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

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Petitioners,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,
Respondents.

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, ET AL.,
Petitioners,
v.
MARTIN JONATHAN BATALLA VIDAL, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit And Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Second Circuit

Brief for DACA Recipient Respondents, Make the Road New York, County of Santa Clara, and Service Employees International Union Local 521

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Petitioners,

v.

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

Respondents.

On Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The District Of Columbia Circuit

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QUESTIONS PRESENTED

Since 2012, the Deferred Action for Childhood Arrivals ("DACA") policy has enabled nearly 800,000 undocumented individuals who arrived in the United States as children to live and work here without fear of deportation, so long as they qualify and remain eligible for the policy. In September 2017, the Attorney General issued a one-page, conclusory letter reversing the government's longstanding legal position. Bound by the Attorney General's advice, the Acting Secretary of Homeland Security abruptly issued a new immigration enforcement policy that terminated DACA.

The questions presented in these consolidated cases are:

1. Whether either the Administrative Procedure Act ("APA"), 5 U.S.C. § 701(a)(2), or the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(b)(9), (g), precludes judicial review of the Secretary's decision to terminate the DACA policy.

2. Whether the Secretary's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA, 5 U.S.C. § 706(2)(A).

PARTIES TO THE PROCEEDING

In No. 18-587, 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; and the United States.

Respondents are the Regents of the University of California; Janet Napolitano, President of the University of California; the State of California; the State of Maine; the State of Maryland; the State of Minnesota; the City of San Jose; Dulce Garcia; Miriam Gonzalez Avila; Saul Jimenez Suarez; Viridiana Chabolla Mendoza; Norma Ramirez; Jirayut Latthivongskorn; the County of Santa Clara; and Service Employees International Union Local 521.*

In No. 18-588, 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. Citizenship and Immigration Services; U.S. Immigration and Customs Enforcement; the U.S. Department of Homeland Security; and the United States.

Respondents are the Trustees of Princeton University; Microsoft Corporation; Maria De La Cruz Perales Sanchez; National Association for the Advancement of Colored People; American Federation of Teachers, AFL-CIO; and the United Food and Commercial Workers International Union, AFL-CIO, CLC.

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* After the Complaint was filed in September 2017, Viridiana Chabolla Mendoza was granted Lawful Permanent Resident status.

In No. 18-589, Petitioners are Kevin K. McAleenan, Acting Secretary of Homeland Security; the U.S. Department of Homeland Security; William P. Barr, Attorney General of the United States; Donald J. Trump, President of the United States; U.S. Citizenship and Immigration Services; U.S. Immigration and Customs Enforcement; and the United States.

Respondents are Martin Jonathan Batalla Vidal, Antonio Alarcon, Eliana Fernandez, Carlos Vargas, Mariano Mondragon, and Carolina Fung Feng, on behalf of themselves and all other similarly situated individuals; Make the Road New York, on behalf of itself, its members, its clients, and all similarly situated individuals; the State of New York; the State of Massachusetts; the State of Washington; the State of Connecticut; the State of Delaware; the District of Columbia; the State of Hawaii; the State of Illinois; the State of Iowa; the State of New Mexico; the State of North Carolina; the State of Oregon; the State of Pennsylvania; the State of Rhode Island; the State of Vermont; the State of Virginia; and the State of Colorado.

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INTRODUCTION

The Constitution and federal immigration laws afford the Executive Branch significant authority to set immigration enforcement priorities. For decades, presidential administrations from both political parties have used that authority to permit certain categories of individuals to remain and work in the United States. The principal check on the Executive's authority in this area is procedural: As with other exercises of the government's coercive power, the Executive must comply with the Administrative Procedure Act ("APA") by giving "reasoned explanation[s] … that can be scrutinized by courts and the interested public." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). An administration may impose new or different priorities, but only if it adheres to APA requirements and clearly states its policy choices so that it can be held publicly accountable for them. The judiciary, in turn, has a limited but essential role: ensuring that the Executive considers and clearly explains the consequences of new approaches, especially for those who will be profoundly affected by a change.

This case concerns an immigration policy change covering undocumented individuals who arrived in the United States as children. Since 2012, the Deferred Action for Childhood Arrivals ("DACA") policy allowed these individuals, known as "Dreamers," to obtain an education, work, and contribute to this nation and its economy without constant fear of deportation. The Secretary of Homeland Security announced DACA in a memorandum that explicitly articulated the factors underlying the policy: the agency's limited "enforcement resources," DACA recipients'

"contribut[ions] to our country," and the need for a "clear and efficient process for exercising prosecutorial discretion" on an "individual basis." *Regents* Pet. App. 98a-100a. The policy has been widely perceived as a success, and many people—including DACA recipients, and their families, employers, and educational institutions—have made significant decisions based on forbearance from removal, just as the government intended them to do.

For many months, the current administration maintained and publicly supported DACA. But in September 2017, the Secretary suddenly announced a new policy that terminated the five-year-old policy, threatening deportation of DACA recipients from the only country many of them have ever known as home. In sharp contrast to the decision adopting DACA, the new memorandum came nowhere near satisfying the APA's requirements for reasoned decisionmaking. The Secretary did not even mention enforcement resources or the significant costs to DACA recipients, their families, communities, workplaces, schools, and the larger economy.

The government has offered different rationales for the decision over time. But the same fatal flaw infects them all: The Secretary's assertion that DACA exceeded her authority. In terminating DACA, the Secretary purported to respond to a binding letter from the Attorney General stating that DACA is unlawful and unconstitutional. The letter's perfunctory legal analysis included an obvious factual error and failed to acknowledge the administration's departure from the Executive Branch's longstanding legal position, as presented to this Court and reflected in advice of the Justice Department's Office of Legal Counsel ("OLC"). In fact, the Secretary's ostensible

legal premise driving her decision was erroneous: DACA is lawful.

The administration could have left DACA in place. It did not have to end this humanitarian policy that allows nearly 700,000 people to stay in the only country they have ever really known. It did not have to eliminate the opportunity for these individuals to earn a living to support themselves and their families. It did not have to disclaim Executive authority that administrations of both parties rightly have exercised for decades. But rather than own up to its choice, the administration claimed its hands were tied by the courts and the law. It is a cardinal principle of administrative law that the Executive may not shield discretionary policy decisions from scrutiny behind erroneous claims that the law allows only one result, yet that is what the administration did here.

The APA demands—and the public deserves—a genuine analysis and lucid explanation of the relevant policy considerations before reversing a long-standing policy and subjecting 700,000 individuals to deportation to unfamiliar nations where they may not even speak the language. Because DHS failed to meet these basic standards, the lower courts correctly set aside the new policy.

STATEMENT

1. The Immigration and Nationality Act ("INA") grants immigration officials "broad discretion" to pursue removal from the United States of noncitizens deemed removable by Congress. *Arizona v. United States*, 567 U.S. 387, 396 (2012). That discretion is one of immigration law's "principal feature[s]." *Ibid*. It reflects the reality that "there simply are not enough resources to enforce all of the rules and regulations presently on the books," and that "[i]n

some circumstances"—because Congress "cannot possibly [have] contemplate[d] all of the possible circumstances in which the [INA] may be applied"—"application of the literal letter of the law" would be "unconscionable" and "serve no useful purpose." *Regents* Ct. App. ECF No. 45, at 1215. The INA accordingly directs the Secretary of Homeland Security to "[e]stablis[h] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5).

Every presidential administration over the past 65 years has exercised some form of enforcement discretion—through more than thirty separate policies—to make categories of undocumented noncitizens deemed low priority eligible for forbearance from removal. American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present* 3-10 (Oct. 2014), https://tinyurl.com/y27k6qx8 ("AIC Report"). The Eisenhower, Kennedy, Johnson, and Nixon Administrations, for example, paroled more than 600,000 Cubans into the United States, and the Ford and Carter Administrations paroled in nearly 360,000 Vietnamese, Cambodians, and Laotians. *Ibid*. Similarly, from 1960 to 1990, each presidential administration used "extended voluntary departure" to forbear removal of groups of "otherwise deportable aliens" based on their nationality "out of concern that … forced repatriation … could endanger their lives or safety." H.R. Rep. No. 627, 100th Cong., 2d Sess. 6 (1988). The Reagan and George H.W. Bush Administrations' Family Fairness Program made extended voluntary departure available to 1.5 million eligible recipients—more than 40 percent of the undocumented population at the time—while their parents or spouses pursued immigration status under

newly enacted legislation. AIC Report, at 2. Subsequent administrations used "deferred enforced departure" to grant similar relief to 80,000 Chinese following the Tiananmen Square protests, 190,000 Salvadorans after their eligibility for temporary protected status expired, and others. *Id.* at 6-7.

One way the Executive exercises its enforcement discretion is through deferred action, "a regular practice" in which the government elects not to seek removal of individuals "for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 & n.8 (1999) ("*AADC*"). The Executive has granted deferred action since the 1970s, *Regents* Ct. App. ECF No. 45, at 1220, and each presidential administration since 1997 has adopted deferred action policies covering categories of noncitizens. J.A. 822-26. Past policies covered battered spouses and human trafficking survivors awaiting visas, students displaced by Hurricane Katrina, and surviving spouses of U.S. citizens who had "no avenue of immigration relief." *Ibid*.

The Executive has long recognized the need for individuals granted discretionary relief from removal to support themselves and their families. Since 1981, federal regulations have expressly authorized recipients of deferred action and other exercises of enforcement discretion to work in the United States. 8 C.F.R. § 109.1(b)(6) (1982); *id.* § 274a.12(c)(14). Congress later codified this authority by permitting employers to hire any noncitizen "authorized to be … employed by [the INA] *or by the Attorney General*" (now Secretary). 8 U.S.C. § 1324a(h)(3) (emphasis added); 8 C.F.R. § 274a.12(c)(14). By statute and regulation,

deferred action recipients may also obtain driver's licenses, REAL ID Act of 2005, Pub. L. No. 109-13, Div. B., § 201(c)(2)(B)(viii), 119 Stat. 302 (2005); participate in Social Security and Medicaid, 8 U.S.C. § 1611(b)(2)-(4); 8 C.F.R. § 1.3(a)(4)(vi); 42 C.F.R. § 417.422(h); and apply for and receive advance parole, allowing them to travel abroad and re-enter the United States, 8 C.F.R. § 212.5.

