No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

CASA DE MARYLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
JONATHAN Y. ELLIS
Assistant to the Solicitor General
MARK B. STERN
ABBY C. WRIGHT
THOMAS PULHAM
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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 Court, a decision of the Fifth Circuit holding that two related U.S. 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.

PARTIES TO THE PROCEEDING

Petitioners are Donald J. Trump, President of the United States; William P. Barr, Attorney General of the United States; Kevin K. McAleenan, Acting Secretary of Homeland Security; U.S. Department of Homeland Security; L. Francis Cissna, Director of U.S. Citizenship and Immigration Services; U.S. Citizenship and Immigration Services; Matthew T. Albence, Acting Director of U.S. Immigration and Customs Enforcement; U.S. Immigration and Customs Enforcement; John P. Sanders, Acting Commissioner of U.S. Customs and Border Protection; U.S. Customs and Border Protection; and the United States.

Respondents are Casa de Maryland; Coalition for Humane Immigrant Rights; Fair Immigration Movement; One America; Promise Arizona; Make the Road Pennsylvania; Michigan United; Arkansas United Community Coalition; Junta for Progressive Action, Inc.; Angel Aguiluz; Estefany Rodriguez; Heymi Elvir Maldonado; Nathaly Uribe Robledo; Eliseo Mages; Jesus Eusebio Perez; Josue Aguiluz; Missael Garcia; Jose Aguiluz; Maricruz Abarca; Annabelle Martines Herra; Maria Joseline Cuellar Baldelomar; Brenda Moreno Martinez; Luis Aguilar; J.M.O., a minor child; Adriana Gonzales Magos, next of friend to J.M.O.; A.M., a minor child; Isabel Cristina Aguilar Arce, next of friend to A.M.

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The Solicitor General, on behalf of the U.S. Department of Homeland Security and other federal parties, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-61a) is not yet reported but is available at 2019 WL 2147204. The memorandum opinion of the district court (App., *infra*, 62a-98a) is reported at 284 F. Supp. 3d 758.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to the petition for a writ of certiorari in *DHS*

v. *Regents of the University of California*, No. 18-587, at 127a-143a (filed Nov. 5, 2018) (*Regents* App.).

STATEMENT

1. a. 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). 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); see also 8 U.S.C. 1227(a) (2012 & Supp. V 2017). As a practical matter, however, the federal government cannot 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, U.S. Department of Homeland Security (DHS) officials must first "decide whether it makes sense to pursue removal at all." *Arizona*, 567 U.S. at 396. After removal proceedings begin, government officials may decide to grant discretionary protection or relief from removal, 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) (2012 & Supp. V 2017).

b. In 2012, DHS announced the policy known as Deferred Action for Childhood Arrivals (DACA). See *Regents* App. 97a-101a. Deferred action is a practice in which the Secretary exercises discretion to notify an alien of a decision to forbear from seeking the alien's removal for a designated period. *AADC*, 525 U.S. at 484. Under DHS regulations, aliens granted deferred action may apply for and receive work authorization for the duration of the deferred-action grant 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.

DACA made deferred action available to "certain young people who were brought to this country as children." *Regents* App. 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.[1] 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 made clear that it "confer[red] no substantive right, immigration status or pathway to citizenship," because "[o]nly

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[1] See, *e.g.*, S. 1291, 107th Cong., 1st Sess. (2001); S. 1545, 108th Cong., 1st Sess. (2003); S. 2075, 109th Cong., 1st Sess. (2005); S. 2205, 110th Cong., 1st Sess. (2007); S. 3827, 111th Cong., 2d Sess. (2010).

the Congress, acting through its legislative authority, can confer these rights." *Id.* at 101a.

DHS explained that information provided in the DACA request process would be protected from disclosure for the purpose of immigration enforcement proceedings unless certain criteria related to national security or public safety were satisfied, or the individual met the requirements for a Notice to Appear. U.S. Citizenship & Immigration Servs., DHS, *Deferred Action for Childhood Arrivals: Frequently Asked Questions*, https://go.usa.gov/xngCd. DHS also stated, however, that this information-sharing policy "may be modified, superseded, or rescinded at any time without notice," and that it "may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." *Ibid.*

Later, in 2014, DHS created a new policy of enforcement discretion referred to as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). See *Regents* App. 102a-110a. Through a process expressly designed to be "similar to DACA," DAPA made deferred action available for certain individuals who had a child who was a U.S. citizen or lawful permanent resident. *Id.* at 107a; see *id.* at 107a-108a. At the same time, DHS also expanded DACA by extending the deferred-action period from two to three years and by loosening the age and residency criteria. *Id.* at 106a-107a.

c. Soon thereafter, Texas and 25 other States 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 was a "'substantive' rule that should have undergone the notice-and-comment rule making procedure" required by the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* *Texas* v. *United States*, 86 F. Supp. 3d 591, 671 (S.D. Tex. 2015); see *id.* at 607, 647, 664-678.

The Fifth Circuit affirmed the injunction, holding that the DAPA and expanded DACA policies likely violated both the APA and the INA. *Texas* v. *United States*, 809 F.3d 134, 146, 170-186 (2015). The court of appeals concluded that plaintiffs had "established a substantial likelihood of success on the merits of their procedural claim" that DAPA and expanded DACA were invalidly instituted without notice and comment. *Id.* at 178. The court also concluded, "as an alternate and additional ground," that the policies were substantively contrary to law. *Ibid.* The court observed 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. It also noted that Congress had repeatedly declined to enact legislation "closely resembl[ing] DACA and DAPA." *Id.* at 185.

After briefing and argument, this Court affirmed the Fifth Circuit's judgment by an equally divided Court, *United States* v. *Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam), leaving the nationwide injunction in place.

d. In June 2017, Texas and other plaintiff States in the *Texas* case announced their intention to amend their complaint to challenge the original DACA policy. D. Ct. Doc. 26-1, at 238-240 (Nov. 15, 2017). 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." *Id.* at 239.

On September 5, 2017, rather than confront litigation challenging DACA on essentially the same grounds that had succeeded in *Texas* before the same court for the DAPA and expanded DACA policies, DHS decided to wind down DACA in an orderly fashion. *Regents* App. 111a-119a. In the rescission memorandum, then-Acting Secretary of Homeland Security Elaine C. 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 terminated." *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 memorandum was "rescind[ed]." *Id.* at 117a.

The rescission memorandum stated, however, that the government "[w]ill not terminate the grants of previously issued deferred action * * * solely based on the directives in this memorandum" for the remaining two-year periods. *Regents* App. 118a. The memorandum also explained that DHS would "provide a limited window in which it w[ould] adjudicate certain requests for DACA." *Id.* at 117a. Specifically, DHS 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.

DHS has also made clear that the "information-sharing policy has not changed in any way since it was first announced, including as a result of the Sept. 5, 2017" DACA rescission. U.S. Citizenship & Immigration Servs., DHS, *Guidance on Rejected DACA Requests*, https://go.usa.gov/xPVmG; see DHS, *Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals (DACA)*, https://go.usa.gov/xPVmE.

e. Shortly after DHS's decision to rescind DACA, challenges to the rescission were filed across the country, including in the Northern District of California, the Eastern District of New York, the District of Columbia, and, in this case, the District of Maryland. See, *e.g.*, *Regents of the Univ. of Cal.* v. *DHS*, No. 17-cv-5211 (N.D. Cal. filed Sept. 8, 2017); *NAACP* v. *Trump*, No. 17-cv-1907 (D.D.C. filed Sept. 18, 2017); *Batalla Vidal* v. *Nielsen*, No. 16-cv-4756 (E.D.N.Y. second amended complaint filed Sept. 19, 2017). The plaintiffs alleged that the termination of DACA is unlawful because it is arbitrary and capricious under the APA; violates the APA's requirement for notice-and-comment rulemaking; and denies respondents equal protection and due process. See, *e.g.*, App., *infra*, 12a. The government defended, arguing that the plaintiffs' claims are not reviewable under the APA and that, in any event, DHS rationally explained the decision to wind down the discretionary DACA policy, given the agency's conclusion that the policy is unlawful and the imminent risk of its

being invalidated in the *Texas* case, and that the plaintiffs' claims are otherwise without merit.

The first nationwide injunction soon followed. On January 9, 2018, in *Regents of the Univ. of Cal.* v. *DHS*, *supra*, the district court entered a preliminary injunction requiring the government to "maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017," with certain exceptions. *Regents* App. 66a; see *id.* at 1a-70a. The court determined that, although agency decisions "not to prosecute or initiate enforcement actions are generally not reviewable," the rescission of DACA was different because it concerned a "broad enforcement polic[y]," rather than an "'individual enforcement decision,'" and the "main" rationale for rescinding the prior policy was its "supposed illegality," which the court reasoned it could assess. *Id.* at 27a-28a, 30a (citation omitted). The court concluded that the plaintiffs were likely to succeed in showing that the rescission was arbitrary and capricious because, in the court's view, it was "based on a flawed legal premise." *Id.* at 42a.

The same court largely denied the government's motion to dismiss three days later. *Regents* App. 71a-90a. It declined to dismiss respondents' arbitrary-and-capricious claim for the same reasons it granted the nationwide preliminary injunction. *Id.* at 72a. And the court declined to dismiss the equal-protection claim, concluding that respondents' allegations "raise 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. The court *sua sponte* certified that order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). *Regents* App. 89a.

f. Less than a week later, the merits of the dispute reached this Court for the first time. On January 18, 2018, the government filed a petition for a writ of certiorari before judgment seeking review the *Regents* court's orders. *DHS* v. *Regents of the Univ. of Cal.*, No. 17-1003. The government contended that the district court's unprecedented order requiring DHS to maintain a discretionary policy of non-enforcement on a nationwide basis warranted this Court's immediate review. In February 2018, the Court denied the government's petition. *DHS* v. *Regents of the Univ. of Cal.*, 138 S. Ct. 1182. But the Court stated that its order was "without prejudice" and it "assumed that the Court of Appeals w[ould] proceed expeditiously to decide this case." *Ibid.*

When the government's *Regents* appeal remained pending before the Ninth Circuit eight months later, the government filed a second petition for a writ of certiorari before judgment in *Regents*, along with similar petitions for writs of certiorari before judgment to the Second and D.C. Circuits, both of which were (and are) considering appeals of similar orders. See *DHS* v. *Regents of the Univ. of Cal.*, No. 18-587 (filed Nov. 5, 2018); *Trump* v. *NAACP*, No. 18-588 (filed Nov. 5, 2018); *McAleenan* v. *Batalla Vidal*, No. 18-589 (filed Nov. 5, 2018). The government explained that the petitions were necessary for the Court to consider and resolve this important dispute during the current Term. While briefing proceeded on those petitions, the Ninth Circuit resolved the appeal in *Regents*, affirming the district court's orders. *Regents* Gov't Supp. Br. App. 1a-78a. The government filed a supplemental brief, alerting this Court to the Ninth Circuit's decision and suggesting that the government's petition in that case should be

considered a petition for a writ of certiorari after judgment, in keeping with the Court's practice in similar cases. *Regents* Gov't Supp. Br. 1. No other party objected to the government's suggestion.

The government's petitions in *Regents*, *Batalla Vidal*, and *NAACP* were distributed to the Court for consideration at its January 11, 2019 Conference. They were redistributed for consideration at the Court's January 18, 2019 Conference. No further activity has been recorded on the dockets.

2. Meanwhile, this case proceeded in parallel in the District of Maryland. In March 2018, the district court granted the government's motion for summary judgment in relevant part. App., *infra*, 62a-98a. Although the court concluded that respondents' claims were justiciable, *id.* at 75a-79a, it rejected on the merits each of respondents' challenges to DACA's rescission, *id.* at 81a-97a. The court reasoned that the rescission was exempt from APA's notice-and-comment requirements because the rescission memorandum provides guidance on the agency's "exercise of discretion," not "a rule with the force of law." *Id.* at 82a. It rejected respondents' arbitrary-and-capricious challenge, observing that "[r]egardless of whether DACA is, in fact, lawful or unlawful," the agency's "belief that it was unlawful and subject to serious legal challenge is completely rational." *Id.* at 83a. And the court concluded that respondents' allegation of discriminatory intent was "unsupported by the record," and that they otherwise failed to establish a violation of equal-protection, due-process, or estoppel principles. *Id.* at 93a; see *id.* at 84a-95a. Respondents appealed.[2]

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[2] The district court also concluded that it was "theoretically possible" that the government might use information obtained from

3. In June 2018, while this case was pending before the Fourth Circuit, then-Secretary of Homeland Security Kirstjen M. Nielsen issued a memorandum in response to the district court in *NAACP* v. *Trump*, *supra*, providing further explanation of DHS's decision to rescind DACA. *Regents* App. 120a-126a. Secretary Nielsen concluded 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" and explained that "[a]ny arguable distinctions between the DAPA and DACA policies" were "not sufficiently material" to convince her otherwise. *Ibid.*; see *id.* at 122a-123a. Second, the Secretary reasoned that, in any event, "[l]ike Acting Secretary Duke, [she] lack[s] sufficient confidence in the DACA policy's legality to continue this non-enforcement policy, whether the courts would ultimately uphold it or not." *Id.* at 123a. She noted that "[t]here are sound reasons for a law enforcement agency to avoid discretionary policies that are legally questionable." *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." *Ibid.* The Secretary also explained that, although she "do[es] not come to these conclusions lightly," "neither any individual's reliance on the expected continuation of the DACA pol-

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DACA requestors in a manner inconsistent with estoppel principles, and therefore enjoined DHS to comply with the information-sharing policy as "first announced in 2012" pending further order from the court. App., *infra*, 95a; 3/15/18 Am. Order 1; see App., *infra*, 95a-97a. The court of appeals, however, vacated that injunction, and it is not at issue in this petition. App., *infra*, 33a-35a.

icy nor the sympathetic circumstances of DACA recipients as a class" outweigh the reasons to end the policy. *Id.* at 125a. The parties addressed the implications of Secretary Nielsen's memorandum for this case in their briefs to the court of appeals. See, *e.g.*, Gov't C.A. Br. 38-39, 41-42; Resps. C.A. Resp. & Reply Br. 16.

4. On May 17, 2019, a divided panel of the court of appeals affirmed in part, reversed in part, vacated in part, dismissed in part, and remanded the case to the district court. App., *infra*, 1a-37a.

a. The panel majority first determined, like the district court, that respondents' claims were justiciable. App., *infra*, 14a-25a. The majority acknowledged that, under *Chaney*, *supra*, an agency's decision whether "to enforce the substantive law" was presumptively "committed to agency discretion by law," 5 U.S.C. 701(a)(2). App., *infra*, 19a; see *id.* at 18a-19a. But it concluded that the presumption was inapplicable here. *Id.* at 19a-23a. Because DACA's rescission was a "[m]ajor agency policy decision[]," rather than an exercise of enforcement discretion "in an individual case," the court concluded that the rescission was "not a '*Chaney*-type enforcement action.'" *Id.* at 19a-20a (brackets and citation omitted).

The court of appeals further concluded that Section 1252 of the INA did not require that challenges to DACA's rescission be raised only at the behest of an individual alien after a final order of removal. App., *infra*, 14a-16a. In the court's view, the rescission of DACA was not a "'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders'" such that Section 1252(g) would preclude review prior to a final order of removal. *Id.* at 14a (quoting 8 U.S.C. 1252(g)). And it reasoned that the "'zipper' clause" in

Section 1252(b)(9), *AADC*, 525 U.S. at 483—which provides that "[j]udicial review of all questions of law and fact * * * arising from any action taken * * * to remove an alien * * * shall be available only in judicial review of a final order under [Section 1252]," 8 U.S.C. 1252(b)(9)—"applies *only* with respect to review of an *order of removal* under [8 U.S.C. § 1252(a)(1)]." App., *infra*, 16a (citation omitted; brackets in original).

b. On the merits, the court of appeals agreed with every court to have considered the issue that DACA's rescission did not violate the procedural requirements in the APA. App., *infra*, 25a-28a. The court observed that while the rescission removed a "mechanism under which individuals could receive deferred action," it did not create any "'new binding rule of substantive law'" or "curtail [DHS's] discretion to make deferred action available on a case-by-case or ad hoc basis." *Id.* at 27a-28a (citation omitted). The court thus concluded that the rescission memorandum was a "general statement[] of policy" to which the APA's notice-and-comment requirements "do[] not apply." *Id.* at 26a (quoting 5 U.S.C. 553(b)(A)).

The court of appeals determined, however, that the rescission was substantively arbitrary and capricious, because DHS "failed to give a reasoned explanation for the change in policy, particularly given the significant reliance interests involved." App., *infra*, 31a. The court rejected DHS's reliance on the *Texas* litigation as justifying the change, observing that "DACA and DAPA are not identical." *Id.* at 32a (quoting *Texas*, 809 F.3d at 174). It faulted DHS for not explaining "why it was likely that the district court in the *Texas* litigation would have enjoined DACA." *Ibid.* And the court of appeals criticized DHS for not "adequately account[ing]

for the reliance interests" of individuals who would be affected by the rescission of the policy. *Id.* at 33a. In a footnote, the court refused to consider the explanation in Secretary Nielsen's June 22 memorandum on the ground that the memorandum "was not part of the administrative record in this appeal." *Id.* at 33a n.18.

Accordingly, the court of appeals reversed the district court's arbitrary-and-capricious ruling, vacated DACA's rescission in its entirety, and remanded the matter for "further proceedings consistent with this opinion." App., *infra*, 36a.[3] In light of that disposition, the court of appeals declined to consider whether DHS's "conclusions about DACA's legality [we]re substantively incorrect." *Id.* at 31a n.17. It also "decline[d] to decide whether DACA's rescission violates the Fifth Amendment's due process and equal protection guarantees." *Id.* at 35a. As to the constitutional claims, the court "vacate[d] the district court's judgment on th[o]se issues and dismiss[ed] those claims." *Id.* at 37a.

c. Judge Richardson concurred in part and dissented in part. App., *infra*, 38a-61a. In his view, "the rescission of DACA is judicially unreviewable under the APA." *Id.* at 42a. Judge Richardson explained that "[d]iscretion in prosecutorial enforcement is deeply rooted in the Constitution's separation of powers." *Id.* at 43a. He observed that "[i]t is normally neither appropriate nor

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[3] Because the court of appeals vacated the rescission in its entirety, should the decision take effect, it would alter the status quo and require DHS to, among other things, accept new DACA requests in addition to renewal requests (as required by the *Regents* and *Batalla Vidal* injunctions). Accordingly, the government intends to file a motion in the court of appeals shortly, asking the court to stay its mandate.

necessary for judges to involve themselves in the decision to bring, or not to bring, enforcement actions." *Id.* at 44a. And he concluded that DHS's decision to rescind the policy of enforcement discretion at issue here should be treated no differently. See *id.* at 46a-49a.

Judge Richardson rejected the majority's new "general enforcement policies" exception to these justiciability principles. App., *infra*, 49a. He noted that such an exception was irreconcilable with *Chaney*, which itself concerned "the FDA's categorical decision not to take enforcement action against a *class of actors* (drug manufacturers, prison administrators, and others in the drug distribution chain)" for the use of certain lethal-injection drugs. *Id.* at 50a. He also reasoned that such an exception was "untenable" as a logical matter. *Id.* at 51a. "Standardizing (*i.e.*, generalizing) how agents use their prosecutorial discretion does not alter its character." *Ibid.* In fact, he reasoned, "[t]o find that discretionary enforcement decisions are unreviewable only when inferior officers exercise single-shot" discretion would "brush[] aside" the constitutional separation of powers in which the responsibility for such decisions "remains firmly at the President's feet." *Id.* at 51a-52a.

