U.S. Department of Justice
Civil Division, Federal Programs Branch

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Hon. George B. Daniels
United States District Court
Southern District of New York
500 Pearl Street, Room 1310
New York, NY 10007

Re: Statement of supplemental authority in *New York v. U.S. Department of Homeland Security*, No. 19-7777, and *Make the Road New York v. Cuccinelli*, No. 19-7993

Dear Judge Daniels:

I represent the defendants in the above-captioned cases. I write to call the Court's attention to the Supreme Court's recent ruling in *Department of Homeland Security v. Regents of the University of California*, No. 18-587, 2020 WL 3271746 (U.S. June 18, 2020), which adds support for the Defendants' motions to dismiss.

As relevant here, the Supreme Court rejected plaintiffs' equal protection challenge to the Secretary of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals (DACA) program. In addition to the four Justices in the plurality, four more Justices concurred in the judgment with respect to the equal protection claim, meaning that eight Justices in all agreed that the plaintiffs failed to plead a valid claim. *See* Op. 27-29; Op. of Thomas, J., 3 n.1 (concurring in the judgment in part and dissenting in part); Op. of Kavanaugh, J., 8 (concurring in the judgment in part and dissenting in part). The *Regents* plaintiffs asserted that the appropriate standard for evaluating their equal protection claim was the standard set forth in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), and that they had stated a plausible claim under that standard in light of (1) the decision's disparate impact on minority groups; (2) the allegedly unusual process that led to the Secretary's decision; and (3) purportedly discriminatory remarks made by the President about the impacted groups. Op. 27.

The Court deemed these allegations insufficient to establish a plausible equal protection claim. As the Chief Justice explained, even assuming *Arlington Heights* applied and the President's remarks were given plaintiffs' interpretation, plaintiffs' allegations fell short, whether considered "singly or in concert," because, among other things, they were "remote in time and made in unrelated contexts." Op. 27-28. The Chief Justice emphasized that the Secretary and the Attorney General, not the President, were the relevant decisionmakers, and that plaintiffs presented no evidence of discriminatory animus on their part. Op. 28. The Chief Justice additionally stressed that the DACA decision's disparate impact on minorities was not probative of discriminatory animus given that such impacts are an unavoidable result of most immigration policies. *Id.* at 27.

Plaintiffs' allegations here mirror those brought by the plaintiffs in *Regents*. Plaintiffs cite no evidence that Acting Secretary of Homeland Security McAleenan harbored animus, but nonetheless argue that discriminatory intent can be imputed to the Rule based on its disparate impact on minorities, the purportedly unique process leading up to the Rule, and allegedly discriminatory remarks made by the President and other nondecisionmakers. *See* Pls.' Opp. to Defs.' Mot. to Dismiss, 19-cv-7777, ECF No, 145 at 57-60. Thus *Regents*, strongly supports dismissal of Plaintiffs' similar equal protection claims in these cases.

Respectfully submitted,

/s/
Keri L. Berman

CC: All Counsel of record via ECF.