2. In 2012, Secretary of Homeland Security Janet Napolitano established the DACA policy. *Regents* Pet. App. 97a-101a. Undocumented individuals who arrived in the United States as children and met rigorous criminal background checks and education or military service requirements could apply for deferred action for renewable two-year periods. *Ibid.* Both initial and renewal applications were decided on a "case by case basis," and DHS provided no "assurance[s] that relief w[ould] be granted in all cases." *Id.* at 99a. Indeed, the government does not dispute the Ninth Circuit's determination that DHS actually exercised discretion in adjudicating DACA applications. *See Regents* Supp. App. 50a-51a. Individuals granted deferred action could apply for work authorization and other benefits pursuant to existing statutes and regulation. *Id*. at 12a. Secretary Napolitano explained that immigration laws were not "designed to remove productive young people to countries where they may not have lived or even speak the language," and DHS's exercise of "prosecutorial discretion" to forbear removal of these individuals was "especially justified" because they had "already contributed to our country in significant ways" and "lack the intent to violate the law." *Regents* Pt. App. 98a-99a. She adopted DACA to "ensure that [the government's] enforcement resources are not expended on these low priority cases." *Ibid*. The government actually encouraged eligible

noncitizens to apply to participate in DACA. *See* Supp. Pet. App. 73a (Ninth Circuit "agreeing" that the government's "assurances were crucial to inducing [DACA recipients] to apply for DACA") (quotation marks omitted); *Regents* Dist. Ct. ECF No. 121-1, at 181, 227; *id.* ECF No. 1 ¶ 33.

DACA has allowed nearly 800,000 people—including nearly 700,000 current recipients—to build productive lives in the United States without persistent fear of deportation. *NAACP* Pet. App. 5a. Based upon DACA, they have organized their lives to advance their education, serve in the U.S. military, start businesses, have families, and make other life-changing decisions. J.A. 435-49, 652-70. Like many other DACA recipients, the individual respondents here—Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Norma Ramirez, Jirayut Latthivongskorn, Martín Jonathan Batalla Vidal, Antonio Alarcon, Eliana Fernandez, Carlos Vargas, Mariano Mondragon, and Carolina Fung Feng—have pursued new paths and dreams previously unavailable to them. Some have embarked on careers as lawyers, medical professionals, and teachers; others now can raise families without fear of separation, pay for children's or parents' health care, drive family members to school and medical appointments, provide a home for their families, or advocate for their communities. *Id.* at 659, 889-910, 927, 946, 960. DACA recipients are embedded throughout the economy; 72% of Fortune 500 companies have hired DACA recipients. *Id.* at 605. If DACA is eliminated, recipients will face the persistent fear of being uprooted from their homes and separated from their families. They, their families, and their communities will suffer extraordinary losses. *Id.* at 435-49, 461.

3. Four years after DACA began, this Court considered a challenge to a different policy—Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). Announced in 2014 but never implemented, DAPA would have made deferred action available to up to 4.3 million parents whose children were U.S. citizens or lawful permanent residents. *Regents* Pet. App. 54a, 107a-08a. Unlike DACA, the memorandum announcing DAPA said that, although "[d]eferred action does not confer any form of legal status in this country, … it simply means that, for a specified period of time, an individual is presumed to be lawfully present in the United States." *Id.* at 104a. DAPA also would have loosened the age and residency requirements for DACA and extended the deferred action period to three years. *Id.* at 106a-07a.

Before DAPA was implemented, several states challenged it under the APA and obtained a preliminary injunction. A divided Fifth Circuit panel affirmed. *Texas v. United States*, 809 F.3d 134, 171-86 (5th Cir. 2015). This Court affirmed by an evenly divided vote in a per curiam, nonprecedential decision on June 23, 2016. *Texas v. United States*, 136 S. Ct. 2271 (2016).

4. The current administration initially supported DACA. In March 2017, DHS Secretary John Kelly stated that DACA embodies a "commitment" "by the government towards … Dreamer[s]." J.A. 435. In April 2017, the President personally assured DACA recipients they could "rest easy" because the "policy of [his] administration [is] to allow the dreamers to stay." *Ibid* (alterations in original). DHS continued to accept, process, and grant DACA applications.

Then the administration reversed course. On September 4, 2017, Attorney General Jefferson Sessions sent a one-page letter to Acting DHS Secretary Elaine Duke, stating that "DACA was effectuated by the previous administration through executive action, without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." J.A. 877. Although no court had found DAPA constitutionally defective, the Attorney General cited the *Texas* decision and stated that DACA has "the same legal and constitutional defects that the courts recognized as to DAPA." *Id.* at 877-78.

The following day, Secretary Duke issued a new enforcement policy memorandum that ended DACA. *Regents* Pet. App. 111a-19a. Her explanation was brief: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing [DAPA] litigation, and the September 4, 2017 letter from the Attorney General," she concluded that DACA "should be terminated." *Id.* at 117a. The memorandum contained no analysis of purported litigation risks. Nor did it weigh defending DACA and its benefits against the hardship that limiting deferred action would impose on the hundreds of thousands of DACA recipients, their families, employers, schools, communities, and the economy. The memorandum instructed DHS to stop approving new DACA applications—even where immigration officials might have granted the same relief before DACA—and to stop processing certain renewal applications in October 2017, thus allowing individual recipients' deferred action to expire beginning in March 2018. *Id.* at 117a-18a.

Even after the new policy was announced, the President publicly supported DACA recipients. *E.g.*,

Donald Trump (@realDonaldTrump), Twitter (Sept. 14, 2017, 5:28 AM), https://tinyurl.com/y378dsy9 ("Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really!"); Donald Trump (@realDonaldTrump), Twitter (Sept. 14, 2017, 5:35 AM), https://tinyurl.com/y29uh56w ("They have been in our country for many years through no fault of their own - brought in by parents at young age.").

5. Respondents in these consolidated cases filed lawsuits challenging DHS's action in the Northern District of California, the District of Columbia, and the Eastern District of New York. J.A. 376-796. Respondents contend, *inter alia*, that the policy is unlawful under the APA because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). J.A. 463-767.

The government produced a mere 256-page administrative record comprising just 14 public documents: the memoranda adopting and rescinding DACA, OLC's analysis of DAPA, the Attorney General's letter, published opinions from the DAPA litigation, and letters from States and Members of Congress. *Regents* Dist. Ct. ECF No. 64-1. "All nonpublic materials, some eighty-four documents, actually reviewed by the Acting Secretary remained withheld as privileged." *Regents* Pet. App. 23a. The lower courts in *Regents* and *Batalla Vidal* found that the administrative record was incomplete. *Regents* Dist. Ct. ECF No. 79, at 8; *Batalla Vidal* Dist. Ct. ECF No. 89, at 3; *see also In re Nielsen*, No. 17-3345, ECF No. 171, at 3 (2d Cir. Dec. 27, 2017) (finding "strong suggestion" that administrative record was

incomplete). It turns out, for example, that DHS did not include a Summary of Conclusions from a Principals Committee meeting, dated August 24, 2017, reflecting the Committee's "agree[ment] that" DHS will "withdraw the 2012 DACA memorandum … in light of DOJ's legal determination" that DACA is unlawful. *Make the Road N.Y. v. U.S. Dep't Homeland Sec.*, No. 1:18-cv-2445, ECF No. 63-1, at 209 (E.D.N.Y. Aug. 14, 2019).

In all three cases, the district courts rejected the government's arguments that the APA and the INA prohibit judicial review of its action. *Regents* Pet. App. 26a-33a; *NAACP* Pet. App. 25a-43a; *Batalla Vidal* Pet. App. 24a-38a. Each court then either enjoined or vacated the policy.

In *Department of Homeland Security v. Regents of the University of California*, No. 18-587 ("*Regents*"), the district court granted preliminary injunctive relief. *Regents* Pet. App. 41a-69a. It found respondents likely to succeed on their APA claim that DHS's policy was "'not in accordance law' because [the decision to adopt it] was based on the flawed legal premise that the agency lacked authority to implement DACA." *Id.* at 42a. And it held that equity strongly favored preliminary relief because eliminating DACA would "result in hundreds of thousands of individuals losing their work authorizations and deferred action status," tearing apart families and removing productive workers from the economy. *Id.* at 65a. The Ninth Circuit affirmed the injunction for largely the same reasons. *Regents* Supp. App. 1a-78a.[1]

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[1] The Ninth Circuit also affirmed the denial of the government's motion to dismiss the DACA Recipient Respondents' Equal Protection claim, but noted that "Plaintiffs did not seek a

In *McAleenan v. Batalla Vidal*, No. 18-589 ("*Batalla Vidal*"), the district court granted an identical preliminary injunction. *Batalla Vidal* Pet. App. 90a-129a. It found that respondents were likely to succeed on their APA claim because DHS acted "based on an erroneous legal premise." *Id.* at 91a. The court also concluded that the action was arbitrary and capricious because: (1) it rested on an "obvious factual mistake"—the Attorney General's assertion that the Fifth Circuit in *Texas* had found "'constitutional defects … as to DAPA,'" *id.* at 105a (omission in original); and (2) the Secretary's decision to wind down DACA gradually was "internally inconsistent" with her statement that DACA is unlawful, *id.* at 107a-09a.

In *Trump v. NAACP*, No. 18-588, the district court vacated Secretary Duke's memorandum. *NAACP* Pet. App. 48a-66a. It reasoned that the government had failed sufficiently to explain its legal conclusion that DACA is unlawful, and the decision therefore was arbitrary and capricious regardless of the correctness of that legal conclusion. *Id.* at 49a-55a. The court rejected the government's request to remand to the new DHS Secretary, Kirstjen Nielsen, while leaving DHS's new policy in place. *Id.* at 62a-66a. Instead, it vacated the policy but stayed its order for 90 days to give the

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preliminary injunction on [that] claim, instead relying solely on their APA argument." *Regents* Supp. App. 84a. The district court in *Batalla-Vidal* likewise found that plaintiffs had stated an Equal Protection claim, *Batalla-Vidal* Pet. App. 157a, but based its preliminary injunction only on the APA, *id.* at 68a. Respondents do not rely on the Equal Protection claims to affirm the issuance of the preliminary injunctions. No court has yet decided the merits of those claims. The APA claims are sufficient to resolve the case, and this Court need not address Equal Protection in this interlocutory posture at the pleading stage.