Judge Richardson determined that respondents' constitutional claims were reviewable, App., *infra*, 56a n.6, but he had "little trouble" agreeing with the district court that they failed on the merits, *id.* at 56a. With respect to due process, he reasoned that respondents "fail[ed] to articulate a constitutionally protected life, liberty, or property interest impacted by the rescission." *Ibid.* Indeed, he noted that the DACA memorandum itself disavowed creating any rights or entitlements, "acknowledg[ing] that such rights could be conferred

only by 'Congress, acting through its legislative authority.'" *Id.* at 57a (quoting *Regents* App. 101a). With respect to equal protection, Judge Richardson concluded that respondents had failed to create a "plausible inference" of invidious animus on the part of the Attorney General or Acting Secretary in "tak[ing] the official government actions at issue," much less the showing of "outrageous discrimination" that would be required to establish what in essence is a selective-prosecution claim. *Id.* at 58a-59a.

REASONS FOR GRANTING THE PETITION

In November 2018, the government filed petitions for writs of certiorari before judgment to the Second, Ninth, and D.C. Circuits to review decisions concluding that the rescission of DACA either is or likely is unlawful. Six months later, those petitions remain pending before this Court. In the meantime, by virtue of two nationwide injunctions, the government remains obligated to keep in place a discretionary policy of nonenforcement that the Attorney General and DHS have reasonably concluded is unlawful and that is sanctioning an ongoing violation of federal immigration law by nearly 700,000 aliens. That state of affairs calls for this Court's immediate action.

As the government has explained in its previous filings, the DACA policy is materially indistinguishable from the related policies that the Fifth Circuit held were contrary to federal immigration law in a decision that four Justices of this Court voted to affirm. Consistent with that decision, DHS has decided that such a policy should be adopted only by legislative action, not unilateral executive action. Yet a divided panel of the court of appeals in this case, like those earlier courts,

concluded that DHS somehow acted arbitrarily and capriciously by relying in part on the Fifth Circuit's decision to reach that conclusion. The court of appeals' decision is of a piece with the related decisions pending before this Court, and it is wrong for the reasons explained in the petition for a writ of certiorari in *DHS* v. *Regents of the University of California*, No. 18-587 (filed Nov. 5, 2018). At a minimum, these decisions presently warrant this Court's plenary review. Accordingly, to facilitate the Court's orderly consideration of this important dispute, the government respectfully submits that the Court should expedite consideration of this petition, grant the government's petition in this case and the other pending cases before the Court's summer recess, and consolidate the cases for review next Term.

A. The Questions Presented Warrant The Court's Immediate Review

The government's petition in *Regents* explains in detail why a grant of certiorari is necessary in order to obtain an appropriately prompt resolution of this important dispute. *Regents* Pet. 15-17. In February 2018, this Court recognized the need for an "expeditious[]" resolution of this dispute in its order denying without prejudice the government's petition for a writ of certiorari before judgment in *DHS* v. *Regents of the University of California*, 138 S. Ct. 1182. Now 15 months later, the government is still being required to retain a discretionary non-enforcement policy that DHS and the Attorney General have correctly concluded is unlawful and that sanctions the ongoing violation of federal law by more than half a million people.

In the meantime, the very existence of this pending litigation (and lingering uncertainty) continues to impede efforts to enact legislation addressing the legitimate policy concerns underlying the DACA policy. See, *e.g.*, S.M., *What the Supreme Court's Silence on DACA Means*, The Economist, Jan. 23, 2019, https://www.economist.com/democracy-in-america/2019/01/23/what-the-supreme-courts-silence-on-daca-means (explaining that the existing injunctions are frustrating legislative negotiations); Ted Mitchell, *Congress Must Act to Protect Dreamers Still Living in Legal Limbo*, Fox News, May 21, 2019, https://www.foxnews.com/opinion/ted-mitchell-congress-must-act-to-protect-dreamers-still-living-in-legal-limbo) (describing the current inability to bring any legislation concerning DACA recipients to a vote); Jordan Fabian, *Trump Rolls Out "Pro-American" Immigration Plan*, The Hill, May 16, 2019, https://thehill.com/homenews/administration/444092-trump-rolls-out-pro-american-immigration-plan (noting that DACA was left out of the Administration's most recent immigration proposal). As a result, "the political process has been pre-empted, and we have had over a year of bitter political division that included a government shutdown of unprecedented length." William P. Barr, Att'y Gen., *Remarks to the American Law Institute on Nationwide Injunctions* (May 21, 2019), https://go.usa.gov/xmGBx.

B. This Case Squarely Presents The Reviewability And The Lawfulness Of DACA's Rescission

Like the others pending before the Court, this case squarely presents both of the questions presented. Respondents raise all of the principal challenges to the lawfulness of the rescission of DACA, including that it is arbitrary and capricious, that it should have gone

through notice-and-comment rulemaking, and that it violates equal-protection and due-process principles. The government moved to dismiss or, in the alternative, for summary judgment on all of respondents' claims on justiciability and merits grounds. The district court rejected each of respondents' claims on the merits. The court of appeals passed on the justiciability issues and rested its merits determination on essentially the same arbitrary-and-capricious grounds on which the district courts in *Regents* and in *McAleenan* v. *Batalla Vidal*, No. 18-589 (filed Nov. 5, 2018), rested their nationwide preliminary injunctions and the district court in *Trump* v. *NAACP*, No. 18-588 (filed Nov. 5, 2018), based its final order of vacatur.

Moreover, although the court of appeals remanded the case to the district court, it did so only after finally resolving the arbitrary-and-capricious claim and "vacat[ing] as arbitrary and capricious" DACA's rescission. App., *infra*, 36a. And after declining to address the merits of respondents' constitutional challenges, the court of appeals "vacate[d] the district court's judgment on th[o]se issues and dismiss[ed] those claims." *Id.* at 37a. Because respondents pressed each of their constitutional claims in the court of appeals, they remain free to reassert them in this Court as an alternative ground for affirmance. See *Whitley* v. *Albers*, 475 U.S. 312, 326 (1986). A grant of certiorari to the Fourth Circuit would therefore bring before this Court the court of appeals' final determination of all of the relevant issues and permit the Court to address all of the relevant claims.

C. The Court Should Expedite Consideration Of This Petition, Grant The Government's Petitions Before The Summer Recess, And Consolidate The Cases For Consideration Next Term

To ensure an adequate vehicle for the timely and definitive resolution of this dispute, the government respectfully submits that the Court should expedite consideration of this petition to permit consideration before the Court's summer recess, alongside the pending petitions in *Regents*, *Batalla Vidal*, and *NAACP*. Those petitions have now been pending before this Court for six months. Briefing was completed on those petitions in early January 2019. And although each of the petitions was filed as a petition for a writ of certiorari before judgment, all parties appear to agree that given the Ninth Circuit's intervening decision, the *Regents* petition is properly treated as an ordinary petition for a writ of certiorari after judgment. Resolution of those petitions before the summer recess is critical, if the petitions are granted, to afford the government and the multiple private and state parties involved sufficient time to coordinate on a briefing schedule and to allow appropriate time for each side to address, and for the Court to consider and resolve, the many important issues presented by these cases. And expedition of this petition would allow the Court to consider this petition at the same time.

The Court should grant the petitions in this case, *Regents*, and *NAACP*, and consolidate those cases for further review. Although respondents in this case present the principal challenges against the rescission of DACA and the court of appeals' decision represents its final resolution of those issues, the court did not pass on the constitutional claims and it refused to consider the implica-

tions of Secretary Nielsen's June 22 memorandum before vacating DACA's rescission. Granting the government's petitions in *Regents* and *NAACP* would bring before this Court the Ninth Circuit's resolution of the equal-protection and due-process claims, and allow for consideration of the *NAACP* court's analysis of the June 22 memorandum. See *Regents* Gov't Supp. Br. 7-10.

As for *Batalla Vidal*, as the government's supplemental brief in *Regents* explained, the Court may still wish to grant the *Batalla Vidal* petition to permit the parties in those cases to participate in the Court's consideration of the overlapping issues. See *Regents* Gov't Supp. Br. 10-11. The Court could, however, hold the *Batalla Vidal* petition pending resolution of the government's petitions in the other cases to ensure that an order vacating the nationwide injunction in *Regents* would have immediate effect on the identical injunction issued in the *Batalla Vidal* cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
JONATHAN Y. ELLIS
Assistant to the Solicitor General
MARK B. STERN
ABBY C. WRIGHT
THOMAS PULHAM
Attorneys

MAY 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1521

CASA DE MARYLAND; COALITION FOR HUMANE IMMIGRANT RIGHTS (CHIRLA); FAIR IMMIGRATION MOVEMENT (FIRM); ONE AMERICA; PROMISE ARIZONA; MAKE THE ROAD PENNSYLVANIA; MICHIGAN UNITED; ARKANSAS UNITED COMMUNITY COALITION; JUNTA FOR PROGRESSIVE ACTION, INC.; ANGEL AGUILUZ; ESTEFANY RODRIGUEZ; HEYMI ELVIR MALDONADO; NATHALY URIBE ROBLEDO; ELISEO MAGES; JESUS EUSEBIO PEREZ; JOSUE AGUILUZ; MISSAEL GARCIA; JOSE AGUILUZ; MARICRUZ ABARCA; ANNABELLE MARTINES HERRA; MARIA JOSELINE CUELLAR BALDELOMAR; BRENDA MORENO MARTINEZ; LUIS AGUILAR; J.M.O., A MINOR CHILD; ADRIANA GONZALES MAGOS, NEXT OF FRIEND TO J.M.O.; A.M., A MINOR CHILD; ISABEL CRISTINA AGUILAR ARCE, NEXT OF FRIEND TO A.M.,
PLAINTIFFS-APPELLANTS

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. CUSTOMS AND BORDER PROTECTION; DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; WILLIAM P. BARR, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES; ELAINE C. DUKE, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF HOMELAND SECURITY; L. FRANCIS CISSNA, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES; RONALD D. VITIELLO, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;

KEVIN K. MCALEENAN, IN HIS OFFICIAL CAPACITY IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER OF CUSTOM AND BORDER PROTECTION; UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES

18-1522

CASA DE MARYLAND; COALITION FOR HUMANE IMMIGRANT RIGHTS (CHIRLA); FAIR IMMIGRATION MOVEMENT (FIRM); ONE AMERICA; PROMISE ARIZONA; MAKE THE ROAD PENNSYLVANIA; MICHIGAN UNITED; ARKANSAS UNITED COMMUNITY COALITION; JUNTA FOR PROGRESSIVE ACTION, INC.; ANGEL AGUILUZ; ESTEFANY RODRIGUEZ; HEYMI ELVIR MALDONADO; NATHALY URIBE ROBLEDO; ELISEO MAGES; JESUS EUSEBIO PEREZ; JOSUE AGUILUZ; MISSAEL GARCIA; JOSE AGUILUZ; MARICRUZ ABARCA; ANNABELLE MARTINES HERRA; MARIA JOSELINE CUELLAR BALDELOMAR; BRENDA MORENO MARTINEZ; LUIS AGUILAR; J.M.O., A MINOR CHILD; ADRIANA GONZALES MAGOS, NEXT OF FRIEND TO J.M.O.; A.M., A MINOR CHILD; ISABEL CRISTINA AGUILAR ARCE, NEXT OF FRIEND TO A.M., PLAINTIFFS-APPELLEES

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. CUSTOMS AND BORDER PROTECTION; DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; WILLIAM P. BARR, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES; ELAINE C. DUKE, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF HOMELAND SECURITY; L. FRANCIS CISSNA, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES; RONALD D. VITIELLO, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;

KEVIN K. MCALEENAN, IN HIS OFFICIAL CAPACITY IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER OF CUSTOM AND BORDER PROTECTION; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

Argued: Dec. 11, 2018
Decided: May 17, 2019

Appeals from the United States District Court for the District of Maryland, at Greenbelt. Roger W. Titus, Senior District Judge. (8:17-cv-02942-RWT)

Before: KING, DIAZ, and RICHARDSON, Circuit Judges.

DIAZ, Circuit Judge:

In 2012, the Secretary of Homeland Security established the Deferred Action for Childhood Arrivals ("DACA") policy. Under this policy, certain noncitizens who came to the United States as children could receive deferred action—a decision forbearing their removal from the country. Hundreds of thousands of individuals, including those who appear as Plaintiffs in these appeals, applied for and received grants of deferred action under DACA.

In 2017, the Acting Secretary of Homeland Security rescinded DACA, which prompted a flurry of lawsuits across the country challenging the action. Plaintiffs in these appeals (a group of individuals and organizations) allege that the government's decision to rescind DACA (and its changes to policies governing the use of information provided by DACA applicants) violates the Fifth

Amendment to the U.S. Constitution, as well as the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, and common law principles of estoppel.

On the government's motion for summary judgment, the district court determined that Plaintiffs' challenges were subject to judicial review, that the rescission of DACA and changes to the government's policies on use of DACA applicant information did not violate the APA, that the constitutional claims were without merit, and that DACA's rescission did not violate principles of estoppel. The court, however, ordered the government (on grounds of estoppel) to comply with the policies promulgated in 2012 on the use of information provided by DACA applicants and enjoined it from altering these policies.

As we explain, we agree with the district court that Plaintiffs' challenges are subject to judicial review. We also agree with the district court that the government's decision to rescind DACA did not require notice and comment under the APA. But the decision nonetheless violated the APA because—on the administrative record before us—it was not adequately explained and thus was arbitrary and capricious. We also conclude that the district court erred in ordering the government to comply with its policies promulgated in 2012 on the use of information provided by DACA applicants and enjoining it from altering those policies.

Given our resolution, we decline, under the doctrine of constitutional avoidance, to decide whether Plaintiffs' Fifth Amendment rights were violated. Nor do we address Plaintiffs' remaining arguments challenging the district court's grant of summary judgment.

I.

A.

Before turning to the record material, some context is in order. The Secretary of Homeland Security is "charged with the administration and enforcement" of the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1103(a)(1). One of the enforcement tools available under the INA is the removal of aliens from the United States. "Aliens may be removed if 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), 1227(a) (listing classes of deportable and inadmissible aliens).

Because of the "practical fact," however, that the government can't possibly remove all such aliens, the Secretary has discretion to prioritize the removal of some and to deprioritize the removal of others. *Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir. 2015); *see* 6 U.S.C. § 202(5) (charging the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities"). One form of discretion the government exercises is deferred action, which "is a decision by Executive Branch officials not to pursue deportation proceedings against an individual or class of individuals otherwise eligible for removal from this country." *Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 487 (9th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3201 (U.S. Nov. 5 & 19, 2018) (No. 18-587).

Immigration authorities have granted deferred action and related forms of relief from deportation or removal since at least the early 1960s. *See id.* at 487-89;

The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. ____, 2014 WL 10788677, at *10-13 (Nov. 19, 2014) ("2014 OLC Opinion")[1] (addressing the Department's practices of granting deferred action ad hoc and through broad policies making relief from removal available to particular groups of aliens). The Supreme Court also has recognized deferred action by name, describing it as the executive branch's "regular practice . . . of exercising . . . discretion for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AAADC*"), 525 U.S. 471, 484 (1999).

B.

Turning now to the record material, the essential undisputed facts are as follows. To ensure government resources were not spent on the "low priority cases" of "certain young people who were brought to [the United

[1] The Office of Legal Counsel, or OLC, is an office within the U.S. Department of Justice that drafts legal opinions of the Attorney General and provides its own written opinions and other advice in response to requests from various agencies within the executive branch. *See* 28 U.S.C. § 512 (providing that agency heads may seek legal advice from the Attorney General); 28 C.F.R. § 0.25 (delegating Attorney General's authority to render legal advice to OLC); "Office of Legal Counsel," The United States Department of Justice, https://www.justice.gov/olc (saved as ECF opinion attachment). Although not binding on courts, OLC opinions "reflect[] the legal position of the executive branch" and "are generally viewed as providing binding interpretive guidance for executive agencies." *United States v. Arizona*, 641 F.3d 339, 385 n.16 (9th Cir. 2011) (internal quotation marks omitted) (Bea, J., concurring in part and dissenting in part), *aff'd in part, rev'd in part*, 567 U.S. 387 (2012).

States] as children and know only this country as home," J.A. 129, then Secretary of Homeland Security Janet Napolitano announced in a June 15, 2012, memorandum the policy that has become known as DACA. The DACA Memo made renewable two-year terms of deferred action from removal and authorization for employment available to individuals who came to the United States as children, satisfied certain other eligibility criteria,[2] and passed background checks.

To be considered for deferred action under DACA, applicants had to submit to biometric screening and provide extensive personal information to the Department of Homeland Security. The Department informed applicants that the information provided was "protected from disclosure . . . for the purpose of immigration enforcement proceedings" unless the requestor met criteria for commencement of removal proceedings or referral to U.S. Immigration and Customs Enforcement for a determination whether to commence removal proceedings.[3] J.A. 1004. The Department warned, however, that these policies could be "modified, superseded, or rescinded at any time without notice" and were "not intended to" and did not "create any right or benefit,

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[2] In its original form, deferred action was available to individuals who were under age 16 when they came to the United States, were not above age 30, had continuously resided in the United States for at least five years preceding June 15, 2012, and were present in the country on June 15, 2012, and satisfied certain other requirements relative to public safety and education or military service.

[3] Separately, the Department noted that the information provided could be shared with national security and law enforcement agencies "for purposes other than removal." J.A. 1004.

substantive or procedural, enforceable at law by any party." *Id.*

The DACA Memo made clear that it "confer[red] no substantive right, immigration status[,] or pathway to citizenship." J.A. 131. DACA recipients, however, were eligible to receive a host of other benefits under preexisting statutes and regulations, including advance parole allowing reentry into the United States after travel abroad, social security benefits, and certain forms of public assistance. *See* 8 U.S.C. §§ 1182(d)(5)(A), 1611(b)(1), 1621(b)(1), (d); 8 C.F.R. §§ 1.3(a)(4)(vi), 212.5. DACA recipients also were eligible to receive employment authorization on a showing of economic necessity. *See* 8 U.S.C. § 1324a(h)(3); 8 C.F.R. § 274a.12(c)(14).

In November 2014, then Secretary of Homeland Security Jeh Johnson announced a separate deferred action policy for certain parents of United States citizens and lawful permanent residents that became known as Deferred Action for Parents of Americans ("DAPA").[4] The DAPA memorandum also expanded DACA by (1) extending the deferred action and employment authorization terms from two to three years; (2) removing the "age cap" that previously excluded certain individuals from DACA eligibility; and (3) reducing the period of time

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[4] The 2014 OLC Opinion concluded that DAPA "would constitute a permissible exercise of [the Department of Homeland Security]'s enforcement discretion under the INA." J.A. 162; 2014 WL 10788677, at *23. While the opinion doesn't directly address the Department's authority to implement DACA, it does recount that, before DACA was announced, the OLC had "orally advised" the Department that the policy would be permissible "provided that immigration officials retained discretion to evaluate each application on an individualized basis." J.A. 149 n.8; 2014 WL 10788677, at *13 n.8.

that someone needed to be physically present in the United States to be eligible for DACA. *See* J.A. 167-68.

