Agenda Item: File ID19-11286
Date: 9/18/2019
Council Meeting Date: 9/19/19

FRESNO CITY COUNCIL

City of FRESNO

Supplemental Information Packet

Agenda Item – ID 19-11286, RESOLUTION – Joining the Multi=city/County Amicus Brief in Support of Plaintiffs/Respondents in the Deferred Action for Childhood Arrivals (DACA) Cases Currently Before the United States Supreme Court

Content of Supplement: Approximate Active DACA Recipients, 9th Circuit document, and Supreme Court of the United States Document

Supplemental Information:

Any agenda related public documents received and distributed to a majority of the City Council after the Agenda Packet is printed are included in Supplemental Packets. Supplemental Packets are produced as needed. The Supplemental Packet is available for public inspection in the City Clerk's Office, 2600 Fresno Street, during normal business hours (main location pursuant to the Brown Act, G.C. 54957.5(2). In addition, Supplemental Packets are available for public review at the City Council meeting in the City Council Chambers, 2600 Fresno Street. Supplemental Packets are also available on-line on the City Clerk's website.

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APPROXIMATE ACTIVE DACA RECIPIENTS

Approximate Active DACA Recipients: Core Based Statistical Area As of April 30, 2019	
Core Based Statistical Area	**Number (rounded)**
Grand Total	**669,080**
Los Angeles-Long Beach-Anaheim, CA	83,520
New York-Newark-Jersey City, NY-NJ-PA	43,560
Dallas-Fort Worth-Arlington, TX	36,200
Houston-The Woodlands-Sugar Land, TX	33,780
Chicago-Naperville-Elgin, IL-IN-WI	33,740
Riverside-San Bernardino-Ontario, CA	23,380
Phoenix-Mesa-Scottsdale, AZ	21,630
Atlanta-Sandy Springs-Roswell, GA	15,100
San Francisco-Oakland-Hayward, CA	14,330
Washington-Arlington-Alexandria, DC-VA-MD-WV	12,690
San Diego-Carlsbad, CA	10,820
Miami-Fort Lauderdale-West Palm Beach, FL	10,180
Las Vegas-Henderson-Paradise, NV	9,950
Denver-Aurora-Lakewood, CO	9,540
San Jose-Sunnyvale-Santa Clara, CA	8,930
Seattle-Tacoma-Bellevue, WA	7,430
Austin-Round Rock, TX	7,430
McAllen-Edinburg-Mission, TX	7,340
Portland-Vancouver-Hillsboro, OR-WA	5,850
Charlotte-Concord-Gastonia, NC-SC	5,850
Sacramento--Roseville--Arden-Arcade, CA	5,810
San Antonio-New Braunfels, TX	5,210
Fresno, CA	5,040
Bakersfield, CA	5,030
Salt Lake City, UT	4,680
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD	4,450
Boston-Cambridge-Newton, MA-NH	4,390
Minneapolis-St. Paul-Bloomington, MN-WI	4,250
Oxnard-Thousand Oaks-Ventura, CA	3,980
Indianapolis-Carmel-Anderson, IN	3,970
Raleigh, NC	3,760
Kansas City, MO-KS	3,550
Visalia-Porterville, CA	3,550
Stockton-Lodi, CA	3,410
Nashville-Davidson--Murfreesboro--Franklin, TN	3,330
Tampa-St. Petersburg-Clearwater, FL	3,180
Santa Maria-Santa Barbara, CA	3,020
Modesto, CA	3,000
Salinas, CA	3,000
Oklahoma City, OK	2,890
Albuquerque, NM	2,790
Milwaukee-Waukesha-West Allis, WI	2,740

Orlando-Kissimmee-Sanford, FL	2,720
Santa Rosa, CA	2,530
Detroit-Warren-Dearborn, MI	2,350
Winston-Salem, NC	2,250
Baltimore-Columbia-Towson, MD	2,220
Brownsville-Harlingen, TX	2,170
Salem, OR	2,120
Yakima, WA	2,030
Tucson, AZ	2,020
Greensboro-High Point, NC	1,990
Bridgeport-Stamford-Norwalk, CT	1,920
Tulsa, OK	1,890
Merced, CA	1,890
Kennewick-Richland, WA	1,890
Durham-Chapel Hill, NC	1,850
Memphis, TN-MS-AR	1,850
Columbus, OH	1,840
Fayetteville-Springdale-Rogers, AR-MO	1,780
Provo-Orem, UT	1,730
Reno, NV	1,710
El Paso, TX	1,670
North Port-Sarasota-Bradenton, FL	1,530
Vallejo-Fairfield, CA	1,490
Omaha-Council Bluffs, NE-IA	1,470
Cape Coral-Fort Myers, FL	1,460
Grand Rapids-Wyoming, MI	1,450
Birmingham-Hoover, AL	1,410
Greenville-Anderson-Mauldin, SC	1,390
Santa Cruz-Watsonville, CA	1,360
Gainesville, GA	1,360
Ogden-Clearfield, UT	1,340
Laredo, TX	1,290
Providence-Warwick, RI-MA	1,280
Wichita, KS	1,270
Boise City, ID	1,220
Lakeland-Winter Haven, FL	1,220
Elkhart-Goshen, IN	1,180
Richmond, VA	1,130
Naples-Immokalee-Marco Island, FL	1,080
Louisville/Jefferson County, KY-IN	1,040
Des Moines-West Des Moines, IA	1,030
New Haven-Milford, CT	1,020
Cincinnati, OH-KY-IN	1,010
Greeley, CO	1,010
Other CBSA	95,230
Non CBSA	14,920
Not available	1,290

1) The report reflects the most up-to-date data available at the time the report is generated.

2) The Active DACA population are individuals who have an approved I-821D with validity as of Apr. 30, 2019.

3) Individuals who have obtained Lawful Permanent Resident Status or U.S. Citizenship are excluded.

4) Core Based Statistical Areas (CBSA) at the time of most recent application. CBSAs are defined by the Office of Management and Budget.

5) CBSA with less than 1,000 individuals are included in Other CBSA.

6) Not available means the data is not available in the electronic systems.

7) Totals may not sum due to rounding.

9th CIRCUIT DOCUMENT

18-15068 (consol. w/ 18-15069, 18-15070, 18-15071, 18-15072, 18-15128, 18-15133, 18-15134)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
Plaintiffs-Appellees

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the Northern District of California,
Nos. 17-cv-05211, 17-cv-05235, 17-cv-05329, 17-cv-05380, & 17-cv-05813
Honorable William H. Alsup

BRIEF OF 40 CITIES AND COUNTIES, THE NATIONAL LEAGUE OF CITIES AND THE UNITED STATES CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND FOR AFFIRMANCE

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STATEMENT OF INTEREST AND CONSENT TO FILE

Amici Curiae[1] are located across the United States and include 40 cities and counties, the National League of Cities and the United States Conference of Mayors.[2] The full list of *Amici* is attached as Exhibit A.

This litigation is of momentous interest to *Amici*, since 49.9**%** – nearly 1 in 2 – of all currently active recipients of the Deferred Action for Childhood Arrivals (DACA) program – 340,540 individuals – live in the metropolitan areas of the *Amici* cities and counties.[3]

The Los Angeles, New York, Dallas, Chicago, and Houston metro regions have the five largest DACA populations in the United States. According to the

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a), *Amici* obtained the consent of all parties before filing this brief. Counsel for *Amici* authored this brief in whole, and no party, no party's counsel, nor any other person has contributed money intended to fund preparation of this brief. *See* Fed. R. App. P. 29(a)(4).

[2] The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans. The United States Conference of Mayors is the official non-partisan organization of cities with populations of 30,000 or more. There are 1,408 such cities in the country today. Cities are represented in the Conference by their chief elected official, the mayor.

[3] United States Citizen and Immigration Service (USCIS) data show that approximately 807,000 applicants have qualified for DACA since the start of the program. Approximately 682,750 DACA recipients currently have active DACA status. For purposes of this brief, residency in a "metropolitan area" is defined as residency in a Core Based Statistical Area (CBSA) at the time of the DACA recipient's most recent application. CBSAs are defined by the United States Office of Management and Budget. *See* U.S. Citizenship and Immigration Services DACA Data dated "As of January 31, 2018" (USCIS Data). Available at: https://tinyurl.com/USCIS2018data

USCIS, as of January 31, 2018, approximately 13% of all active DACA recipients reside in the Los Angeles metro area. Another 22% of active recipients reside in either the New York, Dallas, Chicago, or Houston metro regions, while Atlanta, the San Francisco Bay Area, Denver, Austin, Seattle and Washington D.C. together account for an additional 10% of the active DACA population. Collectively, more active DACA recipients reside in *Amici*'s metro areas than the combined active DACA populations of **46** states.[4]

Since obtaining deferred action, these DACA recipients – our employees and residents – have made substantial contributions to our communities as business owners, educators, researchers, artists, journalists, and civic leaders. Tens of thousands DACA enrollees are attending our local schools, studying to become our newest doctors and nurses, lawyers and entrepreneurs. Many DACA recipients work directly for *Amici*, and play critical roles in our daily government operations. No matter how DACA recipients choose to contribute, all of *Amici* are stronger and safer because of the DACA program. Therefore, *Amici* profoundly object to Appellants' actions to eliminate DACA. These actions are harmful and unlawful.

Since its inception more than two centuries ago, our nation has served as an adopted home for generations of migrant children. Welcoming and protecting young immigrants is part and parcel of our DNA. More than a century ago, in 1904, the

[4] *Id.*

Washington Post profiled eleven "matrons" whose job was to care for minor children arriving in the United States through New York Harbor and Ellis Island. The head matron, Regina Stucklen, noted that the children under her care were "the sweetest things that grow."[5]

More than one million children passed through Ellis Island in its 62 years as an immigration station. Some of those "sweetest things" grew to become laborers in our factories, warehouses, and mills, driving our engines of economic growth. Others chose lives in public service, becoming members of our military, teachers, social workers, firefighters, and police officers. Some of those immigrant children who entered via Ellis Island grew up to become renowned artists, athletes, musicians, and authors, like Irving Berlin, Bob Hope, Claudette Colbert, Knute Rockne, and Frank Capra, and institutional leaders, like Los Angeles Archbishop Timothy Manning, San Francisco Mayor George Christopher, and Supreme Court Justice Felix Frankfurter.[6]

However immigrants came to our country, those who arrived here as children helped to build the foundation of *Amici*'s economic prosperity, military security, cultural artistry, and civic society. *Amici* now look to a new generation of child

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[5] Special Correspondence, *Tots at Ellis Island*, THE WASHINGTON POST (June 5, 1904), available at: https://secure.pqarchiver.com/washingtonpost_historical/doc/144543811.html.

[6] Moreno, Barry, *Children of Ellis Island*, ARCADIA PUBLISHING (2005).

migrants, especially those eligible for the DACA program, to help guide our financial and cultural success into the future.

TERMINATING DACA WILL HARM *AMICI CURIAE*

Stated in more detail, the DACA program is vitally important to *Amici* for several reasons. First, the DACA program promotes economic prosperity and benefits taxpayers, which means that *Amici* will suffer direct economic harm if DACA is rescinded. *Amici* rely heavily upon the economic contributions of foreign-born residents and DACA recipients make up a statistically significant portion of *Amici*'s foreign-born labor force. Collectively, the DACA recipients living in *Amici* cities and counties openly earn billions of dollars in taxable income because of the work authorization benefit provided by the DACA program.[7]

A 2017 study by the Institute on Taxation and Economic Policy found DACA recipients pay an estimated $1.6 billion in state and local taxes annually, giving them a higher effective tax rate than the average state and local tax rate paid by the top 1% of U.S. taxpayers.[8] Because USCIS Data show that DACA recipients are

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[7] USCIS DACA Frequently Asked Questions (USCIS DACA FAQ), at Question 1, available at: https://www.uscis.gov/archive/frequently-asked-questions (stating that "an individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate 'an economic necessity for employment.'")

[8] Institute on Taxation and Economic Policy, *State & Local Tax Contributions of Young Undocumented Immigrants* (2017) (Washington D.C.), available at: http://tinyurl.com/ITEPDACAstudy

concentrated in *Amici*'s metro areas, those with deferred action are an important subset of the foreign-born populations critical to the economy of *Amici* cities. This arbitrary and capricious action by Appellants to eliminate DACA will negatively impact *Amici* by removing hundreds of thousands of workers, business owners, and taxpayers from our respective economies.

On a micro-economic level, the benefits gained through the DACA program have given recipients of deferred action the encouragement and comfort to openly enter the work force, take on student loans, sign mortgages, and start businesses. Studies show that DACA recipients have made profound economic gains *because of* receiving deferred action. In a representative survey, the Center for American Progress found that, after receiving deferred action, 69% of employed DACA recipients moved to a higher-paying job and 5% of recipients started a new business, which is a rate of business creation greater than among the general public.[9]

The Center's study also found that the hourly wages of surveyed DACA recipients increased by an average of 42%; that 60% of those with increased earnings have become financially independent; and that 61% have started to contribute to their family's finances. At least half of all DACA recipients surveyed by the Center reported that they have bought a car since receiving deferred action, 12% have

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[9] Center for American Progress, *DACA Recipients' Economic and Educational Gains Continue to Grow* (2017) (CAP Study) Washington, D.C. The CAP Study is available at: http://tinyurl.com/CAPDACAstudy.

bought their first home, and 25% have a child who is an American citizen.

Terminating this program will not only roll back these financial and familial gains earned by DACA recipients, it will harm *Amici,* in that cities and counties operate – and our taxpayers fund – the social safety net that will be required to catch these families if the DACA recipients' work authorization is taken away, families are forced apart by removals, and homes fall into foreclosure.

Second, DACA promotes public safety and public welfare by bringing hundreds of thousands of young immigrants out of the shadows. *Amici's* law enforcement agencies know firsthand that, as immigration enforcement and the threat of deportation increase, undocumented immigrants are substantially less likely to report crimes by others, including violent crimes.[10] And studies estimate that granting legal status – such as the deferred action conferred by DACA – to only 1% of undocumented immigrants in the United States can lower crime rates by 2 to 6%.[11]

Similarly, a study from the CATO Institute concluded that native-born Americans are 14% more likely than DACA-eligible immigrants with the same age

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[10] Burnett, John, *New Immigration Crackdowns Creating 'Chilling Effect' on Crime Reporting*, National Public Radio (May 25, 2017), available at https://tinyurl.com/NPRchillingeffect.

[11] Baker, Scott R., *Effects of Immigrant Legalization on Crime: The 1986 Immigration Reform and Control Act*, Stanford Law and Econ. Olin Working Paper, at 25 (July 28, 2014) available at https://tinyurl.com/Stanfordcrimestudy.

and education to be incarcerated.[12] To even qualify for deferred action, DACA applicants must submit detailed personal histories and pass a rigorous background check. And, if they are arrested after obtaining deferred action, they can lose their DACA status. Indeed, very few DACA recipients – only 0.25% – have been expelled from the program for criminal activity or other public safety concerns, which is a rate substantially lower than the general rate of criminality in American society.[13]

What's more, DACA recipients – free to contribute openly to their communities – have been hailed as heroes. Houston-area paramedic Jesus Contreras is a DACA recipient. He worked six straight days after Hurricane Harvey hit southeast Texas, rescuing people from floodwaters and putting his own life in danger. News reports show that had Mr. Contreras' DACA status been rescinded during those six days, he could have immediately been pulled from his ambulance for losing his work authorization, reducing the number of available first responders.[14] Similarly, many have praised the efforts of the countless volunteers who used their own boats, at their own peril, to rescue their neighbors during

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[12] *The DREAMer Incarceration Rate* (2017), CATO Institute, Washington, D.C. available at: https://www.cato.org/publications/immigration-research-policy-brief/dreamer-incarceration-rate

[13] *Id.*

[14] Flores, Adolfo, *This Paramedic Who Rescued Harvey Victims May Be Deported If Trump Ends DACA,* BUZZFEED (September 1, 2017) available at: http://tinyurl.com/paramedicstory

Hurricane Harvey. One such Good Samaritan, Alonso Guillen, was a 31-year-old DACA recipient who, according to reports, drowned while trying to save others from the deadly floodwaters that inundated the Houston area.[15]

In addition, applicants who pass DACA's strict vetting process have been allowed to sign up for U.S. military service as part of a Pentagon program called Military Accessions Vital to the National Interest, or MAVNI. The day after Appellants moved to terminate DACA, the Pentagon announced that 900 DACA recipients are actively serving or have signed recruitment contracts to serve in the military. This service to our country and our communities, along with others whose service stories have yet to be told, makes *Amici* safer.