Secretary an opportunity to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." *Id.* at 66a.

6. Secretary Nielsen declined the *NAACP* court's invitation to issue a new agency action. Instead, she issued a memorandum in which she "decline[d] to disturb" Secretary Duke's policy and proffered several reasons why, in her view, that action "was, and remains, sound." *Regents* Pet. App. 121a.

Secretary Nielsen's memorandum stated that she was "bound" by the Attorney General's conclusion that DACA is unlawful, and therefore legally compelled to terminate DACA. *Regents* Pet. App. 122a-23a. Thus, she did not address—any more than the Attorney General or Secretary Duke—the Trump and Obama administrations' prior support for DACA or the Executive's longstanding legal position and exercises of deferred action authority. Instead, Secretary Nielsen purported to recast that conclusion in policy terms—suggesting for example that deferred action "should be enacted legislatively" rather than implemented by the Executive. *Id.* at 123a-24a. The memorandum did not weigh these supposed policy considerations independently against the significant hardships that denying deferred action would cause to multiple stakeholders. Instead, it offered only the perfunctory conclusion that DACA's "questionable legality" and "other reasons" *together* outweighed the unstated "interests" of DACA recipients alone. *Id.* at 125a.

The government has not defended Secretary Nielsen's memorandum as a new agency action. Instead, DHS offered the memorandum as a reason for the district court to reconsider its order vacating

Secretary Duke's initial decision. *See NAACP* Pet. App. 81a. Exercising discretion under Federal Rule of Civil Procedure 54(b)—which permits reconsideration of interlocutory orders any time before final judgment—the court declined to consider any "'new reason[s]'" first offered by Secretary Nielsen. *Id.* at 92a. The court agreed to consider the Nielsen memorandum only as it clarified Secretary Duke's reasoning, *id*. at 91a-92a, but concluded that even with this additional gloss, the reasons Secretary Duke "previously gave" could not salvage her decision "because the Court ha[d] already rejected them." *Id.* at 82a. The Court thus allowed its vacatur of Secretary Duke's policy to stand. *Ibid*.

SUMMARY OF ARGUMENT

1. Neither the APA's narrow exception for decisions "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), nor the INA prevents judicial review of the government's new enforcement policy.

The APA does not preclude review of an agency's action affecting 700,000 DACA recipients' ability to remain in the United States, as well as eligibility for work authorization and other benefits under separate authorities. There is no remotely comparable case withholding judicial review, much less a "tradition" of unreviewability. Here, there are meaningful standards for the Court to apply, particularly because DHS's decision was based on an (incorrect) legal judgment. The government now claims that its decision was based on "litigation risk," but that rationale appears nowhere in Secretary Duke's memorandum, nor can it be meaningfully separated from DHS's incorrect belief that DACA is unlawful.

The government also argues that Secretary Nielsen's subsequent memorandum precludes review.

But that memorandum was not offered as a new agency action on a new administrative record. It merely purported to provide additional support for Secretary Duke's memorandum after it was vacated by the *NAACP* court. That court did not abuse its discretion in refusing to reconsider the vacatur based on Secretary Nielsen's memorandum. In any event, *both* memoranda can be reviewed under the APA's general requirement of reasoned decisionmaking.

Nor does the INA, 8 U.S.C. § 1252(b)(9), (g), preclude review. Section 1252(b)(9) applies only to removal orders, detention decisions, and removal decisions. Section 1252(g) applies only to decisions to commence proceedings, adjudicate cases, or executive removal orders. Respondents' claims do not fall into any of these categories.

2. The Executive can change course on enforcement policies, but not in arbitrary and unreasoned ways. DHS's new policy terminating DACA did not meet the APA's requirement for reasoned decisionmaking and public accountability. DHS did not consider, for example, the Executive's long history of deferred action policies and institutional claim of legal authority. Nor did it consider the costs of its decision, including loss of work authorization for 700,000 DACA recipients. The failure to consider costs to DACA recipients, their families and employers, and the larger economy is particularly egregious as hundreds of thousands of people made life-altering decisions based on DACA, as the government intended them to do.

Moreover, the central rationale for DHS's decision—that DACA is unlawful—is wrong. The government has never defended the Attorney General's assertion that DACA is "unconstitutional."

Nor has it questioned the Executive's authority to grant deferred action on an individualized basis, 70 years of deferred action policies affecting more than a million noncitizens, or the validity of regulations making deferred action recipients eligible for work authorization. The Executive's inherent authority over immigration, which this administration and others have consistently argued to this Court, and the congressional ratification of deferred action put DACA on solid legal footing. DACA fits comfortably within the tradition of past humanitarian deferred action policies. The government's contrary conclusion is "not in accordance with the law." 5 U.S.C. § 706(2)(A).

The government's remaining rationales also fail.

First, purported concerns over litigation risk cannot justify DHS's action. Secretary Duke claimed she was bound by the Attorney General's erroneous conclusion that DACA was unlawful; thus, any discussion of litigation risk was an afterthought and bound up with the legal error. Regardless, the agency never fully considered litigation risk through, for example, carefully comparing DACA and DAPA or weighing the benefits of defending DACA against risks the government might face if DACA were successfully challenged. Moreover, because nearly all major agency action will spur litigation, this rationale—if credited—would defeat judicial review of nearly any agency action. As Gene Hamilton, the principal drafter of Secretary Duke's memorandum testified, a "litigation risk" rationale "sounds like the craziest policy you could have in a department. You could never do anything if you were always worried about being sued." J.A. 1007.

Second, Secretary Nielsen's memorandum does not justify the agency's action. She, too, claimed to be

bound by the Attorney General's legal conclusion and she, too, failed to meaningfully analyze litigation risk. Her other rationales, which she claims are independent, merely recast the legal case against DACA in policy terms. Her memorandum is not supported by any administrative record (none was ever filed).

Secretary Nielsen's purported rationales—"doubts" about legal authority and concern that relief "should be enacted legislatively," be provided "individually," and "project a message" of consistent enforcement—cannot provide the "reasoned explanation" absent from Secretary Duke's memorandum because Secretary Nielsen chose not to take new agency action. Regardless, Secretary Nielsen (like her predecessor) never accounted for the hardships that DHS's reversal would impose on DACA recipients or others. Her superficial cost-benefit analysis weighed the costs of ending DACA against all of her collective reasons for supporting that outcome—including her erroneous views on DACA's legality. Her conclusion cannot stand.

ARGUMENT

I. DHS's New Immigration Enforcement Policy Terminating DACA Is Judicially Reviewable

The APA mandates that those who "suffe[r] legal wrong because of agency action" are "entitled to judicial review." 5 U.S.C. § 702. Because agencies are "'especially'" likely to disregard their legal obligations "'when [violations] have no consequence,'" the APA establishes a "'strong presumption favoring judicial review of administrative action,'" *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018), especially in the immigration context, *see INS v. St.*

Cyr, 533 U.S. 289, 298 (2001). The government bears the "heavy burden" to overcome that presumption. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015).

Agency decisions are reviewable unless: (1) they have been "committed to agency discretion by law," 5 U.S.C. § 701(a)(2); or (2) another "statut[e] preclude[s] judicial review," *id.* § 701(a)(1). As every court to consider the issue has agreed, *see*, *e.g.*, U.S. Opening Brief ("Br.") 9-14, neither bar applies here.

A. The APA Does Not Bar Judicial Review

This Court "narrowly" construes the APA's exception to judicial review for decisions "committed to agency discretion by law." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019). The exception is "limited … to certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion." *Ibid.* (quotation marks omitted). And it only precludes review when there is "no meaningful standard" for courts to apply. *Ibid*. Neither requirement is met here.

1. DHS's Action Is Not A Traditionally Unreviewable Nonenforcement Decision

The government asserts that DHS's new policy terminating DACA is unreviewable because it is like a traditionally unreviewable decision "not to institute enforcement actions." Br. 17. But DHS did not decline to institute an enforcement action. It made a broad policy change affecting all DACA recipients' ability to remain in the country and, pursuant to separate authorities, access work authorization and other attendant benefits. The government cannot

point to any remotely similar policy reversal that has escaped judicial review—let alone a tradition of denying review—because none exists. The government thus falls far short of its "heavy burden" to avoid review. *Mach Mining*, 135 S. Ct. at 1651.

The government relies mainly on *Heckler v. Chaney*, 470 U.S. 821 (1985), but *Chaney* involved a completely different situation. In *Chaney*, eight inmates who had been sentenced to death petitioned the FDA to initiate enforcement proceedings against two States to prevent their use of particular drugs for lethal injections. In denying the petition, the FDA invoked its "inherent discretion to decline to pursue certain enforcement matters." *Id*. at 824. This Court held that the decision was not reviewable in light of the "tradition" of affording "absolute" deference to "an agency's decision not to prosecute or enforce." *Id.* at 831. The Court emphasized the "complicated balancing of … factors" involved in selecting enforcement targets and measuring "particular enforcement action[s]" against the "agency's overall policies." *Ibid.* Most tellingly, the Court reasoned that nonenforcement decisions generally lack any "focus for judicial review" because they do not involve the exercise of "*coercive* power" over an individual. *Id.* at 832.

Here, by contrast, DHS's action is coercive. Although DACA is rooted in the government's authority to defer removal proceedings against individuals subject to deportation, Congress (by statute) and DHS (by regulation) have added benefits that flow from deferred action, including access to work authorization. Ending DACA denies 700,000 DACA recipients the ability to work, and thus directly "infringe[s] upon areas that courts are called upon to

protect." *Chaney*, 470 U.S. at 832. The government is therefore wrong that ending DACA "will not, by itself, bring to bear the agency's coercive power over any individual." Br. 19.