A coalition of states led by Texas sued to block implementation of the DAPA policy (and its proposed expansions to DACA) on the grounds that it violated the APA and the Take Care Clause of the Constitution, U.S. Const. art. II, § 3 (the "*Texas* litigation"). *See Texas v. United States*, 86 F. Supp. 3d 591, 604 & n.1, 607 (S.D. Tex. 2015). The district court in that case granted injunctive relief, *id.* at 671-72, 677-78 & n.111, and the Fifth Circuit affirmed, *Texas v. United States*, 809 F.3d 134, 178-79, 186, 188 (5th Cir. 2015). The Supreme Court affirmed the Fifth Circuit's judgment by an equally divided vote. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

In June 2017 (approximately five months after the Trump administration took office), then Secretary of Homeland Security John Kelly rescinded DAPA but left in place DACA and the deferred action relief and employment authorizations granted between the issuance of the DAPA Memo and the district court's decision in the *Texas* litigation.

On September 4, 2017, Attorney General Jefferson Sessions wrote to then Acting Secretary Elaine Duke, advising her to rescind DACA. According to the Attorney General:

> DACA was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration

> laws was an unconstitutional exercise of authority by the Executive Branch. The related . . . DAPA . . . policy was enjoined on a nationwide basis in a decision affirmed by the Fifth Circuit on the basis of multiple legal grounds and then by the Supreme Court by an equally divided vote. . . . Because the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA.[5]
>
> In light of the costs and burdens that will be imposed on DHS associated with rescinding this policy, DHS should consider an orderly and efficient wind-down process.

J.A. 379 (internal citations omitted).

The next day, Acting Secretary Duke rescinded DACA and instructed Department personnel to "wind-down" the policy. J.A. 380, 383. The Secretary's Rescission Memo recounts in a "Background" section the DACA and DAPA policies, the *Texas* litigation, Secretary Kelly's rescission of DAPA, the letter to Attorney General Sessions from the plaintiffs in the *Texas* litigation, and General Sessions's September 4 letter. The Rescission Memo then states:

> Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017[,] letter from the Attorney

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[5] Plaintiffs in the *Texas* litigation had written to General Sessions in June 2017, requesting that the Secretary of Homeland Security rescind DACA and prohibit new grants and renewals of deferred action. The letter warned that, if the Executive Branch failed to so act, plaintiffs there would amend their complaint to challenge DACA.

> General, it is clear that the June 15, 2012[,] DACA program should be terminated.

J.A. 383.

The Rescission Memo—which issued without notice or an opportunity for public comment—did not end DACA outright. Rather, it allowed for a case-by-case basis adjudication of initial applications for deferred action and employment authorization accepted by September 5, 2017, and renewal requests accepted by October 5, 2017, from current DACA beneficiaries whose benefits would expire between September 5, 2017, and March 5, 2018.

The Memo stated that the Department would not terminate existing grants of deferred action and employment authorization under DACA "solely based on the directives" in the Memo and would "generally honor" approved applications for advanced parole. *Id.* But it made clear that the Department would reject all other DACA applications, including initial applications filed after September 5, 2017, and all pending and future applications for advance parole under DACA. *Id.* The Memo, however, explicitly placed "no limitations" on the Department's "otherwise lawful enforcement . . . prerogatives." J.A. 384.

The Department also announced that once an individual's deferred action under DACA expired, information provided by applicants would not be "proactively provided to [law enforcement agencies] for the purpose of immigration enforcement proceedings" unless the requestor met criteria for commencement of removal proceedings or referral to U.S. Immigration and Customs Enforcement for a determination whether to commence

removal proceedings. J.A. 1142. For individuals whose pending DACA requests were denied, the announcement stated that "[g]enerally, information provided in DACA requests will not be proactively provided to other law enforcement entities . . . for the purpose of immigration enforcement proceedings" unless the requestor posed "a risk to national security or public safety" or met criteria for commencement of removal proceedings or referral to U.S. Immigration and Customs Enforcement for a determination whether to commence removal proceedings. J.A. 1143.

Nearly 800,000 individuals have received deferred action under DACA since its inception.

C.

Plaintiffs' complaint raises a host of challenges to the government's decision to rescind DACA. First, the complaint alleges that the rescission is a substantive rule and thus requires notice-and-comment rulemaking under the APA. Next, it asserts that the government's decisions to rescind DACA and change the way the government proposed to share personal information collected from DACA applicants were arbitrary, capricious, and contrary to law, in violation of the APA, and violated the substantive and procedural due process protections of the Fifth Amendment. Plaintiffs also allege that the decision to rescind DACA violates the equal protection guarantee of the Fifth Amendment. Finally, Plaintiffs say that the government should be equitably estopped from rescinding DACA or using information provided by DACA applicants for immigration enforcement purposes beyond those first announced in 2012, when the government's information-sharing policies were first implemented.

The district court granted partial summary judgment to the government. The court found (contrary to the government's contention) that Plaintiffs' claims were justiciable. *Casa De Maryland v. DHS*, 284 F. Supp. 3d 758, 768-71 (D. Md. 2018). But on the merits, the court determined that DACA's rescission and the government's changes to its policies on information-sharing did not violate the APA and that Plaintiffs' constitutional claims lacked merit. *Id.* at 771-77. The court also determined that DACA's rescission did not violate the doctrine of estoppel. *Id.* at 777-78.

The court, however, granted summary judgment to Plaintiffs on the portion of their estoppel claim pertaining to the sharing of DACA applicant information. The court ordered the government to comply with the policies as originally announced in 2012 and enjoined it from altering these policies. *Id.* at 778-79; J.A. 1531-33.

These appeals followed. We review a district court's grant of summary judgment de novo. *Roland v. USCIS*, 850 F.3d 625, 628 (4th Cir. 2017). "We can affirm a grant of summary judgment only where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Certain Underwriters at Lloyd's, London v. Cohen*, 785 F.3d 886, 889-90 (4th Cir. 2015) (internal quotation marks omitted). We review a district court's grant of an injunction for abuse of discretion. *South Carolina v. United States*, 907 F.3d 742, 753 (4th Cir. 2018).

II.

We begin with the government's argument that Plaintiffs' claims are not justiciable, an issue we consider de novo. *See Bostic v. Schaefer*, 760 F.3d 352, 370

(4th Cir. 2014); *Angelex Ltd. v. United States*, 723 F.3d 500, 505 (4th Cir. 2013).

A.

The government contends that Plaintiffs' claims are immune from judicial review under 8 U.S.C. § 1252(g), a provision of the INA stating, "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 [Secretary of Homeland Security] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

According to the government, § 1252(g) bars review here in two ways. First, noting that the Supreme Court in *AAADC* observed that § 1252(g) "seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations," 525 U.S. at 485,[6] the government contends that this section bars review because DACA's rescission is a "no deferred action" decision. But this contention ignores both the plain language of § 1252(g) and the Supreme Court's determination in *AAADC* that this section "applies *only* to three discrete actions that the [Secretary of Homeland Security] may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* at 482 (first emphasis

[6] The Supreme Court said as much after reviewing a treatise describing the practice of deferred action and litigation that would result when it was not granted. *AAADC*, 525 U.S. at 484-85. That treatise, however, referred explicitly to "[e]fforts to challenge the refusal to exercise [deferred action] *on behalf of specific aliens*." *Id.* at 485 (emphasis added). Plaintiffs don't challenge the refusal to grant deferred action to a particular individual.

added). In rescinding DACA, the Acting Secretary did none of these things.

Second, the government says that § 1252(g) precludes review because DACA's rescission is an initial "action" in the commencement of removal proceedings. As the government would have it, review of its decision to rescind DACA must await a final order of removal. The Supreme Court in *AAADC* though "specifically rejected a broad reading of the three discrete actions listed in [§] 1252(g)." *Regents*, 908 F.3d at 504. Specifically, "decisions to open an investigation, [or] to surveil the suspected violator" are not encompassed by § 1252(g)'s jurisdictional bar, even though these decisions "may be part of the deportation process." *AAADC*, 525 U.S. at 482; *see Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (Alito, J., plurality) ("[In *AAADC*, w]e did not interpret [§ 1252(g)] to sweep in any claim that can technically be said to 'arise from' the three listed actions. . . . Instead, we read the language to refer *to just those three specific actions themselves*." (emphasis added)).

And while we accept that § 1252(g) "is specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings," *AAADC*, 525 U.S. at 487, the government hasn't moved to remove any of the Plaintiffs. The two Circuit decisions on which the government relies to support the proposition that judicial review of DACA's rescission is available only through review of a final order of removal—*Vasquez v. Aviles*, 639 F. App'x 898 (3d Cir. 2016), and *Botezatu v. INS*, 195 F.3d 311 (7th Cir. 1999)—are inapposite. Those cases involved challenges to individual "no deferred action" decisions by aliens adjudicated removable.

Vasquez, 639 F. App'x at 901; *Botezatu*, 195 F.3d at 314. The government's reliance on *AAADC* is therefore misplaced, and we reject its argument that § 1252(g) bars review of Plaintiffs' claims.[7]

B.

The government argues that another provision of the INA—8 U.S.C. § 1252(b)(9)—bars review of Plaintiffs' claims. The government did not press this argument in the district court. But because a party may challenge subject matter jurisdiction for the first time on appeal, *Am. Canoe Ass'n, Inc. v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003), we consider this issue.

Section 1252(b)(9) provides that "[j]udicial review of 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 shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9). But that provision doesn't help the government here because it "applies *only* with respect to review of an *order of removal* under [8 U.S.C. § 1252(a)(1)]." *INS v. St. Cyr*, 533 U.S. 289,

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[7] *Accord Regents*, 908 F.3d at 504 (holding § 1252(g) doesn't deprive courts of jurisdiction to review DACA's rescission); *NAACP v. Trump*, 298 F. Supp. 3d 209, 224 (D.D.C. 2018) (rejecting as "misplaced" government's reliance on *AAADC* and finding § 1252(g) didn't bar review of challenges to DACA's rescission), *appeals docketed*, Nos. 18-5243, 18-5245 (D.C. Cir. Aug. 10 & 13, 2018), *petition for cert. before judgment filed*, 87 U.S.L.W. 3204 (U.S. Nov. 5, 2018) (No. 18-588); *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 152-54 (E.D.N.Y. 2017) (rejecting government's § 1252(g) argument in challenge to DACA's rescission), *appeals docketed*, Nos. 18-1985, 18-1986 (2d Cir. July 5, 2018), *petition for cert. before judgment filed*, 87 U.S.L.W. 3201 (U.S. Nov. 5, 2018) (No. 18-589).

313 (2001) (emphases added; internal quotation marks and alteration omitted); *see Calcano-Martinez v. INS*, 232 F.3d 328, 340 (2d Cir. 2000) ("Congress enacted [§ 1252(b)(9)] for the important purpose of consolidating all claims that *may be brought in removal proceedings* into one final petition for review of a final order in the court of appeals." (emphasis added)), *aff'd*, 533 U.S. 348 (2001).

The government's contention that § 1252(b)(9) bars review thus is without merit.

C.

Next, the government contends that judicial review is foreclosed under the APA because the decision to rescind DACA is committed to agency discretion by law. We do not agree.

"Although there is a 'strong presumption' in favor of judicial review of agency action," *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 316 (4th Cir. 2008) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)), the APA bars judicial review of agency action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The government says that the Acting Secretary's decision to rescind DACA is a type of agency enforcement decision that is presumptively unreviewable under the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985).[8] Invoking the "broad discretion exercised by

[8] The government doesn't appear to seriously contest that Plaintiffs' procedural APA claim challenging the decision to rescind DACA is subject to judicial review. *Accord Lincoln v. Vigil*, 508 U.S. 182, 195-98 (1993) (process by which an agency makes a rule may be

immigration officials" that is a "principal feature of the removal system," *Arizona*, 567 U.S. at 396, the government urges that the concerns driving *Chaney*'s presumption of unreviewability apply with "particular force" in the removal context, a context in which allowing delay would result in ordering the government to allow a "continuing violation" of federal law, *AAADC*, 525 U.S. at 490.

And while conceding that an agency's expression of a legal interpretation announced in a broad or general enforcement policy may be reviewable, the government says that the decision to rescind DACA is distinguishable because it rested on discretionary enforcement concerns and expressed the Department of Homeland Security's view about the scope of its enforcement authority, not the substantive unlawfulness of the policy. Finally, relying on the Supreme Court's post-*Chaney* decision in *ICC v. Bhd. of Locomotive Eng'rs* ("*BLE*"), 482 U.S. 270 (1987), the government argues that, even if the sole rationale for the rescission decision was the view that DACA was unlawful, such rationale cannot provide a "hook" to support review of the decision.

Because the government relies so heavily on *Chaney* for its argument, we turn to that decision. There, a group of death row inmates petitioned the Food and Drug Administration to prevent the use in lethal injections of certain drugs that the agency had not approved for that purpose. 470 U.S. at 823-24. The agency refused to act, based on its view that its jurisdiction to act under the substantive law was unclear and, even if it had jurisdiction, it would decline to exercise that jurisdiction

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reviewed for compliance with applicable procedural requirements, regardless of reviewability of the substance of the rule).

under its inherent discretion to do so. *Id.* at 824-25. The petitioners filed suit, seeking an order directing the agency to act. *Id.* at 825.

Without addressing the jurisdictional issue, the Court held that the agency's discretionary decision not to enforce the substantive law was unreviewable under the APA. *Id.* at 828, 837-38. As the Court explained, such decisions "often involve[] 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, whether the agency is likely to succeed if it acts, [and] whether the particular enforcement action . . . best fits the agency's overall policies." *Id.* at 831.

Nonenforcement decisions, the Court observed, generally do not involve the exercise of "*coercive* power over an individual's liberty or property rights," and, accordingly, do "not infringe upon areas that courts often are called upon to protect." *Id.* at 832. Such decisions also "share[] 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." *Id.* For these reasons, the Court found, such decisions have "traditionally been committed to agency discretion," and Congress, in "enacting the APA[,] did not intend to alter that tradition." *Id.* (internal quotation marks omitted). Thus, the Court concluded, "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." *Id.*

Here, however, the Department of Homeland Security's decision to rescind DACA is not a "*Chaney*-type enforcement action[]." *Kenney v. Glickman*, 96 F.3d

1118, 1123 (8th Cir. 1996). For starters, the Acting Secretary did not exercise her discretion in an individual case.[9] Nor did she identify a violation of the INA against which to act, determine whether government resources would be best spent enforcing one violation over another, or decide whether the Department would succeed if it pursued a particular violation. Rather, Acting Secretary Duke rescinded a general enforcement policy in existence for over five years and affecting hundreds of thousands of enrollees based on the view that the policy was unlawful.

Major agency policy decisions are "quite different from day-to-day agency []enforcement decisions." *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988). Where an agency expresses a broad or general enforcement policy, different considerations than those driving *Chaney*'s presumption are at play. "As general statements, they are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994).

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[9] The government correctly observes that an agency's discretionary decision to enforce the law may be unreviewable under § 701(a)(2). *See Speed Mining*, 528 F.3d at 311, 317-18 (holding agency's discretionary decision to enforce substantive law by issuing citations for safety violations was committed to agency discretion and therefore unreviewable). But *Speed Mining* is distinguishable because it involved a discretionary enforcement decision in an individual case.

Accordingly, as courts have recognized, an agency's expression of a broad or general enforcement policy based on the agency's legal interpretation is subject to review. *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 811-12 (D.C. Cir. 1998) (holding courts had jurisdiction under APA because challenged agency action was a general policy of refusing to enforce provision of substantive law and not a "single-shot non-enforcement decision" (citing *Crowley*, 37 F.3d at 674-76)); *see Kenney*, 96 F.3d at 1123-24 (concluding *Chaney* applies to "individual, case-by-base determinations of when to enforce existing [law] rather than permanent policies or standards" and did not encompass agency's adoption of general policies stating standards agency deemed acceptable to implement statutory goals); *Crowley*, 37 F.3d at 672-73, 675 (*Chaney*'s presumption applies if "agency bases its refusal to enforce in an individual case solely on a legal interpretation without explicitly relying on its enforcement discretion"); *see also Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) (holding challenge to agency's interpretation of law and regulations advanced in enforcement policy statement was "not the type of discretionary judgment concerning the allocation of enforcement resources that [*Chaney*] shields from judicial review"); *Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765, 767, 773 (D.C. Cir. 1992) (holding *Chaney*'s presumption "is inapplicable or at least rebutted [where plaintiff] raise[d] a facial challenge to the [agency's] statutory interpretation embodied in [a regulation] and d[id] not contest a particular enforcement decision" and

citing authority in support). DACA's rescission fits well within this rubric.[10]

The government attempts to distinguish this authority, but its efforts are unavailing. It claims DACA's rescission involved discretionary balancing because it was based on concerns about its legality and "litigation risk," a term that appears to refer to the likelihood the policy would have been invalidated had it been challenged in the *Texas* litigation. But the Rescission Memo doesn't identify the "risk" of litigation as a "consideration" on which the Acting Secretary relied in rescinding the policy. Rather, the Memo relies on the Attorney General's conclusion that DACA needed to be rescinded because it was unlawful.[11] True, the Attorney General's letter also proffers the conclusion that "potentially imminent litigation" would invalidate DACA, as was the case with DAPA in the *Texas* litigation. But we agree with the determination of our district court colleague Judge Bates in his opinion resolving challenges to DACA's rescission that this justification "was too closely bound up with [the Attorney General's] evaluation of DACA's legality," *NAACP*, 298 F. Supp. 3d at 234, and

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[10] Our dissenting colleague contends that decisions from the D.C. Circuit supporting our view that DACA's rescission is reviewable don't explain how they can be reconciled with *Chaney*. Dis. op. at 48-51. We disagree. *See Crowley*, 37 F.3d at 675-77; *Nat'l Wildlife Fed'n*, 980 F.2d at 772-73.

[11] *See* 8 U.S.C. § 1103(a)(1) ("[D]etermination[s] and ruling[s] by the Attorney General with respect to all questions of law shall be controlling [on the Secretary of Homeland Security]."); *see Yanez-Marquez v. Lynch*, 789 F.3d 434, 450 n.6 (4th Cir. 2015) (finding Attorney General's position controlling where Department of Homeland Security and Attorney General had conflicting views about applicability of a legal doctrine).

thus cuts against *Chaney*'s presumption of unreviewability.

