF No. 9-9 ¶ 31 (describing SIJS beneficiary who relied on availability of SIJS deferred action in deciding not to apply for asylum). *Second*, as in *Regents*, many invested significant time and money to pursue education and careers that they have now been forced to abandon. *See, e.g.*, ECF No. 9-1 ¶ 9 (Plaintiff B.R.C. relied on the Policy in enrolling in community college, but will now have to drop out); ECF No. 9-7 ¶¶ 12, 18 (Plaintiff S.M.M. prepared college applications in reliance on the Policy, but submitting them would now be futile); ECF No. 9-9 ¶ 31 (SIJS beneficiary applied and was accepted into college in reliance on the Policy, but now cannot attend); ECF No. 9-13 ¶¶ 14–15, 18 (many SIJS youth relied on the Policy when choosing to pay tuition over meeting other needs).[1] *Third*, as in *Regents*, SIJS beneficiaries also relied on the Policy in making commitments to provide housing, healthcare, and financial support to their families, who now face hardship. *See* ECF No. 9-8 ¶ 20 (Plaintiff Y.A.M.

[1]Individuals invest in education not just to gain knowledge, but with the expectation of obtaining a degree that will, for example, allow access to career paths, increase earning potential, provide greater job security, or allow for upward mobility. Not completing their education leaves them worse off because they are no closer to obtaining that degree and its associated benefits, yet have forgone valuable alternatives (for example, saving or investing in a home or other assets). *See, e.g.*, ECF No. 9-13 ¶¶ 13, 18 (explaining that many SIJS youth "must choose between using money for tuition, food or public transportation").

relied on the Policy to secure housing for herself and young son, but will now lose his job); ECF No. 9-9 ¶ 32 (many SIJS beneficiaries relied on SIJS deferred action EADs to lift their families out of poverty); ECF No. 9-18 ¶ 20 (describing impact on SIJS beneficiaries' partners and young children); ECF No. 9-23 ¶ 18 (similar).

Moreover, as in *Regents*, numerous third parties also relied on the Policy. This includes employers who "invest[ed] money, resources, and time in training" SIJS beneficiaries and "relie[d] on the workforce contributions of th[ose] employee[s] with the hope and expectation of a return on the investment." Connor Decl. ¶¶ 10–11 (calculating that it could cost U.S. employers as much as $100 million to retrain new employees to replace those lost due to the 2025 Rescission Policy); *see also* Kallick Decl. ¶¶ 13–16; Supp. Minoff Decl. ¶¶ 6–10. It includes postsecondary education institutions, which lose tuition revenue when a student withdraws before graduating. Supp. Minoff Decl. ¶ 12. It also includes state child welfare agencies, who "had come to rely on the ability of some of their foster youth to work, earn money, and potentially close their cases prior to turning 21," such that "their budgets were developed with this expectation," and the 2025 Rescission Policy "has already caused and will likely cause further unanticipated administrative and financial burdens." Supp. Mandelbaum Decl. ¶ 11. And it includes states who relied on the Policy by planning for SIJS beneficiaries to become contributing members of the community and generate crucial tax revenues. *See* Kallick Decl. ¶¶ 11–12 (estimating that New York state alone could lose more than $45 million in tax revenues due to 2025 Rescission Policy); Connor Decl. ¶ 9; New York State Comment on SIJS Final Rule[2] at 3; New York State Office for New Americans

[2] State of N.Y. Office of the Attorney General, Comment Letter from Letitia James, Attorney General on Proposed Rule for Special Immigrant Juvenile Petitions (Nov. 15, 2019), https://www.regulations.gov/comment/USCIS-2009-0004-0118.

Comment on SIJS Deferred Action Termination[3] at 3–4; ECF No. 9-17 ¶¶ 15–17. These third-party reliance interests also cannot be ignored. *See Texas II*, 20 F.4th at 989–90.

B. USCIS's Failure to Provide a Reasoned Explanation for Any Claim of Illegality Is Also Fatal to the Rescission Policy.

As a threshold matter, the 2025 Rescission Policy was not actually based on an agency determination of illegality. In *Regents*, the Attorney General had declared DACA unlawful, 591 U.S. at 8, and the Supreme Court went so far as to conclude that DHS had acted arbitrarily and capriciously by failing to consider leaving in place certain aspects of the program he had not addressed, *id.* at 28. Here, there was never an explicit finding that the 2022 SIJS Deferred Action Policy was unlawful. At most, the 2025 Policy Alert and USCIS's June 6, 2025, internal memo (the "Nonpublic Memo") (which should not be considered in any event, *see infra* Sec. III) suggest that USCIS questioned the statutory basis for the 2022 Policy. ECF No. 1-2 at 1; ECF No. 42-5 at 4, 6. USCIS did not, however, draw any definitive conclusion about the policy's legality, failing even to expressly reconsider its prior position that deferred action was an exercise in prosecutorial discretion that required no direct statutory authorization. Special Immigrant Juv. Pets., 87 Fed. Reg. 13066-01, 13095 (Mar. 8, 2022).