Further, the Secretary exercised that power categorically, whereas *Chaney* involved "[i]ndividual, isolated nonenforcement decisions." 470 U.S. at 839 (Brennan, J., concurring). As Justice Brennan explained, *Chaney* "holds that [the FDA's] *individual* decisions … not to take enforcement action in response to citizen requests are presumptively not reviewable" because Congress did not "inten[d] courts to review such mundane matters." *Id.* at 838-39 (emphasis added). The FDA did not make an affirmative, public "programmatic determination" to exempt all cases from enforcement, as the government contends. Br. 21-22. It declined to initiate specific enforcement actions sought in a single petition.

This Court has declined to extend *Chaney* to decisions that are "'less frequent'" and "'more apt to involve legal as opposed to factual analysis.'" *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007). Decisions about general enforcement policy are both. They are "abstracted from the particular combinations of facts" that "drive … individual enforcement decision[s]," and that agencies may be better suited to evaluate. *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994). They also cover more ground, so agencies typically supply "a clearer (and more easily reviewable) statement of [their] reasons." *Ibid.* "[C]ursory, ad hoc, or post hoc" decisionmaking may be the norm, by necessity, for "individual decisions to forego enforcement," *ibid*, but agencies must explain major policy initiatives that

tangibly and adversely affect hundreds of thousands of persons.

These considerations permit review of Secretary Duke's decision for the same reason they permit review of the decisions to adopt DACA and DAPA. As the Fifth Circuit explained, a decision that "triggers … eligibility for federal benefits" involves "much more than nonenforcement," and is therefore reviewable. *Texas v. United States*, 809 F.3d 134, 166 (5th Cir. 2015). This was the ground for reviewability offered to this Court. State Resp. Br. at 39, *Texas*, 2016 WL 1213267 (U.S. Mar. 28, 2016). And the very premise of the change in policy is that "potentially imminent litigation" would enjoin DACA. J.A. 878. The government dismisses any distinction between "eliminat[ing]" and "adopt[ing]" DACA as "immaterial," Br. 22 (emphasis omitted), so its assertion that the decision to eliminate DACA is unreviewable contradicts the stated premise of DHS's new policy. DHS's action is reviewable.

2. There Are Meaningful Standards For Judicial Review

There are "meaningful standard[s]" for courts to apply in reviewing Secretary Duke's action. *Dep't of Commerce*, 139 S. Ct. at 2568.

a. Secretary Duke ostensibly announced a new policy terminating DACA because Attorney General Sessions determined that DACA was "unconstitutional" and "effectuated … without proper statutory authority." J.A. 877. Secretary Nielsen later recognized that conclusion was binding on DHS. *Regents* Pet. App. 122a-23a (citing 8 U.S.C. § 1103(a)(1)). In her memorandum, Secretary Duke said that she "[took] into consideration" only the

Attorney General's letter and the authorities underlying his legal conclusion. *Id.* at 117a.

Assessing this purely legal premise falls squarely within the judiciary's core competency: "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The APA likewise "requires the court to determine legal questions," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., concurring in the judgment). The legal question here can be answered by reference to the INA's text and structure, the Executive's broad discretion over immigration and long history of implementing deferred action policies, and this Court's precedent on the appropriateness of deferred action. *See infra* at 37-48.

Secretary Duke's disavowal of legal authority to maintain DACA also further distinguishes this case from *Chaney*. The Secretary did not "exercise [her] 'discretion'" to change DHS's deferred action policy based on a "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Chaney*, 470 U.S. at 823, 831. In fact, she *disclaimed* discretion to maintain DACA in light of the Attorney General's binding legal determination. *Cf. id.* at 833 n.4 (distinguishing "a refusal by an agency to institute proceedings based solely on the belief that it lacks jurisdiction").

Reviewing an agency's determination that it lacks legal authority furthers, rather than threatens, the agency's discretion. It frees the agency to make a policy decision to exercise or decline to exercise its authority. "[A]llowing judicial review under these circumstances … promot[es] … democratic accountability" within the Executive Branch by preventing it from "blam[ing] the other two branches … for a choice that was the agency's to make all

along." *Regents* Supp. App. 31a-33a. Reviewing the Executive's new enforcement policy "prevents this anti-democratic and untoward outcome," *id*. at 33a, and ensures that "an official cannot claim that the law ties her hands while at the same time denying the courts' power to unbind her," *NAACP* Pet. App. 73a. These are not "free-floating" accountability concerns, Br. 31; they reflect the APA's central purpose of holding federal agencies "accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

The government is wrong that under *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) ("*BLE*"), it "makes no difference what reasons DHS gave." Br. 23. *BLE* involved an agency's single-shot decision not to reconsider its prior order after the time to obtain judicial review had passed. This Court held that parties could not "exten[d] indefinitely" the time to seek relief by first asking the agency to reconsider its order and then petitioning for review of the decision denying reconsideration, 482 U.S. at 280, and emphasized that there is a "tradition" of denying review in similar circumstances, *id.* at 282. These reasons did not depend on *why* the agency had denied reconsideration, so the Court adopted a blanket rule that such decisions are always unreviewable, even if the agency gives a "'reviewable' reason." *Id.* at 283.

This situation is very different. It may be that under *BLE*, "agency actions *falling within a tradition of nonreviewability*" remain nonreviewable even when they are based on "reviewable reason[s]." Br. 23-24 (quoting *BLE*, 482 U.S. at 282-83) (quotation marks omitted; emphasis added). But Secretary Duke's decision—to deprive DACA recipients of deferred action and, as a result, eligibility for work

authorization by regulation—is the type of decision that courts traditionally review. *See supra* at 21. It is enough, therefore, that there are meaningful standards to apply *in this case*. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (review available if there is "law to apply" "in a given case"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The Secretary's reliance on a reviewable legal premise satisfies that requirement.

b. The government denies that the decision was "based solely on DHS's legal conclusion." Br. 26. Although Secretary Duke's sole stated reason for her new policy was DACA's supposed illegality, the government has unearthed a new and different argument in this litigation—that it was justified by "litigation risk." Br. 27. This maneuver does not defeat reviewability.

First, the Ninth Circuit correctly deemed that justification a "mere post hoc rationalization" and refused to consider it, including in deciding reviewability. *Regents* Supp. App. 35a. *Post hoc* rationalizations cannot deprive courts of the ability to review the agency's otherwise-reviewable original action. *See infra* at 48-49.

Second, even if Secretary Duke's reasoning were stretched to encompass litigation risk, there are still meaningful standards for courts to apply. The Attorney General's conclusion about the likely outcome of litigation challenging DACA was expressly premised on his own view of the policy's legality. J.A. 878 ("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.").

Nothing else in Secretary Duke's memorandum is tethered to litigation risk. As such, litigation risk here is inseparable from the reviewable legal judgment. *NAACP* Pet. App. 41a-42a. Moreover, assessing a lawsuit's likelihood of success—as the lower courts did here in assessing the need for a preliminary injunction—is standard fare for courts. *E.g.*, *Regents* Supp. App. 77a.

c. Secretary Nielsen's later memorandum comes too late to bear on reviewability and in any event would not lead to a different result.

i. The Nielsen memorandum is not a new agency action like the successive travel bans in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), and the government has not defended it as such. The government offers it only as support for the Duke memorandum. Br. 28. Since *NAACP* vacated *that* memorandum before Secretary Nielsen issued hers, the Nielsen memorandum is relevant only if it provides a basis to reconsider the vacatur.

The decision to reconsider an interlocutory order rests in "the discretion of the district judge." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 12 (1983). As *BLE* confirms, decisions denying reconsideration—"by lower courts" and agencies alike—are traditionally reviewable only in limited circumstances. 482 U.S. at 282. Appellate courts review denials of reconsideration for abuse of discretion. *E.g.*, *SPV-LS, LLC v. Transamerica Life Ins. Co*., 912 F.3d 1106, 1111 (8th Cir. 2019); *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc*., 630 F.3d 217, 227 (D.C. Cir. 2011).

The district court in *NAACP* did not abuse its discretion in denying reconsideration. DHS had every opportunity to offer additional reasons for its new

policy, both before the policy was vacated and after. The court invited Secretary Nielsen to revive the policy properly—through a new agency action on a new administrative record, *NAACP* Pet. App. 94a—but she declined. The court was not required to revisit its vacatur at all, let alone based on arguments DHS failed to advance before vacatur. *See* Moore's Federal Practice §§ 54.25[4], 59.30[6] (2019). The court thus reasonably declined to consider Secretary Nielsen's "new reason[s]" through the backdoor of a reconsideration motion. *NAACP* Pet. App. 92a.

The government points out that *NAACP* discussed the Nielsen memorandum at length. Br. 28. But the court considered that memorandum only as evidence of *Secretary Duke's* reasons, *NAACP* Pet. App. 91a-92a, and properly read, it sheds no light on that issue. Secretary Nielsen issued her memorandum "to explain *her* reasons," not Secretary Duke's. Br. 29. Since nothing in the record suggests Secretary Duke shared Secretary Nielsen's reasons, the Nielsen memorandum does not affect the district court's reasoning.

ii. Regardless, the Nielsen memorandum is reviewable in its own right "according to the general requirements of reasoned agency decisionmaking" under the APA. *Dep't of Commerce*, 139 S. Ct. at 2569. Judicial review is available to ensure, at minimum, that DHS: (1) gave a "reasoned explanation … that can be scrutinized by courts and the interested public," *id.* at 2575-76; (2) considered the "facts and circumstances that underlay or were engendered by [its] prior policy" before "chang[ing] … course," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009); and (3) "pa[id] attention to the advantages *and* the disadvantages of [its] decisions," *Michigan v. EPA*,

135 S. Ct. 2699, 2707 (2015). Courts routinely apply these standards.

It makes no difference, therefore, whether the INA itself "circumscribes the Secretary's decision." Br. 19. The authority to set aside agency action that is "arbitrary" and "capricious" or an "abuse of discretion," 5 U.S.C. § 706(2)(A), is independent of the authority to set aside actions "in excess of statutory jurisdiction," *id.* § 706(2)(C).