Nor are we persuaded by the government's claim that DACA's rescission rested on the Department's view of the scope of its enforcement authority, not the substantive unlawfulness of the policy. As Judge Bates aptly noted when presented with the same argument, "this strikes the [c]ourt as a distinction without a difference. To say that a particular agency action is 'without statutory authority' is simply to say that no statutory provision authorizes that action; in a sense, therefore, it is a determination of the substantive content of each statutory provision that might plausibly apply." *Id.* at 232. We, like Judge Bates, "fail[] to perceive any meaningful difference between an agency's conclusion that it lacks statutory authority and its interpretation of a specific statutory provision." *Id.*[12]

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[12] Our dissenting colleague notes that Acting Secretary Duke didn't say in the Rescission Memo "that DACA *must* be terminated or that she lacked the legal authority to enforce DACA or a DACA-like program." Dis. op. at 54. It is true that Acting Secretary Duke wrote only that it was clear DACA "should" be terminated. J.A. 383. Standing alone, however, "should" can express the notion of requirement or obligation. *Should*, Webster's Third New International Dictionary Unabridged (2002) ("used . . . to express duty, obligation, [or] necessity"). Given the Attorney General's evaluation of DACA's legality and the absence of any reference to litigation risk in the Rescission Memo's list of considerations, this use of the word "should" supports our conclusion, *ante*, at 20, 22, that the Secretary rescinded DACA based on her view that the policy was unlawful. Contrary to our dissenting colleague's view, our decision today does not intrude on discretionary prerogatives of the Executive Branch (*see* Dis. op. at 50-52); rather, it "preserves the judiciary's role as the ultimate arbiter of statutory meaning while at the

The government also relies on the Supreme Court's decision in *BLE* as further support for the view that Plaintiffs' claims are unreviewable. But there, the Supreme Court held only that "where a party petitions an agency for reconsideration on the ground of material error, *i.e.*, on the same record that was before the agency when it rendered its original decision, an order which merely denies rehearing of the prior order is not itself reviewable." 482 U.S. at 280 (internal quotation marks, ellipsis, and alteration omitted). The government is correct that the Court also rejected the principle that, if an "agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable," citing as an example a prosecutor's refusal to institute criminal proceedings based on the belief that the law will not sustain a conviction. *Id.* at 283. But *BLE* still does not advance the government's argument.

For one thing, Plaintiffs here filed a timely challenge to the government's *original* decision to rescind DACA. *BLE* doesn't bar review of that type of challenge. Moreover, as the government itself concedes, Appellees' Opening & Response Br. at 19, *BLE* addressed the scope of judicial review in the context of agency non-enforcement action in an individual case. *See Crowley*, 37 F.3d at 675-77 (explaining the basis for distinguishing—for purposes of judicial review—between individual enforce-

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same time affording agencies breathing space to adopt enforcement policies for discretionary reasons," *NAACP*, 298 F. Supp. 3d at 234.

ment decisions and implementation of broad enforcement policies). DACA's rescission involves a broad enforcement policy, not an individual decision.[13]

In sum, we hold that Plaintiffs' claims are reviewable.[14]

III.

A.

We turn now to the merits and consider first whether the district court erred in granting summary judgment to the government on Plaintiffs' procedural APA claim. The court determined that DACA's rescission was akin to a policy statement and thus was not subject to notice and comment under the APA. *Casa*, 284 F. Supp. 3d at 772. We review this determination de novo. *Children's Hosp. of the King's Daughters, Inc. v. Azar* ("*CHKD*"), 896 F.3d 615, 619 (4th Cir. 2018).

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[13] We accept that agency action doesn't become reviewable simply because "the agency gives a 'reviewable' reason for otherwise unreviewable action." *BLE*, 482 U.S. at 283. But, as we've explained, DACA's rescission is not such an unreviewable decision. *See NAACP*, 298 F. Supp. 3d at 231 ("[A]n otherwise reviewable interpretation of a statute does not become presumptively unreviewable simply because the agency characterizes it as an exercise of enforcement discretion.").

[14] The government has not cross-appealed from the district court's additional determination that all Plaintiffs had standing, *Casa*, 284 F. Supp. 3d at 771, and the parties have not briefed this issue on appeal. Nonetheless, reviewing this issue de novo, *Bostic*, 760 F.3d at 370, we agree with the district court that the individual DACA recipient Plaintiffs have standing to sue. We consequently need not consider whether the other Plaintiffs have standing. *See id.* at 370-71.

The APA generally requires that agencies provide notice of proposals to create, amend, or repeal a rule[15] and an opportunity for interested persons to comment on the proposal. *See* 5 U.S.C. §§ 551(4)-(5), 553(a)-(c). "Rules issued through the notice-and-comment process are often referred to as legislative rules because they have the force and effect of law." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (internal quotation marks omitted). "[T]he APA provides[, however,] that, unless another statute states otherwise, the notice-and-comment requirement 'does not apply' to 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'" *Id.* at 1203-04 (quoting 5 U.S.C. § 553(b)(A)).

Plaintiffs argue that DACA's rescission required notice and comment under the APA because the Rescission Memo is a legislative rule that mandates how Department officials must act and substantively affects DACA recipients. The government rejects this premise, countering that the Memo is a general statement of policy. We agree with the government.[16]

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[15] The parties don't dispute that DACA's rescission qualifies as a "rule" for APA purposes. *See* 5 U.S.C. § 551(4).

[16] *Accord Regents*, 908 F.3d at 512-14 (holding DACA's rescission is not a binding rule of substantive law); *NAACP*, 298 F. Supp. 3d at 237 ("[T]he rescission of DACA was exempt from notice and comment as a general statement of agency policy."); *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 270-73 (E.D.N.Y. 2018) (dismissing notice-and-comment claims because Rescission Memo is not a legislative rule), *appeals docketed*, Nos. 18-1521, 18-1525, 18-1986 (2d Cir. May 21 & July 5, 2018).

The critical question in distinguishing between legislative rules and general statements of policy is whether the statement "is of present binding effect; if it is, then the APA calls for notice and comment." *Elec. Privacy Info. Ctr. v. DHS* ("*EPIC*"), 653 F.3d 1, 7 (D.C. Cir. 2011) (internal quotation marks and ellipsis omitted). "[S]ubstantive or legislative rule[s], pursuant to properly delegated authority, ha[ve] the force of law, and create[] new law or impose[] new rights or duties." *CHKD*, 896 F.3d at 620 (internal quotation marks omitted); *see Nat'l Latino Media Coal. v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987) ("A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute."). "To that end, a rule is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *CHKD*, 896 F.3d at 620 (internal quotation marks and alteration omitted).

By contrast, general statements of policy "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Vigil*, 508 U.S. at 197 (internal quotation marks omitted). A directive that doesn't establish a "binding norm" and leaves agency officials free to exercise their discretion qualifies as a general statement of policy. *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1341 (4th Cir. 1995) (citing *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987), and *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1015 (9th Cir. 1987)).

The Rescission Memo removes a mechanism under which individuals could receive deferred action but places "no limitations" on other lawful enforcement prerogatives

of the Department of Homeland Security. J.A. 384. As the district court observed, *Casa*, 284 F. Supp. 3d at 772, the Memo doesn't curtail the Department's discretion to make deferred action available on a case-by-case or ad hoc basis. Nor does the Memo, by its terms, create "right[s] or benefit[s]" enforceable "by any party." J.A. 384.

Additionally, although DACA was rescinded based on the government's view that the policy was unlawful, the Rescission Memo doesn't bind subsequent Secretaries who might disagree with this reasoning or bar the Department from implementing other deferred action policies in the future. Contrary to Plaintiffs' arguments, the Memo doesn't "replace[] agency discretion with a new binding rule of substantive law," *Mada-Luna*, 813 F.2d at 1014 (internal quotation marks omitted), affecting the rights of people regulated by the Department, *see EPIC*, 653 F.3d at 7 (agency's statement "cast in mandatory language so the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences" qualifies as binding on those subject to it (internal quotation marks omitted)). It therefore falls on the policy "end of the spectrum," *CHKD*, 896 F.3d at 620-21 (internal quotation marks omitted), and thus was exempt from notice and comment under the APA.

B.

We consider next whether the district court erred in granting summary judgment to the government on Plaintiffs' claim that DACA's rescission is substantively invalid under the APA.

1.

The APA requires a reviewing court to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). These "criteria render our oversight highly deferential, with a presumption in favor of finding the agency action valid." *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 587 (4th Cir. 2012) (internal quotation marks omitted). This standard, however, "does not reduce judicial review to a rubber stamp of agency action." *Id.* (internal quotation marks omitted). Rather, "we must engage in a searching and careful inquiry of the [administrative] record, so that we may consider whether the agency considered the relevant factors and whether a clear error of judgment was made." *Id.* (internal quotation marks omitted). Where agency action qualifies as "unreasonable as a matter of law, it is likely to have been arbitrary and capricious." *Id.* (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 n.23 (1989)). "We evaluate [this issue] de novo[.]" *Id.*

To comply with § 706(2)(A), an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The giving of "adequate reasons" for an agency's decision is "[o]ne of the basic procedural requirements of administrative rulemaking." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). In a challenge under § 706(2)(A), "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S.

at 50; *see Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 299 (4th Cir. 2018) ("[A] reviewing court may not speculate on reasons that might have supported a change in agency position []or supply a reasoned basis for the agency's action that the agency itself has not given." (internal quotation marks and citation omitted)).

An agency satisfactorily explains a decision when it provides "enough clarity that its 'path may reasonably be discerned.'" *Jimenez-Cedillo*, 885 F.3d at 297 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). If the agency provides such an explanation, "we will uphold its decision." *Id.* at 297-98. "But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars*, 136 S. Ct. at 2125.

These principles apply with equal force to a change in agency position. *Jimenez-Cedillo*, 885 F.3d at 298. Thus, in changing policies, agencies "must 'provide a reasoned explanation for the change.'" *Id.* (quoting *Encino Motorcars*, 136 S. Ct. at 2125). "At a minimum, an agency must 'display awareness that it is changing position and show that there are good reasons for the new policy.'" *Id.* (quoting *Encino Motorcars*, 136 S. Ct. at 2126). The agency's explanation must address the "facts and circumstances that underlay or were engendered by the prior policy," including any "serious reliance interests." *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)). "An 'unexplained inconsistency' in agency policy indicates that the agency's action is arbitrary and capricious, and therefore unlawful." *Jimenez-Cedillo*,

885 F.3d at 298 (quoting *Encino Motorcars*, 136 S. Ct. at 2125).

2.

Plaintiffs argue that DACA's rescission was arbitrary and capricious because the Department of Homeland Security failed to give a reasoned explanation for the change in policy, particularly given the significant reliance interests involved. We agree.[17]

As we have explained, DACA was rescinded based on the Department's view that the policy was unlawful. But neither the Attorney General's September 4 letter nor the Department's Rescission Memo identify any statutory provision with which the DACA policy conflicts. *Cf. Encino Motorcars*, 136 S. Ct. at 2127 (rejecting as insufficient agency statement regarding statutory exemption proffered in support of policy change where agency did not "analyze or explain" why statute should be interpreted as agency suggested).

The Attorney General's letter does mention that the Fifth Circuit affirmed the injunction against the DAPA policy on "multiple legal grounds" in the *Texas* litigation, J.A. 379, and the Rescission Memo cites to this ruling. The Fifth Circuit's ruling was based in part on its determination that the DAPA policy likely ran counter to the INA's "intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status." *Texas*, 809 F.3d at 179. There

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[17] Plaintiffs also assert that (1) the district court failed to consider evidence of "bad faith" and "animus" underlying the decision to rescind DACA presented in their complaint and (2) the Department's conclusions about DACA's legality are substantively incorrect. Given our disposition, we decline to address these arguments.

is no dispute here, however, that "DACA has no analogue in the INA." *NAACP*, 298 F. Supp. 3d at 239 (internal quotation marks omitted). Further, as the Fifth Circuit explained in reaching its conclusion, "DACA and DAPA are not identical." *Texas*, 809 F.3d at 174.

The Attorney General's letter also asserts that DACA suffered from the same "constitutional defects that the courts recognized as to DAPA." J.A. 379. The courts in the *Texas* litigation, however, did not address constitutional claims. And while the Attorney General urged in his letter that his office had a duty to "defend the Constitution" and "faithfully execute the laws passed by Congress," J.A. 379, he does not explain how allowing the DACA policy to remain in effect would violate that duty.

The Attorney General's letter and the Rescission Memo also proffer the concern—based on the Attorney General's determination that the DAPA and DACA policies share the same legal defects—that "potentially imminent" litigation would result in a ruling in the *Texas* litigation enjoining DACA. Entirely absent, however, is an explanation why it was likely that the district court in the *Texas* litigation would have enjoined DACA.

Further, the 2014 OLC Opinion outlining the Department's authority to implement the DAPA policy identified "from the nature of the Take Care duty" at least "four general . . . principles governing the permissible scope of enforcement discretion," J.A. 137-38; 2014 WL 10788677, at *5-6, and noted that concerns "animating DACA were . . . consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion," J.A. 149 n.8; 2014 WL 10788677, at *13 n.8.

The point is that the Department had before it at the time it rescinded DACA a reasoned analysis from the office tasked with providing legal advice to all executive branch agencies that supported the policy's legality. Yet the Department changed course without any explanation for why that analysis was faulty. *Cf. Fox Television Stations*, 556 U.S. at 516 ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the prior policy.").

Nor did the Department adequately account for the reliance interests that would be affected by its decision. Hundreds of thousands of people had structured their lives on the availability of deferred action during the over five years between the implementation of DACA and the decision to rescind. Although the government insists that Acting Secretary Duke[18] considered these interests in connection with her decision to rescind DACA, her Memo makes no mention of them.

Accordingly, we hold that the Department's decision to rescind DACA was arbitrary and capricious and must be set aside.

IV.

We turn next to the district court's rulings (1) granting summary judgment to Plaintiffs on the portion of their estoppel claim pertaining to sharing of DACA applicant information, and (2) ordering the government to

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[18] The government urges us to consider the June 2018 memorandum from former Secretary of Homeland Security Kirstjen Nielsen belatedly proffered by the government as a basis for upholding DACA's rescission. We decline to do so because the memorandum was not part of the administrative record in this appeal. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985).

comply with the information-sharing policies promulgated in 2012 and enjoining it from altering those policies.

"Equitable estoppel is a well-established concept invoked by courts to aid a party who, in good faith, has relied, to his detriment, upon the representations of another." *United States ex rel. Humble Oil & Ref. Co. v. Fid. & Cas. Co. of N.Y.*, 402 F.2d 893, 897 (4th Cir. 1968) (internal footnote omitted). To establish equitable estoppel, "[i]t is only necessary to show that the person [sought to be] estopped, by . . . statements or conduct, misled another to his prejudice." *Id.* at 898 (quoting *United States ex rel. Noland Co. v. Wood*, 99 F.2d 80, 82 (4th Cir. 1938)). As against the government, "estoppel may only be justified, if ever, in the presence of affirmative misconduct by government agents." *Dawkins v. Witt*, 318 F.3d 606, 611 (4th Cir. 2003).

In enjoining the government, the district court determined that estoppel "potentially would apply to any use for immigration enforcement of the information collected . . . during DACA registrations" because "the Government promised not to transfer or use the information gathered from [DACA applicants] for immigration enforcement." *Casa*, 284 F. Supp. 3d at 778.

We disagree with the district court. The government did not make such a promise or suggest in any other way that its policies governing the sharing of information provided by DACA applicants would never change. Rather, the government warned DACA applicants that information they provided could be used for immigration enforcement where criteria for commencement of removal proceedings or referral to law enforcement for a determination whether to commence such proceedings were met. It also warned that its policies governing the sharing of

applicant information could be "modified, superseded, or rescinded at any time without notice" and created no "right or benefit." J.A. 1004. In view of these clear and unequivocal warnings, Plaintiffs could not reasonably believe that the information they provided as part of their DACA application would never be used for immigration enforcement purposes. *Cf. Volvo Trucks of N. Am., Inc. v. United States*, 367 F.3d 204, 212 (4th Cir. 2004) ("Equitable estoppel requires reasonable reliance."). Plaintiffs' equitable estoppel claim thus necessarily fails.

V.

We turn finally to Plaintiffs' constitutional claims, which were dismissed by the district court. We decline to decide whether DACA's rescission violates the Fifth Amendment's due process and equal protection guarantees under the "well established principle governing the prudent exercise of this [c]ourt's jurisdiction that normally the [c]ourt will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam). Because we have determined that DACA's rescission violates the APA, we need go no further. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 265 (5th Cir. 2016).

We also decline to decide whether Plaintiffs' Fifth Amendment rights were violated by the policies announced on September 5, 2017, regarding the sharing of personal information from DACA applicants.[19] *McMillan*, 466 U.S. at 51. Our decision today restores DACA to its pre-September 5, 2017, status, rendering a

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[19] Although the district court found Plaintiffs' due process claims lacked merit, its analysis addressed DACA's rescission, not information-sharing. *Casa*, 284 F. Supp. 3d at 775-77.

nullity the information-sharing policies announced on September 5. It therefore is unnecessary to address Plaintiffs' constitutional challenge to these policies. *See Veasey*, 830 F.3d at 265.[20]

VI.

To sum up: We affirm the district court's rulings that Plaintiffs' claims are justiciable and that DACA's rescission did not require notice and comment under the APA. We reverse the district court's ruling sustaining the rescission of the policy as valid under 5 U.S.C. § 706(2)(A). DACA's rescission is vacated as arbitrary and capricious, and the matter is remanded for further proceedings consistent with this opinion. We reverse the district court's ruling finding Plaintiffs entitled to injunctive relief on equitable estoppel grounds, reverse the grant of summary judgment in Plaintiffs' favor, and vacate the injunction. Because we find it unnecessary to decide Plaintiffs' constitutional challenges to DACA's rescission and the related changes to the Department's

[20] Plaintiffs also contend that the district court misapplied Fed. R. Civ. P. 56 by failing to (1) afford them a reasonable opportunity for discovery on their claims, (2) consider or address their statement of material facts in dispute, and (3) view the facts in the light most favorable to them. They allege further that the district court misapplied the APA by granting summary judgment to the government without addressing their contention that the administrative record was incomplete and by failing to consider evidence of "bad faith and improper behavior" by government officials. Given our disposition, we find it unnecessary to address these issues.

policies governing use of information provided by DACA applicants, we vacate the district court's judgment on these issues and dismiss those claims.

AFFIRMED IN PART,
REVERSED IN PART,
VACATED IN PART,
DISMISSED IN PART,
AND REMANDED

RICHARDSON, Circuit Judge, concurring in part and dissenting in part:

The plaintiffs ask this Court to invalidate the rescission of DACA, a seven-year-old program explained at its inception as an act of prosecutorial discretion. The Majority's opinion grants this request, reasoning that the Department of Homeland Security behaved in an arbitrary and capricious manner by giving what my good colleagues decide are faulty legal reasons for rescinding the discretionary policy.

I disagree with the premise that the Administrative Procedure Act permits this review of the Executive Branch's rescission of DACA. Enforcement discretion lies at the heart of executive power. The Executive may decide to prosecute, or not prosecute, an individual or a group so long as the reasons for that decision are constitutionally sound and the decision does not violate or abdicate the Executive's statutory duties. Here, the Executive's proper exercise of that discretion to rescind DACA is judicially unreviewable under the Administrative Procedure Act, regardless of one's view of the policy questions underlying DACA. To hold otherwise permits the Judicial Branch to invade the province of the Executive and impair the carefully constructed separation of powers laid out in our Constitution.