Thus, and thirdly, DACA recipients bring many tangible and intangible benefits to *Amici* cities and counties. Much like those children who passed through Ellis Island decades ago went on to become acclaimed actors, athletes, artists and leaders, today's DACA recipients are helping to weave our modern-day social fabric. Active DACA recipients are employed by at least 72% of the top 25 "Fortune 500" companies, many of which are headquartered in *Amici*. There are 250 DACA

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[15] Carroll, Susan and Kriel, Lomi *Lost in Cypress Creek* HOUSTON CHRONICLE (September 9, 2017), available at: http://tinyurl.com/lost-in-cypress-creek

beneficiaries alone working at Apple Inc., the world's most valuable company.[16]

Among the individual recipients of deferred action living in *Amici* cities and counties are a public school teacher in Austin, Texas with a master's degree in education focusing on hearing-impaired students; a Los Angeles-based graphic designer who has worked on marketing campaigns for *Star Wars: Rogue One* and *Game of Thrones*; a political organizer based in Washington D.C., who recently served as a press secretary for a 2016 presidential candidate; a producer for MSNBC's *Morning Joe* who helps shape the network's morning programming and, separately, a licensed attorney and the first member of the New York State Bar with DACA status, both of whom live in New York City.

Ultimately, this litigation is about protecting these young people who were brought here by their parents, often as infants. These children typically know no country besides the United States and may speak no language besides English. They study in our schools, work in our economy, and pledge allegiance to our flag. As President Obama stated the day the program was created, they "are Americans in their hearts, in their minds, in every single way but one: on paper."[17] Turning our back on DACA recipients is turning our back on the future.

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[16] Shaban, Hamza, *CEO Tim Cook says he stands by Apple's 250 DACA-status employees,* THE WASHINGTON POST (September 3, 2017), available at: http://tinyurl.com/DACAFortune500

[17] Remarks by President Obama. June 15, 2012. http://tinyurl.com/Obama-6-15-12

ARGUMENT

I. The DHS action to terminate DACA implicate "broad" changes to agency policy that are disconnected from any individual enforcement action and are, therefore, subject to judicial review.

Appellants contend that the DHS action to rescind DACA (Rescission Policy) is entirely beyond judicial review. It is not. As Appellees correctly assert and as the district court correctly ruled, neither the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, nor the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, prohibit judicial review of broad-based revisions of immigration policy, such as the Rescission Policy, as distinguished from decisions in individual immigration proceedings.[18]

A. Appellants' actions in this matter are judicially reviewable under Section 701(a)(2) of the APA.

The district court correctly ruled that Section 701(a)(2) of the APA does not preclude judicial review of the Rescission Policy. *Id.* This exception to APA review for actions committed to an agency's discretion by law is very narrow, is rarely applicable, and in particular does not apply to "broad" changes to agency policy that are disconnected from enforcement action against particular individuals (i.e. when there is no "law to apply"). *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citations omitted), *abrogated on other grounds by Califano v.*

[18] *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, No. 17-cv-05211 (WHA) (SK), 2018 U.S. Dist. LEXIS 4036 at *48-49 (N.D. Cal. Jan. 9, 2018).

Sanders, 430 U.S. 99 (1977). This holds true even in the arena of federal immigration enforcement. *See, e.g., McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 483-84 (1991).

Even assuming the ultimate decision to exercise prosecutorial discretion to defer action against any one individual were unreviewable by a court, the indiscriminate revocation of deferred action for all DACA recipients based upon a misguided legal determination that DACA was unlawful is, and ought to be, reviewable.[19]

For all intents and purposes, the Rescission Memo takes deferred action off the table for an entire class of persons, and impacts an entire class of persons, demonstrating that the Rescission Policy is the poster child for a justiciable agency action.

As noted in *Amici's* statement of interest, DACA recipients have made profound gains because of receiving deferred action. The hundreds of thousands of DACA enrollees who received deferred action will see these gains uniformly wiped out, not because of any individualized discretionary action, but because Appellants

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[19] *See* DHS Memorandum titled *Memorandum on Rescission of Deferred Action For Childhood Arrivals* (Rescission Memo) (September 5, 2017), http://tinyurl.com/2017Memo (stating that because a Texas district court preliminarily enjoined a DHS program called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), DACA must suffer from "the same legal and constitutional defects.").

formed a legal conclusion that DACA was unlawful, and, with the stroke of a pen, terminated the program. This "application of law" plainly provides justiciability for the lower court to review Appellees' APA claims.

B. Section 1252(g) of the INA does not preclude judicial review.

Section 1252(g) states, in part, that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." Both this Court and the United States Supreme Court have consistently interpreted this provision to apply only to the three narrow categories of decisions or actions Congress specifically identified in the statute. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (AADC)*; Alcaraz v. Immigration & Naturalization Serv.*, 384 F.3d 1150, 1161 (9th Cir. 2004); *Catholic Soc. Servs. v. Immigration & Naturalization Serv.*, 232 F.3d 1139, 1150 (9th Cir. 2000) ("[Section 1252(g)] applies only to the three specific discretionary actions mentioned in its text, not to all claims relating in any way to deportation proceedings.").

In an attempt to squeeze within the narrowly defined scope of the statute, Appellants contend that the Rescission Policy is but "an initial 'action' in the agency's 'commence[ment] [of] proceedings' against aliens who are unlawfully in

the country."[20] Already, however, three district courts, including Judge William Alsup's order in the instant matter, have rejected this self-serving characterization of DACA termination in the past few months. *Regents of the Univ. of Cal.,* 2018 U.S. Dist. LEXIS 4036, at *49; *see also Inland Empire - Immigrant Youth Collective v. Kirstjen Nielsen*, No. 17-cv-02048 (PSG) (SHK), 2018 U.S. Dist. LEXIS 34871, at *46 (C.D. Cal. Feb. 26, 2018) (ruling that that Appellants "interpret § 1252(g) too broadly" and that, because the plaintiffs were challenging not the decision to commence removal proceedings but the "separate and independent decision to revoke DACA," Section 1252(g) did not deprive the court of jurisdiction over plaintiff's claims); *Vidal v. Duke*, No. 16-cv-4756 (NGG) (JO), 2017 U.S. Dist. LEXIS 186349, at *47 (E.D.N.Y. Nov. 9, 2017).

This Court should similarly reject Appellants argument because it would, in effect, remove all such policy changes from judicial review. Indeed, any time the federal government implements a new policy that renders certain individuals removable, that new policy would, by nature, be a necessary step in commencing future enforcement proceedings under the policy. Congress clearly did not intend for Section 1252(g) to serve as the type of general preclusion statute into which Appellants' interpretation would transform it.

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[20] Defs.-Appellants' Opening Br., *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, No. 18-15068 (Dkt. 31) (Feb. 13, 2018) at pg. 26.

II. The district court correctly ruled that DHS acted arbitrarily and capriciously in violation of the APA.

A. DHS's sole stated reason for ending the DACA program was conclusory and relies upon flawed legal analysis.

DHS is an "agency" under the APA, 5 U.S.C. § 551(1), and the September 5, 2017 memorandum from Acting DHS Secretary Elaine Duke rescinding DACA is a "final agency action" subject to judicial review. 5 U.S.C. §§ 551(13), 704. An agency action is final when "rights or obligations have been determined or legal consequences will flow from the agency action." *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Any action taken "without observance of procedure required by law" or that is "arbitrary" or "capricious" is "unlawful" and must be "set aside" by the court. 5 U.S.C. § 706(2)(A)-(D). Accordingly, DHS was required to have employed "reasoned decisionmaking" when it moved to rescind DACA. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

In the DHS memo rescinding DACA, Appellants state in a conclusory manner it was "clear" that DACA "should be terminated."[21] The memo presumes that because a Texas district court preliminarily enjoined a separate DHS program called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)

[21] DHS Memorandum titled *Memorandum on Rescission of Deferred Action For Childhood Arrivals* (Rescission Memo)(September 5, 2017), available at: http://tinyurl.com/2017Memo.

in 2015, DACA must suffer from "the same legal and constitutional defects."[22] In justifying this legal conclusion, the Rescission Memo leans entirely on a 362-word letter from Attorney General Sessions.

In this short letter, the Attorney General asserts – by fiat – that: (1) DACA is just like DAPA; (2) DAPA was preliminarily enjoined on "multiple legal grounds," and that injunction was affirmed by the Fifth Circuit; therefore, (3) DACA is "likely" to be similarly enjoined, so DHS should rescind the program immediately.[23]

The Attorney General's analysis is wrong and DHS's sudden retreat from DACA was arbitrary and capricious and violates the APA.

As a threshold issue, Appellants' embrace of the Fifth Circuit's opinion declaring DAPA subject to judicial review is wholly inconsistent with the position they presented to the district court in their Motion to Dismiss and to this Court in their opening brief – *i.e.* a court may, under no circumstances, review the agency's exercise of prosecutorial discretion.[24] If Appellants believe that no court may review DHS's purported exercise of prosecutorial discretion, or that no one has standing to

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[22] *Id.*, quoting Letter from Attorney General Sessions to DHS Acting Secretary Elaine Duke on the Rescission of DACA (September 4, 2017) (Sessions Letter), available at: http://tinyurl.com/AG-Duke-Letter; *see also Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

[23] Sessions Letter, *supra*, note 23.

[24] Defs.' Mem. In Supp. of Mot. To Dismiss, No. 3:17-cv-05211-WHA (Document 114) (Nov., 1, 2017) at pg. 14; Defs.-Appellants' Opening Br., at pg. 15, *supra*, note 20.

challenge such a decision, they should not have advanced the Fifth Circuit's opinion as the basis for terminating DACA.

An agency rule is arbitrary and capricious "if the agency … offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43. The inherent contradiction between Appellants' justiciability and APA reviewability arguments in seeking to end DACA is just "so implausible."

Next, the Fifth Circuit was mistaken when it suggested, in dictum, that DAPA is contrary to the INA. *Texas v. United States*, 809 F.3d 134, 186, 214-215 (5th Cir. 2015).[25] The dissent's reasoning should instead guide this Court's analysis. *Id.* at 214-218 (King, J., dissenting).

All three branches of the Federal government have long embraced deferred action as a part of the immigration landscape. In fact, "deferred action" is one of the well-established ways in which DHS has historically prioritized enforcement.[26] The Supreme Court has recognized that deferred action is "a regular practice" in which

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[25] *See also Simons v. Bellinger*, 643 F.2d 774, 809, n.48 (1980) (Wilkey, J., dissenting) (a "determination was an alternative basis for dismissal, and to that extent the language may be regarded as dictum").

[26] *Regents of the Univ. of Cal.*, 2018 U.S. Dist. LEXIS 4036, at *15-16; *see also* Pls.' Mem. In Supp of Mot. for Provisional Relief, 3:17-cv-05211 (WHA) (Document 111) (Nov. 1, 2017) at pg. 4.

DHS exercises "discretion for humanitarian reasons or simply for its own convenience." *AADC*, 525 U.S. at 483-84.

Congress, meanwhile, has enacted legislation explicitly recognizing the DHS practice of granting deferred action. For example, the REAL ID Act of 2005, Pub. L. No. 109-13, allows states to issue driver's licenses to those undocumented immigrants with "approved deferred action status." Similarly, since 1981, federal regulations allow those "granted deferred action" to "apply for employment authorization." 8 C.F.R. § 274a.12(a)(11). And Congress has yet to disturb this regulation in three-plus decades.

More practically, Congress has never appropriated funding sufficient to remove all undocumented immigrants. This is why DHS, and its predecessors, have implemented more than 20 deferred action policies over the last 50 years.[27] Programs like DAPA and DACA enable DHS to focus limited resources on removing serious criminals by deferring action on low priority immigrants. As the D.C. Circuit Court wrote in *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986), "[t]he power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws." Moreover, "Congress has never prohibited or limited ad hoc deferred action, which

[27] *United States v. Texas*, 2015 U.S. Briefs 674 (Initial Brief of Appellant-Petitioner at pg. 5) (Mar. 1, 2016).

is no different than DAPA other than scale." *Texas*, 809 F.3d at 216 (King, J., dissenting).

Finally, even if DAPA were, as the Fifth Circuit concluded, "contrary" to the INA, *Texas*, 809 F.3d at 179, that rationale is inapplicable to DACA. Despite the Attorney General's assertion, DACA is not just like DAPA. The Fifth Circuit's opinion itself specifically notes "DACA and DAPA are not identical." *Id.* at 174 (finding "eligibility for DACA was restricted to a younger and less numerous population," and DAPA had different "discretionary criteria").

In sum, the only reason DHS gave for rescinding DACA was that the program was "likely" to be unlawful. But DACA is not unlawful,[28] which means that Appellants' actions are in violation of the APA given there is no other proffered agency justification for the rescission by DHS. *See Natural Resources Defense Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 96 (D.D.C. 2017) (stating "suffice it to say, it is arbitrary and capricious for an agency to base its decision on a factual premise that the record plainly showed to be wrong.").

[28] *Regents of the Univ. of Cal.*, 2018 U.S. Dist. LEXIS 4036, at *65; *Vidal v. Nielsen*, No. 16-cv-4756 (NGG) (JO), 2018 U.S. Dist. LEXIS 23547, at *51 (E.D.N.Y. Feb. 13, 2018).

B. The district court correctly rejected Appellants' post hoc rationalization for the termination – that it was necessary to ensure an orderly wind down given litigation risks – as arbitrary and capricious and an abuse of discretion.

After the Rescission Policy was challenged, Appellants began to rationalize the DACA termination by arguing that, based on the Acting Secretary's "reasonable evaluation of the litigation risk posed by the imminent lawsuit against the DACA policy, the choice she faced was between a gradual, orderly, administrative wind-down of the policy, and the risk of an immediate, disruptive, court-imposed one."[29]

But, if the Acting Secretary was going to rely upon a public policy rationale for her decision, she should have — but did not — weigh DACA's programmatic objectives as well as the reliance interests of DACA recipients.[30]

As Justice Anthony Kennedy wrote in *Encino Motorcars, LLC v. Navarro*, — U.S. —, 136 S. Ct. 2117, 2126–27 (2016), one of the principal requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. Appellants were, therefore, required to show, not just "that there are good reasons for the new policy," *id.* quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), but that they also considered the fact that longstanding policies may have "engendered serious *reliance interests* that must be taken into account." *Id.* (emphasis added).

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[29] Defs.-Appellants' Opening Br., at pg. 35-36, *supra*, note 20.

[30] *Regents of the Univ. of Cal.*, 2018 U.S. Dist. LEXIS 4036, at *40.