In *Judulang v. Holder*, for example, this Court held that a Board of Immigration Appeals policy governing eligibility for discretionary relief from deportation was properly reviewed under the APA's "arbitrary and capricious" standard, even though the challenged policy was "not an interpretation of any statutory language" and the statute "d[id] not mention" the question decided by the agency. 565 U.S. 42, 52 n.7 (2011). Even without a "textual anchor" to guide its review, the Court unanimously rejected the policy because it was based on "irrelevant" factors unconnected to whether the noncitizens affected deserved the requested relief. *Id.* at 55, 60. As *Judulang* recognized, removal of noncitizens with "longstanding ties to this country" is "a matter of the utmost importance," and statutory silence cannot justify approaching that matter arbitrarily without judicial oversight. *Id.* at 64. Even when an agency acts within its substantive authority, courts have "a role, and an important one, in ensuring that [it] engaged in reasoned decisionmaking." *Id*. at 53.[2]

[2] Although DHS's substantive authority is "broad," it is not "unbounded." *Dep't of Commerce*, 139 S. Ct. at 2568. Congress

B. The INA Does Not Bar Judicial Review

The government's truncated arguments based on the INA, 8 U.S.C. § 1252(b)(9), (g), are similarly misplaced. *See* Br. 20-21. The challenged action does not fit within either provision's plain language and thus cannot overcome the presumption of reviewability. *Mach Mining*, 135 S. Ct. at 1651.

Neither provision applies outside of the removal process. Section 1252(b)(9) limits judicial review of claims that challenge "an order of removal," a "decision to detain … or to seek removal," or "part of the process by which … removability will be determined." *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality op.). The three-justice plurality in *Jennings* stated this expressly, and the three dissenting justices would have gone farther, limiting Section 1252(b)(9) to claims that "challenge … an order of removal." *Id*. at 876 (Breyer, J., dissenting). Section 1252(g), meanwhile, "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Reno v. AADC*, 525 U.S. 471, 482 (1999). It is not triggered by "all claims arising from deportation proceedings," *ibid.*, and does not "sweep in any claim that can

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authorized the Secretary to set "national immigration … priorities," 6 U.S.C. § 202(5), but it regularly circumscribes that authority. *See*, *e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. F, Tit. II, 129 Stat. 2242, 2497 (directing the Secretary to prioritize the removal of criminal noncitizens by "severity of th[e] crime"); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. A, Tit. II, 121 Stat. 1844, 2051 (conditioning grant of funds to deport noncitizens who have committed crimes on the Secretary's creation of a "methodology" to "identify and prioritize for removal criminal aliens convicted of violent crimes").

technically be said to 'arise from' the three listed actions of the Attorney General," *Jennings*, 138 S. Ct. at 841 (plurality op.).

Respondents here do not challenge any removal order or detention decision. And the Duke memorandum is not a decision to "commence" removal proceedings against any DACA recipient; "adjudicate" any case; or "execute" any removal order. 8 U.S.C. § 1252(g). Accordingly, neither statute applies.

Sections 1252(b)(9) and 1252(g) may "give *some* measure of protection to 'no deferred action' decisions" in the specific context of individual removal proceedings. Br. 20 (quoting *AADC,* 525 U.S. at 485) (emphasis added). But Congress was concerned about "'[e]fforts to challenge the refusal to exercise [deferred action] on behalf of *specific* aliens.'" *AADC*, 525 U.S. at 485 (emphasis added). The government's programmatic decision here is not a matter that must await judicial review in separate, individual actions in immigration courts.

II. DHS Violated The APA By Failing To Engage In Reasoned Decisionmaking

DHS's new policy that terminated DACA is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of the APA, 5 U.S.C. § 706(2)(A), and must be set aside, *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("*Chenery I*") ("[A]n order may not stand if the agency has misconceived the law.").

The fundamental principle of administrative law is that "administrative agencies are required to engage in reasoned decisionmaking." *Michigan*, 135 S. Ct. at 2706 (quotation marks omitted). While agencies remain "free to change their existing policies," the

APA demands that they "provide a reasoned explanation for [such] change[s]," *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016), "that can be scrutinized by courts and the interested public," *Dep't of Commerce*, 139 S. Ct. at 2575-76.

Respondents do not ask this Court to "second-gues[s]" DHS's policy "judgment" or question its ability to change policy. Br. 32-33. The decisions below recognized that the Executive *can* rescind DACA "as an exercise of [its] discretion," *Regents* Supp. App. 57a, but the policy cannot be changed without the "minimal level of analysis" necessary for reasoned decisionmaking, judicial oversight, and public accountability, *Encino Motorcars*, 136 S. Ct. at 2125, supported by the administrative record, *Dep't of Commerce*, 139 S. Ct. at 2573. The way in which DHS replaced DACA with a new enforcement policy is antithetical to proper administrative action. DACA is a matter of significant public concern. DACA recipients, their communities, and the public deserve a reasoned explanation for the government's decision supported by a complete administrative record. They did not receive one.

A. The Government Violated the APA By Failing To Explain Its Policy Change Or Acknowledge Its Prior Stance On DACA's Legality

The letter from Attorney General Sessions and Secretary Duke's memorandum do not allow a reviewer to reasonably "discer[n]" the legal "path" DHS followed in jettisoning its prior positions and concluding that DACA is unlawful. *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The decision violated the APA.

For decades, the Executive has exercised its authority to grant deferred action for humanitarian purposes, including on a categorical basis, and to couple that relief from removal with work authorization and other benefits. After DACA was adopted, the Department of Justice vigorously defended it as a "valid exercise of the [Executive's] broad authority and discretion to set policies for enforcing the immigration laws." U.S. Amicus Br. at 1, *Ariz. Dream Act Coalition v. Brewer*, 2015 WL 5120846 (9th Cir. Aug. 2015); *see also Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015); *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015). Reflecting the Executive's legal judgment and long-term institutional interests, the Solicitor General defended DAPA before this Court and argued that challenges to that deferred action policy "dramatically understate[d] the scope of [DHS's] authority" to establish immigration-enforcement policies and priorities. Pet. Br. at 61, *Texas*, 2016 WL 836758 (U.S. Mar. 1, 2016); *see also* Appellants' Br. at 26, *Barr v. E. Bay Sanctuary Covenant*, 2019 WL 4307408 (9th Cir. Sept. 3, 2019) (government arguing it was permitted to "exercise its discretion" to limit asylum "through categorical rules").

That position was backed by OLC's considered legal analysis. OLC "orally advised" DHS that DACA was lawful, J.A. 827 n.8, and later memorialized its recognition of DHS's authority to grant deferred action on a categorical basis in a lengthy opinion that the Justice Department made public. *Id.* at 797-856. Such OLC "formal written opinions" are a "particularly important form of controlling legal advice," and especially "significant" OLC opinions are "presumpt[ively]" made public, thereby educating the nation "on some of the weightiest matters in our

public life." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 922 F.3d 480, 483-84 (D.C. Cir. 2019) (quotation marks omitted). And for much of 2017—even after this Court's 4-4 affirmance in *Texas*—President Trump, the DHS Secretary, and other members of the current administration publicly supported DACA. J.A. 455.

Notwithstanding this history, Attorney General Sessions and Secretary Duke offered only a threadbare explanation of their central legal premise that DACA is both unconstitutional and unlawful. Neither addressed the Solicitor General's detailed defense of Executive authority and practice on deferred action before this Court or the analysis in OLC's opinion, nor did they explain why the Fifth Circuit's reasons for rejecting DAPA would apply to the materially different policy considerations in DACA. Indeed, in citing the Fifth Circuit's *Texas* decision to conclude that DACA is unconstitutional, the Attorney General's letter mischaracterized the very opinion on which it purported to rely—a crucial and "obvious factual mistake." *Batalla Vidal* Pet. App. 98a. The Fifth Circuit expressly *declined* to resolve constitutional questions regarding DAPA, *Texas*, 809 F.3d at 154, and as the government recently argued to this Court, "'claims that an official exceeded his statutory authority' are *not* constitutional claims." App. for Stay Pending Appeal, *Trump v. Sierra Club*, No. 19A60 (U.S., July 12, 2019) (quoting *Dalton v. Specter*, 511 U.S. 462, 474 (1994)).

The government tries to excuse its unexplained about-face by asserting that it reflected DHS's "agree[ment]" with the Fifth Circuit's "fla[t] reject[ion]" of OLC's lengthy analysis. Br. 52. But neither the Attorney General's letter nor Secretary

Duke's memorandum said that. And regardless, a conclusory, unexplained statement "agreeing" with the ruling of a single, divided court of appeals—in the face of DOJ's analysis and decades-old Executive practice across administrations of both parties—does not constitute "[r]easoned decisionmaking." *Dep't of Commerce*, 139 S. Ct. at 2576. Nor does this Court's 4-4 summary affirmance in *Texas* elevate the legal significance of the Fifth Circuit's ruling or its reasoning. *See* Br. 7, 15, 16, 33, 52. "An unexplained affirmance by an equally divided court" is "not entitled to precedential weight no matter what reasoning may have supported it." *Rutledge v. United States*, 517 U.S. 292, 304 (1996).

While the government need not outline its reasoning "with legislative precision" (Br. 27), the Attorney General's letter and Secretary Duke's memorandum are so sparse that one cannot reasonably "discer[n]" the logical "path" DHS followed in its decisionmaking. *Bowman*, 419 U.S. at 286. It would be one thing for the government to have acknowledged its official prior positions, as articulated by OLC and elsewhere, and explained its newfound disagreement to justify disclaiming Executive authority and abandoning the five-year-old policy with 700,000 participants. But the Attorney General's unexplained "failure to even consider OLC's thorough [public] analysis"—without any principled reasons for doing so—"is [itself] arbitrary and capricious." *NAACP* Pet. App. 54a n.23.

B. The Government Violated the APA By Failing To Consider The Costs Of Its Decision Or The Interests Affected

"[R]easonable regulation" also "ordinarily requires paying attention to the advantages *and* the

disadvantages of agency decisions," *Michigan*, 135 S. Ct. at 2707, and then "explain[ing] whether the benefits outweigh the costs," *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 734 (D.C. Cir. 2016) (Kavanaugh, J., dissenting). In adopting her new policy, Secretary Duke "failed [her] most basic duty under the [APA] to consider all of the relevant factors, including costs," and thereby "asses[s] whether [her] proposed action would do more good than harm." *Id.* at 732. Both "common administrative practice and common sense require[d]" such an assessment, *id.* at 733, and its absence here violated the APA, *Michigan*, 135 S. Ct. at 2707.