Moreover, even if USCIS did determine the 2022 Policy was illegal, it failed to provide an adequately reasoned explanation for such a determination. For example, the agency did not:

- analyze whether the SIJS statutory scheme itself evinces a congressional intent to keep beneficiaries safe in the United States with an opportunity to apply for adjustment of status, as USCIS stated in the 2022 Policy, *infra* Sec. I.C.1.;
- review whether statutory authorization is required for the agency's exercise of prosecutorial discretion through deferred action (which is fundamentally contrary to the government's historical approach), *infra* Sec. I.C.2.; or
- establish the absence of statutory authorization, which in fact exists for both deferred action and employment authorization, *infra* Sec. I.C.3., I.D.

[3] N.Y. Dept. of State's Office for New Americans, Comment Letter on the Elimination of Deferred Action for SIJS recipients (July 28, 2025), https://www.regulations.gov/comment/USCIS-2005-0024-0129.

It thus skipped every key point in the analysis. Any attempt now to construct a definitive agency opinion on illegality would be "impermissible *post hoc* rationalizations." *Regents*, 591 U.S. at 22.

C. In Any Event, the 2022 SIJS Deferred Action Policy Was Lawful.

1. The SIJS Statutory Scheme Supports the 2022 SIJS Deferred Action Policy.

Unlike DACA and a similar program, DAPA, which both crafted protections from removal for populations that lacked an existing statutory definition, the 2022 SIJS Deferred Action Policy finds strong support in the SIJS statutory scheme. Specifically:

- The definition of SIJS sets stringent eligibility requirements, including state court findings that the petitioner was abused, neglected, abandoned, or similarly mistreated by one or both parents and that it would not be in the petitioner's best interest to be repatriated, 8 U.S.C. § 1101(a)(27)(J)(i)–(ii); *see also* 8 C.F.R. § 204.11(b)–(c);
- The statute governing adjustment of status creates a special pathway for SIJS beneficiaries, allowing them to obtain green cards despite common grounds for disqualification, such as having entered the United States without inspection or without presenting the necessary entry documents, while leaving in place bars to adjustment such as those related to criminal convictions or threats to the national security, 8 U.S.C. § 1255(h)(2); *see also* 8 C.F.R. § 1245.1(e)(3).[4]

This statutory scheme has led the Third and Ninth Circuits to conclude that Congress "inten[ded] to assist a limited group of abused children *to remain safely in the country with a means to apply for LPR [lawful permanent residence] status.*'" *Osorio-Martinez v. Att'y Gen. United States*, 893 F.3d 153, 168 (3d Cir. 2018) (emphasis added) (quoting *Garcia v. Holder*, 659 F.3d 1261, 1271 (9th Cir. 2011)).[5] For the first 26 years of the SIJS program (1990 to 2016), when there was no visa backlog, beneficiaries could do just that—apply for LPR status immediately based on their

[4] SIJS beneficiaries can adjust to LPR status only while remaining in the United States. *See* 8 U.S.C. § 1101(a)(27)(J) (defining SIJS to apply to "an immigrant who is *present* in the United States") (emphasis added); USCIS Pol'y Manual vol. 7, pt. F, ch. 7.C. (stating that SIJS beneficiaries must be "physically present in the United States at the time of filing and adjudication of an adjustment application.").

[5] Although Plaintiffs do not concede that SIJS beneficiaries are generally removable, the Court need not decide this issue. Pls.' PI Br. at 5 n.4. The point here is that the SIJS statutes at a minimum directly support the 2022 Policy.

approved SIJS petitions, and they were eligible for work authorization while their LPR applications were pending. 8 C.F.R. § 274a.12(c)(9).

The 2022 Policy directly follows from that scheme. The Policy "further[ed] congressional intent" by ensuring that ballooning visa backlogs would not subvert "the protection that Congress intended to afford SIJs through adjustment of status." ECF No. 1-1 at 1. After all, what would be the point of having children request special findings from state courts, submit those to USCIS, secure a SIJS approval confirming the bona fides of their petitions, and become eligible for a special pathway to LPR status, only to subject them to aggressive immigration enforcement during a congressionally unanticipated waiting period to apply for a green card? Because the 2022 Policy plugged a hole the backlog had punched in the protection Congress intended to confer on SIJS beneficiaries, the statutory scheme underlying SIJS provides strong support for that Policy.

2. The Exercise of Prosecutorial Discretion for SIJS Beneficiaries Does Not Require Separate Statutory Authorization.

The Supreme Court has repeatedly affirmed the Executive's Article II power to exercise prosecutorial discretion in the realm of immigration, including in the form of deferred action. *See United States v. Texas*, 599 U.S. 670, 679 (2023); *Arizona v. United States*, 567 U.S. 387, 396 (2012). As the Supreme Court has recognized, "discretion exercised by immigration officials" is a "principal feature" of the immigration system, *Arizona*, 567 U.S. at 396, which derives in part from the Executive's Article II authority under the Take Care Clause to "decide how to prioritize and how aggressively to pursue legal actions against defendants who violate the law[,]" *Texas*, 599 U.S. at 678–79 (cleaned up). Under the 2022 SIJS Deferred Action Policy and comparable programs, the agency is required to consider exercising its discretion to grant or deny deferred action by deciding whether, given limited resources, "it makes sense to pursue removal" against

particular individuals. *See id.*; *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) ("*AADC*").