I. Background

The Secretary of Homeland Security is charged by statute with enforcing the nation's immigration laws. *See* 8 U.S.C. § 1103(a); 6 U.S.C. § 202(5). Among those responsibilities is removing individuals subject to removal under federal law. *See Arizona v. United States*,

567 U.S. 387, 396 (2012). "A principal feature of the removal system is the broad discretion exercised by immigration officials." *Id.* At each stage of the process—from investigation to execution of a removal order—the Secretary has the discretion to pursue removal or forbear doing so. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999).

The Secretary has used this discretion to prioritize the removal of certain categories of aliens and deprioritize others. *See, e.g.*, Memorandum from Doris Meissner, Commissioner, Dep't of Justice, Immigration & Naturalization Service, "Exercising Prosecutorial Discretion" 7-9 (Nov. 17, 2000) (deprioritizing the removal of aliens who, for instance, resided in the United States for a long time, had little to no criminal history, and had greater ties to the United States than another country); Memorandum from John Morton, Director, Dep't of Homeland Sec., Immigration & Customs Enforcement, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" 2 (June 17, 2011) (deprioritizing the removal of veterans, minors, elderly individuals, pregnant women, and various other groups). On top of these general, department-wide enforcement policies, individual agents have been empowered to exercise enforcement discretion based on specific circumstances. *See, e.g.*, Meissner Memorandum at 1-2. Just as a highway patrolman has discretion whether to pull over a given driver (and even after pulling someone over, whether to give that person a ticket), immigration agents can weigh individual and country-specific humanitarian circumstances when deciding whether to exercise their prosecutorial discretion. *See* Morton Memorandum at 4.

Relying on this broad enforcement discretion to set enforcement priorities and to guide agents in rendering their individualized enforcement decisions, the Secretary of Homeland Security established the DACA program. Memorandum from Janet Napolitano, Secretary, Dep't of Homeland Sec., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (June 15, 2012). DACA authorized agents to grant deferred action[1] to certain people brought illegally to the United States as children. Under DACA, aliens who applied and satisfied certain gateway criteria were "granted" or "denied" deferred action, ostensibly on an individualized, case-by-case basis. *Id.* Even when granted, deferred action could be revoked unilaterally by the Department. *See AAADC*, 525 U.S. at 484-85. The DACA memorandum stated expressly that it conferred upon recipients of deferred action "no substantive right, immigration status or pathway to citizenship." Napolitano Memorandum at 3.

Two years later, the Secretary expanded DACA by loosening some restrictions and extending the period of deferred action from two years to three. Memorandum from Jeh Johnson, Secretary, Dep't of Homeland Sec., "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (Nov. 20, 2014). In the same action, the Secretary also created a new enforcement policy, known as "DAPA," extending "deferred action, on a case-by-case basis," to parents of American citizens and lawful permanent residents. *Id.* at 4.

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[1] "Deferred action" means "an act of administrative convenience to the government which gives some cases lower priority." 8 C.F.R. § 274a.12(c)(14).

Led by Texas, a coalition of states challenged this new policy in federal court, arguing that DAPA (and the DACA expansion) violated the Administrative Procedure Act as well as the President's Article II duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. The district court preliminarily enjoined DAPA, holding that the Department had "legislated a substantive rule without complying with the procedural requirements under the" APA. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015). The Fifth Circuit affirmed the district court, finding that the Department had promulgated DAPA in violation of the APA and that it was "manifestly contrary" to the Immigration and Nationality Act ("INA"). *Texas v. United States*, 809 F.3d 134, 182 (5th Cir. 2015).[2]

The Supreme Court granted certiorari and directed the parties to brief not only the issues decided by the Fifth Circuit, but also whether "the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3." *United States v. Texas*, 136 S. Ct. 906 (2016). But after oral argument, the Fifth Circuit decision was summarily affirmed by an equally divided Court. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016).

In response, the Secretary rescinded the enjoined DAPA program and DACA expansion. Memorandum from John Kelly, Secretary, Dep't of Homeland Sec., "Rescission of November 20, 2014 Memorandum" (June

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[2] In finding DAPA subject to review under the APA, the Fifth Circuit held that deferred action "is much more than nonenforcement." *Texas*, 809 F.3d at 166. The court reasoned that since recipients are conferred "lawful presence" and may receive associated benefits such as driver's licenses and unemployment insurance, deferred action was not an exercise of enforcement discretion. *Id.* at 168, 168 n.108.

15, 2017). And several months later, after Texas threatened to challenge the original DACA policy, the Acting Secretary similarly rescinded DACA. Memorandum from Elaine Duke, Acting Secretary, Dep't of Homeland Sec., "Rescission of the June 15, 2012 Memorandum" (Sept. 5, 2017).

In justifying her decision to rescind DACA, the Acting Secretary referred to the Supreme Court and Fifth Circuit decisions in the DAPA litigation. She also relied on a letter from the Attorney General that asserted that because DACA "has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA." *Id.* at 3-4. The Acting Secretary nonetheless ordered that DACA be wound down in stages over a six-month period. *Id.*

II. Administrative Procedure Act Review

The plaintiffs primarily contend that the rescission of DACA violates the APA. Because I find that immigration enforcement decisions are committed to the discretion of the Department, I part with my colleagues and conclude that the rescission of DACA is judicially unreviewable under the APA.[3]

A. Discretionary enforcement decisions are presumptively unreviewable.

The APA regulates the decisionmaking process of federal agencies. As such, the statute provides for the judicial review of a "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704.

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[3] The plaintiffs' constitutional claims are, of course, reviewable, and I address them separately below.

Even so, the statute does not permit review of agency action that "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This provision applies to a variety of agency decisions that are unsuitable for judicial review. *See Lincoln v. Vigil*, 508 U.S. 182, 191 (1993); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). One essential category of decisions "generally committed to an agency's absolute discretion" consists of enforcement decisions, both in the civil and criminal arenas. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Discretion in prosecutorial enforcement is deeply rooted in the Constitution's separation of powers. *See, e.g.*, *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013); Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 537-63 (2005). Indeed, the division of labor with respect to enforcement is among the most critical protections the Constitution affords: The Executive Branch decides whether and when to begin enforcement actions while the Judicial Branch adjudicates the government's claims. This division reflects the Framers' recognition that, "in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

Encroachment by the judiciary into enforcement decisions upsets this constitutional balance. If judges could decide which cases to prosecute, that would combine the role of prosecutor and judge in one branch of government, seriously risking individual liberty. *See In re United States*, 345 F.3d 450, 454 (7th Cir. 2003); *see also* 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 154 (Thomas Nugent trans., 6th ed. 1792) ("[T]here is no liberty, if the judiciary power be not separated

from the legislative and executive."). And if the judiciary could decide which meritorious cases *not* to prosecute, that would improperly divest the President, who unlike judges is elected by the people, of the executive authority that the Constitution affords to protect public safety and enhance public welfare. Thus, in "the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)); *see also United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."). The judiciary's role is to protect individuals by properly adjudicating the charges against them—for example, by dismissing meritless enforcement actions after they are filed. It is normally neither appropriate nor necessary for judges to involve themselves in the decision to bring, or not to bring, enforcement actions.

Though perhaps more often discussed in the criminal context, this broad enforcement discretion also encompasses civil enforcement decisions. *See Speed Mining, Inc. v. Federal Mine Safety*, 528 F.3d 310, 317 (4th Cir. 2008); *see also Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 448 (1979). Indeed, the Supreme Court has recognized that the concerns that counsel against reviewing criminal enforcement decisions are even stronger in the context of immigration removal decisions. *AAADC*, 525 U.S. at 490 (noting that the "sys-

temic costs" of judicial supervision of enforcement decisions are "greatly magnified in the deportation context"); *see also Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976).

The nature of civil enforcement discretion led the Supreme Court in *Heckler v. Chaney* to hold that an agency's nonenforcement decision was presumptively unreviewable under the APA. In that case, the Food and Drug Administration refused to take civil enforcement action against a class of drug manufacturers and others who produced and distributed drugs used by states to perform executions. The FDA explained its decision not to institute any enforcement action as a product of concerns that it lacked jurisdiction to address the use of drugs in such a way. Yet even if it could, the FDA noted that it would decline to exercise jurisdiction over those manufacturers under its inherent enforcement discretion. The Court found the decision to be presumptively unreviewable under the APA because agency enforcement decisions "involve[] a complicated balancing of a number of factors," like allocating resources and prioritizing policies, that "are peculiarly within [the FDA's] expertise" and are thus generally unsuitable for judicial review. *Chaney*, 470 U.S. at 831; *cf. Wayte v. United States*, 470 U.S. 598, 607 (1985) (noting that the factors that underlie prosecution decisions are of the type that courts are not competent to evaluate).

While civil enforcement decisions are presumptively unreviewable, Congress can overcome that presumption by "circumscrib[ing] agency enforcement discretion" through a substantive statute. *Chaney*, 470 U.S. at 834; *see also id.* at 830 (noting that judicial review is unavailable under the APA if the statute provides "no judicially manageable standards . . . for judging how and

when an agency should exercise its discretion"). In this way, Congress retains the ability to restrict the Executive's enforcement discretion. In *Chaney*, to decide whether the FDA was so restricted, the Court examined the relevant statutory provisions and determined that the statutes provided no dictate about when enforcement discretion must be exercised. Since the FDA's enforcement discretion was both statutorily authorized and unconstrained, the Court held that the enforcement decision was not subject to APA review.

Chaney also noted, without deciding, two other possible bases for judicial review of civil nonenforcement decisions: if (1) the decision was based "solely on belief that [the agency] lacked jurisdiction"; or (2) an agency expressly adopted a "general policy that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4. The Supreme Court later rejected the first possibility in *I.C.C. v. Brotherhood of Locomotive Engineers*, finding that an agency's reliance on a "reviewable reason" for an otherwise unreviewable discretionary decision did not transform the decision into one subject to APA review. 482 U.S. 270, 283 (1987). The second, which might be thought related to the Take Care Clause, U.S. CONST. art II, § 3, remains a narrow exception theoretically permitting judicial review of agency enforcement decisions in some rare cases.

B. The rescission of DACA is not reviewable.

The decision to rescind DACA is precisely the sort of enforcement decision that is "traditionally . . . 'committed to agency discretion'" and not reviewable by the

courts. *Chaney*, 470 U.S. at 832. None of the recognized exceptions to that limitation apply, and so the rescission of DACA is not reviewable under the APA.

The Supreme Court has recognized that a "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012). Indeed, executive decisions about immigration enforcement are even further beyond the capacity of judicial review than criminal enforcement decisions, which are otherwise thought to represent the peak of executive discretion. *AAADC*, 525 U.S. at 489-90.

As a result, with or without DACA, government agents have discretion to grant deferred action in individual cases. *Id.* at 483-84, 484 n.8. At least by its own terms, DACA did not eliminate the individualized discretion over enforcement decisions: it created procedural and substantive scaffolding to guide that discretion. *See* Napolitano Memorandum at 2. Rescinding DACA took away the scaffolding but left the underlying core—individualized discretion—untouched. Thus, insofar as DACA is merely a programmatic enforcement decision, so is its rescission, and both are unreviewable.

The best argument in favor of reviewability is that DACA itself was something other than an enforcement decision. Once granted, deferred action makes recipients eligible for benefits such as the ability to work legally in the country. These are subsidiary or collateral benefits that arise from other legal provisions not challenged here. *See* 8 U.S.C. § 1324a(h)(3) ("'[U]nauthorized alien' means . . . that the alien is not at that time . . . authorized to be so employed by this chapter or by the Attorney General."); *see also* 8 C.F.R.

§ 274a.12(c)(14). Yet the Fifth Circuit found DAPA reviewable because it "would affirmatively confer 'lawful presence' and associated benefits." *Texas*, 809 F.3d at 166. Moreover, some have argued that DACA only masquerades as a program involving individualized discretion and in fact amounts to an entitlement of benefits for the class of aliens who meet the program's threshold criteria. Again, the Fifth Circuit reached a similar conclusion about DAPA. *See id.* at 171-76.

But neither side presses such an argument in this case, and for good reason. The government does not because it claims DACA's rescission is unreviewable. Nor do the plaintiffs, because if they did, their case would be much harder on the merits. DACA relied on identified individualized enforcement as a necessary predicate for the program's existence. *See* The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. ____, 2014 WL 10788677, at *13 n.8 (Nov. 19, 2014). If that predicate was false, then DACA was almost surely procedurally and substantively invalid. And that would mean one of the Department's proffered explanations for rescinding DACA—that it was likely unlawful—was valid. Unsurprisingly then, the plaintiffs do not rely on this point, giving us no occasion to consider whether DACA might be anything other than what it claimed to be: a program for a specific exercise of prosecutorial discretion.

No other exception makes the plaintiffs' APA claims reviewable. In particular, nothing in the INA overcomes *Chaney*'s presumption of unreviewability. That presumption "may be rebutted where the substantive

statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Chaney*, 470 U.S. at 832-33; *see also Webster v. Doe*, 486 U.S. 592, 600 (1988) ("§ 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based[.]"). Nothing in the INA cabins the government's broad immigration enforcement discretion. To the contrary, the INA expansively vests the Secretary of Homeland Security with authority for "establishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5); *see also* 8 U.S.C. § 1103(a)(1). Our nation's immigration laws do not limit the Secretary's authority to enforce those laws by removing illegal aliens. As a result, the INA does not overcome the presumptive unreviewability of the DACA rescission.

C. The generalized nature of DACA does not render its rescission reviewable.

The Majority adopts a new exception, contending that general enforcement policies, unlike individual enforcement decisions, are reviewable. While this exception has some support in out-of-circuit precedent, I would reject it.

This exception is grounded in dictum from *Chaney*, which left open the possibility of review when an agency adopts a "general policy *that is so extreme as to amount to an abdication of its statutory responsibilities*." *Chaney*, 470 U.S. at 833 n.4 (emphasis added). That is, a general policy that licensed illegal conduct across the board or that categorically excluded a class of individuals from complying with the law might well be reviewable. But nobody here is arguing that the *rescission* of DACA should be so characterized. Nor could they. A

return to the pre-DACA regime would increase the Department's enforcement of the immigration laws, not abandon it.

A few cases from the D.C. Circuit seem to stretch *Chaney*'s dictum to encompass any "general enforcement policy," as opposed to a "single-shot nonenforcement decision." *E.g.*, *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994)). The facts of these cases suggest this principle may be narrower than it appears at first blush. For example, in some cases, the agency's policy was promulgated as a binding regulation after notice-and-comment rulemaking, which would of course be much more amenable to judicial review than a program like DACA, announced by an informal memorandum. *See National Wildlife Federation v. EPA*, 980 F.2d 765 (D.C. Cir. 1992). It also appears that these cases did not involve programs that, like DACA, were expressly predicated on the agency's exercise of individualized discretion.

To the extent that the D.C. Circuit *has* embraced the broad principle that *any* "general enforcement policy" is judicially reviewable, that principle simply cannot be reconciled with *Chaney*. There, the Supreme Court held unreviewable the FDA's categorical decision not to take enforcement action against a *class of actors* (drug manufacturers, prison administrators, and others in the drug distribution chain). 470 U.S. at 824-25, 837-38. The fact that the decision was made by the FDA Commissioner made no difference. *See id.* at 824. The D.C. Circuit's decisions in this area do not even attempt to explain how this sweeping principle can be reconciled with the facts of *Chaney*. *See, e.g.*, *Crowley*, 37 F.3d at

675-77. Indeed, they often have no reasoning, simply reciting language (often dicta) from earlier circuit cases.

Such a broad exception for "generalized enforcement policies" would also unduly trammel the Executive Branch in carrying out its duties. The head of an agency has every right to exercise enforcement discretion. Standardizing (*i.e.*, generalizing) how agents use their prosecutorial discretion does not alter its character. Whether the Secretary exercises her discretion over an individual case or provides guidance for how discretion should be applied in a class of cases, the decision is unreviewable as one "committed to agency discretion by law." Under the plaintiffs' view, a line agent's decision not to remove a cancer-stricken alien would be unreviewable, but a front-office policy directing line agents to consider whether an alien is terminally ill would be reviewable. That distinction is untenable. *See Perales v. Casillas*, 903 F.2d 1043, 1048 (5th Cir. 1990) (holding that § 701(a)(2) precluded review of a categorical refusal by a district office to grant work authorization and pre-hearing voluntary departure to a certain class of eligible aliens over a three-year period).

As anyone who has exercised enforcement discretion knows, supervisory control over that discretion is necessary to avoid arbitrariness and ensure consistency. Supervision through generalized guidance that directs the exercise of enforcement discretion cannot transform the enforcement directive into a reviewable action. To find that discretionary enforcement decisions are unreviewable only when inferior officers exercise single-shot enforcement decisions also brushes aside the separation of powers that the Constitution lays out. The President is empowered by Article II to "take Care that the

Laws be faithfully executed," and thus may hire officers to assist in these duties. But the constitutional responsibility remains firmly at the President's feet, and therefore, the President remains responsible for his subordinates' exercise of executive power. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them.").[4]

DACA—at least on its face—was just such an unreviewable exercise of supervisory enforcement discretion. It was issued by the Secretary and instructed her subordinates when and how to exercise their discretion, emphasizing that "requests for relief pursuant to this memorandum are to be decided on a case by case basis."

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[4] The supervisory use of prosecutorial discretion is not a novel phenomenon. *See, e.g.*, *Treasury Department Circular to the Supervisors of the Revenue* (Sept. 30, 1791), in 9 PAPERS OF ALEXANDER HAMILTON 248-49 (Harold C. Syrett ed., 1965) (advising Treasury officials that "a great relaxation appears unavoidable" in enforcing provisions for seizing spirits without required certificates); Ruth Wedgewood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 278, 339-53 (1990) (describing President Adams's decision to direct the federal prosecutor to enter a *nolle prosequi* for an allegedly mutinous sailor and describing then-Representative John Marshall's floor speech defending the Executive's prosecutorial discretion, *see* 10 ANNALS OF CONG., 6th Cong. 1st Sess. 614-17 (Mar. 7, 1800)); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS, THE JEFFERSONIANS: 1801-1829, at 5-6 (2001) (noting President Jefferson's "decision to pardon two individuals who had been convicted under the Sedition Act and to quash the pending prosecution of a third"); Letter from Thomas Jefferson to William Duane (May 23, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON 54, 55 (Paul Leicester Ford ed., 1897) (explaining that whenever President Jefferson should be met with a prosecution under the Sedition law he would treat it as a nullity and order a *nolle prosequi*).

Napolitano Memorandum at 2. Such general decisions on enforcement policy, no less than the individual decisions that flow from them, cannot be reviewed by the courts without intruding on the prerogatives of the Executive Branch. And that is necessarily true of DACA's rescission, which merely removed one avenue for exercising individualized discretion. As a result, the rescission is an even less viable candidate for judicial review than is the promulgation of DACA.

D. The Acting Secretary's use of legal reasoning in rescinding DACA does not render her decision reviewable.

The plaintiffs also argue that the Acting Secretary's use of legal reasoning in deciding to rescind DACA makes the decision subject to judicial review. In their view, courts can evaluate legal determinations.