Put plainly, DACA recipients have a strong reliance interest in the program, which was created for the purpose of "lifting the shadow of deportation" and bringing recipients "out of the shadows" so that recipients could live economically stronger and personally safer lives. Former Secretary of Homeland Security Jeh Johnson confirmed as much in his letter to Congresswoman Judy Chu when he wrote, "DACA applicants most assuredly relied" upon the "representations made by the U.S. government."[31]

DACA recipients' self-identification to DHS was likely an *irreversible* action taken at the encouragement of the federal government. DACA applicants would not have taken the risk of sharing intimate details and biometric data about themselves and their families – serving up removal of themselves and their families on a platter – without being able to rely upon the benefits provided by the program created by Appellants.

This is analogous to Supreme Court cases that found reliance interests in the continued receipt of welfare payments or of a public school teaching position despite lack of tenure protections or employment contract because of an "implied promise of continued employment." *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)

[31] Letter by Secretary Jeh Johnson dated December 30, 2016, to U.S. Rep. Judy Chu (Johnson Letter), available at: http://tinyurl.com/JehJohnsonLetter

(citing *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) and *Connell v. Higginbotham*, 403 U.S. 207, 208 (1971)).

Appellants focus on the fact that USCIS retained "discretion" in acting on the DACA program.[32] But the fact that DHS retained "discretion" in a broad sense as it reviewed applications and granted DACA status cannot cure Appellants' post hoc rationalizations.

The federal government has highlighted and *Amici* do not dispute that the original DACA memorandum included a statement that applicants had no right to rely on statements made therein, but such disclaimers do not carry the day when they clash with guidance's broader substance and purpose. *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000). Here, the recipients were highly vulnerable parties whose substantial reliance on the memorandum's assurances was all but certain – and indeed intended – as a practical matter. The federal government persuaded them to "come out of the shadows" and hand over sensitive information to ICE in exchange for DACA status and lawful work authorization.

As this Court reasoned in *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970), good faith actors should not be told "[t]he joke is on you," for trusting the pronouncements of the government. *See also St. Regis Paper Co. v. United States*,

[32] USCIS DACA FAQ, at Question 51, *supra*, note 7.

368 U.S. 208, 229 (1961) (Black, J., dissenting) ("Our Government should not, by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.").

DACA applicants responded by irrevocably rearranging their lives, funding college educations, signing mortgages, enrolling in the military, and starting families. These acts were not the just the foreseeable effects of the federal government program inducement but rather what the program was at its core designed to induce.

Under these exceptional circumstances, Appellants must have some reasonable purpose for changing a policy to ensure "some minimum standard of decency, honor and reliability in … dealing with the Government." *Heckler v. Community Health Servs.*, 467 U.S. 51, 59-61 (1984). And since they do not, Appellants' "[u]nexplained inconsistency" in agency policy is enough to find the DACA termination "to be an arbitrary and capricious change from agency practice." *Encino Motorcars, LLC,* 136 S. Ct. at 2126, quoting *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981-982 (2005).

III. The district court's issuance of a nationwide injunction was appropriate, as the negative consequences that would flow from a piecemeal application of our nation's immigration law would irreparably harm *Amici*.

Appellants assert that the district court's injunction grants "relief to thousands of DACA recipients who are not parties before the court and who do not need to be covered" in order to provide relief in the instant case.[33]

But that argument ignores this Court's recent holdings in *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), that the immigration laws of the United States must be "uniformly" enforced, and in *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (per curiam), that a geographic restriction on the scope of an injunction of an immigration enforcement policy "would run afoul of the constitutional and statutory requirements for uniform immigration law and policy."

Piecemeal injunctive relief for a small subset of DACA recipients would undoubtedly create social upheaval and encourage mass migration of potentially hundreds of thousands of recipients to those areas of the country protected by a narrower injunction, especially when one considers that the March 5, 2018, date set by President Trump and carried out by DHS for the complete termination of the DACA program has already passed. And limiting relief to a discrete set of persons or geographic boundaries would have a substantially negative impact on the

[33] Defs.-Appellants' Opening Br., at pg. 54, *supra*, note 20.

economic welfare and public safety of most, if not all, *Amici* cities and counties.

Foreign-born residents make up almost half of Los Angeles' workforce; they contribute over $3 billion in state and local taxes yearly; they own businesses that generate $3.5 billion in annual income for city residents; and, they have local spending power of almost $30 billion a year.[34] More than 51% of all of New York City's business owners are foreign-born and foreign-born residents are responsible for 32% (*i.e.* $100 billion) of all income earned by New York City residents. New York City families that include immigrant members pay an estimated $8 billion in city and state personal income taxes and approximately $2 billion in city property taxes.[35]

Similarly, 35% of business owners in San Francisco are immigrants, including 12,756 foreign-born entrepreneurs.[36] Entrepreneurs in the Philadelphia metro region, of which 40,171 are foreign-born, are 43.1% more likely to be immigrants

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[34] New American Economy, *New Americans in Los Angeles* (2017) available at: http://www.newamericaneconomy.org/wp-content/uploads/2017/02/LA_Brief_V8.pdf

[35] NYC Comptroller Report, *Our Immigrant Population Helps Power NYC Economy* (January 11, 2017), available at: http://tinyurl.com/NYC-Comptroller-Report

[36] United States Census Bureau. Survey of Business Owners 2007-2012; New American Economy, *Immigrants and the economy in: California District 12* (2017) available at: http://www.newamericaneconomy.org/locations/california/california-district-12/

than native-born.[37] This entrepreneurship creates jobs and increases the tax base.

Comparable statistics can be shown for other *Amici* and these data points cannot be discounted as generalizations of all foreign-born residents. The DACA program has provided deferred action to some 807,000 applicants, 91% of whom are employed, which equates to 3% or 1 in 33 of *all foreign-born persons* in the United States labor force.[38]

Just to highlight one *Amici* city in greater detail, the DACA-eligible population in the City of Dallas – of whom 93.4% were employed – earned nearly $860 million in income in 2016.[39] With this income, Dallas's DACA-eligible residents paid a significant amount in taxes – to the tune of $161 million in 2016 alone – including state and local property, sales, and excise taxes. And that means these residents have some $700 million in annual spending power left after taxes, which further reverberates across the Dallas economy through spending and investments.

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[37] New American Economy, *Immigrants and the economy in: Philadelphia Metro Area* (2017) available at: http://www.newamericaneconomy.org/city/philadelphia/

[38] *See* USCIS Data, *supra*, note 3; CAP Study, *supra*, note 9; US Bureau of Labor Statistics 2016 foreign-born labor force statistics, available at: http://tinyurl.com/BLS-foreignborn

[39] New American Economy, *New Americans in Dallas* (2018) available at: http://research.newamericaneconomy.org/report/12252/

This is why limiting the scope of the injunction will sow a national economic slowdown. Estimates show DACA recipients would otherwise contribute $46 billion to the United States gross domestic product over each of the next few years.[40] DACA recipients across the board obtain higher earnings, have a higher employment rate, and a higher tax compliance rate than similarly-situated undocumented immigrants.[41] In fiscal terms, narrowing the injunction could result $60 billion in lost federal, state and local tax revenues over the next decade.[42]

Narrowly limiting the injunction will also make communities less safe by pushing recipients underground during the pendency of the litigation. That will cause crimes to go unreported and limit the success of police investigations, thereby greatly undermining public safety for all of our residents in each our communities.

Numerous academic studies examining the impact of immigrants on their adopted communities reveal that communities with large immigrant populations, like *Amici*, have often outpaced the nationwide crime drop over the past 30 years.[43]

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[40] Center for American Progress, *A New Threat to DACA Could Cost States Billions of Dollars* (2017) Washington, D.C., available at: http://tinyurl.com/CAPStatesGDP.

[41] CAP Study, *supra*, note 9.

[42] CATO Institute, *The Economic and Fiscal Impact of Repealing DACA* (2017) Washington, D.C, available at: http://tinyurl.com/CATODACAstudy

[43] The Sentencing Project, *Immigration and Public Safety* (2017), Washington, D.C., available at http://www.sentencingproject.org/wp-content/uploads/2017/03/Immigration-and-Public-Safety.pdf

Also, because DACA applicants had to provide personal and biometric data to DHS to qualify for DACA, recipients will fear deportation at any moment, making them statistically less likely to identify themselves to law enforcement, including *Amici's* sheriffs and police departments, to report crimes, or assist in criminal investigations.[44] The same fear can result in unreported code enforcement and wage theft violations, crimes that are enforced by *Amici*. And slum landlords and sweatshop owners are likely to prey upon former DACA recipients if the program is terminated, resulting in unsafe and unhealthy conditions in the workplace and at home.

Amici's law enforcement leadership consistently remind us that all communities are safer when victims and witnesses of crime, irrespective of immigration status, cooperate with law enforcement. For example, Los Angeles Police Department Chief Charlie Beck has routinely stated that his department depends on "immigrant communities, not only to keep them safe but to keep [the public] safe. Without that cooperation we all suffer."[45]

---

[44] *See, e.g.,* Theodore, Nik, University of Chicago, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (May 2013), available at: http://tinyurl.com/ChicagoPoliceStudy

[45] Ulloa, Jazmine, *L.A. Police Chief Charlie Beck endorses 'sanctuary state' bill that Eric Holder hails as 'constitutional',* THE LOS ANGELES TIMES (June 19, 2017), available at: http://tinyurl.com/Beckstory

Likewise, narrowing the scope of the injunction endangers already vulnerable immigrant communities in the wake of natural disasters. After this year's devastating California wildfires, many immigrants avoided applying for aid to which they and their families were entitled because FEMA's form states that application information "may be subject to sharing within the Department of Homeland Security, including but not limited to, the Bureau of Immigration and Customs Enforcement."[46] The federal government's request to limit the scope of the injunction can only exacerbate the fears of those who may need to ask for help in a future disaster.

For these reasons, *Amici* respectfully request this Court to affirm the district court's issuance of a nationwide injunction.

. . .

. . .

[46] FEMA Declaration and Release form, available at: https://www.fema.gov/pdf/assistance/process/00903.pdf

CONCLUSION

Amici respectfully urge this Court to uphold decision of the district court and the nationwide scope of the injunction requiring Appellants to maintain DACA. If the federal government is allowed to renege on a promise it made to all DACA recipients and their family members, a damaging message would be delivered that the United States government cannot be trusted to act in a decent, honorable or reliable manner, and it would impose significant adverse consequences on *Amici*.

Dated: March 20, 2018

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Signature of Attorney or Unrepresented Litigant: s/ Michael Dundas

Date: Mar 20, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)

EXHIBIT A

Exhibit A: Complete List of *Amici Curiae*

- The City of Los Angeles, California;
- The County of Alameda, California;
- The City of Atlanta, Georgia;
- The City of Austin, Texas;
- The City of Berkeley, California;
- The City of Boston, Massachusetts;
- The City of Cambridge, Massachusetts;
- The City of Chelsea, Massachusetts;
- The City of Chicago, Illinois;
- Cook County, Illinois;
- The City of Dallas, Texas;
- The City and County of Denver, Colorado;
- The District of Columbia;
- The City and County of Honolulu, Hawaii;
- The City of Houston, Texas;
- The City of Gary, Indiana (joined by its Mayor, Karen Freeman-Wilson);
- The City of Ithaca, New York (joined by its Mayor, Svante L. Myrick);
- The City of Iowa City, Iowa;
- King County, Washington;
- The City of Long Beach, California;
- Los Angeles County, California;
- The City of Madison, Wisconsin;
- The City of Minneapolis, Minnesota;
- The County of Monterey, California;
- The City of New Haven, Connecticut
- The City of New York, New York;
- The City of Oakland, California;
- The City of Philadelphia, Pennsylvania;
- The City of Phoenix, Arizona (as joined by its Mayor, Greg Stanton);
- The City of Portland, Oregon;
- The City of Providence, Rhode Island;
- The City of Rochester, New York;
- The City of Sacramento, California;
- The City and County of San Francisco, California;
- The City of Santa Fe, New Mexico;
- The City of Santa Monica, California;
- The City of Seattle, Washington;
- The City of Somerville, Massachusetts;
- The City of Tucson, Arizona;
- The City of West Hollywood, California;
- The National League of Cities; and
- The United States Conference of Mayors.

9th Circuit Case Number(s) | 18-15068 (consol. w/ 18-15069; 18-15070; 18-15071; 18-15072; 18-15133; 18-15134)

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SUPREME COURT OF THE UNITED STATES DOCUMENT

Nos. 18-587, 18-588, and 18-589

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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Additional Captions Listed on Inside Cover

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED

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

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

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

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In the Supreme Court of the United States

No. 18-587

DEPARTMENT OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18-588

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-589

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

In *Department of Homeland Security* v. *Regents of the University of California*, No. 18-587 (*Regents*), the opinion of the court of appeals (*Regents* Supp. Br. App. 1a-87a) is reported at 908 F.3d 476, and the orders of the district court granting respondents' motion for a preliminary injunction and granting in part and denying in part the government's motion to dismiss (*Regents* Pet. App. 1a-70a, 71a-90a) are reported at 279 F. Supp. 3d 1011 and 298 F. Supp. 3d 1304. In *Trump* v. *NAACP*, No. 18-588 (*NAACP*), the order of the district court granting respondents summary judgment (*NAACP* Pet. App. 1a-74a) is reported at 298 F. Supp. 3d 209, and the order of the district court declining to reconsider its prior order (*NAACP* Pet. App. 80a-109a) is reported at 315 F. Supp. 3d 457. In *McAleenan* v. *Batalla Vidal*, No. 18-589 (*Batalla Vidal*), the order of the district court granting respondents' motion for a preliminary injunction (*Batalla Vidal* Pet. App. 62a-129a) is reported at 279 F. Supp. 3d 401, and the orders of the district court granting in part and denying in part the government's motion to dismiss (*Batalla Vidal* Pet. App. 1a-58a, 133a-171a) are reported at 295 F. Supp. 3d 127 and 291 F. Supp. 3d 260.

JURISDICTION

In *Regents*, the judgment of the court of appeals was entered on November 8, 2018. In *NAACP*, the judgment of the district court was entered on August 3, 2018 (*NAACP* Pet. App. 110a-111a); the notices of appeal were filed on August 6, 2018 (*id.* at 112a-115a); and the appeal was docketed in the court of appeals on August 10, 2018. The court of appeals' jurisdiction rests on 28 U.S.C. 1291. In *Batalla Vidal*, the district court certified its orders granting in part and denying in part the government's motion to dismiss on January 8, 2018, and

April 30, 2018; the notices of appeal were filed, respectively, on January 8, 2018 (*Batalla Vidal* Pet. App. 59a-61a), and May 21, 2018 (*id.* at 172a-174a); and the appeals of those orders were docketed on July 5, 2018. The district court entered its preliminary injunction on February 13, 2018 (*id.* at 62a-129a); the notice of appeal was filed on February 20, 2018 (*id.* at 130a-132a); and the appeal was docketed on the same day. The court of appeals' jurisdiction over the appeals of the certified orders in *Batalla Vidal* rests on 28 U.S.C. 1292(b). The court of appeals' jurisdiction over the appeal of the preliminary injunction rests on 28 U.S.C. 1292(a)(1). The petitions for writs of certiorari in all three cases were filed on November 5, 2018, and were granted on June 28, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-22a.

STATEMENT

A. Legal Framework

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, charges the Secretary of Homeland Security "with the administration and enforcement" of the immigration laws. 8 U.S.C. 1103(a)(1). The Secretary is vested with the authority to "establish such regulations; * * * issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the Act, and is given "control, direction, and supervision" of all Department of Homeland Security (DHS) employees. 8 U.S.C. 1103(a)(2) and (3).