The practice of granting noncitizens deferred action stretches back decades. *See AADC*, 525 U.S. at 484 n.8. So too does the practice of systematically considering certain groups of noncitizens for individualized grants of deferred action based, in part, on shared characteristics that serve as strong factors in favor of protection. *See, e.g.*, ECF No. 6 at 16–18 (listing various programs). A defining feature of many of these previous programs is that they served as "bridges from one legal status to another," temporarily protecting vulnerable individuals from removal while they awaited permanent status. *See Texas v. United States*, 809 F.3d 134, 184 (5th Cir. 2015), *aff'd*, 579 U.S. 547 (2016) ("*Texas I*").[6] For example, in 1990, DHS's predecessor, the Immigration and Naturalization Service (INS), implemented a "Family Fairness" program extending a type of deferred action to spouses and children of noncitizens "while they 'wait[ed] for a visa preference number to become available . . . .'" *Id.* at 185. Like the 2022 SIJS Deferred Action Policy, which provided protection while beneficiaries waited to adjust status under statutory provisions specifically applicable to them, *see* 8 U.S.C. § 1255(h), such programs were "interstitial to a statutory legalization scheme." *Texas I*, 809 F.3d at 185 & n.198. Critically, such programs were also careful not to overstep the bounds of permissible prosecutorial discretion: they did not "disregard legislative direction in the statutory scheme" or constitute an "abdication of [the agency's] statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 & n.4 (1985); *cf. Texas I*, 809 F.3d at 179, 186 (finding DAPA unlawful where Congress had already "enacted an intricate

[6]As the *Texas I* court acknowledged, these include, for example, programs "deferring action on the removal of nonimmigrant nurses whose temporary licenses expired so that they could pass permanent licensure examinations; directing that possible victims of the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), 'should not be removed from the United States until they have had the opportunity to avail themselves of the . . . VTVPA,' including receipt of a T- or U-visa; utilizing deferred action for VAWA self-petitioners 'pending the availability of a visa number'; [and] deferring action on students 'based upon the fact that the failure to maintain status is directly due to Hurricane Katrina'." 809 F.3d at 184, n.195 (cleaned up).

process for illegal aliens to derive a lawful immigration classification from their children's immigration status[,]" "'directly address[ing] the precise question at issue.'") (citation omitted).

Well-established agency practice, as well as the Executive's authority under the Take Care Clause, distinguishes the 2022 SIJS Deferred Action Policy from the student loan forgiveness program at issue in *Biden v. Nebraska*, 600 U.S. 477 (2023). In *Nebraska*, the Supreme Court held that program exceeded congressionally delegated authority under the major questions doctrine in part because the agency had invoked a statutory authority in a way that did "not remotely resemble how it has been used on prior occasions." *Id.* at 497; *see also Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.") (cleaned up). Additionally, unlike the loan forgiveness program in *Nebraska* (which was purely a creature of statute), deferred action programs like the 2022 Policy are based on two independent sources of authority: direct and implied *statutory* delegations of authority to create immigration policies and priorities, *infra* Sec. I.C.3., as well as the executive's *constitutionally* conferred discretionary authority under the Take Care Clause to determine whether to initiate enforcement proceedings, *Texas*, 599 U.S. at 678-79; *Chaney*, 470 U.S. at 831. The statutory nondelegation principles underlying the major questions doctrine do not apply to exercises of constitutional authority.

The 2022 Policy mirrors these historic deferred action programs. It serves as a bridge from SIJ status to LPR status while youth wait for a visa to become available. ECF No. 1-1 at 1. It furthers Congress' intent to provide these young people permanency and protection in the United States. *Supra* Sec. I.C.1. And it does not conflict with any existing statutory scheme for this population—to the contrary, it furthers such a scheme. *Id*. For these reasons, considering SIJS

beneficiaries for deferred action through the 2022 Policy was a valid exercise of prosecutorial discretion that did not require separate statutory authorization. To hold otherwise would be to conclude that every deferred action program, going back nearly five decades, was *ultra vires*—an implausible conclusion the Government has never advanced in this litigation.

3. Even If Statutory Authority Were Necessary, Congress Has Granted DHS Broad Authority to Defer Immigration Enforcement.

Additionally, the 2022 SIJS Deferred Action Policy was a reasonable exercise of the discretion vested in DHS by Congress to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and to carry out the "administration and enforcement of [the INA] and all other laws relating to immigration and naturalization of [noncitizens]," 8 U.S.C. § 1103(a)(1), by "establish[ing] such regulations; . . . issu[ing] such instructions; and perform[ing] such other acts as he deems necessary for carrying out his authority under [the INA]." 8 U.S.C. § 1103(a)(3).[7]

The 2022 Policy was well within the discretion granted to DHS by Congress. "Whether to initiate removal proceedings and whether to grant relief from deportation are among the discretionary decisions *the immigration laws* assign to the executive." *Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir. 2015) (emphasis added) (citing *Arizona*, 567 U.S. at 396). Through its broad authority under 8 U.S.C. § 1103(a)(1) to administer and enforce the INA and "all other laws related to the immigration and naturalization of noncitizens," USCIS issued the 2022 Policy to effectively administer the SIJS statutes. *Supra* Sec. I.C.1.