This argument is foreclosed by Supreme Court precedent. The Supreme Court has matter-of-factly explained that there is no "principle that if the agency gives a reviewable reason for otherwise unreviewable action, the action becomes reviewable." *BLE*, 482 U.S. at 283 (internal quotation marks omitted). Enforcement decisions are often intertwined with legal reasoning, most obviously "the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction." *Id.* The Court found it "entirely clear" that this "reviewable" proposition cannot render the prosecutor's "refusal to prosecute" subject to judicial review. *Id.*

Efforts to distinguish *BLE* factually cannot avoid its holding. In *BLE*, an agency had refused to reconsider a prior decision on the ground of material error. The Court found that such denials of reconsideration have

"traditionally been 'committed to agency discretion by law.'" *Id.* at 282 (quoting *Chaney*, 470 U.S. at 832). As here, the plaintiffs argued that the particular decision before the Court should be reviewable anyway, because the agency had based its refusal on a reviewable issue of law. The Court disagreed and held, as noted, that an unreviewable decision does not become reviewable by virtue of the reasons provided. *Id.* at 280-81. That holding is plainly not limited to cases involving requests for reconsideration. After *BLE*, the scope of permissible judicial review must be determined by the type of agency action at issue and not the agency's reasons for acting.

Just as in *BLE*, there is a nonsensical implication in the plaintiffs' position: that the Executive's discretion is more constrained when it gives a "reviewable" reason for its actions than when it gives no reason at all. If the Acting Secretary was wrong about the likely illegality of DACA,[5] then this might mean that she had provided *no lawful reason* for the rescission. But in the context

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[5] Evaluating the actual legality of DACA requires considering whether and how a court may adjudicate an alleged violation of the Take Care Clause. *See Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838). But it also requires addressing the distinct question of whether and how one presidential administration may determine that a previous administration's policy was inconsistent with the constitutional obligation to take care that the nation's immigration laws be faithfully executed. *Cf.* Letter from President George Washington to Sec'y Alexander Hamilton, U.S. Dep't of the Treasury (Sept. 7, 1792) in 32 WRITINGS OF GEORGE WASHINGTON 144 (John C. Fitzpatrick ed., 1939) (writing in 1792 about enforcing unpopular tax laws, President Washington explained that it was his "duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it").

of the Executive's enforcement discretion, this is perfectly appropriate. The Executive need not explain why it makes particular enforcement and non-enforcement decisions. The Judicial Branch cannot bootstrap review of decisions committed to the discretion of the other branches simply because the reasons provided are of a type that judges consider themselves competent to evaluate.

In any event, the Acting Secretary's rescission memorandum was not a mere statement on the legality of DACA. Instead, the memorandum considered various court rulings as well as the Attorney General's letter before concluding that the "DACA program *should* be terminated." Duke Memorandum at 4 (emphasis added). She did not say that DACA *must* be terminated or that she lacked the legal authority to enforce DACA or a DACA-like program. And in declaring the rescission of DACA after a six-month wind-down period, the Acting Secretary invoked her statutory authority to "establish[] national immigration policies and priorities." *Id.* The Acting Secretary's legal analysis was only one aspect of her reasoning for rescinding DACA, and, of course, a prosecutor may consider beliefs about the law when setting enforcement policy, *see BLE*, 482 U.S. at 283.

For these reasons, I conclude that the plaintiffs' APA claims are not reviewable and would dismiss them.

III. Constitutional Claims

Because they rule for the plaintiffs under the APA, my colleagues in the Majority decline to address the plaintiffs' constitutional claims. But because I find the plaintiffs' APA claims to be unreviewable, I must briefly address their claims that the rescission of DACA also

violates the Fifth Amendment's guarantees of Due Process and Equal Protection.[6] I have little trouble concluding that it did not.

A. Due Process

The plaintiffs' due process claim fails to articulate a constitutionally protected life, liberty, or property interest impacted by the rescission of DACA. And without a protected interest, there can be no unconstitutional deprivation.

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V, cl. 4. A plaintiff raising a due process claim must thus begin by identifying a relevant liberty or property interest. *Wooten v. Clifton Forge Sch. Bd.*, 655 F.2d 552, 554 (4th Cir. 1981). While a government benefit may create such an interest, "a person clearly must have more than an abstract need or desire for [the benefit]. . . . He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

While the plaintiffs argue that DACA created such a claim of entitlement, it did not. On its face, DACA explicitly conferred no protected property or liberty interest, making deferred action putatively available on a discretionary case-by-case basis for two-year periods that could be terminated at any time at the Secretary's discretion. *See* Napolitano Memorandum at 2-3; *AAADC*,

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[6] Of course, courts may review the exercise of enforcement discretion for compliance with the Constitution. *See Armstrong*, 517 U.S. at 464.

525 U.S. at 484-85. The memorandum itself acknowledged that such rights could be conferred only by "Congress, acting through its legislative authority." *Id.* at 3; *see also Smith v. Ashcroft*, 295 F.3d 425, 429 (4th Cir. 2002) (noting that for a statute to create a liberty or property interest, "it must confer more than a mere expectation (even one supported by consistent government practice) of a benefit"). Having failed to show a protected interest, the plaintiffs' due process claim fails.

The plaintiffs may have serious concerns about our nation's immigration laws and the Department's policy of enforcing those laws. But an understandable policy concern is not a legally cognizable right. The rescission of DACA simply does not generate a due process claim.

B. Equal Protection

The plaintiffs also argue that the rescission of DACA violates the Fifth Amendment's guarantee of equal protection by targeting a class of aliens for removal based on their race and national origin. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). They have failed to plausibly allege such a claim.

As both parties acknowledge, DACA is an enforcement policy, and so the plaintiffs' challenge to its rescission is necessarily a selective-prosecution claim.[7] In an

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[7] The plaintiffs assert that they are not claiming selective prosecution "but instead that the Government violated the Equal Protection Clause by rescinding the DACA program in order to target a class defined by race and national origin." Appellants' Response Brief at 30. This attempted rewording makes no difference. The rescission of DACA reset the agency's enforcement policies to no longer channel the exercise of enforcement discretion in a certain

ordinary selective-prosecution case, the plaintiffs would have to show that the government's conduct "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608 (1985); *see also Armstrong*, 517 U.S. at 465 (noting that "the decision whether to prosecute may not be *based on* 'an unjustifiable standard such as race, religion, or other arbitrary classification'") (emphasis added) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). There is also a "presumption that a prosecutor has acted lawfully," which can be displaced only by "clear evidence." *AAADC*, 525 U.S. at 489. But the plaintiffs' burden is even higher in this case, because the rescission of DACA only applies to aliens who are in this country illegally. Such an alien "has no constitutional right to assert selective enforcement as a defense against his deportation," with a possible exception for "rare" cases of particularly "outrageous" discrimination. *Id.* at 488, 491.

Here, both DACA and its rescission are, on their face, neutral policies. Logically, the presumption of lawfulness that applies in individual selective-prosecution cases is at least as strong when applied to neutral policies promulgated by senior Executive Branch officials. And the plaintiffs must allege facts that, if true, plausibly suggest that this presumption can be overcome and replaced with an inference of outrageous discrimination.

The plaintiffs have alleged two sets of facts to support their claim of discrimination. First, they argue

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way. As the plaintiffs cannot dispute that the government has the statutory authority to enforce the immigration laws against them, any equal protection claim in this context must necessarily be a selective-prosecution claim.

that since 93% of DACA recipients are Latino, the program's rescission had a disparate impact. A selective-prosecution claim normally requires differential treatment of "similarly situated individuals of a different race." *Armstrong*, 517 U.S. at 465. Yet who is "similarly situated" to DACA recipients except other DACA recipients? Setting aside the closely related and now-rescinded DAPA program, DACA stands alone as a unique exercise of Executive authority. While there are other deferred action programs (many of which are statutory), none resembles DACA. And the Department rescinded DACA for all recipients, not just for those of a particular ethnicity or nationality.

Second, the plaintiffs rely on presidential campaign tweets, which they claim show invidious animus. But the plaintiffs must create a plausible inference that the same animus allegedly underlying these statements also motivated the Attorney General and the Acting Secretary to take the official government actions at issue. Their complaint simply lacks the connective tissue required to draw that inference. There is also an "obvious alternative explanation" for these officials' actions. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009). As the record shows, DACA has long been politically controversial. It "should come as no surprise," *id.*, that well-known policy differences would lead cabinet officials in a new administration to change a controversial government policy. *See* Memorandum from John Kelly, Secretary, Dep't of Homeland Sec., "Enforcement of the Immigration Laws to Serve the National Interest" 2 (Feb. 20, 2017) (setting out the Administration's new enforcement policies and stating "the Department no longer will exempt classes or categories of removable al-

iens from potential enforcement"). Changes in government policy are perfectly lawful, and for a selective-prosecution claim, we must presume that the Attorney General and the Acting Secretary were motivated by such a lawful purpose. *AAADC*, 525 U.S. at 489. The plaintiffs allege no facts plausibly displacing that presumption.

In short, the plaintiffs have presented no evidence that racial motivations played any part in either the former Attorney General's advice or the former Acting Secretary's decision to rescind DACA. Therefore, I would dismiss the equal protection claim.

IV. Information-Sharing Policy

The Majority is correct that the plaintiffs' estoppel claim against the Department is baseless. The availability of equitable estoppel against the government is controversial under any circumstances. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419-21 (1990). The issue remains unresolved by the Supreme Court. *See id.* at 423. And we have recognized that if such a doctrine is ever justified in this context, there must be "affirmative misconduct by government agents." *Dawkins v. Witt*, 318 F.3d 606, 611 (4th Cir. 2003) (citing *INS v. Hibi*, 414 U.S. 5, 8 (1973)).

In any case, the mere fact that the Department explicitly told applicants that its information-sharing policy "may be modified, superseded, or rescinded at any time" and that the policy "may not be relied upon to create any right or benefit," J.A. 1004, is enough to end our analysis. There was nothing for the plaintiffs to rely on for the proposition that their information was immune from disclosure.

Additionally, even if the doctrine of estoppel applied here, that would not justify the district court's nationwide injunction. *See Gill v. Whitford*, 138 S. Ct. 1916, 1930-31, 1934 (2018); *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 394 (4th Cir. 2001) (abrogated on other grounds). This potent judicial tool was largely unheard-of until the mid-twentieth century. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 428 (2017). These broad injunctions pose many drawbacks that can quickly outweigh their benefits, particularly when they are overused (and overused repeatedly). Among other things, such injunctions sharpen plaintiffs' incentives to forum-shop while inhibiting the proper ventilation of difficult legal issues by deterring other lower courts from grappling with them. *See id.* at 460-61. Under our decentralized and multifaceted judicial system, judges must scrutinize the scope of the injunctive remedies they fashion. Even assuming a nationwide injunction could be appropriate in some case, an injunction that is limited to the plaintiffs should generally suffice.

* * *

We in the Judicial Branch have a narrowly circumscribed role. It is not our place to second-guess the wisdom of the discretionary decisions made by the other Branches. The rescission of DACA was a controversial and contentious decision, but one that was committed to the Executive Branch. For this reason, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. RWT-17-2942

CASA DE MARYLAND, ET AL., PLAINTIFFS

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL., DEFENDANTS

Filed: Mar. 5, 2018

MEMORANDUM OPINION

On October 5, 2017, Plaintiffs filed a Complaint seeking to enjoin rescission of a program known as Deferred Action for Childhood Arrivals ("DACA"), asserting a variety of claims as to why the rescission was unlawful. *See* ECF No. 1. Plaintiffs are a number of individual participants in that program known as "Dreamers," as well as a series of special interest organizations that deal with immigration policy issues and work directly with immigrants in the community. *Id.* at 11-21. Defendants are President Donald Trump, Attorney General Jeff Sessions, and a series of government agencies—the Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS"), U.S. Immigration and Customs Enforcement ("ICE"), U.S. Customs and Border Protection ("CBP")—as well as each agency's acting leader (secretary, director, or commissioner). Defendants collectively will be referred to

as the "Government." Each individual defendant is being sued in his or her official capacity. *Id.* at 21-22.

Plaintiffs' Complaint alleges a number of causes of action—both administrative and constitutional—which they believe are proper grounds for relief. Plaintiffs assert that rescission of the DACA program was unlawful under the Administrative Procedure Act ("APA") both (1) as an arbitrary and capricious decision and (2) for failure to follow notice-and-comment procedures. *Id.* at 54-58. Plaintiffs further allege that the DACA rescission was a violation of the Fifth Amendment on the grounds of procedural due process, substantive due process, and equal protection. *Id.* at 49-54. Plaintiffs seek injunctive relief on the basis of equitable estoppel both as to the DACA rescission itself and its information sharing policy. *Id.* at 58-59. Lastly, Plaintiffs seek declaratory relief that the DACA program is lawful. *Id.* at 59-60.

On November 1, 2017, the Court held an in-person status conference in order to resolve the scheduling and logistical issues of this case. ECF No. 19. Thereafter on November 15, 2017, the Government filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. ECF No. 27. On November 28, 2017, Plaintiffs responded in opposition, ECF No. 29, and on December 5, 2017, the Government replied in support of its Motion, ECF No. 30. The Court issued an Order on December 11, 2017 giving notice to the parties in accordance with Rule 56(f) that it may grant summary judgment for the non-moving party. *See* ECF No. 31. On December 15, 2017, the Court held a hearing on the Motion. ECF No. 34.

I. BACKGROUND

"Can we all get along?"—Rodney King[1]

In recent years, many Americans have found themselves sharing Mr. King's sentiment. This Court previously noted, albeit in the context of congressional gerrymandering, that "[n]ever before has the United States seen such deep political divisions as exist today, and while the courts are struggling in their efforts to find a standard [for the adjudication of gerrymandering claims], the fires of excessive partisanship are burning and our national government is encountering deadlock as never before." *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 905 (D. Md. 2011) (Titus, J., concurring), *aff'd*, 567 U.S. 930 (2012). Unfortunately, that 2011 observation still holds true today—perhaps even more so.

This case is yet another example of the damaging fallout that results from excessive political partisanship. The highly politicized debate surrounding the DACA program has thus far produced only rancor and accusations. During the recent debate over the rescission of DACA, the program even turned into a bargaining chip that resulted in a brief shutdown of the entire federal government earlier this year.[2] In order to adequately resolve the legal issues of this case, it is important to step back from the heated rhetoric and understand the context under which DACA was promulgated and rescinded.

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[1] *See* Richard A. Serrano, *Rodney King: 'Truth will come out'*, L.A. Times (May 2, 1992), http://www.latimes.com/local/california/la-me-king-case-aftermath-city-in-crisis-19920502-story.html.

[2] *See* Gregory Krieg, *The DACA shutdown is over. Now What?*, CNN (Jan. 22, 2018), https://www.cnn.com/2018/01/22/politics/shutdown-immigration-daca-outcomes/index.html.

The Dream Act—a Lengthy History of Failed Legislation

The Constitution reserves the power to enact immigration policy to the legislative branch. U.S. Const. art. I, § 8 ("[T]o establish a uniform rule of naturalization"). However, the "supervision of the admission of aliens into the United States may be intrusted by [C]ongress" to the executive branch. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). For over a decade at the start of the 21st century, Congress quarreled over policies regarding illegal aliens who entered the country as children, and who may have no memory or connection with their country of origin. Would the world's beacon of freedom—a nation founded by immigrants—cast out an immigrant population that was likely brought here without choice and who likely now knows no other home? While "no" would seem to be the obvious answer, ordinary logic has eluded our Congress.

"Dreamers" are neither constitutionally nor statutorily defined. Rather, the concept of protection for "Dreamers" arises from repeated congressional failures to act, and presidential action taken in their wake. A series of congressional sessions marked by bitter strife and inaction left the country without any protections for persons brought here illegally as children. The first attempt at a Development, Relief, and Education for Alien Minors ("DREAM") Act came in 2001, and although it took on many names in subsequent years, the repeated attempts to pass this legislation were filibustered, abandoned, or defeated on the floor.[3] As illustrated by the frequency of bills proposed, Dreamer

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[3] *See* Immigrant Children's Educational Advancement and Dropout Prevention Act of 2001, H.R. 1582, 107th Cong. (2001); Student

legislation reached its zenith during late 2010 in the 111th Session of Congress. On December 8, 2010, the House of Representatives actually passed the DREAM Act.[4] However, like all other iterations of this controversial legislation, its fate was doomed—this time, less than two weeks later on the Senate floor.[5]

DACA—an Act of Desperation Born of Frustration with a Paralyzed Congress

President Obama's administration, faced with the reality that Congress could do little more than squabble regarding the Dreamers, decided to take action on its own. On June 15, 2012, then-Secretary of Homeland Security, Janet Napolitano, issued a memorandum promulgating by executive action what is now known as

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Adjustment Act of 2001, H.R. 1918, 107th Cong. (2001); DREAM Act, S. 1291, 107th Cong. (2002); DREAM Act, S. 1545, 108th Cong. (2003); DREAM Act of 2005, S. 2075, 109th Cong. (2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); American Dream Act, H.R. 5131, 109th Cong. (2006); DREAM Act, S. 2205, 110th Cong. (2007); Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007); DREAM Act of 2009, S. 729, 111th Cong. (2009); DREAM Act of 2010, S. 3827, 111th Cong. (2010); DREAM Act of 2010, S. 3962, 111th Cong. (2010); DREAM Act of 2010, S. 3963, 111th Cong. (2010); DREAM Act of 2010, S. 3992, 111th Cong. (2010); DREAM Act of 2010, H.R. 6497, 111th Cong. (2010); DREAM Act of 2011, S. 952, 112th Cong. (2011).

[4] *See* John Brandt, *House Passes DREAM Act Immigration Measures*, Fox News (Dec. 8, 2010), http://www.foxnews.com/politics/2010/12/08/house-passes-dream-act-immigration-measures.html.

[5] *See DREAM Act Goes Down in Flames in Senate*, Fox News (Dec. 18, 2010), http://www.foxnews.com/politics/2010/12/18/senate-tries-pass-dream-act.html.

DACA ("DACA Memo").[6] DACA protections were afforded to the same class of immigrants foreseen by the various failed iterations of Dreamer legislation. The primary qualifications for DACA protections were that an individual must (1) have come to the U.S. before the age of sixteen, (2) meet various education or military service requirements, (3) not have a criminal record, and (4) register prior to the age of thirty.[7]

DACA was issued under a theory of "prosecutorial discretion" and "deferred action" and essentially permitted otherwise illegal aliens to remain in the United States without fear of deportation.[8] While some heralded DACA as a victory, others decried it as executive overreach—usurping the powers of Congress to promulgate immigration policy.[9] Over the course of the next five years, approximately 800,000 Dreamers registered for DACA protections.

Phase II: DAPA

Soon thereafter, the executive branch sought to expand its use of deferred action beyond the Dreamers. On November 20, 2014, then-Secretary of Homeland Security, Jeh Charles Johnson, issued a pair of memoranda in an attempt to promulgate what is now known

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[6] Memorandum from U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012).