Individual aliens are subject to removal if, *inter alia*, "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona* v. *United States*, 567 U.S. 387, 396 (2012); see 8 U.S.C. 1182(a) (2012 & Supp. V 2017), 8 U.S.C. 1227(a). As a practical matter, however, the Executive Branch lacks the resources to remove every removable alien, and a "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396. For any alien subject to removal, DHS officials must first "decide whether it makes sense to pursue removal at all." *Ibid.* After removal proceedings begin, government officials may decide to grant discretionary relief, such as asylum or cancellation of removal. See 8 U.S.C. 1158(b)(1)(A), 1229b. And, "[a]t each stage" of the process, "the Executive has discretion to abandon the endeavor." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*).

In making these decisions, like other agencies exercising enforcement discretion, DHS must engage in "a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). Recognizing the need for such balancing, Congress has provided that the "Secretary [of Homeland Security] shall be responsible for * * * [e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. 202(5).[1]

Deferred action is a practice in which the Secretary exercises enforcement discretion to notify an alien of the agency's decision to forbear from seeking the alien's removal for a designated period. *AADC*, 525 U.S. at

[1] All references to Section 202(5) are to 6 U.S.C. 202(5) (2012 & Supp. V 2017).

484. Under DHS regulations, aliens granted deferred action may receive certain benefits, including work authorization for the same period if they establish economic necessity, 8 C.F.R. 274a.12(c)(14). A grant of deferred action does not confer lawful immigration status or provide any defense to removal. DHS retains discretion to revoke deferred action unilaterally, and the alien remains removable at any time. *Regents* Pet. App. 101a.

B. Factual Background

1. a. In 2012, DHS announced the nonenforcement policy known as Deferred Action for Childhood Arrivals (DACA). *Regents* Pet. App. 97a-101a. DACA provided deferred action to "certain young people who were brought to this country as children." *Id.* at 97a. The INA does not provide any exemptions or special relief from removal for such individuals. And dating back to at least 2001, bipartisan efforts to provide such relief legislatively had failed (and have continued to fail).[2] Under the DACA policy, following successful completion of a background check and other review, an alien would receive deferred action for a period of two years, subject to renewal. *Id.* at 99a-100a. The policy specified, however, that it "confer[red] no substantive right, immigration status or pathway to citizenship," because "[o]nly the Congress, acting through its legislative authority, can confer these rights." *Id.* at 101a.

In 2014, DHS announced an expansion of the DACA policy and a new, related policy of nonenforcement known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). *Regents* Pet.

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[2] See, *e.g.*, S. 1291, 107th Cong., 1st Sess. (2001); S. 2075, 109th Cong., 1st Sess. (2005); S. 3827, 111th Cong., 2d Sess. (2010); S. 744, 113th Cong., 1st Sess. (2013); S. 1615, 115th Cong., 1st Sess. (2017).

App. 102a-110a. The expansion of DACA would have loosened the age and residency criteria and extended the deferred-action period to three years. *Id.* at 106a-107a. DAPA would have provided deferred action to certain parents whose children were U.S. citizens or lawful permanent residents through a process designed to be "similar to DACA." *Id.* at 107a.

b. Texas and 25 other States promptly brought suit in the Southern District of Texas to enjoin DAPA and the expansion of DACA. The district court issued a nationwide preliminary injunction, finding a likelihood of success on the claim that the DAPA and expanded DACA memorandum violated the notice-and-comment requirement of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* *Texas* v. *United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

The Fifth Circuit affirmed the preliminary injunction, holding that DAPA and expanded DACA likely violated both the APA and INA. *Texas* v. *United States*, 809 F.3d 134, 146, 170-186 (2015). The court agreed that the DAPA and expanded DACA memorandum likely required notice-and-comment rulemaking. *Id.* at 178. It also concluded that the policies were likely substantively contrary to the INA. *Ibid.* The court reasoned that the INA contains an "intricate system of immigration classifications and employment eligibility," and "does not grant the Secretary discretion to grant deferred action and lawful presence on a class-wide basis to 4.3 million otherwise removable aliens." *Id.* at 184, 186 n.202.

This Court affirmed the Fifth Circuit's judgment by an equally divided vote. *United States* v. *Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam).[3]

c. Following this Court's decision, two relevant events occurred concerning the original DACA policy. First, Texas and other States in the *Texas* case announced their intention to amend their complaint to challenge DACA. J.A. 872-876. They asserted that "[f]or the[] same reasons that DAPA and Expanded DACA's unilateral Executive Branch conferral of eligibility for lawful presence and work authorization was unlawful, the original June 15, 2012 DACA memorandum is also unlawful." J.A. 873. Second, in a letter to then-Acting Secretary of Homeland Security Elaine C. Duke, then-Attorney General Jefferson B. Sessions III concluded that, like the DAPA policy, the DACA policy was effectuated "without proper statutory authority," and thus "it [wa]s likely that [the] potentially imminent litigation would yield similar results" to the *Texas* litigation. J.A. 877-878.

2. On September 5, 2017, DHS decided to wind down DACA in an orderly fashion. *Regents* Pet. App. 111a-119a (Duke Memorandum). Acting Secretary Duke explained that, "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation," as well as the Attorney General's view that the DACA policy was unlawful and that the "potentially imminent" challenge to DACA would "likely * * * yield similar results" as the *Texas* litigation, "it is clear that the June 15, 2012 DACA program should be termi-

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[3] After consulting with the Attorney General, then-Secretary of Homeland Security John Kelly rescinded the memorandum announcing DAPA and expanded DACA. J.A. 868-871.

nated." *Id.* at 116a-117a. The Acting Secretary accordingly announced that, "[i]n the exercise of [her] authority in establishing national immigration policies and priorities," the original DACA policy was "rescind[ed]." *Id.* at 117a.

The Duke Memorandum stated, however, that the government would "not terminate the grants of previously issued deferred action * * * solely based on the directives in this memorandum." *Regents* Pet. App. 118a. It also explained that DHS would "provide a limited window" in which it would "adjudicate—on an individual, case by case basis—properly filed pending DACA renewal requests * * * from current beneficiaries that have been accepted by the Department as of the date of this memorandum, and from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017." *Id.* at 117a-118a.

C. Procedural History

These challenges to DACA's rescission were filed in the Northern District of California, the District of Columbia, and the Eastern District of New York. See J.A. 376-796.[4] Collectively, respondents allege that the rescission of DACA is arbitrary and capricious under the APA; violates the APA's requirement for notice-and-

[4] The government's petition for a writ of certiorari to review the Fourth Circuit's judgment in another challenge to the rescission is pending before this Court. See *DHS* v. *Casa de Maryland*, No. 18-1469 (filed May 24, 2019). After the Court granted review in these cases, the government asked the Court to hold the petition in *Casa de Maryland* pending the Court's decision here.

comment rulemaking; and denies equal protection and due process to DACA recipients.[5]

1. District courts enjoin or vacate the rescission on a nationwide basis

In all three of the cases before the Court, district courts either enjoined or vacated DHS's decision on a nationwide basis.

a. In *Regents* and *Batalla Vidal*, the district courts granted in part and denied in part the government's motions to dismiss, and entered identical preliminary injunctions. *Regents* Pet. App. 1a-90a; *Batalla Vidal* Pet. App. 1a-58a, 62a-129a, 133a-171a. Those courts determined that, although agency enforcement decisions "are generally not reviewable," the rescission of DACA was different because it terminated a general policy of nonenforcement, and the "main" rationale was the "supposed illegality" of the prior policy. *Regents* Pet. App. 27a-28a, 30a (citation omitted); see *Batalla Vidal* Pet. App. 29a-30a. They further concluded that the rescission was likely arbitrary and capricious, primarily because, in their view, DACA was lawful. *Regents* Pet. App. 42a; *Batalla Vidal* Pet. App. 91a. Each court ordered the government to maintain DACA "on the same terms and conditions as were in effect before the rescission," with certain exceptions, principally that "new applications from applicants who have never before received deferred action need not be processed." *Regents* Pet. App. 66a-67a. The courts also both declined to dismiss the equal protection claim, finding that respond-

[5] The notice-and-comment claim and due process challenge to the rescission have been uniformly rejected by the lower courts and are not at issue before this Court.

ents' allegations "raise[d] a plausible inference that racial animus towards Mexicans and Latinos was a motivating factor in the decision to end DACA." *Id.* at 87a; see *id.* at 83a-87a; *Batalla Vidal* Pet. App. 152a-153.

b. In *NAACP*, the district court granted summary judgment to respondents and vacated the rescission of DACA in its entirety. *NAACP* Pet. App. 1a-74a. Like the other district courts, the D.C. district court determined that the rescission was reviewable because it was "a general enforcement policy predicated on [a] legal determination that the program was invalid." *Id.* at 43a. Unlike the other courts, the D.C. district court did not address whether DHS's legal conclusion was correct—*i.e.*, whether DACA was lawful. *Id.* at 50a. Instead, the court concluded that the Duke Memorandum's "legal reasoning was insufficient" to satisfy arbitrary-and-capricious review. *Id.* at 51a. In light of that ruling, the court deferred addressing respondents' equal protection claim. *Id.* at 66a-67a. And it stayed its order for 90 days to permit DHS to "reissue a memorandum rescinding DACA, this time providing a fuller explanation." *Id.* at 66a.

2. Secretary Nielsen further explains the rescission

On June 22, 2018, then-Secretary of Homeland Security Kirstjen M. Nielsen issued a memorandum responding to the D.C. district court's invitation to provide further explanation of DHS's decision to rescind DACA. *Regents* Pet. App. 120a-126a (Nielsen Memorandum). Secretary Nielsen explained that "the DACA policy properly was—and should be—rescinded, for several separate and independently sufficient reasons." *Id.* at 122a.

First, the Secretary agreed that "the DACA policy was contrary to law." *Regents* Pet. App. 122a. The Secretary endorsed the Fifth Circuit's conclusion that "'the INA d[id] not grant [her] discretion to grant deferred action and lawful presence on a class-wide basis'" at the scale of the DAPA policy, and she explained that "[a]ny arguable distinctions between the DAPA and DACA policies" were "not sufficiently material" to alter that conclusion. *Ibid.* (citation omitted); see *id.* at 122a-123a.

Second, the Secretary reasoned that, "[l]ike Acting Secretary Duke, [she] lack[ed] sufficient confidence in the DACA policy's legality to continue this non-enforcement policy, whether the courts would ultimately uphold it or not." *Regents* Pet. App. 123a. She noted "sound reasons for a law enforcement agency to avoid discretionary policies that are legally questionable," including the risk of "undermin[ing] public confidence" in the agency and "the threat of burdensome litigation that distracts from the agency's work." *Ibid.*

Third, the Secretary offered several "reasons of enforcement policy to rescind the DACA policy," regardless of whether the policy is "illegal or legally questionable." *Regents* Pet. App. 123a. She reasoned that, in her view, "public policies of non-enforcement * * * for broad classes and categories of aliens" should be "enacted legislatively," not "under the guise of prosecutorial discretion." *Id.* at 123a-124a. She reasoned that DHS should exercise its prosecutorial discretion only "on a truly individualized, case-by-case basis." *Id.* at 124a. And she reasoned that, given the unacceptably high numbers of illegal border crossings, it was "critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, and

transparent enforcement of the immigration laws against all classes and categories of aliens." *Ibid.*

Finally, the Secretary explained that, although she "d[id] not come to these conclusions lightly," "neither any individual's reliance on the expected continuation of the DACA policy nor the sympathetic circumstances of DACA recipients as a class" outweigh the reasons to end the policy. *Regents* Pet. App. 125a. And she noted that the rescission of the policy would not "preclude the exercise[] of deferred action in individual cases if circumstances warrant." *Ibid.*

3. The D.C. district court declines to reconsider its decision in light of the Nielsen Memorandum

Following Secretary Nielsen's memorandum, the D.C. district court denied the government's motion to reconsider its prior order. *NAACP* Pet. App. 80a-109a. The court refused to reconsider whether DHS's decision was reviewable, reasoning that the Nielsen Memorandum, like the Duke Memorandum, was based "first and foremost" on the view that "'the DACA policy was contrary to law.'" *Id.* at 97a (citation omitted). And the court concluded that the independent, non-legal policy reasons offered by Secretary Nielsen were simply "attempt[s] to disguise an objection to DACA's legality as a policy justification for its rescission." *Id.* at 100a. On the merits, the court reaffirmed its conclusion that DHS had not provided a sufficient "legal assessment." *Id.* at 105a. The court further asserted that the Secretary's memorandum "fail[ed] to engage meaningfully with the reliance interests and other countervailing factors that weigh against ending the program." *Ibid.* The court therefore reaffirmed its conclusion that the rescission "must be set aside" in its entirety, *id.* at 109a; see *id.* at

109a n.13, though it ultimately stayed its order with respect to aspects of the rescission exempted from the injunctions issued in California and New York, 17-cv-1907 D. Ct. Doc. 31 (Aug. 17, 2018). See p. 19, *supra*.

4. The Ninth Circuit affirms the nationwide preliminary injunction

Several months later, the Ninth Circuit in *Regents* affirmed the preliminary injunction and the orders resolving the government's motion to dismiss. *Regents* Supp. Br. App. 1a-87a.

a. The panel majority acknowledged that an agency's nonenforcement decision is "generally committed to an agency's absolute discretion." *Regents* Supp. Br. App. 25a (citation omitted). But it reasoned that such a decision is nevertheless reviewable if it is "based solely on a belief that the agency lacked the lawful authority to do otherwise." *Id.* at 29a. The panel majority determined that DACA's rescission, as reflected in the initial Duke Memorandum, rested exclusively on "a belief that DACA was unlawful," not on concerns about maintaining the policy in the face of the then-ongoing litigation or any other exercise of the agency's discretion. *Id.* at 35a; see *id.* at 35a-42a. And it refused to consider the Nielsen Memorandum, suggesting that it was an impermissible "post-hoc rationalization[]" and was not part of the record. *Id.* at 57a-58a n.24 (citation omitted). On the merits, the panel majority agreed that respondents were likely to succeed on their APA claim because DHS's decision was based entirely on an erroneous legal conclusion that DACA was unlawful. *Id.* at 45a-60a.

The panel also affirmed the denial of the government's motion to dismiss respondents' equal protection

claim, concluding that respondents had plausibly alleged that the rescission was racially motivated. *Regents* Supp. Br. App. 73a-77a.

b. Judge Owens concurred. *Regents* Supp. Br. App. 79a-87a. He disagreed that the rescission was reviewable "for compliance with the APA." *Id.* at 79a. He explained that "when determining the scope of permissible judicial review, courts consider only the *type* of agency action at issue, not the agency's *reasons* for acting," and that DHS's decision to "rescind a non-enforcement policy in the immigration context is th[e] type of administrative action" that this Court has recognized is "'committed to agency discretion by law.'" *Id.* at 79a-80a, 83a (citation omitted). Nevertheless, Judge Owens explained that he would affirm the preliminary injunction and remand for the district court to consider whether respondents' equal protection claim provided an alternative ground for enjoining the rescission. *Id.* at 84a-85a.

SUMMARY OF ARGUMENT

I. The orders and judgments under review hold that DACA's rescission either is or likely is arbitrary and capricious under the APA. But the rescission is not reviewable under that standard. Section 701(a)(2) exempts agency action from arbitrary-and-capricious review to the extent the action is "committed to agency discretion by law." A decision to rescind a policy of nonenforcement is a quintessential action committed to an agency's absolute discretion, absent a statutory directive limiting that discretion. And no one contends that the INA itself limits DHS's authority to resume enforcing the law as written.

The lower courts held that Section 701(a)(2) does not apply to DACA's rescission principally on the ground that DHS based its decision solely on a determination

that DACA was unlawful. Even if the rescission were based solely on DHS's legal judgment, however, this Court has squarely held that an otherwise unreviewable agency action does not become reviewable due to the reasons that an agency provides. In any event, the rescission did not rest solely on a legal rationale. The Duke and Nielsen Memoranda make clear that DHS's decision also rests on policy grounds. The lower courts' reasons for disregarding those policy rationales are unpersuasive. Thus, even under the lower courts' theory, arbitrary-and-capricious review is unavailable.