D. Employment Authorization Incident to Deferred Action Is a Creature of Regulation, and This Regulation Is Supported by Statute.

[7]Indeed, after Congress created DHS and the Bureau of Citizenship and Immigration Services (BCIS, now USCIS) through the Homeland Security Act of 2002, delegating to BCIS the adjudicatory powers formerly exercised by the INS, 6 U.S.C. § 271(b), the newly created DHS expressly delegated to BCIS the power "to grant . . . deferred action," DHS, Delegation No. 0150.1 § II.P. (June 5, 2003), https://www.hsdl.org/c/view?docid=234775. The INS had exercised this power before 2003, and DHS exercises it now.

DHS also acted within its statutory authority in recognizing that SIJS deferred action recipients were entitled to apply for employment authorization pursuant to 8 C.F.R. § 274a.12(c)(14), which expressly permits such applications from noncitizens with deferred action. That regulation was first promulgated in 1981. Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25,079, 25,081 (creating 8 C.F.R. 109.1(b)(6)) (May 5, 1981). At that time, no federal statute governed employment authorization for noncitizens, so the regulation was originally promulgated under a statute that gave the former Commissioner of Immigration and Naturalization (now the Secretary of the Department of Homeland Security) general authority to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. § 1103(a)(3).

In 1986, Congress introduced 8 U.S.C. § 1324a—a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002). This statute makes it unlawful "to hire . . . an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3))." 8 U.S.C. § 1324a(a)(1)(A). Under section (h)(3), an "unauthorized alien" is one who, at the time of employment, "is *not* . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter *or by the Attorney General* [now the Secretary of DHS]." 8 U.S.C. § 1324a(h)(3) (emphases added); *see also* 8 U.S.C. § 1324a(b)(1)(C)(ii) (defining "[d]ocuments evidencing employment authorization" to include those which DHS "finds, by regulation, to be acceptable"). Both the Supreme Court and the Second Circuit have cited § 1324a(h)(3) as empowering DHS to authorize noncitizens to work lawfully in the United States.[8]

[8]*See Chamber of Com. of United States v. Whiting*, 563 U.S. 582, 589 (2011) (describing § 1324a(h)(3)'s definition of "unauthorized alien" to include one who is not "*otherwise authorized by the Attorney General* to be employed in the United States") (emphasis added); *Etuk v. Slattery*, 936 F.2d 1433, 1437 (2d Cir. 1991) (stating that Congress had

Relying expressly on this statutory delegation, the legacy INS promulgated regulations specifying that noncitizens with deferred action are eligible to apply for work authorization. Control of Employment of Aliens, 52 Fed. Reg. 16,216-01, 16,228 (creating 8 C.F.R. § 274a.12(c)(14)) (May 1, 1987); *see also Hoffman Plastic*, 535 U.S. at 147 n.3 (noting that the regulations at 8 C.F.R. § 274a implement the provisions of 8 U.S.C. § 1324a); 52 Fed. Reg. 46,092-01, 46,093 (Dec. 4, 1987) ("[T]he only logical way to interpret [§ 1324a(h)(3)] is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute."). Thus, the current regulation permitting those with deferred action to apply for work permits was duly authorized by Congress.[9]

This regulation undergirds work authorization, not only for SIJS beneficiaries under the 2022 Policy, but for all noncitizens with deferred action (other than those with DACA).[10] When USCIS designates certain classes of noncitizens as potentially eligible for deferred action[11] and

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"preclude[d] the employment of aliens who had neither obtained LPR status *nor been granted special employment authorization by the Attorney General*") (emphasis added) (citation omitted).

[9]In *Texas I*, the Fifth Circuit discounted 8 U.S.C. § 1324a as authority for DAPA. 809 F.3d at 183. Because § 1324a "does not mention lawful presence or deferred action" and is "listed as a '[m]iscellaneous' definitional provision expressly limited to . . . the 'Unlawful employment of aliens,'" the court concluded that it was "an exceedingly unlikely place to find authorization for DAPA." *Id.* To the extent that *Texas I* implies that DHS does not have statutory authority to establish work authorization categories by regulation, including based on deferred action, such an implication is mistaken. *See* 8 U.S.C. § 1324a(h)(3); *see also* 8 U.S.C. § 1226(a)(3) (prohibiting DHS from issuing work authorization based on a noncitizen's being in removal proceedings, a prohibition that would be superfluous if DHS did not otherwise possess general authority to issue work authorization to noncitizens). In any event, here the statute constitutes sufficient authorization for the agency to adopt a regulation granting work authorization to SIJS beneficiaries, a population whom the agency lawfully deems qualified for deferred action. *Supra* Sec. II.C.