[7] *See id.*

[8] *See id.*

[9] *See Obama suspends deportation for thousands of illegals, tells GOP to pass DREAM Act*, Fox News (June 15, 2012), http://www.foxnews.com/politics/2012/06/15/obama-administration-to-offer-immunity-to-younger-immigrants.html.

as Deferred Action for Parents of Americans ("DAPA"), as well as a series of minor expansions for DACA.[10]

Less than a month later, DAPA was met with a legal challenge when Texas and twenty-five other states sued to enjoin implementation of the program. *See generally Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015). In that case, DAPA was struck down by the district court, *see id.*, and a divided Fifth Circuit panel affirmed the decision, *see* 809 F.3d 134 (5th Cir. 2015). In June 2016, an equally divided Supreme Court affirmed the decision. *See United States v. Texas*, 136 S. Ct. 2271, 2272 (2016). In addition to finding DAPA and the expansions of DACA unlawful, the judicial decisions throughout the DAPA litigation illustrate two key realities: (1) challenges to DAPA or analogous immigration programs promulgated by DHS without approval by Congress are justiciable; and (2) reasonable legal minds may differ regarding their lawfulness.

Aside from the classes of immigrants to which each applies, DACA and DAPA are largely similar programs addressing different classes or subcategories of immigrants. While DACA affects a population of approximately 800,000 otherwise illegal aliens, DAPA would have affected nearly half of the 11,000,000 immigrants currently in the United States unlawfully. *See Texas v. United States*, 787 F.3d 733, 745 (5th Cir. 2015). DAPA

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[10] Memorandum from U.S. Dep't of Homeland Sec., Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014); Memorandum from U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014).

was challenged and defeated before the program was ever successfully promulgated, while DACA has run for approximately half of a decade before the threat of any litigation.

A Change in Administration and a Corresponding Change in Immigration Philosophy

The 2016 presidential election brought a change in leadership of the executive branch and, with it, significant changes in immigration views and philosophies.[11] In June of 2017, and with the defeat of DAPA directly in the rear-view mirror, Texas and other state plaintiffs sent a letter threatening to challenge DACA if it were not rescinded by September 6, 2017.[12] Attorney General Jeff Sessions advised the Acting Secretary of Homeland Security, Elaine Duke, that DACA was likely unlawful and headed for another legal battle.[13] On September 5, 2017, Acting Secretary Duke issued a memorandum ("DACA Rescission Memo") outlining a six-month wind down of DACA to expire March 5, 2018.[14]

According to the Administrative Record, the basis for the decision to rescind DACA was its presumed unlawfulness in the wake of the DAPA litigation and the threat of imminent legal challenge. The agency's reasoning is

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[11] *See, e.g.*, Tessa Berenson, *Middle Schoolers in Michigan Chant 'Build That Wall' After Trump Victory*, TIME (Nov. 11, 2016), http://time.com/4567812/donald-trump-middle-school-build-wall/.

[12] *See* Admin. R., ECF No. 26-1 at 238-40.

[13] *See* Admin. R., ECF No. 26-1 at 251.

[14] Memorandum from U.S. Dep't of Homeland Sec., Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017).

substantiated by the legal advice of the Attorney General and the fact that the memorandum was issued the day before the state parties had threatened to act. A six-month wind down period was provided to avoid the potential for chaos if a court decision resulted in immediate termination, and the President urged Congress to pass Dreamer-protection legislation.[15]

Complicating the picture for some observers is the unfortunate and often inflammatory rhetoric used by President Trump during the campaign, as well as his Twitter pronouncements, both before and after his election. Thoughtful and careful judicial review is not aided when the President lobs verbal hand grenades at the federal courts, the Department of Justice, and anyone else with whom he disagrees.

As disheartening or inappropriate as the President's occasionally disparaging remarks may be, they are not relevant to the larger issues governing the DACA rescission. The DACA Rescission Memo is clear as to its purpose and reasoning, and its decision is rationally supported by the Administrative Record. *See generally Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) ("[W]hen the Executive exercises [a congressionally delegated power of immigration policies and rules for the exclusion of aliens] negatively on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion."); *Hamdan v. Rumsfeld*, 548 U.S. 557, 623-24 n.52 (2006) ("We have not heretofore,

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[15] *See* Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. Times (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html.

in evaluating the legality of executive action, deferred to comments made by such officials to the media.").[16]

The executive branch may have the authority to exercise or not exercise prosecutorial discretion as it sees fit, and an agency certainly may refrain from action it reasonably believes to be unlawful. Under the Constitution, it is the responsibility of Congress to determine immigration policy, and the executive branch must only act within its constitutional and delegated legislative authority. Although Congress has repeatedly failed to pass Dreamer legislation in the past, the ball is again in its court. And with 87 percent of Americans favoring some sort of DACA-esque protections, the elected members of Congress should understandably feel the pressure now that the President has deferred to them—in short, Congress needs to get the job done now that their

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[16] *See also Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting):

> Even if a politician's past statements were utterly clear and consistent, using them to yield a specific constitutional violation would suggest an absurd result—namely, that the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate. If a court were to find that campaign skeletons prevented an official from pursuing otherwise constitutional policies, what could he do to cure the defect? Could he stand up and recant it all ("just kidding!") and try again? Or would we also need a court to police the sincerity of that mea culpa—piercing into the public official's "heart of hearts" to divine whether he really changed his mind, just as the Supreme Court has warned us not to? *See McCreary*, 545 U.S. at 862, 125 S. Ct. 2722.

authority has been recognized by court decisions and the President.[17]

Other DACA Litigation

Various plaintiffs have filed lawsuits seeking to enjoin the DACA rescission throughout the country—specifically in this Court, the Eastern District of New York, the Northern District of California, and the District of the District of Columbia. These cases are at various stages, but preliminary injunctions have already been granted by the Eastern District of New York and the Northern District of California.[18] With regard to the California case, the Government attempted to bypass the Ninth Circuit and directly petitioned the Supreme Court for a writ of certiorari before judgment.[19] On February 26, 2018, the Supreme Court denied the petition without prejudice, and noted that "[i]t is assumed that the Court of Appeals [for the Ninth Circuit] will proceed expeditiously to decide this case."[20]

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[17] *See* Jennifer De Pinto, Fred Backus, Kabir Khanna & Anthony Salvanto, *Most Americans support DACA, but oppose border wall*, CBS News (Jan. 20, 2018), https://www.cbsnews.com/news/most-americans-support-daca-but-oppose-border-wall-cbs-news-poll/.

[18] *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. CV 17-05211 WHA, 2018 WL 339144 (N.D. Cal. Jan. 9, 2018); *Batalla Vidal v. Nielsen*, No. CV 16-4756 NGG JO, 2018 WL 834074 (E.D.N.Y. Feb. 13, 2018).

[19] *U.S. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. CV 17-05211 WHA, 2018 WL 339144 (N.D. Cal. Jan. 9, 2018), *petition for cert. before judgment filed*, 2018 WL 509822 (U.S. Jan 18, 2018) (No. 17-1003).

[20] Docket, *U.S. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 17-1003, (U.S. Feb. 26, 2018).

All courts reviewing the DACA rescission would benefit from a prior generation's wisdom regarding the separation of powers: "A sturdy judiciary should not be swayed by the unpleasantness or unpopularity of necessary executive action, but must independently determine for itself whether the President was acting, as required by the Constitution, to 'take Care that the Laws be faithfully executed.'" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 709 (1952).[21]

The decisions to date by courts in California and New York are premised on the legal conclusion that DACA is lawful, and therefore, a decision to rescind DACA on the basis of unlawfulness is necessarily arbitrary and capricious. Respectfully, this Court disagrees. Regardless of the lawfulness of DACA, the appropriate inquiry is whether or not DHS made a reasoned decision to rescind DACA based on the Administrative Record. Any alternative inquiry would impermissibly require a court to "substitute its judgment for that of the agency." *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Given the fate of

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[21] Or, more directly, as Judge Niemeyer notes in his recent dissent in the "travel ban" case.

> The public debate over the Administration's foreign policy and, in particular, its immigration policy, is indeed intense and thereby seductively tempts courts to effect a politically preferred result when confronted with such issues. But public respect for Article III courts calls for heightened discipline and sharpened focus on only the applicable legal principles to avoid substituting judicial judgment for that of elected representatives.

Int'l Refugee Assistance Project v. Trump, No. 17-2231, 2018 WL 894413, at *104 (4th Cir. Feb. 15, 2018) (Niemeyer, J., dissenting).

DAPA, the legal advice provided by the Attorney General, and the threat of imminent litigation, it was reasonable for DHS to have concluded—right or wrong—that DACA was unlawful and should be wound down in an orderly manner. Therefore, its decision to rescind DACA cannot be arbitrary and capricious.

II. STANDARD OF REVIEW

Motion to Dismiss. The purpose of a motion to dismiss under Rule 12(b)(6) is "to test the sufficiency of a complaint." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). The Supreme Court has further articulated the standard applicable to Rule 12(b)(6) motions. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Rule 8 "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Twombly*, 550 U.S. at 556 n.3. To survive a motion to dismiss, a complaint must put forth "plausible claim[s] for relief." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

Motion for Summary Judgment. Summary judgment is proper under Fed. R. Civ. P. Rule 56(a) if there is no genuine dispute over any material facts, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 302 (4th Cir. 2006). A material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A

dispute of material fact is genuine if the evidence would allow the trier of fact to return a verdict for the nonmoving party. *Id.* When considering a summary judgment motion, the court has "an affirmative obligation . . . to prevent 'factually unsupported claims or defenses' from proceeding to trial." *Felty v. Grave-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (citing *Celotex*, 477 U.S. at 323-24). Thus, the court may only rely on facts supported in the record, not assertions made in the pleading. *Id.* Moreover, the court must view all facts and make all reasonable inferences in the light most favorable to the nonmoving party. *Matsuhita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party must present more than a "mere scintilla" of evidence to demonstrate a genuine issue of material fact that would preclude summary judgment. *Anderson*, 477 U.S. at 252.

III. ANALYSIS

a. Justiciability

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Congress has the authority to expand or limit federal district court jurisdiction by statute. However, federal courts possess an inherent jurisdiction (under Article III and the fundamental principles of due process) over certain cases relating to the enforcement of the Constitution that cannot be limited by Congress. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988) (permitting federal district court jurisdiction when necessary "to avoid the serious

constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.").

The Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. However, federal courts may only review "cases and controversies" if they are justiciable. *See generally Flast v. Cohen*, 392 U.S. 83, 94-99 (1968) (discussing the doctrine of justiciability as "a blend of constitutional requirements and policy considerations"). A case may lack justiciability when it involves a political question and implicates concerns regarding the separation of powers between the judiciary and one of the other branches of government. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 210-11 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution."). While executive actions may often involve otherwise unreviewable political questions, federal courts always retain the power to review matters of constitutional violations. *See id.* Accordingly, the Court need not reach back to *Marbury v. Madison*, 5 U.S. 137 (1803), to support the conclusion that Plaintiffs' constitutional claims are justiciable.

Turning to Plaintiffs' remaining claims, the Court is required to determine if judicial review has been limited by Congress under the APA. The plain language of the APA—specifically, 5 U.S.C. §§ 701, 702—indicates a presumption for judicial review, at least to the procedures surrounding agency decision-making (but not necessarily

to the substance of those decisions). *See generally Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (restating "the basic presumption of judicial review" for APA claims "so long as no statute precludes such relief or the action is not one committed by law to agency discretion").[22] Under 5 U.S.C. § 701(a), the only two exceptions are when: "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

The Government argues both exceptions—that 8 U.S.C. § 1252(g) precludes judicial review, and that the DACA rescission is "committed to agency discretion" because it is a matter of prosecutorial discretion, *see United States v. Armstrong*, 517 U.S. 456, 464 (1996), immigration enforcement, *see Arizona v. United States*, 567 U.S. 387, 396-97 (2012), and deferred action generally, *see Reno v. Am.-Arab Anti-Discrimination Comm. (AADC)*, 525 U.S. 471, 485 (1999). *See* ECF No. 27-1 at 29-30.

However, the notion that 8 U.S.C. § 1252(g) precludes judicial review has been rejected repeatedly. *See, e.g.*, *AADC*, 525 U.S. at 482 (explicitly rejecting that § 1252(g) serves as a zipper clause that functions to prohibit all judicial review). Furthermore, while DHS possesses specified delegated authority over immigration enforcement, Congress never explicitly granted DHS a blanket authority to disparately enforce policies.

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[22] *abrogated on other grounds by statute*, Pub. L. 94-574, 90 Stat. 2721, *as recognized in Califano v. Sanders*, 430 U.S. 99, 105 (1977) (finding the statutory amendment to "eliminate the requirement of a specified amount in controversy as a prerequisite to the maintenance of any (§ 1331) action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity").

Plaintiffs' APA claims are justiciable because they relate to *the procedures* followed by DHS—not to *the substance* of its policy or its decision of a specific case. The Court may review whether the repeal of DACA followed the correct APA procedures. Furthermore, it is important to note that the Government's explanation for rescinding DACA was the Secretary's belief that the program was unlawful and would face lengthy legal challenges. The similarities between DACA and DAPA support justiciability in this case because review of DAPA was also found to be justiciable. *See Texas v. United States*, 809 F.3d 134, 155-64 (5th Cir. 2015) ("Congress has expressly limited or precluded judicial review of many immigration decisions . . . but DAPA is not one of them."), *aff'd,* 136 S. Ct. 2271 (2016).[23]

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[23] *See also Texas v. United States*, 809 F.3d 134, 165-170 (5th Cir. 2015), *aff'd*, 136 S. Ct. 906 (2016).

> Congress did not intend to make immune from judicial review an agency action that reclassifies millions of illegal aliens in a way that imposes substantial costs on states that have relied on the protections conferred by § 1621. . . . *Chaney*'s presumption against judicial review of agency inaction [exists] because there are no meaningful standards against which to judge the agency's exercise of discretion. But where there is affirmative agency action—as with DAPA's issuance of lawful presence and employment authorization—and in light of the INA's intricate regulatory scheme for changing immigration classifications and issuing employment authorization, the action at least can be reviewed to determine whether the agency exceeded its statutory powers. . . .
>
> At its core, this case is about the Secretary's decision to change the immigration classification of millions of illegal aliens on a class-wide basis. The states properly maintain that DAPA's grant of lawful presence and accompanying eligibility for bene-

Accordingly, the Court finds all claims in Plaintiffs' Complaint are justiciable.

b. Standing

Direct standing exists for plaintiffs who have an injury-in-fact that is traceable to the defendants and which is redressable through adjudication. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 590 (1992). The injury must be more than a generalized grievance, which is an ideological objection or an injury widely shared by all members of the public. *See id.* at 575. Organizations have direct standing when government action has impaired the organization's own legal rights. *See, e.g.*, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342 (U.S. 1977). However, association standing also exists for organizational plaintiffs when (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the purpose of the organization, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See id.* at 343.

The Government does not contest the standing of the individual plaintiffs. However, it argues that the organizational plaintiffs lack direct standing because they are not "the object of any government policy" and are

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fits is a substantive rule that must go through notice and comment, before it imposes substantial costs on them, and that DAPA is substantively contrary to law. The federal courts are fully capable of adjudicating those disputes. Because the interests that Texas seeks to protect are within the INA's zone of interests, and judicial review is available, we address whether Texas has established a substantial likelihood of success on its claim that DAPA must be submitted for notice and comment.

merely seeking to "vindicate their own value preferences." *See* ECF No. 27-1 at 38-39 (equating the organizational plaintiffs' injury to a mere "generalized grievance"). The Government also argues that the organizational plaintiffs lack representational standing for failing to identify members of their organizations who are directly harmed by the repeal of DACA, *see id.* at 41-42, or reside within DACA's zone-of-interests, *see id.* at 42 (citing *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 395-96 (1987)).

The Government's challenges to the standing of the organizational plaintiffs miss the mark. Casa De Maryland and the rest of the organizational plaintiffs are special interest groups directly focused on aiding immigrants and their communities. The fact that one of their primary functions has been assisting their members with "tens of thousands of DACA initial and renewal applications" is sufficient for standing in and of itself. *See* ECF No. 29 at 33. In addition to direct standing, the organizational plaintiffs possess association standing. Each organization has identified a number of its members who are Dreamers, and who unquestionably would have standing in this case. Furthermore, the purpose of these organizations is to aid and represent immigrants in their communities, including compliance with immigration procedures. Therefore, the rescission of DACA has an absolute nexus to the organizations' purpose. Additionally, the relief sought is injunctive and declaratory relief—not damages or any other remedy requiring the individual Dreamers. Hence, these organizational plaintiffs are the prototypical examples of possessing association standing.

Accordingly, the Court finds all Plaintiffs have standing in the instant case.

c. APA Claims

Rulemaking is a common method federal agencies use to promulgate decisions. *See generally Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915); *Londoner v. City & Cty. of Denver*, 210 U.S. 373, 385 (1908). Informal rulemaking is standardized under the APA and requires notice-and-comment procedures. *See* 5 U.S.C. § 553; *e.g.*, *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977). Informal rulemaking does not include non-legislative rulemaking, such as procedural rules, interpretive rules, or policy statements. *See* 5 U.S.C. § 553(b); *e.g.*, *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1324-25 (D.C. Cir. 1988).

After the notice-and-comment requirements, if applicable, have been met, courts must take a hard look at whether the decision to promulgate or repeal a rule is "arbitrary or capricious"—which is to say that there must be a rational correlation between the facts reviewed and the decision made. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983) (explaining that an agency must examine relevant data, articulate a satisfactory explanation contemporaneously with its decision, using rationale that comes from the agency (and not from a court inferring after the fact logic that is not explicitly stated in the record)). *See id.* However, even when notice-and-comment requirements do not apply, agency decisions are subject to judicial review under 5 U.S.C. § 706. By statute, "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions

found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

The DACA program is a deferral of action, which by definition is an exercise of discretion rather than a rule with the force of law. Furthermore, the DACA Rescission Memo was not immediately binding, but rather a statement of intended policy beginning March 5, 2018. To the extent that Plaintiffs aver that, in practice, immigration reviews absent DACA protections lack individualized discretion, their dispute is merely with how the agency applies its policy, and not with the policy itself.[24] Although a substantial paradigm shift, the DACA Rescission Memo neither curtails DHS's discretion regarding individual immigration reviews, nor does it prevent the agency from granting Dreamers deferred action status again in the future. Hence, DACA and its rescission are more akin to non-binding policy statements, and thus not subject to notice-and-comment requirements.

Plaintiffs argue that the decision to rescind DACA must be arbitrary and capricious because the Administrative Record is "insufficient" to make a decision of such magnitude. *See* ECF No. 29 at 35-39 (noting that the Administrative Record is only 256 pages long—192 of which are court opinions related to DAPA); *see also In re United States*, No. 17-72917, 2017 WL 5505730, at *2 (9th Cir. Nov. 16, 2017) ("The notion that the head of a

[24] Plaintiffs' APA claim regarding DACA's information sharing policy also lacks merit. Nothing in the DACA Rescission Memo outlines any change—let alone implements a substantive rule—with regard to the use of any individual's information gathered during DACA's implementation.

United States agency would decide to terminate a program giving legal protection to roughly 800,000 people based on 256 pages of publicly available documents is not credible.").

However, based on the historical and political context outlined in the introductory pages of this Opinion, the decision to rescind DACA was neither arbitrary nor capricious, but rather was a carefully crafted decision supported by the Administrative Record. It is well established that "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. 29, 43 (1983). Therefore, it is irrelevant whether this Court, a judge in California or New York, or even a justice on the Supreme Court might have made a different decision while standing in the shoes of DHS on September 5, 2017. Rather, the relevant inquiry is whether the decision was made with a "satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (internal quotations omitted).