II. Even assuming the rescission were reviewable, DHS provided multiple, independently sufficient grounds for withdrawing DACA. First, as a practical matter, DHS was reasonably concerned about maintaining a nonenforcement policy that is similar to, if not materially indistinguishable from, two related policies that the Fifth Circuit had held unlawful, in a decision affirmed by an equally divided vote of this Court. Second, as a matter of policy, DHS wanted to terminate a legally questionable nonenforcement policy and leave the creation of policies as significant as DACA to Congress. Third, as a matter of law, DHS correctly, and at a minimum reasonably, concluded that DACA is unlawful. None of those three grounds is remotely arbitrary or capricious, let alone all three. Finally, respondents' equal protection claim fails as a matter of law and provides no basis for affirming the orders and judgments below.

ARGUMENT

These cases concern the Executive Branch's authority to revoke a discretionary policy of nonenforcement that is sanctioning an ongoing violation of federal immigration law by nearly 700,000 aliens. At best, DACA is legally questionable; at worst, it is illegal. Either way, DACA is similar to, if not materially indistinguishable from, the policies—including an expansion of DACA itself—that the Fifth Circuit previously held were contrary to federal immigration law in a decision that this Court affirmed by an equally divided vote. In the face of those decisions, DHS reasonably determined—based on both legal concerns and enforcement priorities—that it no longer wished to retain DACA. Yet two nationwide preliminary injunctions have forced DHS to maintain this entirely discretionary policy for nearly two years.

Contrary to the decisions below, the APA does not require DHS to retain a discretionary policy that the INA at most barely permits and likely forbids. Decisions about how the government will exercise enforcement discretion within the bounds of the law are uniquely entrusted to the Executive Branch. The APA's judicial-review provision thus does not apply. But even if DHS's decision were reviewable, DHS's legal and policy justifications for discontinuing DACA were not remotely arbitrary or capricious. DACA was created as a temporary, stopgap measure in 2012, after legislative efforts to provide permanent immigration relief for a similar class of aliens repeatedly failed. DHS has offered a number of reasons why it now wishes to withdraw that policy and instead enforce the INA as written, and the lower courts' criticisms of those rationales do not withstand scrutiny.

I. DACA'S RESCISSION IS NOT JUDICIALLY REVIEWABLE UNDER THE APA

The courts below each found that the rescission of DACA either is or likely is arbitrary and capricious under the APA, 5 U.S.C. 706(2)(A). But Section 706(2)(A) does not apply to agency actions to the extent those actions are "committed to agency discretion by law." 5 U.S.C. 701(a)(2). And DACA's rescission is a quintessential exercise of enforcement discretion to which arbitrary-and-capricious review does not apply.

A. DHS's Decision To Rescind A Policy Of Enforcement Discretion Is Committed To Agency Discretion By Law

"Over the years," this Court has interpreted Section 701(a)(2) to apply to various types of agency decisions that "traditionally" have been regarded as unsuitable for judicial review. *Lincoln* v. *Vigil*, 508 U.S. 182, 191 (1993). That provision precludes review, for example, of an agency's decision not to institute enforcement actions, *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985); an agency's refusal to reconsider a prior decision based on an alleged "material error," *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (*BLE*); and an agency's allocation of funds from a lump-sum appropriation, *Lincoln*, 508 U.S. at 192. The same is especially true of an agency decision to rescind a discretionary policy of nonenforcement against a category of individuals who are violating the law on an ongoing basis.

1. *Chaney* is most instructive. The Court there considered a challenge to the decision of the Food and Drug Administration (FDA) not to enforce the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.*, against the "unapproved use of approved drugs" for capital punishment. *Chaney*, 470 U.S. at 824. The FDA had reasoned that it lacked jurisdiction to bring such

enforcement actions and that, even if it had jurisdiction, the agency would exercise its "inherent" enforcement discretion to decline to do so. *Ibid.* The Court refused to subject the agency's decision to arbitrary-and-capricious review. *Id.* at 831.

The Court observed that "an agency's decision not to prosecute or enforce, whether through civil or criminal process," is "generally committed to an agency's absolute discretion" and "unsuitab[le] for judicial review." *Chaney*, 470 U.S. at 831. It explained that a decision not to enforce "often involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," including "whether agency resources are best spent on this violation or another" and whether enforcement in a particular scenario "best fits the agency's overall policies." *Ibid.* The Court noted, in addition, that when an agency declines to enforce, it "generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. And it recognized that agency enforcement discretion "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch." *Ibid.* Accordingly, the Court concluded that, absent a statute "circumscribing an agency's power to discriminate among issues or cases it will pursue," the agency's "exercise of enforcement power" is "committed to agency discretion by law." *Id.* at 833, 835.

DHS's decision to discontinue the DACA policy is exactly the type of agency decision that traditionally has been understood as unsuitable for judicial review and

therefore "committed to agency discretion" under Section 701(a)(2). Like the decision to *adopt* a policy of nonenforcement, the decision whether to *retain* such a policy "often involves a complicated balancing" of factors that are "peculiarly within [the] expertise" of the agency, including determining how the agency's resources are best spent in light of its overall priorities. *Chaney*, 470 U.S. at 831. Likewise, a decision to abandon an existing nonenforcement policy will not, by itself, bring to bear the agency's coercive power over any individual; that will occur only if any resulting enforcement proceeding leads to a final adverse order. And, like a decision to adopt a nonenforcement policy, an agency's decision to reverse a prior policy of nonenforcement is akin to changes in policy as to criminal prosecutorial discretion. *Casa de Maryland* v. *DHS*, 924 F.3d 684, 709 (4th Cir. 2019) (Richardson, J., dissenting in relevant part), petition for cert. pending, No. 18-1469 (filed May 24, 2019). Such discretion is regularly exercised within the Department of Justice, both within and between presidential administrations, and separation-of-powers considerations underscore why it has never been considered amenable to APA review. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996).

Accordingly, absent a statutory directive "otherwise circumscribing" DHS's traditional discretion, there is no "law to apply" to judge the Secretary's exercise of her broad enforcement discretion. *Chaney*, 470 U.S. at 833-834. No one has suggested that the INA expressly or implicitly circumscribes the Secretary's decision to rescind DACA's broad policy of nonenforcement. See *Regents* Supp. Br. App. 57a ("To be clear: we do not hold that DACA *could not* be rescinded as an exercise

of Executive Branch discretion."). Section 701(a)(1) therefore squarely applies.

2. These principles of nonreviewability apply with particular force in the context of enforcement of the immigration laws. As the Court has observed, the "broad discretion exercised by immigration officials" has become a "principal feature of the removal system." *Arizona* v. *United States*, 567 U.S. 387, 396 (2012). And in that context, the concerns inherent in any challenge to prosecutorial discretion "are greatly magnified." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999). "Whereas in criminal proceedings the consequence of delay is merely to postpone the criminal's receipt of his just deserts," a delay in the enforcement of immigration laws "permit[s] and prolong[s] a continuing violation of United States law." *Ibid.*

Congress's particular concern for these principles is underscored by the INA. Section 1252(g) of the INA channels "any cause or claim by or on behalf of any alien arising from the decision or action * * * to commence proceedings, adjudicate cases, or execute removal orders against any alien" into petitions for review of final removal orders. 8 U.S.C. 1252(g). And Section 1252(b)(9) likewise provides that "*all* questions of law and fact * * * arising from *any* action taken or proceeding brought to remove an alien from the United States under this subchapter" is subject only to "judicial review of a final order under this section." 8 U.S.C. 1252(b)(9) (emphasis added). The Court has previously recognized that these provisions were "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention

outside the streamlined process that Congress has designed." *AADC*, 525 U.S. at 485; see *INS* v. *St. Cyr*, 533 U.S. 289, 313 & n.37 (2001).

The rescission of the DACA policy is the sort of "'no deferred action' decision[]," *AADC*, 525 U.S. at 485, that Congress intended to channel through the INA's careful review scheme. It is properly considered an initial "action" in DHS's "commence[ment] [of] proceedings" within the meaning of Section 1252(g), and an "action taken" to "remove an alien from the United States" within the broader meaning of Section 1252(b)(9), see *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 854 (2018) (Thomas, J., concurring in part and concurring in the judgment). But even if those provisions do not directly preclude review here, see *Regents* Supp. Br. App. 43a-45a & n.19, the INA's cabined review scheme confirms the importance Congress placed on shielding DHS's discretionary decisions from review, and reinforces why immigration enforcement policy decisions are unreviewable under the APA as "committed to agency discretion by law." 5 U.S.C. 701(a)(2).

B. The Lower Courts' Rationales For Reviewing DHS's Decision Lack Merit

The courts below concluded that DHS's decision to rescind the DACA policy was reviewable on three different grounds. Each is wrong.

1. The courts below reasoned in part that the DACA rescission is reviewable because it is a particular *type* of enforcement decision—namely, a broad and categorical decision to rescind a nonenforcement policy, rather than a single-shot decision not to enforce against an individual. But *Chaney* itself concerned the programmatic determination whether to enforce the FDCA with respect to drugs used to administer the death penalty,

not the particular circumstances of any individual case. See 470 U.S. at 824-825. The FDA explained that state lethal-injection laws, as a class, did not present the sort of "serious danger to the public health" that would warrant enforcement of the FDCA, and therefore, even if the agency had "jurisdiction in the area," it would decline to exercise that jurisdiction against such a state law. *Ibid.* As even the D.C. district court here recognized, "the FDA's refusal to act in [*Chaney*] was more than just a one-off nonenforcement decision." *NAACP* Pet. App. 35a.

Chaney's reasoning also fully supports a finding of nonreviewability here. Agency decisions about how its "resources are best spent" or how certain enforcement activity "best fits the agency's overall policies," 470 U.S. at 831, are, if anything, more susceptible to implementation through broad guidance than through case-by-case enforcement decisions. See, *e.g.*, *Wayte* v. *United States*, 470 U.S. 598, 601-603 (1985). Indeed, "supervisory control over that discretion is necessary to avoid arbitrariness and ensure consistency." *Casa de Maryland*, 924 F.3d at 713 (Richardson, J., dissenting in relevant part). A rule that shielded enforcement decisions from review "only when inferior officers exercise single-shot enforcement decisions" would be counterproductive. *Ibid.* It would also "brush[] aside the separation of powers" concerns that underlie the Court's decisions in this area. *Ibid.*; see *AADC*, 525 U.S. at 489 (explaining that review of enforcement discretion "invade[s] a special province of the Executive").

It is likewise immaterial that DHS has *eliminated* a policy of nonenforcement, rather than *adopted* one. See, *e.g.*, *Regents* Supp. Br. App. 34a n.13. A decision whether to retain a nonenforcement policy implicates

all of the same considerations about agency priorities and resources that inform the decision to adopt such a policy in the first instance. And as the D.C. district court also acknowledged, because the rescission does not, by itself, initiate removal proceedings, "like the FDA's nonenforcement decision in *Chaney*, there are no agency proceedings here to provide a 'focus for judicial review,' and DACA's rescission does not itself involve the exercise of coercive power over any person." *NAACP* Pet. App. 33a (citation omitted). Like a criminal defendant, an alien subjected to removal proceedings may challenge the substantive validity of an adverse final order, but he may not raise a procedural claim that the government was arbitrary and capricious for commencing enforcement.

2. The courts below also reasoned that DHS's *rationale* rendered its enforcement decision reviewable because DHS purportedly rested solely on a legal judgment about DACA's lawfulness. That reasoning is both legally and factually wrong. Because the rescission of DACA is the type of decision that *Chaney* held is unreviewable, it makes no difference what reasons DHS gave. And in any event, DHS's decision did not rest solely on a legal judgment.

a. As an initial matter, even if the rescission were based solely on DHS's conclusion that DACA is unlawful, the decision would not be reviewable under the APA. In *BLE*, this Court squarely held that agency actions falling within a "tradition of nonreviewability" do not "become[] reviewable" just because the agency "gives a 'reviewable' reason" concerning its legal authority. 482 U.S. at 282-283. As the Court further explained, "a common reason for failure to prosecute an alleged crim-

inal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction," yet it is "entirely clear" that such decisions are unreviewable. *Id.* at 283. The reconsideration decision at issue in *BLE* was therefore unreviewable, even though the agency based that decision on its legal interpretation of a federal statute. *Id.* at 276, 283. As Judge Owens recognized, the same would "plainly" be true of DHS's decision to rescind DACA, even if it were based solely on the agency's interpretation of the INA. *Regents* Supp. Br. App. 82a; see *Casa de Maryland*, 924 F.3d at 714-715 (Richardson, J., dissenting in relevant part) ("[T]he scope of permissible judicial review must be determined by the type of agency action * * * not the agency's reasons for acting.").

In concluding otherwise, the Ninth Circuit relied on footnote four in *Chaney*, in which this Court "express[ed] no opinion" on whether a nonenforcement decision might be reviewable if it were "based solely on the belief that [the agency] lacks jurisdiction" or were "so extreme as to amount to an abdication of [the agency's] statutory responsibilities." 470 U.S. at 833 n.4; see *Regents* Supp. Br. App. 25a-26a. But whatever doubt *Chaney* left, the Court's subsequent decision in *BLE* resolved it. In any event, as the rest of the footnote and accompanying text make clear, *Chaney* was referring only to circumstances in which "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion.'" 470 U.S. at 833 n.4; see *id.* at 832-833. That was why, in the *Texas* litigation, courts could review the claim that the INA barred DHS from adopting DAPA and expanded DACA. But that theory cannot apply here, where no one argues that the INA somehow bars DHS

from rescinding DACA and resuming enforcement of the law.

The Ninth Circuit recognized that *BLE* "stands for the proposition that if a particular type of agency action is presumptively unreviewable, the fact that the agency explains itself in terms that are judicially cognizable does not change the categorical rule." *Regents* Supp. Br. App. 30a. And it correctly assumed that a decision to rescind a policy of enforcement discretion, like DACA, is the type of decision that is presumptively unreviewable under *Chaney*. See *id.* at 34a n.13. It nevertheless reasoned that a "nonenforcement decision[] based solely on the agency's belief that it lacked power to take a particular course" is reviewable. *Id.* at 31a. But the only difference between an unreviewable "nonenforcement decision[]," *ibid.*, and a "nonenforcement decision[] *based solely on the agency's belief that it lacked power to take a particular course*," *ibid.* (emphasis added), is the agency's *reason* for its decision. That is precisely what *BLE* teaches cannot convert an unreviewable decision into a reviewable one.