[10]DACA recipients apply for work permits under a separate subsection, 8 C.F.R. § 274a.12(c)(33).

[11]USCIS currently, for example, identifies workers involved in governmental investigations of labor exploitation, immediate relatives of present or former active-duty members of the military, those with serious medical or humanitarian reasons to remain temporarily in the United States, and others as potentially qualified for deferred action. USCIS, G-325A, Biographic Information (for Deferred Action) (Special Instructions), https://www.uscis.gov/g-325a (last updated June 6, 2025).

then grants deferred action on a case-by-case basis, the noncitizens who secure this relief may apply for work authorization under 8 C.F.R. § 274a.12(c)(14). Disregarding the express statutory delegation of authority to the agency to qualify noncitizens for work permits, and invalidating the regulation on this basis, would jeopardize the lawful employment of thousands who have followed all the rules to be allowed to work in the United States. This court should avoid such a drastic mistake by acknowledging the legality of the 2022 Policy, including that those granted deferred action could apply for work authorization under 8 C.F.R. § 274a.12(c)(14). ECF No. 1-1 at 2.

II. The Change-in-Position Doctrine Applies Regardless of Whether a Policy Was Promulgated Through a Formal Rulemaking Process.

The change-in-position doctrine squarely governs the 2022 SIJS Deferred Action Policy—indeed, Defendants have said so in this litigation. ECF No. 42 at 24 ("When an agency changes its policy—including acting 'inconsistent[ly]' with an earlier position and reversing its former views—courts apply the 'change-in-position' doctrine.") (quoting *White Lion*, 145 S. Ct. at 918). The doctrine asks two questions: "The first is whether an agency changed existing policy"; the second is: "Did the agency 'display awareness that it *is* changing position' and offer 'good reasons for the new policy'?" *White Lion*, 145 S. Ct. at 918 & n.5 (quoting *Fox Television*, 556 U.S. at 515).

As to the first question, the Supreme Court in *White Lion* "assume[d], without deciding, that the change-in-position doctrine applies to an agency's divergence from a position articulated in nonbinding guidance documents[,]" *id.* at 918 n.5, applying the framework even though the standards at issue in the case appeared only in guidance and internal memoranda, *id.* at 918–19. *See also Shenzhen Youme Info. Tech. Co. v. FDA*, 147 F.4th 502, 512 (5th Cir. 2025) (months after *White Lion*, the Fifth Circuit similarly "assume[d], without deciding" that informal policy changes are subject to the change-in-position doctrine). Even before *White Lion*, courts in this Circuit had

concluded that policies not subject to formal rulemaking fall under the doctrine's ambit. *See, e.g., Saget v. Trump*, 375 F. Supp. 3d 280, 355–56, 59 (E.D.N.Y. 2019) (applying doctrine to set aside DHS Secretary's departure from agency practice in evaluating TPS designations, reasoning that the *Fox Television* standard "is not limited to formal rules or official policies and applies equally to practices implied from agency conduct"); *Velesaca v. Decker*, 458 F. Supp. 3d 224, 237 (S.D.N.Y. 2020) (preliminarily enjoining an ICE policy, despite ICE's denial that the policy existed, finding the APA's arbitrary and capricious standard "not limited to formal rules or official policies"); *see also, e.g.*, *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 645–47 (D.C. Cir. 2020) (applying change-in-position doctrine to assess policies previously codified in report and agency handbook and changed by directive). When courts have eschewed reliance on the change-in-position doctrine, it has generally been because the challenged agency action was too informal or preliminary to constitute a new policy.[12]

Here, the 2022 SIJS Deferred Action Policy and the 2025 Rescission Policy fall within the doctrine's ambit. As in *Regents*, where the Supreme Court applied the doctrine to DACA policy statements, the 2022 SIJS Deferred Action Policy "institute[d] 'a standardized review process' that 'effectively' resembled adjudication." *White Lion*, 145 S. Ct. at 918 n.5 (quoting *Regents*, 591 U.S. at 30). The 2022 Policy Alert, ECF No. 1-1, accompanying USCIS Policy Manual Update, ECF No. 9-26, and explanatory public-facing FAQs[13] describe in detail how the 2022 Policy would govern agency procedure. There can also be no doubt that the 2025 Policy Alert and accompanying changes to the USCIS Policy Manual were a repudiation of the 2022 Policy in both word and

[12]The only case in this Circuit to address *White Lion* is distinguishable because it considered "internal personnel actions [that] are not properly characterized as agency policy," because those actions were not "set forth in some 'formal' manner, such as a regulation, a guidance memorandum, or an agency enforcement action." *New York v. Trump*, 778 F. Supp. 3d 578, 596 (S.D.N.Y. 2025) (quoting *White Lion*, 145 S. Ct. at 918 n.5).