These principles apply with special force where, as here, an agency's "longstanding policies … engendered serious reliance interests," *Encino Motorcars*, 136 S. Ct. at 2126. When individuals and businesses form plans around a policy, reversing course is "more costly" than when an agency "announces a decision on a clean slate." *Mingo*, 829 F.3d at 732 (Kavanaugh, J., dissenting). Considering the consequences of a change for people and institutions who have ordered their affairs in response to government action, in other words, is part of agencies' basic obligation to consider costs, which exists independent of whether regulated parties can assume that the government will stay its course from administration to administration, *see* Br. 42; *Encino Motorcars*, 136 S. Ct. at 2126 (agency was free to change interpretation at any time but had to acknowledge harms that could result). Here, the government never considered the "disruption" its policy "would have on the lives of DACA recipients, let alone their families, employers and employees, schools and communities." *Regents* Pet. App. 60a.

In establishing DACA, Secretary Napolitano explained that the policy was meant "to ensure that [DHS's] enforcement resources are not expended on … low priority cases but are instead appropriately focused on people who meet [DHS's] enforcement priorities." *Regents* Pet. App. 98a. Generally, those who met the policy's criteria were not enforcement priorities because they "lacked the intent to violate the law," and "many" were "already [being] offer[ed] administrative closure" in any event. *Ibid*. "[P]rosecutorial discretion" was also "especially justified" because those "productive young people" had "already contributed to our country in significant ways." *Id*. at 98a-99a.

In terminating DACA for a different enforcement approach, neither Attorney General Sessions nor Secretary Duke even acknowledged such "facts and circumstances," let alone provided "a reasoned explanation … for disregarding [them]." *Fox*, 556 U.S. at 516. They neither questioned DHS's original reasons for adopting DACA nor suggested that the circumstances supporting the policy had changed.

Indeed, nothing in Secretary Duke's memorandum suggests the government considered any of the hardships that DACA recipients and others would face without deferred action. *Michigan*, 135 S. Ct. at 2708. By 2017, DACA had enabled hundreds of thousands of young people "to enroll in colleges and universities, complete their education, start businesses that help improve our economy, and give back to our communities as teachers, medical professionals, engineers, and entrepreneurs—all on the books." *Regents* Dist. Ct. ECF No. 121-1, at 252-53. DACA recipients, including the individual respondents here, had subjected themselves to

background checks, paid their fair share of taxes, and ceased living in persistent fear of removal. They have advanced their education, served in the U.S. military, started businesses, formed families, and taken out business and student loans and mortgages. *Regents* Dist. Ct. ECF No. 124-2, at 1-3. They have made significant contributions to their employers and educational institutions, which in turn made decisions and investments based on the ability of DACA recipients to continue to work or study in the United States. *Id.* at 7-9. Data from shortly before Secretary Duke's memorandum showed that over 90 percent of DACA recipients were then-employed. *Regents* Dist. Ct. ECF No. 119-2, at 41, 44. And research from 2017 estimated that ending DACA would cost the federal government $60 billion in lost revenue and eliminate $215 billion from the economy in lost GDP. *Regents* Dist. Ct. ECF No. 113-1, at 73.

Rather than weigh these costs against the perceived "advantages … of [its] decisio[n]," *Michigan*, 135 S. Ct. at 2707, the government adopted an impermissibly "cost-blind approach" to terminating the policy, *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1265 (D.C. Cir. 2014) (Kavanaugh, J., dissenting), *majority rev'd sub nom. Michigan*, 135 S. Ct. 2699. It treats DHS's policy change as if nothing significant will come of it. This Court is "'not required to exhibit [such] naiveté.'" *Dep't of Commerce*, 139 S. Ct. at 2575.

Beyond failing to consider costs, DHS failed to consider "reasonably obvious alternatives" to terminating DACA. *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 803 (D.C. Cir. 1984). For example, even if the Secretary believed DACA was implemented in a manner that gave insufficient

discretion to agency employees, she was required to consider, at minimum, "significant and viable" alternatives that remedy DACA's alleged legal defects while mitigating the foreseeable impact on relevant reliance interests. *Shieldalloy Metallurgical Corp. v. Nuclear Regulatory Comm'n*, 624 F.3d 489, 493 (D.C. Cir. 2010); *accord Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must consider "important aspect[s]" of its decision). She did not do so.

C. The Decision Violates the APA Because Its Central Legal Premise—That DACA Is Unlawful—Is Wrong

Earlier in this litigation, the government did not directly defend the Secretary's premise that DACA is unlawful; it merely argued that the Secretary's legal premise was "reasonable," *Regents* Ct. App. Br. 31, 39-40, and "ma[de] no effort" to argue that DACA is unlawful, *Regents* Pet. App. 48a. Before this Court, however, the government squarely contends that DACA is unlawful. *See* Br. 43. This Court "normally decline[s] to entertain such forfeited arguments." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016).

Further, the government does not defend Attorney General Sessions' conclusion that DACA is "unconstitutional." It limits its argument that DACA is unlawful to one assertion: The INA cannot be "fairly interpreted as authorizing DHS to maintain a categorical deferred-action policy" comparable to DACA. Br. 43-44.[3]

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[3] The challengers to DAPA took the opposite position in *Texas*, conceding before this Court that the government had ample authority to "forbea[r] from remov[ing]" a large group of noncitizens

The government concedes that, by regulation, noncitizens "granted deferred action may receive certain benefits, including work authorization for the same period if they establish economic necessity." Br. 5 (citing 8 C.F.R. § 274a.12(c)(14)). It has never questioned the legality of those regulations—or any of the benefits conferred by DACA. Thus, this Court need not determine the lawfulness of longstanding regulations that treat recipients of deferred action as "lawfully present" for purposes of Social Security or Medicare. *E.g.*, 8 C.F.R. § 1.3(a)(4)(vi); 42 C.F.R. § 417.422(h). Nor is this Court called upon to assess DHS's longstanding guidance that remaining in the United States during a period of deferred action does not count against an individual seeking lawful admission. *See* Memorandum from Johnny N. Williams, Exec. Assoc. Comm'r, Office of Field Operations, to Reg'l Dirs. et al., *Unlawful Presence* 1 (June 12, 2002); 8 U.S.C. § 1182(a)(9)(B). This Court need not go further than the arguments advanced by the parties. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 721 (2014).

The arguments the government *does* make against the legality of DACA fail for several reasons.

1. The Executive Has Long Granted Deferred Action. The government's argument that deferred action cannot be granted through a broad policy is inconsistent with the INA and the Executive's longstanding practice, which has been approved by Congress and the courts.

The INA directs the Secretary to "establis[h] national immigration enforcement policies and

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on a "class bas[is]." Oral Arg. Tr., *United States v. Texas*, No. 15-674, at 50:9-11 (U.S. Apr. 18, 2016).

priorities," 6 U.S.C. § 202(5), and authorizes her to perform all acts she "deems necessary" for enforcing the immigration laws, 8 U.S.C. § 1103(a)(3). "[T]he broad discretion exercised by immigration officials" pursuant to these provisions is a "principal feature of the removal system." *Arizona v. United States*, 567 U.S. 387, 396 (2012). As the government recognizes, "DHS does not have the ability to vigorously enforce the immigration laws against every alien unlawfully present in the United States." Br. 45. Congress annually appropriates only enough funding to remove 400,000 of 11.3 million undocumented noncitizens, so prioritizing enforcement of certain deportable noncitizens is a "practical necessity." *Batalla Vidal* Pet. App. 72a. The government concedes that setting those priorities is "more susceptible to implementation through broad guidance than through case-by-case enforcement decisions." Br. 22.

For nearly seventy years, the Executive has interpreted the INA to authorize discretionary relief to forbear removal on a categorical basis of undocumented noncitizens deemed to be low-priority. Between 1976 and 2011, the government issued over twenty "administrative directives on blanket or categorical deferrals of deportation" for humanitarian and other reasons ranging from protecting refugees to keeping families together. Andorra Bruno et al., Cong. Research Serv., Analysis of June 15, 2012 DHS Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 15 n.72, 20-23 (July 13, 2012) (capitalization omitted). The Executive has used deferred action to provide relief to battered spouses, human trafficking survivors, foreign students displaced by Hurricane Katrina, and surviving spouses of U.S. citizens. *Id*. at 20. Many of these

policies include work authorization, *e.g. id.* at 21; J.A. 822, 825, and since 1981, the Executive has acknowledged its authority to grant deferred action in published regulations that allow noncitizens to receive work authorization in connection with deferred action, *see* 8 C.F.R. § 109.1(b)(6) (1982), *codifying* 46 Fed. Reg. 25,079, 25,080 (May 5, 1981); 8 C.F.R. § 274a.12(c)(14).

Collectively, these policies provided relief to more than a million recipients before DACA was adopted. In addition, the Family Fairness program (1987-1990) made as many as 1.5 million individuals eligible for discretionary relief—more than 40 percent of the undocumented population at the time. AIC Report at 2.

Thus, in implementing DACA, DHS did not "'discover … an unheralded power'" in a "'long-extant statute,'" as the government contends. Br. 45 (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Instead, the Executive's interpretation of the INA to permit categorical deferred action policies was "early, longstanding, and consistent," and it accordingly "count[s] as powerful evidence of [the INA's] original public meaning." *Kisor*, 139 S. Ct. at 2426 (Gorsuch, J., concurring in the judgment) (emphasis omitted). The novel decision was not the adoption of DACA, but instead the Executive's current position to cede authority long exercised by administrations of both parties rather than protect institutional prerogatives.

2. Congress And This Court Have Ratified Deferred Action. This Court has recognized deferred action as "a regular practice" that the government may exercise "for humanitarian reasons or simply for [its] own convenience." *AADC*, 525 U.S. at 483-84 &

n.8. "Congress," meanwhile, "has not just kept its silence by refusing to overturn the administrative construction" of the INA authorizing deferred action, "but has ratified it with positive legislation." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381-82 (1969).