Some of the courts below were concerned that, if an enforcement decision that rests on a legal interpretation is unreviewable, an agency could shield any interpretation from review by embedding it in such a policy. See, *e.g.*, *NAACP* Pet. App. 31a. As a threshold matter, that concern is not presented here. DHS did not rest the rescission on any interpretation of particular substantive provisions of the INA that plaintiffs could otherwise challenge under the APA. But in any event, the concern is fundamentally misguided. Assuming that an agency's interpretation is otherwise reviewable (*i.e.*, if the plaintiff can satisfy the APA's various requirements

for review), it does not matter that the agency has announced the interpretation together with a nonenforcement policy. "Nothing in the [APA] or in the holding or policy of [*Chaney*], precludes review" of an interpretation as a categorical matter because it is announced with an enforcement decision. *International Union* v. *Brock*, 783 F.2d 237, 245 (D.C. Cir. 1986). A court may or may not be able to review the interpretation and declare it invalid on a prospective basis, *id.* at 247-248; but what it may never do is review the nonenforcement decision itself, *id.* at 246-247. The former would be subject to whatever review is otherwise available under the APA; and the latter remains committed to agency discretion. Combining the two in the same document does not change the reviewability of either.

b. In any event, DACA's rescission was *not* based solely on DHS's legal conclusion that the policy is unlawful. Acting Secretary Duke decided that she did not want to retain and litigate a policy whose legality was, at a minimum, highly questionable in light of the *Texas* litigation. And Secretary Nielsen was clear that those considerations, as well as additional policy concerns with DACA, were the bases for DHS's decision. Accordingly, even under the lower courts' erroneous understanding of *Chaney* and *BLE*, DHS's rescission of DACA is not reviewable under the APA.

i. A fair reading of the Duke Memorandum demonstrates that DHS's decision never rested exclusively on a legal conclusion that DACA was unlawful. The Acting Secretary recounted in significant detail the litigation surrounding the DAPA and expanded DACA policies. *Regents* Pet. App. 111a-114a. She noted that the agency's previous decision to discontinue DAPA and expanded DACA was made after "considering the [government's]

likelihood of success on the merits of th[at] ongoing litigation." *Id.* at 115a-116a. She described the subsequent letter from Texas and other States to the Attorney General notifying him of those States' intention to amend the existing lawsuit to challenge the original DACA policy. *Id.* at 116a. And she focused on litigation risk when she highlighted the Attorney General's statement that "it is likely that potentially imminent litigation would yield similar results with respect to DACA." *Ibid.* The Acting Secretary concluded that, in light of the foregoing, and "[i]n the exercise of [her] authority in establishing national immigration policies and priorities," the DACA policy "should" be terminated and wound down in "an efficient and orderly fashion." *Id.* at 116a-117a. As even the D.C. district court recognized, "[t]ogether, these statements were sufficient to express the Department's concern that a nationwide injunction in the Texas litigation would abruptly shut down the DACA program." *NAACP* Pet. App. 56a.

The Ninth Circuit nevertheless reasoned that the Acting Secretary's statement is "most naturally read as supporting a rationale based on DACA's illegality." *Regents* Supp. Br. App. 36a. It asserted that "litigation risks" were never expressly mentioned as something that Acting Secretary Duke took into "consideration." *Ibid.* And after scrutinizing her word choice and sentence structure as compared to that of her predecessor in rescinding the DAPA policy, the court concluded that the "difference in language" cut against any "suggestion that the rescission was discretionary." *Id.* at 40a. But the memorandum is not a statutory provision properly parsed with legislative precision. The relevant question is whether the Acting Secretary's rationale "may reasonably be discerned." *Bowman Transp., Inc.*

v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The Acting Secretary's extensive discussion of the prior litigation and her statement that she "should"—not must—rescind DACA confirm that the risk she perceived was that the government was not "likel[y]" to "succe[ed]" on the merits of the "imminent litigation." *Regents* Pet. App. 115a-117a.

ii. Regardless, Secretary Nielsen's memorandum removes any doubt that DHS's decision rests on more than DACA's unlawfulness per se. That memorandum makes crystal clear that, "regardless of whether the DACA policy is ultimately illegal," DHS's decision to rescind is also based on the agency's "serious doubts about its legality" and other "reasons of enforcement policy." *Regents* Pet. App. 123a; see *id.* at 122a ("[T]he DACA policy properly was—and should be—rescinded, for several separate and independently sufficient reasons."). Although the Ninth Circuit and the D.C. district court both refused to credit Secretary Nielsen's non-legal rationales, neither court's reasoning withstands scrutiny.

As a threshold matter, the Ninth Circuit refused to consider the Nielsen Memorandum at all on the ground that it postdated the district-court proceedings. *Regents* Supp. Br. App. 58a n.24. By virtue of this Court's grant of certiorari before judgment in *NAACP*, in which the district court invited the additional memorandum and addressed it at length, the Nielsen Memorandum is undoubtedly before this Court. See *NAACP* Pet. App. 66a. The Court cannot and should not decide these cases without assessing the whole of the agency's actions, and its assessment of the Nielsen Memorandum in *NAACP* will necessarily control whether the *Regents* injunction must be vacated.

The Ninth Circuit also wrongly suggested that the Nielsen Memorandum is an impermissible "post-hoc rationalization[]." *Regents* Supp. Br. App. 58a n.24 (citation omitted). To be sure, in reviewing an agency decision under the APA, "courts may not accept *appellate counsel's* post hoc rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (emphasis altered). An agency's actions "must be upheld, if at all, on the basis articulated by the agency itself." *Ibid.* But that rule has no application here. The Nielsen Memorandum was issued directly by the Secretary of Homeland Security—the official vested by Congress with the authority to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. 202(5)—to explain *her* reasons for concluding that DHS's decision to rescind DACA "was, and remains, sound." *Regents* Pet. App. 121a. Just as much as the memoranda establishing DACA and then rescinding it, the Nielsen Memorandum "*is* agency action, not a *post hoc* rationalization of it." *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991).

Indeed, the D.C. district court itself recognized that almost all of Secretary Nielsen's policy grounds were not "post hoc rationalization[s]." *NAACP* Pet. App. 95a. Remarkably, however, that court disregarded Secretary Nielsen's policy reasons for rescinding DACA as an "attempt to disguise an objection to DACA's legality as a policy justification for its rescission." *Ibid.*; see *id.* at 98a-99a. But Secretary Nielsen could not have been clearer that the policy reasons she offered for rescinding DACA were independent from her legal concerns. See *Regents* Pet. App. 123a ("[R]egardless of whether these concerns about the DACA policy render it illegal

or legally questionable, there are sound reasons of enforcement policy to rescind the DACA policy."); *id.* at 122a (providing "several separate and independently sufficient reasons"). There is no basis to question those statements, particularly in light of the presumption of regularity that courts owe to the coordinate Branches. See *Armstrong*, 517 U.S. at 464.

The D.C. district court observed that two of Secretary Nielsen's policy concerns—that DHS (1) "should not adopt public policies of non-enforcement of those laws for broad classes and categories of aliens," *Regents* Pet. App. 123a; and (2) "should only exercise its prosecutorial discretion not to enforce the immigration laws on a truly individualized, case-by-case basis," *id.* at 124a—also had informed the legal analysis of the DACA policy by Attorney General Sessions, Acting Secretary Duke, and the Fifth Circuit. *NAACP* Pet. App. 98a-100a. But far from evidence of pretext, such overlap is entirely expected: those same factors are relevant to whether only Congress can adopt such an enforcement policy as a legal matter *and* to whether, at a minimum, only Congress should adopt the policy as a discretionary matter. In *Chaney* itself, the FDA similarly relied on federalism concerns to conclude both that it lacked jurisdiction to enforce the FDCA against state lethal-injection laws *and* that, even if it possessed such authority, it would not enforce the FDCA against those laws. See Pet. App. at 81a-86a, *Chaney*, *supra* (No. 83-1878). The overlapping considerations did not undermine the nonreviewability of the FDA's decision. The same is true here.

In any event, the D.C. district court's reasoning does not apply by its own terms to Secretary Nielsen's addi-

tional concern that, in light of "tens of thousands of minor aliens [who] have illegally crossed or been smuggled across our border in recent years," it was important for DHS to "project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens" that will discourage such dangerous and illegal journeys. *Regents* Pet. App. 124a. The court itself recognized that rationale was not reflected in the Duke Memorandum or the Attorney General's letter. *NAACP* Pet. App. 94a. For that reason, the court deemed that one rationale an impermissible post hoc explanation. *Id.* at 94a-95a. But that conclusion was wrong for the same reasons the Ninth Circuit's post hoc rationalization holding was incorrect: it is the agency's own explanation for its decision. See p. 29, *supra*. And thus Secretary Nielsen's messaging rationale alone is sufficient to show that the agency did not rely solely on a legal rationale, and that the agency's decision is unreviewable on any theory.

3. Finally, contrary to the lower courts' suggestion, *Regents* Supp. Br. App. 31a-32a; *NAACP* Pet. App. 73a, principles of political accountability do not justify reviewing DHS's decision to rescind DACA. As a threshold matter, the Nielsen Memorandum clearly states that DHS's concerns justify rescinding DACA "whether the courts would ultimately uphold [the policy] or not." *Regents* Pet. App. 123a. Given that plain statement, the lower courts' concerns about political accountability ring hollow. In any event, free-floating concerns about accountability have no grounding in either the text of Section 701(a)(2) or the precedent construing it. The teaching of *Chaney* and *BLE* is that some discretionary

decisions by the Executive Branch are beyond the authority of courts to review—even when justified by reasons that courts might review in other contexts. The Executive Branch is to be held accountable for those discretionary decisions through democratic channels. For instance, Congress may respond to, and accept or override, the Executive's reasons for adopting or rescinding a nonenforcement policy. Here, in fact, Congress and the President were in the midst of attempting to negotiate a legislative solution, when DHS's rescission was enjoined, and the negotiations collapsed. See Dean DeChairo, *Immigration Framework Coming Next Week, Senators Say*, RollCall.com (Jan. 4, 2018), http://www.rollcall.com/news/immigration-framework-coming-next-week-senators-say-2. If anything, judicial review of DHS's decision undermined that political process.

II. DACA'S RESCISSION IS LAWFUL

Even assuming the rescission is reviewable, it is plainly valid. Cf. *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2409 (2018). Under the APA, the decision must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). The scope of review under that standard is "narrow." *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted). It requires only that the agency "'examined the relevant data' and articulated 'a satisfactory explanation'" for its decision, "'including a rational connection between the facts found and the choice made.'" *Ibid.* (citation omitted). A court "may not substitute [its] judgment for that of the [agency]." *Ibid.* DHS's decision here easily passes that test on multiple legal and policy grounds. Ultimately, whether or not DHS was required to rescind DACA, it certainly was not required to maintain

it. The courts below erred in second-guessing DHS's entirely rational judgment to stop facilitating ongoing violations of federal law on a massive scale.

A. The Rescission Is Reasonable In Light Of DHS's Serious Doubts About DACA's Lawfulness

DHS's decision to wind down the DACA policy was more than justified by DHS's serious doubts about the lawfulness of the policy and the litigation risks in maintaining it. Regardless of whether one agrees or disagrees with the Fifth Circuit's decision enjoining both DAPA and expanded DACA—and this Court's affirmance of that decision by an equally divided vote—those decisions provided ample reason to doubt whether the similar, if not materially indistinguishable, DACA policy could survive a legal challenge. DHS reasonably concluded that maintaining a legally questionable policy of nonenforcement could "undermine public confidence in and reliance on the agency and the rule of law," and risk "burdensome litigation" that could distract from the agency's work. *Regents* Pet. App. 123a. Particularly 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. *Id.* at 117a-118a.

1. In *Texas* v. *United States*, the Fifth Circuit affirmed a nationwide preliminary injunction against DAPA and expanded DACA. 809 F.3d 134, 186 (2015), aff'd, 136 S. Ct. 2271 (2016) (per curiam). The court concluded that both DAPA and expanded DACA were "manifestly contrary," *id.* at 186, to the INA for four reasons: (1) "[i]n specific and detailed provisions," the

INA already "confers eligibility for 'discretionary relief,'" including "narrow classes of aliens eligible for deferred action," *id.* at 179 (citation omitted); (2) the INA's otherwise "broad grants of authority" could not reasonably be construed to assign to the Secretary the authority to create additional categories of aliens of "vast 'economic and political significance,'" *id.* at 183 (citation omitted); (3) DAPA and expanded DACA were inconsistent with historical "discretionary deferral[]" policies because they were not undertaken on a "'country-specific basis * * * in response to war, civil unrest, or natural disasters,'" nor served as a "bridge[] from one legal status to another," *id.* at 184 (citation omitted); and (4) "Congress ha[d] repeatedly declined to enact the Development, Relief, and Education for Alien Minors Act ('DREAM Act'), features of which closely resemble DACA and DAPA," *id.* at 185 (footnote omitted).

The entirety of that reasoning applies equally to DACA. The original DACA policy, like its subsequent expansion and the related DAPA policy, grants deferred action to a vast category of aliens, not in response to any country-specific emergency and despite repeated inaction by Congress. Indeed, the Southern District of Texas recently determined, "guided by [that] Fifth Circuit precedent," that the INA could not "'reasonably be construed'" to authorize the maintenance of DACA. *Texas* v. *United States*, 328 F. Supp. 3d 662, 715 (2018) (citation omitted).[6] At a minimum, given these similarities and "potentially imminent litigation," Acting Secretary Duke acted reasonably in instituting an orderly

[6] The district court nevertheless declined to issue a preliminary injunction enjoining the DACA policy in light of, among other things, Texas's delay in seeking injunctive relief. See *Texas*, 328 F. Supp. 3d at 736-742.

wind-down of the policy, rather than risking a court-ordered shutdown, the terms and timing of which would be beyond the agency's control. *Regents* Pet. App. 116a-117a. And Secretary Nielsen reasonably concluded that she too "lack[ed] sufficient confidence in the DACA policy's legality" to maintain it, "whether the courts would ultimately uphold it or not." *Id.* at 123a. The arbitrary-and-capricious standard does not allow a court "to substitute its judgment" for DHS's on that question. *State Farm*, 463 U.S. at 42-43.

2. The courts below distinguished DAPA from DACA on two grounds, both of which lack merit. Certainly, neither is so compelling that it was unreasonable for DHS to conclude that the costs of retaining DACA outweighed the benefits.

a. First, the courts below focused on the Fifth Circuit's observation in *Texas* that "Congress has enacted an intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status," and DAPA would have applied to some similarly situated aliens "without complying with any of the requirements," 809 F.3d at 179-180. *E.g.*, *Regents* Supp. Br. App. 52a. They reasoned that because "there is no analogous provision in the INA defining how immigration status may be derived by undocumented persons who arrived in the United States as children," "[o]ne of the major problems the Fifth Circuit identified with DAPA is * * * not present" in DACA. *Ibid.*

That pathway to legal status, however, was not critical to the Fifth Circuit's analysis. That process was only one of a host of "specific and detailed provisions" that the Fifth Circuit relied on to decide that DAPA and expanded DACA were inconsistent with the INA's overall scheme. *Texas*, 809 F.3d at 179; see *id.* at 179-181.

Moreover, as the Fifth Circuit pointed out, the INA's process applied only to parents of U.S. citizens. See *id.* at 180. DAPA, on the other hand, would have provided relief to parents of U.S. citizens *and* lawful permanent residents—and the Fifth Circuit concluded the policy was invalid in whole, not just in part. *Regents* Pet. App. 108a.

b. Second, the courts noted that DAPA would have made up to "4.3 million otherwise removable aliens" eligible for deferred action and associated benefits, while DACA had been granted to 689,800 enrollees as of September 2017. *Regents* Supp. Br. App. 54a; see *Batalla Vidal* App. 103a. As an initial matter, although the number of aliens who were ultimately granted DACA is approximately 700,000, approximately 1.7 million originally met the eligibility criteria. See Jeffrey S. Passel & Mark Hugo Lopez, Pew Research Center, *Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules* 3 (Aug. 14, 2012). But whether 1.7 million or nearly 700,000 aliens, there can be no debate that DACA, like DAPA and expanded DACA, is a policy of "vast 'economic and political significance'" to which the Fifth Circuit's reasoning applies. *Texas*, 809 F.3d at 183 (citations omitted). The type of deferred-action policies that the Fifth Circuit suggested might be permissible typically "affect[ed] only *a few thousand* aliens for months or, at most, a few years." *Id.* at 185 n.197 (emphasis added).

c. In any event, even if DACA were distinguishable from DAPA, there still would be no question that maintaining the DACA policy presented serious legal concerns. After all, the Fifth Circuit and this Court affirmed an injunction not only against DAPA, but also against the expansion of DACA—which merely would

have extended the length of DACA grants from two to three years and tweaked the age and residency criteria. Although the courts below did not find the Fifth Circuit's decision "persuasive authority" on the validity of expanded DACA, *Regents* Supp. Br. App. 55a, it is obvious that there was, at the very least, serious doubt concerning DACA's lawfulness and a real risk that the policy would meet the same fate. The Secretary therefore faced a choice: expend time and resources defending DACA, with the risk that a court would order it shut down either immediately or pursuant to a court-drafted plan beyond DHS's control, or rescind DACA in an orderly fashion. Regardless of whether one agrees with the policy choice, the Secretary's decision to opt for the latter was an eminently reasonable one.