[13]Special Immigrant Juvenile Policy Updates Pre-Submitted and Live Q&A National Engagement (Apr. 27, 2022), https://www.uscis.gov/sites/default/files/document/outreach-engagements/National_Engagement-Special_Immigrant_Juvenile_Policy_Updates-Q%26A.pdf.

practice. Beyond the governing policy documents, Plaintiffs' supporting declarations attest to the lived experiences of tens of thousands of youth under these policies. *See, e.g.*, ECF No. 9-9, ¶¶ 12, 25; ECF No. 9-10, ¶¶ 6, 18; ECF No. 9-14 ¶¶ 16–18; ECF No. 9-15 ¶¶ 9–16. As USCIS failed to proffer any "good reasons" for its departure from agency practice, *supra* Sec. I.B.; ECF No. 44 at 8–12, the APA mandates vacatur of the 2025 Rescission Policy. *White Lion*, 145 S. Ct. at 918.

III. The Court Should Consider Only the Public June 6, 2025 Policy Alert When Assessing Whether the Rescission of the 2022 SIJS Deferred Action Policy Complied with the APA.

Because Defendants never published the Nonpublic Memo, ECF No. 42-5, the Court should not consider it when assessing the 2025 Rescission Policy under the APA. There is little precedential authority directly addressing whether a contemporaneous but nonpublic internal memo may be considered as part of an agency's explanation for a policy change. However, as the Supreme Court has recognized, the APA "sets forth the procedures by which federal agencies are accountable *to the public*[,]" *Regents*, 591 U.S. at 16 (emphasis added); *see also Dep't of Com. v. N.Y.*, 588 U.S. 752, 785 (2019) ("The [APA's] reasoned explanation requirement . . . is meant to ensure that agencies offer genuine justifications for important decisions, *reasons that can be scrutinized by courts and the interested public*." (emphasis added)). In *Invenergy Renewables LLC v. United States*, the court declined to consider a contemporaneous, internal agency memorandum as the basis for the agency's reasoning because,

> providing explanation in an internal memorandum does not serve the APA's mandate that an agency decision be adequately explained, i.e., not arbitrary and capricious, or the principles of administrative law that require transparency and public accountability. An explanation that is never made available to the parties or to the public at large is not one that can be considered transparent or of use to those who participated outside the agency.

476 F. Supp. 3d 1323, 1346 (Ct. Int'l Trade 2020). Courts are thus limited to reviewing the agency's publicly disclosed reasons and cannot rely on internal agency memoranda.[14]

At the very least, the Court should disregard all justifications for the 2025 Rescission Policy offered in the Nonpublic Memo but not found in the agency's public justification for the decision. The public 2025 Policy Alert asserts two reasons for the Rescission: (1) "USCIS has determined that this update is necessary to more closely align agency policies and procedures with statutory requirements and authorities"; and (2) "this policy adheres to Executive Order 14161 . . . and USCIS has determined it is in the national and public interest to revert to the policy prior to March 7, 2022." ECF No. 1-2 at 1–2. The Nonpublic Memo, on the other hand, claims that the SIJS program has been subject to abuse in part because of the agency's alleged failure to thoroughly vet applicants for deferred action; has led to an increase in applicants; and impacts the availability of certain other immigrant visas. ECF No. 42-5 at 5–6. These purported rationales do more than merely supplement the reasoning in the 2025 Policy Alert; they offer *new* reasons that were not publicly disclosed and cannot be considered by this Court. *See Regents*, 591 U.S. at 21 ("When an agency's initial explanation 'indicate[s] the determinative reason for the final action taken,' the agency may elaborate later on that reason (or reasons) but may not provide new ones." (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)). Ultimately, "'the Government should turn square corners in dealing with the people.'. . . [A]n agency must defend its actions based on the reasons it gave when it acted[,]" not internal, nonpublic justifications. *Id.* at 24 (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961)).

[14]One of Plaintiffs' claims is that Defendants failed to follow the notice-and-comment rulemaking procedures required by Section 553 of the APA. *See* 5 U.S.C. § 553. If Defendants had followed the statutorily required process, they would have been required to "adopt[] a concise general statement of their basis and purpose." *Id*. § 553(c). But they did not follow the process, did not explain the decision, and now seek to benefit from those failures by incorporating never-disclosed reasons as part of the basis for the rescission of the 2022 Policy.

Moreover, even if it were proper for this Court's consideration, the Nonpublic Memo inaccurately portrays the 2022 SIJS Deferred Action Policy and fails to provide a reasoned explanation that could justify the policy change. *Fox Television*, 556 U.S. at 515. For example, the Nonpublic Memo repeatedly mischaracterizes the 2022 Policy as a "*categorical grant* of deferred action (DA) for SIJS," ECF No. 42-5 at 1 (emphasis added); *see also id*. at 4, 5, 7, when the policy only required USCIS to *consider* deferred action, ECF No. 1-1. Similarly, the Nonpublic Memo falsely asserts that the 2022 Policy precluded USCIS from vetting SIJS beneficiaries, ECF No. 42-5 at 5–6, when in actuality USCIS conducted background checks and could require fingerprinting or an interview. *See* ECF No. 9-26 at 4 n.25.[15] And even if the agency reasonably concluded that the vetting process was deficient, its failure to consider improvements, rather than rescinding the policy wholesale, was itself arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–51 (1983); *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 80 (2d Cir. 2006). The Nonpublic Memo also claims that the 2022 SIJS Deferred Action Policy was a "pull factor" causing an increase in SIJS applications, relying primarily on the year-over-year increase. ECF No. 42-5 at 6. But correlation alone does not establish causation—filing volumes may have been influenced by many other external factors, including broader immigration trends. Accordingly, the Nonpublic Memo does not adequately explain the 2025 Rescission Policy.