Even before the INA included any express mention of deferred action, Congress amended the INA to account for it. In 1987, for example, Congress enacted the current provision underlying DACA's work-authorization component, which provides that a noncitizen may be lawfully hired if she is "authorized to be so employed by … the Attorney General." 8 U.S.C. § 1324a(h)(3). And in 1996, Congress enacted 8 U.S.C. § 1252(g), which, as this Court recognized, was "clearly designed to give some measure of protection to 'no deferred action' decisions" in individual cases, *AADC*, 525 U.S. at 485. Congress enacted both provisions without purporting to prohibit the Executive's established practice of granting deferred action (including on a categorical basis), or countermanding the regulation expressly permitting the Attorney General to authorize employment for deferred-action recipients, 8 C.F.R. § 109.1(b)(6) (1982).

Since that time, moreover, Congress has: (1) provided statutory authority to grant deferred action to specific classes of noncitizens, *e.g.*, USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 361 (certain family members of lawful permanent residents killed on September 11, 2001, or of citizens killed in combat); (2) codified procedural protections for deferred action applications, 8 U.S.C. § 1227(d)(2) (denial of administrative stay "shall not preclude the alien from applying for … deferred action"); and (3) authorized States to issue driver's

licenses to deferred action recipients, REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 201(c)(2)(B)(viii), 119 Stat. 302 (2005).

Nowhere in this "closely related" legislation codifying deferred action and its attendant benefits did Congress evince any "contrary indication" that it sought to limit the "broad discretion" thus conferred. *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981). This demonstrates that the Executive is "implementing congressional policy rather than embarking on a frolic of its own." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

3. The Executive Has Inherent Authority To Implement And Maintain DACA. In any event, the power to grant deferred action does not depend on any delegation from Congress because it is inherent in the Executive's constitutional authority. "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Here, the Executive's constitutional duty under the Take Care Clause to "take Care that the Laws be faithfully executed" is more than enough to confer power to grant deferred action even "in absence of … a congressional grant … of authority." *Ibid.* "'Broad discretion,'" including "whether or not to prosecute" is a core executive constitutional function. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). And, an enduring principle of prosecutorial discretion is not prosecution to the full extent of the

law, but rather "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

The Executive has "sweeping authority" in the immigration context. *Trump*, 138 S. Ct. at 2413. Accordingly, Congress's "'delegat[ion]'" of enforcement discretion to DHS "merely authorizes the Executive Branch to exercise a power that it already has." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1248-49 (Thomas, J., dissenting). Congress need not speak with precision to "'delegate a policy decision of [great] economic and political magnitude to an administrative agency,'" Br. 45-46, when the constitutional separation of powers already assigns that decision to the Executive in the first instance.

The government's argument to the contrary is at odds with the administration's own theory of Executive authority. The government told this Court in *Trump v. Hawaii* that the Executive's power over immigration "stems not alone from legislative power but is inherent in the executive power." U.S. Br. 45, *Trump v. Hawaii*, No. 17-965 (U.S. Feb. 21, 2018) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950)). The government offers no principled basis for retreating from that authority here.

This is not to say that the Executive is unchecked. Congress can impose substantive limitations on deferred action—through legislation but not through silence. And under the APA, DHS can adopt deferred action policies only after giving "genuine," "reasoned explanation[s] … that can be scrutinized by courts and the interested public." *Dep't of Commerce*, 139 S. Ct. at 2575-76.

But Congress has not imposed any substantive limit here. Its failure to pass the DREAM Act, *see*

Texas, 809 F.3d at 185; *Texas* Pet. Br. 5 & n.2, cannot be read to limit deferred action because that Act was not a deferred-action policy; instead, it would have provided the Dreamers with a pathway to permanent residency. *Regents* Supp. App. 48a. Congress's failure to act left the status quo intact—where the agency can use, and often has used, deferred action. In fact, Congress repeatedly has refused to pass bills that would terminate DACA. *See, e.g.*, The Separation of Powers Act of 2015, H.R. 29, 114th Cong. (Jan. 6, 2015); No Free Rides Act, H.R. 3090, 115th Cong. (June 28, 2017).

4. DACA Fits Within Traditional Deferred Action Policies. DACA fits squarely within longstanding Executive practice. The policy is limited to individuals who even by Secretary Nielsen's standards are "not [a] priority of enforcement." *DHS Secretary on Trump's Reported Vulgar Comments, DACA Policy*, CBS News (Jan. 16, 2018), https://tinyurl.com/y8ekmzar. They undergo rigorous background checks, J.A. 924; may not have felony or multiple or serious misdemeanor convictions or "pos[e] a threat to national security or public safety"; and must be "in school," have a high school degree or equivalent, or be a veteran, *Regents* Pet. App. 98a. They are "productive young people" who "have already contributed to our country in significant ways." *Id.* at 99a. And because they arrived in this country "as children," *ibid*.—at the average age of 6.5, *Regents* Dist. Ct. ECF No. 119-2, at 41—they "lacked the intent to violate the law." *Regents* Pet. App. 98a. Indeed, "[a]s a general rule, it is not a crime for a removable alien to remain in the United States." *Arizona*, 567 U.S. at 407. DACA "ensure[s] that [the government's] enforcement resources are not

expended on these low priority cases." *Regents* Pet. App. 98a.

Like past forbearance policies, moreover, DACA serves "humanitarian" purposes. *AADC*, 525 U.S. at 483-84. DACA recipients "know only this country as home." *Regents* Pet. App. 97a-98a. Deportation "to countries where they may not have lived or even speak the language," *id.* at 99a, is a "'drastic measure'" akin to "'banishment or exile,'" *Dimaya*, 138 S. Ct. at 1213. The Executive has long treated a person's "ties to [her] home country (*e.g.*, whether the alien speaks the language or has relatives in the home country)" as a "[r]elevant humanitarian concern" in exercising prosecutorial discretion in immigration cases. Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion 3 (Nov. 17, 2000), https://tinyurl.com/y6hw8gsq. The concerns animating DACA are "consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion." J.A. 828 n.8.

The government argues that DACA is a policy of "'vast economic and political significance'" and therefore different from prior policies. Br. 44-45. Setting aside the fact that DHS was required to, but did not, weigh this "vast economic and political significance" in adopting its new policy terminating DACA (*supra* at 33-37), the government identifies no authority that the size of a categorical deferred action policy has statutory or constitutional significance. And the government offers no "discernible and manageable standard" for deciding when a deferred action policy goes "too far." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019).

Even still, whether this Court considers the number of individuals eligible or the number of recipients, DACA is comparable to past policies. The government inflates the number eligible to 1.7 million by including every child that could eventually age into the policy. Jeffrey S. Passel & Mark Hugo Lopez, Pew Research Center, *Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules* 3 (Aug. 14, 2012). The number immediately eligible was 950,000. *Ibid*. Either way, the population is comparable to the 1.5 million that were eligible for Family Fairness by the government's own contemporaneous estimates. The number ultimately "affected" by Family Fairness may have been smaller because fewer applied, Br. 49, but other policies reached hundreds of thousands of recipients, *see supra* at 4.

The government's remaining attempts to distinguish past policies are meritless. Those policies did not exclusively cover individuals awaiting visas or "categories of aliens for whom Congress had expressed special solicitude in the INA." Br. 47-48. The government granted deferred enforced departure to 190,000 Salvadorans after their eligibility for temporary protected status expired. AIC Report, at 7. And it granted deferred action for surviving spouses of U.S. citizens who had "no avenue of immigration relief." J.A. 826. Family Fairness covered individuals whose spouses and parents had a pathway to citizenship and at most could hope to "'bring in immediate relatives'" many years in the future. Br. 49. While some of these policies "purported" to exercise specific grants of statutory authority, Br. 49 n.10 (discussing extended voluntary departure statute), so does DACA, *see supra* at 6, and none of the past statutes support the government's insistence

that only explicit congressional authorization of categorical discretionary relief is sufficient.

5. DACA Does Not Facilitate Legal Violations. The government asserts that DACA "facilitates ongoing violation[s]" of the immigration laws. Br. 46 (emphasis omitted). But that is no more true of DACA than of individual grants of deferred action or for the myriad deferred enforcement policies historically approved by all three branches of government over decades. Perhaps more importantly, remaining in the country while removable is not a crime. Nor is obtaining work authorization or other benefits pursuant to regulations backed by statutory authority that the government does not question in this litigation. If anything, encouraging low-priority enforcement targets to self-identify facilitates enforcement against higher-priority targets. Indeed, the year that the Obama Administration implemented DACA, it deported a record number of individuals. *See* Ana Gonzalez-Barrera, *Record Number of Deportations in 2012*, Pew Research Center (Jan. 24, 2014), https://tinyurl.com/y292hjnh.

6. The APA Does Not Protect "Reasonable" But Wrong Legal Conclusions. Finally, the government argues that its legal position, even if not correct, was nevertheless "reasonable." Br. 43, 50-52. Under the APA, however, a "reasonable" but wrong legal analysis cannot sustain agency action. Agencies, like lower courts, may have "independent duty to determine whether [they] lac[k] authority to act." Br. 50. But those determinations, no less than lower courts' rulings, cannot evade judicial review. Agency decisions are reviewed for "abuse of discretion" and must be set aside if the agency's "conclusions" are "not in accordance with law." 5 U.S.C. § 706(2)(A). Just as

a lower court decision based on "an erroneous view of the law" is "necessarily" an abuse of discretion, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), an agency "order may not stand if the agency has misconceived the law," *Chenery I*, 318 U.S. at 94. Beyond conflicting with the APA, the government's proffered standard of a "reasonable" legal analysis is so ambiguous and subjective as to nearly always be a fallback argument for sustaining agency action. That is not, and cannot be, the law.

D. The Government's Other Proffered Rationales Do Not Justify DHS's Policy

Unable to defend Secretary Duke's stated rationale for her policy, the government primarily defends it on grounds she did not articulate. But these cannot survive scrutiny.

1. Concerns About Litigation Risk Do Not Justify The Decision

The government now claims Secretary Duke ended DACA because she had "serious doubts about the lawfulness of the policy and the litigation risks in maintaining it." Br. 33.

a. It is well-settled that courts "may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Instead, APA review is limited to the "grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery II*"). "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50.