B. The Rescission Is Reasonable In Light Of DHS's Additional Policy Concerns

DHS's decision to rescind DACA is independently supported by several additional enforcement-policy concerns. Secretary Nielsen explained that "regardless of whether * * * the DACA policy [is] illegal or legally questionable, there are sound reasons of enforcement policy to rescind the DACA policy." *Regents* Pet. App. 123a. The INA vests the Secretary with the authority to set the Nation's immigration-enforcement priorities. See 6 U.S.C. 202(5). There is no appropriate basis for courts to second-guess the Secretary's policy judgments, which fall well "within the range of reasonable options." *Department of Commerce*, 139 S. Ct. at 2571.

1. The Secretary reasonably concluded that DHS should not decline on this scale to enforce the law adopted by Congress

The Secretary concluded 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. She thus determined that, even if she could have continued DACA unilaterally, she did not want to. *Regents* Pet. App. 123a-124a. That determination was entirely sensible.

In fact, many of her policy concerns echo those expressed by President Obama upon the announcement of the DACA policy itself. The President agreed with the Secretary's assessment that unilateral executive action could not provide a permanent solution for DACA recipients: "This is not a path to citizenship. It's not a permanent fix. This is a temporary stopgap measure." The White House, *Remarks by the President on Immigration* (June 15, 2012), https://go.usa.gov/xnZFY (*Obama Remarks*). The policy itself acknowledges that it does not confer any lawful "immigration status," because "[o]nly the Congress, acting through its legislative authority, can confer those rights." *Regents* Pet. App. 101a. And precisely because the DACA solution was only "temporary," President Obama agreed that "Congress need[ed] to act." *Obama Remarks*. The Secretary reasonably determined that, in the absence of such congressional action, DHS should not maintain this temporary stopgap measure six years later.

The D.C. district court gave only one reason for rejecting the Secretary's desire to await action by Congress: "an agency's view as to which branch of government ought to address a particular policy issue" is not

"an assessment appropriately" made by an agency. *NAACP* Pet. App. 99a (citation omitted). That is a startling and unsupported assertion. Far from illegitimate, such executive restraint is laudable. It is both a common and salutary feature of our constitutional structure that the political branches may seek to achieve large-scale policy solutions through consensus rather than unilateral action. That is particularly so for controversial policies, where the give and take of the legislative process can help forge stable political compromises that unilateral action cannot. Nothing in our system of separated powers prohibits executive officials from seeking legislative approval for particularly significant executive actions. And the Secretary's decision to do so here was plainly reasonable.

2. The Secretary reasonably concluded that DHS should exercise its prosecutorial discretion not to enforce on a case-by-case basis

The Secretary's determination that "DHS should only exercise its prosecutorial discretion not to enforce the immigration laws on a truly individualized, case-by-case basis" was also reasonable. *Regents* Pet. App. 124a. Whatever its merits, DACA plainly creates an implicit presumption that requestors who meet its eligibility criteria will be granted deferred action.[7] Otherwise, it would serve no purpose. A truly individualized approach to deferred action, in contrast, begins with the

[7] The numbers bear that out. The approval rate for initial requests for DACA is 91% since its adoption in 2012—and that takes into account even requests that were denied merely because the alien did not satisfy the eligibility criteria. See USCIS, *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake and Case Status, Fiscal Year 2012–2019* (Apr. 30, 2019), https://go.usa.gov/xVCpC.

presumption that those here illegally should be removed, and seeks to identify, on a case-by-case basis, individuals who should be excused from that presumption. The Secretary's preference for the latter merely continued the policy adopted by her predecessor, Secretary Kelly. See J.A. 857-867 (prohibiting DHS officials from exercising prosecutorial discretion "in a manner that exempts or excludes a specified class or category of aliens from enforcement of the immigration laws" except pursuant to DAPA, expanded DACA, and DACA); J.A. 868-871 (rescinding DAPA and expanded DACA).

The D.C. district court called this rationale "[s]pecious," reasoning that, "if Secretary Nielsen believes that DACA is not being implemented as written, she can simply direct her employees to implement it properly." *NAACP* Pet. App. 100a. But the Secretary's point was not about "her own employees' misapplication of [the DACA policy]," *ibid.*; it was about the thumb on the scales that is created by any categorical deferred-action policy with stated eligibility criteria. The Secretary wanted to remove that presumption, and return to the truly individualized review of deferred-action requests that was available pre-DACA. One can agree or disagree with that judgment, but it is not remotely specious.

3. The Secretary reasonably concluded that DHS should discourage illegal immigration by projecting a message of consistent enforcement

As Secretary Nielsen recognized, "tens of thousands of minor aliens" in recent years have made the dangerous trek—with or without their families—to and across our southern border without legitimate claims to lawfully enter the country. *Regents* Pet. App. 124a; see generally 84 Fed. Reg. 33,829, 33,838 (July 16, 2019)

(discussing "demographic shift in the alien population crossing the southern border from Mexican single adult males to predominantly Central American famil[ies]"). To address that problem, the Secretary determined that DHS should send a strong message that children who are sent or taken on this perilous and illegal journey will not be accorded preferential treatment. She thus additionally concluded that "it is critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens," and that rescission of the DACA policy will help project that message. *Regents* Pet. App. 124a. That too is an eminently reasonable judgment.

The D.C. district court questioned whether the DACA policy could be blamed for the patterns of illegal immigration about which the Secretary expressed concern, noting that DACA was available only to individuals who have lived in the United States since 2007 and thus aliens who illegally entered the country more recently would not be eligible. *NAACP* Pet. App. 102a. But that misses the point entirely. Amnesty-like policies typically do not encourage further illegal conduct by expressly blessing it prospectively, but rather by "creat[ing] an expectation of future amnesties" and "[h]opes of gaining legal status conditional on living or working in the U.S. for a certain period of time." Pia Orrenius & Madeline Zavodny, *What Are the Consequences of an Amnesty for Undocumented Immigrants?*, 9 Geo. Pub. Pol'y Rev. 21, 31 (2004). The Secretary reasonably concluded that creating that expectation was undermining the Nation's immigration system and that conveying a powerful message of consistent enforcement would address that concern.

4. The Secretary adequately considered any reliance interests

Finally, the Secretary sufficiently considered the reliance interests of DACA recipients as weighed against these reasonable policy concerns. As President Obama forthrightly explained, DACA was a "temporary stopgap measure," not a "permanent fix." *Obama Remarks*. By its own terms, the policy "confer[ed] no substantive right" or lawful "immigration status." *Regents* Pet. App. 101a. It instead expressed the government's intention not to enforce the federal immigration law against the recipient for a two-year period, which itself could be terminated at any time at the agency's discretion. *Ibid.*

Nevertheless, Secretary Nielsen explained that the agency was "keenly aware that DACA recipients have availed themselves of the policy in continuing their presence in this country and pursuing their lives." *Regents* Pet. App. 125a. The Duke Memorandum balanced those interests by permitting existing DACA grants to expire according to their stated two-year terms and by allowing a limited window for additional renewals. *Id.* at 117a-118a. And contrary to the D.C. district court's dismissive suggestion that Secretary Nielsen "ignore[d]" the "serious reliance interests," *NAACP* Pet. App. 107a (citations omitted), she explained that her decision to stand by the rescission was not one she came to "lightly," *Regents* Pet. App. 125a. In the end, however, she concluded that neither the asserted reliance interests of any individual DACA recipient nor "the sympathetic circumstances" of all such recipients could "overcome[] the legal and institutional concerns with sanctioning the continued presence of hundreds of thousands of aliens who are illegally present in violation of the laws passed by Congress." *Ibid.* The APA provides

no basis to second-guess that "value-laden" judgment. *Department of Commerce*, 139 S. Ct. at 2571.

C. The Rescission Is Reasonable In Light Of DHS's Conclusion That DACA Is Unlawful

Finally, DHS's conclusion that the DACA policy was not just legally questionable but indeed unlawful itself requires that the rescission be upheld. That conclusion was correct. But even if the Court disagrees, DHS's reasonable determination of the scope of its own authority provides ample justification for its decision.

1. DHS correctly concluded that DACA is unlawful

a. Deferred action under the INA originally "developed without express statutory authorization." *AADC*, 525 U.S. at 484 (citation omitted). The government has since grounded its authority in the Secretary's general powers to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. 202(5), and to "establish such regulations; * * * issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter," 8 U.S.C 1103(a)(3). And Congress and this Court have recognized the practice's use in certain contexts. See, *e.g.*, *AADC*, 525 U.S. at 484 (noting that "[a] case may be selected for deferred action" for "humanitarian reasons") (citation omitted); 49 U.S.C. 30301 note (authorizing States to issue driver's licenses to aliens with "approved deferred action status"). But neither the INA's general grants of authority in 6 U.S.C. 202(5) and 8 U.S.C. 1103(a)(3), nor the other scattered references to deferred action throughout the U.S. Code, can be fairly interpreted as authorizing DHS to maintain a categorical deferred-action policy affirmatively sanctioning the ongoing violation of federal law by up to

1.7 million aliens to whom Congress has repeatedly declined to extend immigration relief.

In the INA, Congress has provided a comprehensive, detailed scheme for affording certain aliens relief or reprieve from removal. See, *e.g.*, 8 U.S.C. 1158(b) (asylum), 1182(d)(5) (parole), 1229b (cancellation of removal), 1229c (voluntary departure), 1254a (temporary protected status). Those provisions set forth, often in significant detail, when and to whom such relief is available. Section 1229b(a), for example, provides the Attorney General discretion to cancel removal for non-lawful-permanent resident aliens only if the alien (i) has been physically present in the United States for ten years; (ii) has been a person of good moral character; (iii) has not been convicted of an aggravated felony; and (iv) removal would result in exceptional and extremely unusual hardship to the alien's U.S. citizen relative. 8 U.S.C. 1229b(b)(1)(D). Other provisions are similarly detailed. See, *e.g.*, 8 U.S.C. 1254a(b)(1) (defining criteria for temporary protected status).

Of course, DHS retains authority to address "interstitial matters" of immigration enforcement, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (citation omitted), but the DACA policy is hardly interstitial. It presumptively makes a class of more than a million illegal aliens, to whom the INA provides no recognition or special solicitude, eligible for reprieve from removal that the INA does not afford. And that forbearance, pursuant to longstanding regulations, in turn makes DACA recipients eligible to obtain affirmative assistance—*e.g.*, work authorization—to aid them in their continuing unlawful presence. See 8 C.F.R. 274a.12(c)(14). That is not a gap-filling measure in any meaningful sense. It is instead "an agency decision[] of

vast 'economic and political significance'" without any warrant from Congress. *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) (citation omitted). And "[w]hen an agency claims to discover in a long-extant statute an unheralded power" over important national affairs, this Court "typically greet[s] its announcement with a measure of skepticism." *Ibid.*

To be sure, the Court has recognized DHS's "broad discretion" in the enforcement of the federal immigration laws, *Arizona*, 567 U.S. at 396, including its ability to grant deferred action, *AADC*, 525 U.S. at 484. And, as a practical matter, DHS does not have the ability to vigorously enforce the immigration laws against every alien unlawfully present in the United States. Cf. *Regents* Supp. Br. App. 55a-56a. DHS therefore must establish enforcement priorities, and strategically deploy its resources to enforce the law. See 6 U.S.C. 202(5). But informing roughly 1.7 million aliens that they may continue violating federal law without fear of enforcement—while establishing a procedure to make them eligible for additional benefits—goes well beyond strategically directing the agency's resources to the highest priority violators. It instead deploys those resources on a massive scale in a manner that will undermine the deterrent effect of federal law by facilitating its continuing violation.

Regardless of the sympathetic circumstances of the aliens involved or the merits of deferred action as a general matter, "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson*, 529 U.S. at 133. And the Secretary's general

powers to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. 202(5), and to "perform such other acts as he deems necessary for carrying out his authority under the [INA]," 8 U.S.C 1103(a)(3), simply do not provide the clarity that is required to authorize a nonenforcement policy of the nature and scope of DACA.

b. In reaching a contrary conclusion, the lower courts did not dispute the magnitude of the policy or identify any specific delegation on which DHS could rely. Rather, the lower courts principally rested on the vast disparity between the estimated number of aliens unlawfully within the United States and the resources available to DHS to enforce the immigration laws. *E.g.*, *Batalla Vidal* Pet. App. 95a. But at most, that justifies a decision not to deploy limited resources to remove low-priority targets. As explained above, however, it does not justify deploying those limited resources in a manner that *facilitates* ongoing violation of federal law by a massive number of aliens. There is an obvious difference between not pursuing lower-priority offenses (especially completed ones) and affirmatively assisting lower-priority offenders to persist in ongoing illegal activity.

The lower courts also identified several prior class-based deferred-action policies that they deemed analogous to DACA. *E.g.*, *Regents* Supp. Br. App. 13a, 56a. Although the courts did not spell out the theory, a previous memorandum from the Office of Legal Counsel (OLC), when addressing DAPA, observed that "Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disap-

prove or limit the practice." J.A. 828. That memorandum further observed that, on several occasions, Congress has "either assumed that deferred action would be available in certain circumstances, or expressly directed that [it] be extended to certain categories of aliens." J.A. 828-829.

The OLC memorandum, however, does not undermine the Secretary's conclusion that DACA is unlawful. Even if legislation that "assume[s]" the existence of a DHS policy should be understood as ratifying that policy, J.A. 828, the prior deferred-action policies on which OLC relied are all easily distinguished.[8] To begin, they all used deferred action to provide certain aliens temporary relief while the aliens sought or awaited permanent status afforded by Congress—*e.g.*, while the alien's bona fide visa application awaited approval or until a visa actually issued following approval. They were also afforded to categories of aliens for whom Congress had

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[8] See Memorandum from Paul W. Virtue, Acting Exec. Assoc. Comm'r, INS., to Reg'l Dirs. et al., INS, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* (May 6, 1997) (domestic violence victims whose visa applications had been approved, but were not immediately available); Memorandum from Stuart Anderson, Exec. Assoc. Comm'r, INS, to Johnny N. Williams, Exec. Assoc. Comm'r, INS, *Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* (May 8, 2002) (possible victims of human trafficking with *bona fide* pending visa applications); Press Release, USCIS, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* (Nov. 25, 2005) (aliens on nonimmigrant student visas temporarily displaced from their full course of study by Hurricane Katrina); Memorandum from Donald Neufeld, Acting Assoc. Dir., Office of Domestic Operations, USCIS, to Field Leadership, USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children* (Sept. 4, 2009) (widows and widowers of U.S. citizens previously eligible for visas, pending a statutory fix).

expressed a special solicitude in the INA—*e.g.*, victims of domestic violence or human trafficking. And, importantly, they were far more limited in scope, "affecting only a few thousand aliens for months or, at most, a few years." *Texas*, 809 F.3d at 185 n.197. For these reasons, all of those policies might fairly be described as "interstitial" in nature. *Brown & Williamson*, 529 U.S. at 159 (citation omitted). They are categorically different from DACA.