IV. The 2022 SIJS Deferred Action Policy Must Be Restored to Provide Meaningful Relief to the Plaintiffs and Proposed Classes.

During the September 4 hearing, the Court inquired about the Government's ability to remove individuals while under consideration for deferred action, as well as the timing of deferred action determinations under the 2022 Policy. In view of the Government's concession that a SIJS

[15]Background checks revealing criminal history or other grounds that rendered the young person ineligible for adjustment of status "would generally be a strong negative factor weighing against" a grant of deferred action. USCIS, *supra*, Special Immigr. Juv. Pol'y Updates, Q&A, A14 at 6.

beneficiary cannot be removed while being considered for deferred action, and upon further consideration of the guidance and policy documents that accompanied the implementation of the 2022 Policy, Plaintiffs provide the following clarifications on these issues.

A. As the Government Concedes, Under the 2022 Policy, a SIJS Beneficiary Could Not Be Removed While USCIS Considered Deferred Action.

While Defendants claim that SIJS beneficiaries "remain subject to removal for lack of lawful status[,]" ECF No. 42-5, they also unequivocally stated at the hearing that, under the 2022 Policy, SIJS beneficiaries could not be removed while awaiting deferred action adjudication:

> Your Honor, we agree that it would be an absurd interpretation to say that under the old policy being able to remove someone while under consideration for deferred action would be permitted. It would be absurd because it would defeat the point of that consideration. And at that point, as your Honor pointed out, if a person is removed before a decision on deferred action is made, then the deferred action is pointless and then the policy becomes a nullity. So we do reject the reading that a person could—you know, that under the old policy a person could be removed from the United States pending assessment of that deferred action request.

Tr. 38: 3-15. This reading of the Policy is endorsed by the USCIS Policy Manual in effect at the time, which provided that USCIS could grant deferred action to a SIJS beneficiary "*with a final [removal] order*." ECF No. 42-2 n.27 (emphasis added). This confirms that even young people who might otherwise have been subject to immediate removal[16] were entitled to an adjudication under the 2022 Policy and thus could not be removed during the adjudication period.[17]

B. Requiring a Presumptive 90-Day Adjudication Timeframe Is Consistent with the 2022 Policy and Necessary to Restore SIJS Beneficiaries to the *Status Quo Ante*.

[16]Removal from the United States generally requires the initiation of removal proceedings, a final removal order, and exhaustion of the right to appeal. *See* 8 U.S.C. §§ 1229a; 1231(a)(1), 1101(a)(47)(B).

[17]Only the individual Plaintiffs seek a stay of removal for the pendency of this litigation based on the Court's inherent authority under the All Writs Act, 28 U.S.C. § 1651(a)–(b).

As also noted at the hearing, while USCIS is required by statute to adjudicate SIJS petitions within 180 days, 8 U.S.C. § 1232(d)(2), the 2022 Policy Alert did not provide a timeframe within which USCIS had to conduct deferred action adjudications, *see* ECF No. 1-1. That said, USCIS generally "issue[d] a deferred action determination together with [its] decision on Form I-360 [the SIJS petition]." Norton Decl., Ex. B. However, if USCIS determined that it "need[ed] additional information, which may include requesting biometrics, to make the deferred action determination, [it would] issue a decision on Form I-360 first." *Id.*; *see also* ECF No. 9-26 at 6 n.25.

To fully restore Plaintiffs and the putative classes to the *status quo ante* under the 2022 Policy, Defendants must adjudicate deferred action within some reasonable timeframe. Even though under the 2022 Policy SIJS beneficiaries with final removal orders are protected from deportation pending a deferred action determination, they cannot apply for EADs until deferred action is granted. Plaintiffs' requested 90-day period is reasonable as a presumptive timeline, given that, under the 2022 Policy, USCIS generally conducted deferred action and SIJS adjudications concurrently, and that, at least as far back as 2012, USCIS itself recognized a 90-day adjudication timeframe for all deferred action requests.[18] Plaintiffs acknowledge that any order must allow an additional reasonable period for adjudication of cases in which background checks reveal information that in USCIS's view requires additional biometrics or an interview (pursuant to the 2022 Policy); however, USCIS should be required to issue such requests promptly and within the presumed 90-day period.

C. Either a Stay of the 2025 Rescission Policy Pursuant to Section 705 of the APA or a Preliminary Injunction Ordering Adjudication of Deferred Action Within a Reasonable Timeframe Is Appropriate to Restore the *Status Quo Ante*.

[18]Norton Decl., Ex. A at 6 ("Field offices will make every effort to ensure that deferred action requests are completed within 90 days."); *see also* ECF No. 42-5 at 5 n.10 (Defendants' Nonpublic Memo citing the 2012 Standard Operating Procedures as authority for historical agency practice regarding deferred action adjudications).