DHS's rationale provided in the DACA Rescission Memo was a belief, based on recent court decisions and the advice of the Attorney General, that DACA was unlawful. Assuming that a reasonable basis for that belief exists in the Administrative Record, how could trying to avoid unlawful action possibly be arbitrary and capricious? Quite simply, it cannot. Regardless of whether DACA is, in fact, lawful or unlawful, the belief that it was unlawful and subject to serious legal challenge is completely rational.

DAPA—an analogous program, promulgated by analogous means—had been defeated less than a year prior.

The litigation that stopped DAPA included expansions of DACA itself. The same plaintiffs who defeated DAPA threatened to challenge DACA imminently. The Attorney General of the United States—the nation's chief legal officer—provided legal advice that DACA was likewise unlawful and likely ill-fated against a legal challenge. All of this is in the Administrative Record—the remnants of the DAPA litigation,[25] the threatened legal challenge,[26] and the Attorney General's advisory letter.[27]

Therefore, what did the Acting Secretary of DHS do? She opted for a six-month wind-down period instead of the chaotic possibility of an immediate termination, which would come at a time known only to the judge resolving a future challenge to the DACA program. This decision took control of a pell-mell situation and provided Congress—the branch of government charged with determining immigration policy—an opportunity to remedy it. Given the reasonable belief that DACA was unlawful, the decision to wind down DACA in an orderly manner was rational.

Accordingly, the Court finds Plaintiffs' APA claims to lack merit; the rescission of DACA neither required notice-and-comment procedures, nor was it decided arbitrarily or capriciously.

d. Equal Protection

Equal protection is the legal mechanism by which the law prevents disparate treatment between groups. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.

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[25] *See* Admin. R., ECF No. 26-1 at 42-228.

[26] *See* Admin. R., ECF No. 26-1 at 238-40.

[27] *See* Admin. R., ECF No. 26-1 at 251.

432, 439 (1985). A violative statute or action may provide for disparate treatment facially or in its application. *See id.* at 447-48. In reviewing legislation, which creates disparate impacts 'as applied,' courts review whether the action is covertly based on a suspect classification or if it can be plausibly explained on neutral grounds. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Probative considerations include a history of hostility towards the group, the sequence of events leading to the government action, departures from previous policies, and the legislative history. *See id.* at 265-67. The level of judicial scrutiny depends on the nature of the class targeted for disparate treatment.

The Complaint asserts that strict scrutiny should apply because the disparate treatment allegedly involves suspect classes—race, alienage, and national origin. *See, e.g.*, *Ambach v. Norwick*, 441 U.S. 68, 84 (1979) (finding alienage as a suspect class). When strict scrutiny applies, the government has the burden to demonstrate a compelling state interest, for which the governmental action is narrowly tailored and the least restrictive means. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 308 (2013).

The Government's equal protection argument analogizes the rescission of DACA to "selective prosecution" —which is afforded a presumption of non-discriminatory motives absent "clear evidence to the contrary." *See* ECF No. 27-1 at 58-61 (citing *United States v. Armstrong*, 517 U.S. 456, 463-68 (1996) where the court denied discovery on a selective prosecution claim regarding 24 drug-trafficking offenses (all of which were against African-American defendants)). Plaintiffs correctly note

that the *Armstrong* court accepted the proposition that "the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification." *Armstrong*, 517 U.S. at 464 (1996). Plaintiffs aver that the DACA rescission was "a discriminatory policy decision (not a challenge to a particular prosecution) that has a discriminatory impact and was motivated by discriminatory animus." *See* ECF No. 29 at 55 (noting that Hispanics comprise 93 percent of the 800,000 immigrants affected by DACA). To substantiate their claim, Plaintiffs cite to some of President Trump's unfortunate, less-than-politically-correct, statements. *See* ECF No. 29 at 54.

Both sides miss the mark. While DACA was promulgated under a theory of prosecutorial discretion, its rescission was not based on an exercise of that discretion. Rather, its rescission was premised on a legitimate belief that DACA was unlawful and should be wound down in an orderly manner, while giving Congress a window to act and adopt an appropriate legislative solution. The Administrative Record—the basis from which the Court must make its judicial review—does not support the notion that it was targeting a subset of the immigrant population, and it does not support any supposition that the decision was derived on a racial animus. That is where the judicial inquiry should end.

The Court rejects Plaintiffs' reliance on the President's misguided, inconsistent, and occasionally irrational comments made to the media to establish an ulterior motive. *See generally Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (finding that courts should defer to any "facially legitimate and bona fide reason" for executive action and not "look behind the exercise of that

discretion"); *Hamdan v. Rumsfeld*, 548 U.S. 557, 623-24 n.52 (2006) (noting that courts have never, "in evaluating the legality of executive action, deferred to comments made by such officials to the media"); *County of McCreary v. ACLU of Kentucky*, 545 U.S. 844, 845 (2005) (warning courts, albeit in the context of the First Amendment, to refrain from "scrutinizing purpose" when it requires "judicial psychoanalysis of a drafter's heart of hearts").[28]

Although the DACA Rescission Memo is facially clear as to its purpose and reasoning, Plaintiffs urge the Court to look behind it and find an allegedly discriminatory motivation—one that Plaintiffs attempt to establish with some of the President's remarks and statements. However, Plaintiffs here fail to make the necessary factual showing to permit this Court to do so. Albeit in the context of an Establishment Clause challenge, the Fourth Circuit recently explained in the "travel ban" case that there is "a heavy burden on Plaintiffs, but not

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[28] *See also Int'l Refugee Assistance Project v. Trump*, No. 17-2231, 2018 WL 894413, at *102 (4th Cir. Feb. 15, 2018) (Niemeyer, J., dissenting):

> Because of their nature, campaign statements and other similar statements, including Tweets, are unbounded resources by which to find intent of various kinds. They are often short-hand for larger ideas; they are explained, modified, retracted, and amplified as they are repeated and as new circumstances and arguments arise. And they are often susceptible to multiple interpretations, depending on the outlook of the recipient. . . . At bottom, the danger of this new rule is that it will enable a court to justify its decision to strike down any executive action with which it disagrees. It need only find one statement that contradicts the official reasons given for a subsequent executive action and thereby pronounce that the official reasons were a pretext.

an insurmountable one [in seeking to introduce such statements]. [Precedent] clearly affords the political branches substantial deference," but "also accounts for those very rare instances in which a challenger plausibly alleges that a government action runs so contrary to the basic premises of our Constitution as to warrant more probing review." *Int'l Refugee Assistance Project v. Trump*, No. 17-2231, 2018 WL 894413, at *12 (4th Cir. Feb. 15, 2018) (reviewing the standard set forth in *Kleindienst v. Mandel*, 408 U.S. 753 (1972) "through the lens of Justice Kennedy's [concurring] opinion in" *Kerry v. Din*, 135 S. Ct. 2128 (2015)).

In that case, Chief Judge Gregory, writing for the majority, explained that *Mandel* requires courts to "first ask whether the proffered reason for the Proclamation is 'facially legitimate and bona fide.'" *Id.* (citing *Mandel*, 408 U.S. at 770). Under *Din*, however, a district court "may 'look behind' the Government's proffered justification for its action" upon "an 'affirmative showing of bad faith,' which [plaintiffs] must 'plausibly allege with sufficient particularity.'" *Id.* (citing *Din*, 135 S. Ct. at 2139-41 (Kennedy, J., concurring)). However, while the plaintiffs in the "travel ban" case offered "undisputed evidence" of an "anti-Muslim bias," *see id.* at *13, the Plaintiffs cannot here make a similarly substantial showing. The Fourth Circuit found that then-candidate Trump regularly disparaged Islam as a religion and repeatedly proposed banning Muslims from the United States. *See id.* at *13-*16. Implicit to the issue was a direct nexus between the discriminatory statements and the executive action in question in that case—a travel ban targeting predominantly Muslim nations.

The instant case is factually very different. The President certainly made statements of his strong views on immigration policy, including advocacy for the rescission of the DACA program.[29] However, his statements have frequently shifted but have moderated since his election. He has referred to the Dreamers as "terrific people;" he has pledged to "show great heart;" and he has referred to Dreamers as "incredible kids."[30] He referred to the "DACA situation" as a "very difficult thing for me. Because, you know, I love these kids."[31] He added that "the existing law is very rough. It's very, very rough."[32]

The rescission of the DACA program merely fulfills the duty of the executive branch to faithfully enforce the laws passed by Congress. Accordingly, no affirmative showing of bad faith can follow. In fact, the President actually urged Congress to pass Dreamer-protection legislation during DACA's wind down period[33]—simply put, this case is wholly dissimilar to the "extraordinary case" regarding the recent "travel ban."[34] As a result,

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[29] *See* Gregory Krieg, *Trump's many shifting positions on DACA, from the campaign to right now*, CNN (Jan. 25, 2018), https://www.cnn.com/2018/01/25/politics/donald-trump-positions-daca/index.html.

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See supra* Note 15.

[34] *Accord Int'l Refugee Assistance Project v. Trump*, No. 17-2231, 2018 WL 894413, at *13 (4th Cir. Feb. 15, 2018) ("In the extraordinary case before us, resolution of that question [regarding pretext] presents little difficulty. Unlike *Din* and *Mandel*, in which the Government had a "bona fide factual basis" for its actions, *Din*, 135 S. Ct.

the Court need not go further than the facially legitimate motivation offered in the DACA Rescission Memo and supported by the Administrative Record.

Accordingly, the Court finds Plaintiffs' equal protection claims to lack merit

e. Procedural Due Process

Procedural due process ensures that the government must satisfy certain procedures prior to depriving a person of his or her rights. *See Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976). Procedural due process applies whenever the government seeks to deprive a person of a liberty or property interest. *See id.* Liberty interests include physical restraint, a substantial infringement of a fundamental right, harm to one's reputation affecting another tangible interest, or the unjustified intrusion of one's personal security. *See, e.g.*, *Vitek v. Jones*, 445 U.S. 480, 488 (1980). Property interests include real property, personal property, intellectual property, or any legitimate claim of entitlement. *See, e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Entitlements—rights to things like education, public employment, and welfare—are grounded in the law and cannot be removed except for cause. *See id.* In determining the amount of process owed, courts balance (1) the importance of the right the individual is trying to preserve, (2) the risk of erroneous deprivation of that right given the existing level of due process, and (3) the level of governmental burden for the additional

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at 2140 (Kennedy, J., concurring in the judgment), here the Government's proffered rationale for the Proclamation lies at odds with the statements of the President himself.").

levels of due process sought. *See Eldridge*, 424 U.S. at 334-35.

Plaintiffs allege that under DACA, Dreamers were afforded, and are now being deprived of, a number of protected interests, including the ability to (1) obtain employment authorization, (2) travel internationally, (3) attend schools, (4) pay into and receive payment from Social Security and disability, (5) secure other opportunities like obtaining bank accounts or credit cards, and (6) otherwise be considered "lawfully present." *See* ECF No. 29 at 58.

First, Plaintiffs' claim fails because procedural due process only applies to individualized deprivations, not policy-based deprivations for an entire class. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (holding that individualized hearings are unnecessary when impractical and when the challenged policy affects a large number of people; in these instances, the political process serves as an effective alternative).

Second, even assuming *arguendo* that due process did attach to class-wide policy deprivations, Plaintiffs' due process claim would fail because DACA did not create an entitlement. Facially, the June 15, 2012 DACA Memo explicitly denied the creation of any such rights:

> This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.

Memorandum from U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012).

While entitlements are not always self-labeled or created with bright flashing lights, the exercise or restraint of prosecutorial discretion is not traditionally the sort of governmental action that creates substantive rights. The DACA Memo did not guarantee any individual immigrant particular benefits, and the DACA Rescission Memo did not curtail DHS's discretion regarding individual immigration reviews. Therefore, even if due process could attach to DACA, no *de facto* entitlements were created by the program itself.

Accordingly, the Court finds Plaintiffs' procedural due process claim to lack merit.

f. Substantive Due Process

While procedural due process outlines the manner by which the government may deprive a person of his or her rights, substantive due process bars the government from depriving a person of a right altogether. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 167-68 (1973) (Stewart, J., concurring). If the right being deprived is a "fundamental right," courts apply strict scrutiny; if the right being deprived is not fundamental, courts apply rational basis.

Certain rights have been adjudicated formally as fundamental (right to associate, right to educate one's children, right to procreate, right to marry, etc.). *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 482-86 (1965). In determining whether a non-previously-adjudicated right is fundamental, courts have applied different approaches—whether the absence of the right would

make other fundamental rights "less secure," *see id.* at 482-83, whether the right is "deeply rooted in this Nation's history and tradition," *see Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)), and whether the right is a basic value "implicit in the concept of ordered liberty," *see Glucksberg*, 521 U.S. at 720-21 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

In the instant case, Plaintiffs claim a "denial of fundamental fairness." *See* ECF No. 29 at 63-64. However, for the "denial of fundamental fairness" to rise to the level of a substantive due process violation, it must be "so egregious" and "so outrageous" as "to shock the contemporary conscience." *See Manion v. N. Carolina Med. Bd.*, 693 F. App'x 178, 181 (4th Cir. 2017) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8, 850 (1998), *abrogated on other grounds by Saucier v. Katz*, 533 U.S. 194 (2001)). Plaintiffs believe they have met this burden by alleging a discriminatory intent in DACA's rescission—an allegation unsupported by the record before this Court.

The rescission of a policy relating to prosecutorial discretion does not shock the conscience of this Court. Absent congressional action, the benefits given to Dreamers by DACA were in potential violation of congressional immigration laws; the only thing that has changed is that deferred status will expire, and enforcement of immigration laws may recommence in the absence of action by Congress, which the President has requested. There is nothing surprising or unfair about policies, laws, or enforcement thereof changing with an election cycle.

Furthermore, the election process, and not federal litigation, is the appropriate method for resolving any fairness implicated in DACA's rescission.

Accordingly, the Court finds Plaintiffs' substantive due process claim to lack merit.

g. Estoppel

The doctrine of estoppel is traditionally founded in the principles of fraud as applied in contract law, but the doctrine may be applied elsewhere in the law as well. *See generally W. Augusta Dev. Corp. v. Giuffrida*, 717 F.2d 139, 141 (4th Cir. 1983) (discussing the outgrowth of the doctrine of estoppel as a claim against the government). In general, "equitable estoppel is comprised of three basic elements: (1) a voluntary misrepresentation of one party, (2) that is relied on by the other party, (3) to the other party's detriment." *Chawla v. Transamerica Occidental Life Ins. Co.*, 440 F.3d 639, 646 (4th Cir. 2006). In this Circuit, when raising such a claim against the government, there is a heightened standard for the first element, and an additional showing of "affirmative misconduct" by the government actors. *See Dawkins v. Witt*, 318 F.3d 606, 611 (4th Cir. 2003).

As with Plaintiffs' substantive due process claim, estoppel cannot apply to DACA's rescission. The rescission of a policy relating to prosecutorial discretion does not amount to a misrepresentation by the government. DACA was promulgated with an express disclaimer that it was not conferring any rights. Nothing in the DACA Memo or in DACA's implementation suggested to Dreamers that the program was permanent, and individuals in the program were aware that their protections

were subject to renewal every two years. DACA's rescission lacks any serious injustice—let alone, affirmative misconduct by any of the defendants.

However, while estoppel does not apply to DACA's rescission, it potentially would apply to any use for immigration enforcement of the information collected from Dreamers during DACA registrations. With regard to this narrow issue, and based on the evidence before it, the Court finds that the Government promised not to transfer or use the information gathered from Dreamers for immigration enforcement. *See* ECF No. 29 at 42-44, 60-61; ECF No. 29-3 at 15-27, 32-41, 52-76, 96-98, 109-13. And now that the government is in possession of this information, the potential for use or sharing of it is theoretically possible.

On the one hand, the Government claims that no changes have been made to the information-sharing policy. However, at oral argument, counsel for the Government was unable to provide any assurance that the Government would not make changes.

> [*Mr. Shumate:*] The rescission policy that is being challenged here says nothing about the sharing of information for enforcement purposes. There's nothing more that the plaintiffs have raised other than a speculative fear that this might happen in the future. But DHS has been quite clear and they said on the FAQ section—
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> *The Court:* Are you prepared to say that from representing the defendants that there is no intention of changing the information-sharing assurances that were given in connection with DACA?

> *Mr. Shumate:* No. I'm not making that representation, Your Honor. Even from the beginning, DHS has been quite clear that this policy on information-sharing can change. . . . But they also I think take liberties with what that policy is. There has never been a promise or assurance that that information would never be changed. FAQ 19 quite clearly says that the information is generally protected and will not be shared for enforcement purposes, but there may be circumstances where it will be to adjudicate a DACA application or for law enforcement purposes if the individual meets the status of the test for notice to appear. But also quite clearly, DHS has said from the start that the information policy—sharing policy can change, but it has not. So that really should be the end of the debate about the information-sharing.

Tr. of Mot. Hr'g (Dec. 15, 2017) at 16-17.

The Court disagrees that this "should be the end of the debate about the information-sharing." *Id.* Logic would dictate that it is possible that the government, having induced these immigrants to share their personal information under the guise of immigration protections, could now use that same information to track and remove them. This potentially would be "affirmative misconduct" by the government, and the Dreamers' detrimental reliance would be self-evident in the information-sharing itself.

Therefore, while the Government will not be enjoined from rescinding DACA, given the substantial risk for irreparable harm in using Dreamers' DACA-provided information, the Court will enjoin the Government from using information provided by Dreamers through the

DACA program for enforcement purposes. In the event that the Government needs to make use of an individual Dreamer's information for national security or some purpose implicating public safety or public interest, the Government may petition the Court for permission to do so on a case-by-case basis with *in camera* review.

IV. CONCLUSION

In concluding this Opinion, the Court notes the recent opinion of Judge Gonzalo P. Curiel, of the Southern District of California, in which he made observations that aptly apply to this case. In a case involving a challenge to President Trump's proposed "border wall," he noted that the case was "currently the subject of heated political debate," but that in its review of the case, "the Court cannot and does not consider whether underlying decisions . . . are politically wise or prudent." *In re Border Infrastructure Envtl. Litig.*, No. CV 17-1215 GPC (WVG), 2018 WL 1071702, at *1 (S.D. Cal. Feb. 27, 2018). For this proposition, he cited the opinion of his fellow Indiana native, Chief Justice Roberts, in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012): "Court[s] are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices."

The result of this case is not one that this Court would choose if it were a member of a different branch of our government. An overwhelming percentage of Americans support protections for "Dreamers," yet it is not the province of the judiciary to provide legislative or

executive actions when those entrusted with those responsibilities fail to act. As Justice Gorsuch noted during his confirmation hearing, "a judge who likes every outcome he reaches is probably a pretty bad judge, stretching for the policy results he prefers rather than those the law compels."[35]

This Court does not like the outcome of this case, but is constrained by its constitutionally limited role to the result that it has reached. Hopefully, the Congress and the President will finally get their job done.

Date: Mar. 5, 2018

/s/

ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

[35] Neil Gorsuch, Transcript of Opening Remarks at Confirmation Hearing, Comm. on the Judiciary (Mar. 20, 2017), https://www.judiciary.senate.gov/imo/media/doc/03-20-17%20Gorsuch%20Testimony.pdf.