As for the various other DHS discretionary-relief policies cited by the lower courts—on which OLC did not focus—they are also inapposite. See *Regents* Supp. Br. App. 11a-13a. Consider, for example, the "Family Fairness" policy, which the Ninth Circuit deemed a "salient" precedent. *Id.* at 12a. Under that policy, the Immigration and Nationality Service (INS) exercised its discretion, in certain circumstances, to grant so-called "extended voluntary departure" to the spouses and children of aliens who had been granted a pathway to legal status by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359.[9] OLC has explained that extended voluntary departure was "derived from the voluntary departure statute," which, at the time, "permitted the Attorney General to make a finding of removability if an alien agreed to voluntarily depart the United States, without imposing a time limit for the alien's departure." J.A. 817 n.5 (citing 8 U.S.C.

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[9] See *Recent Developments*, 64 No. 41 Interpreter Releases 1190, App. I at 1203-1204 (Oct. 26, 1987); Memorandum from Gene McNary, Comm'r, INS, to Reg'l Comm'rs, et. al., INS, *Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990).

1252(b) (1988 & Supp. II 1990)). When created, Family Fairness and similar policies thus had a plausible basis in the INA.[10] Congress has since set a time limit of 120 days for voluntary departure, and DHS has not granted an alien extended voluntary departure in more than 30 years. *Ibid.*

Moreover, like the prior deferred-action policies, Family Fairness provided limited relief to aliens while they awaited permanent relief expressly provided by the INA. See *Recent Developments*, 64 No. 41 Interpreter Releases 1190, App. I at 1202 (Oct. 26, 1987) (explaining that once an alien was approved for permanent resident status under IRCA, "the legalized alien will be eligible to bring in immediate relatives" under the INA). Its scale also ultimately did not match that of DACA. While some contemporaneous estimates stated that as many as 1.5 million aliens were eligible for relief under Family Fairness, *Regents* Supp. Br. App. 13a & n.3, other estimates by the INS suggested as few as 100,000 aliens would be affected. *Recent Developments*, 67 No. 6 Interpreter Releases 153, 153 (Feb. 5, 1990); see *Recent Developments*, 67 No. 8 Interpreter Releases 201, 206 (Feb. 26, 1990). In the end, fewer than 50,000 applications were reportedly received. David Hancock, *Few Immigrants Use Family Aid Program*,

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[10] In *Texas*, the United States argued that extended voluntary departure was distinct from statutory voluntary departure. See U.S. Br. 48-49, *Texas*, *supra* (No. 15-674); U.S. Reply Br. 23 & n.3, *Texas*, *supra* (No. 15-674). Whether or not that was correct, the INS at least purported to be implementing the voluntary-departure statute in granting extended voluntary departure. See 43 Fed. Reg. 29,526, 29,528 (July 10, 1978) (describing extended voluntary departure as an exercise of the "authority contained in [8 U.S.C. 1252(b) (1976)] to allow aliens to depart voluntarily"). The same cannot be said here.

Miami Herald, 1990 WLNR 2016525 (Oct. 1, 1990). In sum, neither Family Fairness nor other historical policies provide a basis for sustaining the very different DACA policy.

2. DHS's legal conclusion provides ample basis for upholding the decision

In any event, even if the Court disagrees with DHS's legal conclusion, DHS's decision to rescind DACA based on its own view of its legal authority—informed by the Fifth Circuit's decision, this Court's equally divided affirmance, and the Attorney General's opinion—was not the type of "clear error of judgment" that would make it arbitrary and capricious under the APA. *State Farm*, 463 U.S. at 43 (citation omitted).

a. The Ninth Circuit and New York district court held that DHS could not rely on an assessment of DACA's legality unless the courts agreed that it was correct as a matter of law. *Regents* Supp. Br. App. 46a; *Batalla Vidal* Pet. App. 91a. Both courts relied on this Court's statement that "if [agency] action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). In *Chenery*, however, the agency was adjudicating the rights of various third parties in a company's reorganization plan. *Id.* at 82-85. Here, DHS was interpreting the scope of its own authority to maintain a discretionary policy of nonenforcement that no one claims was required by law.

That difference matters because, as a coordinate Branch, the Executive has an independent duty to determine whether it lacks authority to act. And in the unique context of its decision whether or not to enforce the law, the Executive is entitled to act on its view of the

bounds of its enforcement discretion even if the courts might disagree. For example, the Attorney General may direct United States Attorneys not to bring prosecutions that, in his view, would be unconstitutional—even if the courts might hold those prosecutions valid. There is nothing arbitrary and capricious about making such an enforcement decision based on the Executive's own view of what the law permits. So too here, DHS was entitled to stand on its view that DACA is an invalid exercise of prosecutorial discretion even if the courts would uphold it.

b. The D.C. district court declined to uphold the rescission on the basis of DHS's legal conclusion because, in its view, DHS did not adequately explain its change in position. *NAACP* Pet. App. 49a-55a; see *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."). Of course, if DACA is unlawful, even an inadequate explanation could not provide a basis to overturn the agency's decision to rescind the unlawful policy. See *Morgan Stanley Capital Grp., Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 544-545 (2008). But assuming a reasoned explanation were needed, the agency met that requirement here. DHS "display[ed] awareness that it [was] changing position," "show[ed] that there are good reasons for the new policy," and took into account any "serious reliance interests." *Encino Motorcars*, 136 S. Ct. at 2126 (citation omitted).

In both the Duke and Nielsen Memoranda, DHS plainly displayed an awareness that it was changing its policy and its legal view by issuing a memorandum rescinding DACA based, in part, on the legal concerns. *Regents* Pet. App. 117a, 122a. Both memoranda also

provided good reasons for that new position by discussing at length the intervening history of the DAPA litigation, including the Fifth Circuit's and this Court's decisions, and the Attorney General's view that DACA suffered from the same legal defects. *Id.* at 112a-117a, 122a-123a. And to the extent the asserted reliance interests are cognizable, the Nielsen Memorandum elaborated on the reasons why they were insufficient to maintain the prior policy. See pp. 42-43, *supra*.

The D.C. district court nevertheless reasoned that DHS did not "satisfy [its] obligation to explain its departure from its prior stated view that DACA was lawful." *NAACP* Pet. App. 51a. The court appeared to be referring to the prior OLC opinion. See *Id.* at 53a-54a nn.22-23. As noted, that opinion principally addressed the lawfulness of DAPA and another related deferred-action policy that DHS was considering. In a footnote, the opinion reported that, before the announcement of the DACA policy, OLC had "orally advised" DHS of its "preliminary view" that the policy "would be permissible." J.A. 827 n.8. But of course, OLC's opinion had since been flatly rejected by the Fifth Circuit in an opinion that was affirmed by an equally divided vote in this Court. And DHS made clear that it agrees with the robust analysis in the Fifth Circuit's intervening decision and that it sees no meaningful distinctions between the lawfulness of those policies and the lawfulness of the original DACA policy. *Regents* Pet. App. 117a, 122a. The APA demands nothing more.

D. The Rescission Does Not Violate Equal Protection

Lastly, DACA's rescission does not violate the equal protection principles of the Fifth Amendment. Respondents contend that DHS's exercise of enforcement discretion was motivated by discriminatory animus.

Although review of that constitutional claim is not foreclosed by Section 701(a)(2), see *Webster* v. *Doe*, 486 U.S. 592, 603-604 (1988); *Chaney*, 470 U.S. at 838, the claim fails on the merits for multiple reasons.

1. At the outset, a discriminatory-enforcement claim is not cognizable in the immigration context. As the Court explained in *AADC*, "a selective prosecution claim is a *rara avis*." 525 U.S. at 489. Even in the ordinary criminal context, discriminatory-motive challenges to enforcement discretion "invade a special province of the Executive" and "'threaten[] to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry.'" *Id.* at 489-490 (citation omitted). In the immigration context, these concerns are "greatly magnified," because a selective-prosecution claim not only delays "just deserts," but "permit[s] and prolong[s] a continuing violation" of law. *Id.* at 490. Courts are also "ill equipped" to consider the authenticity or the adequacy of the foreign-policy considerations that motivate such decisions. *Id.* at 491. For those reasons, although the Court has "not rule[d] out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome," as a general matter, "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *Id.* at 488, 491.

The Ninth Circuit and New York district court refused to dismiss the equal protection claim under *AADC*, reasoning that respondents had plausibly stated a claim under the general equal protection standard articulated in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *Regents* Supp. Br. App. 73a-77a; *Batalla Vidal* Pet. App. 147a-

157a. The courts reasoned that, rather than asserting a selective enforcement claim "as a defense against * * * deportation," *AADC*, 525 U.S. at 488, respondents raise a "freestanding claim that the Executive Branch, motivated by animus, ended a program that overwhelmingly benefits a certain ethnic group." *Regents* Supp. Br. App. 75a. But the "program" the government ended was a policy of immigration enforcement that "benefit[ed]" the group by formally forbearing from removing them. Contrary to the Ninth Circuit's puzzling assertion, a challenge to DHS's decision to rescind that policy as motivated by a discriminatory purpose directly implicates the *AADC* Court's concerns about "inhibiting prosecutorial discretion, allowing continuing violations of immigration law, and impacting foreign relations." *Id.* at 76a. Because DHS's facially neutral rescission of a nonenforcement policy is not the rare case where an exception to *AADC* may be warranted, respondents' claim fails.

2. In any event, even under the *Arlington Heights* factors, respondents do not state a claim. The courts below relied on three categories of allegations: (1) the disparate impact of the rescission, noting that "93% of DACA recipients" are "Latinos and individuals of Mexican heritage"; (2) various "pre-presidential and post-presidential statements" made by President Trump almost entirely unrelated to the DACA policy or the decision to rescind; and (3) the "unusual history" behind the rescission. *Regents* Supp. Br. App. 74a-75a (footnote omitted); see *Batalla Vidal* Pet. App. 152a-153a. None of those factors, either alone or together, supports respondents' equal protection claim.

First, given the United States' natural immigration patterns, the disparate impact of the rescission of DACA

is neither surprising nor illuminating of the agency's motives. Indeed, if it were enough to state a claim that a broad-scale immigration decision disparately impacted individuals of any particular ethnicity, virtually any such decision could be challenged on that ground.

Second, the cited statements are equally irrelevant. Here, the relevant decisionmakers were Secretaries Duke and Nielsen, and there is no evidence that either harbored any discriminatory animus towards anyone. As the New York district court recognized, respondents "have not identified statements by Acting Secretary Duke or the Attorney General that would give rise to an inference of discriminatory motive," *Batalla Vidal* Pet. App. 156a, and the same goes for Secretary Nielsen. In any event, only one of the President's statements relied on by the lower courts even addresses DACA recipients and it reveals nothing more than the obvious fact that DACA has been an important part of legislative negotiations on immigration reform. See *Regents* Supp. Br. App. 74a-75a n.30 ("The Democrats have been told, and fully understand, that there can be no DACA without the desperately needed WALL at the Southern Border.") (citation omitted). And in fact, the President has repeatedly praised DACA recipients and urged Congress to "legalize" their protection. *Batalla Vidal* Pet. App. 156a; see J.A. 679 ("Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military?") (citation omitted); The White House, *Remarks by President Trump in Press Conference* (Feb. 16, 2017), https://go.usa.gov/xVYjF ("But the DACA situation is a very, very—it's a very difficult thing for me. Because, you know, I love these kids.").

Finally, there is nothing remotely "unusual" about the history of the rescission. On February 20, 2017, then-Secretary of Homeland John Kelly announced a general policy against exercising immigration enforcement discretion "in a manner that exempts or excludes a specified class or category of aliens." J.A. 863. At the time, Secretary Kelly carved out DACA, expanded DACA, and DAPA from that policy. J.A. 858. In June 2017, Secretary Kelly announced that, "[a]fter consulting with the Attorney General" and in light of the ongoing *Texas* litigation, he was rescinding the DAPA and expanded DACA policies, while DACA "remain[ed] in effect." J.A. 870-871. And in September 2017, Acting Secretary Duke rescinded DACA as well. *Regents* Pet. App. 111a. Far from a "strange about-face," *Regents* Supp. Br. App. 75a, the rescission of DACA was the logical consequence of a general policy approach adopted at the beginning of this Administration and, after careful deliberation, gradually extended to the most controversial of such policies.

The Ninth Circuit approvingly quoted the district court's description of the Duke Memorandum as "hurriedly cast[ing] aside" a policy that had recently been "reaffirm[ed]" on the basis of "what seems to have been a contrived excuse (its purported illegality)." *Regents* Pet. App. 86a; see *Regents* Supp. Br. App. 75a. But the court's description omits key facts: two weeks after Secretary Kelly rescinded the DAPA and expanded DACA policies, the *Texas* plaintiffs indicated their intent to challenge the original DACA policy, and the Attorney General informed the Acting Secretary that he had concluded that the policy was unlawful based in significant part on the *Texas* litigation invalidating the DAPA and expanded DACA policies. Both of those

facts provide ample explanation for the policy change and its timing.

In short, whether considered separately or collectively under either *AADC* or *Arlington Heights*, respondents' allegations are wholly insufficient to show that Secretaries Duke and Nielsen were motivated by racial animus in deciding to rescind a policy sanctioning the ongoing violation of federal immigration law by 700,000 aliens, especially given the serious questions about its legality. Respondents' equal protection claim fails as a matter of law, and cannot provide a basis for affirming the orders and judgments below.

CONCLUSION

The judgments of the Ninth Circuit and the District Court for the District of Columbia, as well as the orders of the Eastern District of New York, should be reversed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 5 U.S.C. 701 provides:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

3. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

4. 6 U.S.C. 202 (2012 & Supp. V 2017) provides:

Border, maritime, and transportation responsibilities

The Secretary shall be responsible for the following:

(1) Preventing the entry of terrorists and the instruments of terrorism into the United States.

(2) Securing the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States, including managing and coordinating those functions transferred to the Department at ports of entry.

(3) Carrying out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the date on which the transfer of functions specified under section 251 of this title takes effect.

(4) Establishing and administering rules, in accordance with section 236 of this title, governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States.

(5) Establishing national immigration enforcement policies and priorities.

(6) Except as provided in part C of this subchapter, administering the customs laws of the United States.

(7) Conducting the inspection and related administrative functions of the Department of Agriculture transferred to the Secretary of Homeland Security under section 231 of this title.

(8) In carrying out the foregoing responsibilities, ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce.

5. 8 U.S.C. 1103 provides in pertinent part:

Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

(2) He shall have control, direction, and supervision of all employees and of all the files and records of the Service.

(3) He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.

(4) He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service.

(5) He shall have the power and duty to control and guard the boundaries and borders of the United States

against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper.

(6) He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

(7) He may, with the concurrence of the Secretary of State, establish offices of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries.

(8) After consultation with the Secretary of State, the Attorney General may authorize officers of a foreign country to be stationed at preclearance facilities in the United States for the purpose of ensuring that persons traveling from or through the United States to that foreign country comply with that country's immigration and related laws.

(9) Those officers may exercise such authority and perform such duties as United States immigration officers are authorized to exercise and perform in that foreign country under reciprocal agreement, and they shall enjoy such reasonable privileges and immunities necessary for the performance of their duties as the government of their country extends to United States immigration officers.

(10) In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

(11) The Attorney General, in support of persons in administrative detention in non-Federal institutions, is authorized—

(A) to make payments from funds appropriated for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service pursuant to Federal law under an agreement with a State or political subdivision of a State; and

(B) to enter into a cooperative agreement with any State, territory, or political subdivision thereof, for the necessary construction, physical renovation, acquisition of equipment, supplies or materials required to establish acceptable conditions of confinement and detention services in any State or unit of local government which agrees to provide guaranteed bed space for persons detained by the Service.

* * * * *

(g) Attorney General

(1) In general

The Attorney General shall have such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.

(2) Powers

The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.

6. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by rea-

son of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B) of this section, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall

transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name

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[1] See References in Text note below.

of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or

written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully ad-

mitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.