Because USCIS's practice under the 2022 Policy was generally to adjudicate deferred action and SIJS contemporaneously, with flexibility for additional vetting as needed, and because the standard practice was to adjudicate any deferred action request within 90 days, *see supra* Sec. IV.B, the relief Plaintiffs seek is achievable through an APA stay of the 2025 Rescission Policy and consequential restoration of the 2022 Policy, as informed by the general deferred action timeline. Accordingly, assuming that a stay of the 2025 Rescission Policy under Section 705 of the APA incorporates the presumptive 90-day adjudication timeline, the necessary relief could be accomplished through either such a stay or a classwide preliminary injunction.

A preliminary injunction would not run afoul of 8 U.S.C. § 1252(f)(1) because the constraint on removal and the timing of the deferred action decision flow from the 2022 Policy and standard USCIS adjudication timelines—not from an injunction. Restoration of the 2022 Policy would therefore not enjoin the "operation" of any of the provisions covered by § 1252(f)(1). And in any event, § 1252(f)(1) does not deprive the Court of jurisdiction to issue injunctions that only collaterally affect the operation of the covered provisions. *See Garland v. Aleman Gonzalez*, 596 U.S. 543, 553 n.4 (2022) ("[A] court may enjoin the unlawful operation of a provision *that is not specified in § 1252(f)(1)* even if that injunction has some collateral effect on the operation of a covered provision[.]"); *Gonzales v. DHS,* 508 F.3d 1227, 1233 (9th Cir. 2007) (an injunction concerning the adjustment of status statutory provisions was not barred by 1252(f)(1) because it has at most a "one-step removed effect" on a covered provision); *Al Otro Lado v. Exec. Off. for Immigr. Rev.*, 138 F.4th 1102, 1125-26 (9th Cir. 2025) ("Even though asylum eligibility may change the outcome of a removal proceeding under a covered provision, such an effect is collateral under our precedents.").

CONCLUSION

The Court should issue a preliminary injunction or enter a stay pursuant to APA § 705.

Dated: September 17, 2025

Respectfully submitted,

/s/ John Magliery

Natalie J. Kraner, No. 4441598
Alexander Shalom
Catherine Weiss (*pro hac vice*)
Markiana Julceus
Noemi Schor (*pro hac vice*)
LOWENSTEIN SANDLER LLP
1251 Avenue of the Americas, 17th Floor
New York, NY 10020
212.262.6700
nkraner@lowenstein.com
ashalom@lowenstein.com
cweiss@lowenstein.com
mjulceus@lowenstein.com
nschor@lowenstein.com
Stephanie E. Norton, No. 5205539*
Rachel Leya Davidson**
Yulie Landan (*pro hac vice*)***
NATIONAL IMMIGRATION PROJECT
1763 Columbia Road NW
Suite 175 #896645
Washington, DC 20009
202.217.4742
ellie@nipnlg.org
rachel@nipnlg.org
yulie@nipnlg.org
Rebecca Scholtz (*pro hac vice*)
NATIONAL IMMIGRATION PROJECT
30 S. 10th St. (c/o Univ. of
St. Thomas Legal Services Clinic)
Minneapolis, MN 55403
202.742.4423
rebecca@nipnlg.org

Brad Miller (*pro hac vice* forthcoming)
Adam Sieff (*pro hac vice* forthcoming)
Zoë McKinney (*pro hac vice*)
Joseph Elie-Meyers (*pro hac vice*)
AK Shee (*pro hac vice* forthcoming)
Monica E. Gibbons (*pro hac vice* forthcoming)
DAVIS WRIGHT TREMAINE LLP
350 South Grand Avenue, 27th Floor
Los Angeles, CA 90071
213.633-6800
bradmiller@dwt.com
adamsieff@dwt.com
zoemckinney@dwt.com
josepheliemeyers@dwt.com
akshee@dwt.com
monicagibbons@dwt.com

John Magliery, No. 60082
DAVIS WRIGHT TREMAINE LLP
1251 6th Avenue, 21st Floor
New York, NY 10020
212.489.8230
johnmagliery@dwt.com

Rebecca Brown (*pro hac vice*)
PUBLIC COUNSEL
610 S. Ardmore Ave.
Los Angeles, CA 90005
213.385.2977
rbrown@publiccounsel.org

Attorneys for Plaintiffs A.C.R., J.G.V., E.A.R., C.V.R., Y.A.M., B.R.C., J.C.B., L.M.R., and S.M.M., Central American Refugee Center (CARECEN-NY), and Centro Legal de la Raza

Wendy Wylegala, No. 4154621
KIDS IN NEED OF DEFENSE (KIND)
252 West 37th Street, Floor 15
New York, NY 10018
646-970-2913
wwylegala@supportkind.org

*Not admitted in DC; working remotely from Wyoming and admitted in New York only.
**Not admitted in DC; admitted in New York only.
***Not admitted in DC; working remotely from New York and admitted in California only.