The government's litigation-risk rationale is a "classic post hoc rationalization" because it appears

"[n]owhere in the administrative record." *Regents* Pet. App. 56a. Neither Attorney General Sessions nor Secretary Duke ever "consider[ed] whether defending the program in court would (or would not) be worth the litigation risk." *Ibid*. Although Secretary Duke mentioned possible litigation challenging DACA, she never identified "risks" posed by this litigation that the government would avoid by adopting a new policy.

The government now suggests the decision was motivated by a concern that a "court-ordered" end to the policy would be more "'abrupt'" than an administrative "wind-down." Br. 27, 34-35. But Secretary Duke's memorandum "offers absolutely no indication that [the government] considered these impacts," and no one reading the memorandum would "have guessed that [the government] made [its] decision for this reason." *Batalla Vidal* Pet. App. 111a-13a. The memorandum's statement that DACA should be terminated in "'an efficient and orderly fashion,'" Br. 27 (quoting *Regents* Pet. App. 116a-17a), did not evince a *reason* for terminating DACA; it was a statement of *how* the Secretary planned to end the policy given the administrative "complexities" of doing so.

A recent Freedom of Information Act production by the government confirms that DACA was terminated based on a legal judgment and not any other reason. *See supra* at 11. A Principals Committee meeting at the White House determined that DACA "is unlawful and will be ended" and specified a process to be followed. "The DOJ will send a memorandum to DHS outlining the legal reasons that the DACA program is unlawful," and then "DHS will draft a memorandum to withdraw the 2012 DACA memorandum, and any related memoranda or

guidance, in light of DOJ's legal determination." *Make the Road*, No. 1:18-cv-2445, ECF No. 63-1, at 209. At that point, "DHS will then propose a plan to wind down the DACA program." *Ibid.* This document establishes that the government did not include vital information in the incomplete administrative records in these cases, and that "litigation risk" and other subsequent "rationales" are litigation-driven, *post hoc* justifications and not legitimate bases for the decision.

b. The prospect of litigation hovers over virtually all major policy decisions by an agency. If that alone justified abandoning a rule, the APA's requirement of reasoned explanation would be a dead letter. As Gene Hamilton, the principal drafter of Secretary Duke's memorandum, testified, a "litigation risk" rationale "sounds like the craziest policy you could have in a department." J.A. 1007. Nor would anyone have thought that a decision to terminate DACA—a longstanding policy currently affecting 700,000 people—would avoid significant litigation. And indeed, it did not.

Any assessment of litigation risk also cannot be extricated from the government's flawed conclusion that DACA is unlawful. The Attorney General predicted that litigation challenging DACA would likely succeed "[b]ecause" of DACA's "legal and constitutional defects." J.A. 878. His factual and legal errors inevitably infected his conclusion. More fundamentally, Secretary Duke and Secretary Nielsen were "bound" by the Attorney General's conclusion that DACA is unlawful, *Regents* Pet. App. 122a-23a, so the discussion of potential litigation at best was offered to bolster a foregone conclusion. In these circumstances, it is impossible to excise the

Secretary's "mistake[s]" in concluding that DACA was unlawful and say they "clearly had no bearing on the … substance" of whatever litigation risk analysis she may have performed. *Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964).

c. Although the Attorney General and the Secretary placed great weight on the Fifth Circuit's decision in *Texas*, neither considered the "differences between DAPA and DACA that might have led to a different result." *Regents* Pet. App. 57a. The Fifth Circuit recognized that "DAPA and DACA are not identical" and that "any extrapolation from DACA [to DAPA] must be done carefully." *Texas*, 809 F.3d at 173-74. The policies differ in significant ways.

First, DAPA, unlike DACA, would have classified recipients as "lawfully present in the United States," as the memorandum adopting DAPA expressly stated. *Regents* Pet. App. 104a. This language formed the centerpiece of the *Texas* plaintiffs' arguments challenging DAPA before this Court. Texas Pet. Br., *United States v. Texas*, No. 15-674, at 1, 7-8 (U.S. Dec. 2015). By contrast, "the DACA memo itself said nothing about lawful presence." *Id*. at 6.

Second, DAPA covered parents of citizens and lawful permanent residents, who already had a statutory path to lawful immigration status. *Texas*, 809 F.3d 179-80.[4] The Fifth Circuit found this fact decisive in concluding that DAPA could not be justified as filling a "'gap'" in the INA. *Id.* at 186. Secretary Nielsen thus mischaracterized the Fifth

[4] The government is wrong that parents of lawful permanent residents have no path to lawful status. Br. 36. Lawful permanent residents can become citizens, 8 U.S.C. § 1427, and then sponsor their parents for lawful permanent residence, *id.* § 1151(b)(2)(A)(i).

Circuit's opinion when she claimed the decision "did not turn on whether [DAPA recipients] had a pathway to lawful status." *Regents* Pet. App. 122a. Unlike DAPA, DACA "has no … analogue in the INA"—DACA recipients have no statutory path to lawful status. *Id*. at 54a.

Third, DAPA was challenged before it took effect, whereas DACA took effect over seven years ago. Any judicial decision to terminate DACA necessarily would have to account for the policy's impact on hundreds of thousands of people. *Regents* Pet. App. 57a. Indeed, consideration of those costs had an impact in *Texas v. United States*, where a district court recently denied a preliminary injunction against DACA despite its doubts about DACA's lawfulness. 328 F. Supp. 3d 662, 740-42 (S.D. Tex. 2018). The court recognized the difficulty of "unscrambl[ing] the egg" after DACA recipients and their families relied on the program. *Ibid.* The recognition dispels any fear of the sort of imminent judicial termination of DACA that the government now claims it was seeking to avoid by winding down the policy.

Fourth, DAPA would have covered more than one-third of those unlawfully present in the United States. *Texas*, 809 F.3d at 148. The Fifth Circuit concluded that DAPA's size undermined its legality. *Id.* at 181-82. DACA is "open to far fewer individuals than DAPA would have been," *Batalla Vidal* Pet. App. 103a, and is close in size to past deferred action policies.

There is no evidence in the administrative record that the Secretary ever considered these distinctions. Failing to do so was arbitrary and capricious.

2. Secretary Nielsen's Memorandum Does Not Justify The Decision

a. Secretary Nielsen's central reason for supporting Secretary Duke's policy remains the Attorney General's erroneous conclusion that DACA is unlawful and unconstitutional. *Regents* Pet. App. 122a-23a. She also states that DACA should be ended because: (1) maintaining it despite "doubts" about its lawfulness may "undermine public confidence in and reliance on the agency and the rule of law" and result in "burdensome litigation"; (2) relief "should be enacted legislatively"; (3) deferred action should be implemented on an "individualized" basis; and (4) DHS should convey a "message" of "consistent" enforcement. *Id.* at 123a-24a.

The *NAACP* court rightly dismissed these "attempt[s] to disguise … objection[s] to DACA's legality as … policy justification[s]." *NAACP* Pet. App. 100a. "[B]oilerplate assertions[s]" that agencies should avoid legally questionable policies and leave them to Congress cannot "insulate" an agency's assessment of its legal authority from judicial review. *Id.* at 98a. Especially given the government's concession that the Attorney General's legal conclusion *compelled* Secretary Nielsen to defend DACA's termination, *NAACP* Ct. App. Oral Arg. 33:11-33:26, https://tinyurl.com/y64xnxoc, there is no way extricate her reasoning from the Attorney General's. *See Mass. Trustees*, 377 U.S. at 248. If Secretary Nielsen did not believe she was free to leave DACA in place, then there was no policy choice for her to make. At a minimum, her attempt to reframe the decision in policy terms in the midst of litigation challenging that premise must be "viewed critically." *Overton Park*, 401 U.S. at 420.

b. Even if considered independently, Secretary Nielsen's additional rationales also fail to supply the "reasoned explanation" missing from the Duke memorandum. *Dep't of Commerce*, 139 S. Ct. at 2575-76. None of the rationales finds support in the administrative record, to which "a court is ordinarily limited." *Id.* at 2573. Indeed, the government has never produced an administrative record supporting the Nielsen memorandum, and the judicial opinions on DAPA that largely comprise the record for the Duke memorandum do not support Secretary Nielsen's rationales. That alone is fatal. The rationales each fail on their own terms as well.

First, "doubts" about legal authority alone are insufficient to justify abandoning a lawful policy. Agencies do not ordinarily give up their policies merely because they are challenged, at least without specific, articulable reasons for doing so. This administration is no exception: Secretary Nielsen defended multiple controversial policies against legal challenges—including policies that detain minor children and separate them from their parents, *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018), preclude asylum for individuals who enter the United States outside a designated port of entry, *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1101 (N.D. Cal. 2018), and return asylum seekers to Mexico during their immigration proceedings, *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 124 (D.D.C. 2018). Each time, consistent with past practice, *e.g.*, *Trump*, 138 S. Ct. at 2423, the government endured "the litigation risks in maintaining" these policies despite public "doubts" about their lawfulness, Br. 33. Secretary Nielsen offers no neutral principle for treating "doubts" as dispositive here but not elsewhere. The evident explanation, which she

conceded, is that she was bound by the Attorney General's erroneous legal conclusion.

Second, asserting that relief "should be enacted legislatively" does not explain why the Executive should not act absent a legislative solution. As the government concedes, President Obama pursued a legislative solution but still supported DACA as a "stopgap" measure. Br. 38. Secretary Nielsen never explained why she viewed these two solutions as mutually exclusive.

Third, Secretary Nielsen's asserted aversion to categorical Executive action is incompatible both with decades-long deferred-action practice, *supra* at 4, and DHS's recent policies. Under the current administration, DHS has unilaterally imposed categorical bans on noncitizens from multiple countries and categorically altered the requirements for obtaining asylum—a far more expansive use of executive power than allowing a class of people to *apply* for an individualized grant of deferred action. *See supra* at 54. Indeed, just last month, the Executive defended its authority to "exercise its discretion" to limit asylum "through categorical rules, not just through case-by-case adjudication." App. for Stay Pending Appeal, at 26, *E. Bay*, No. 19A230 (U.S. Aug. 26, 2019). Selective departure from an agency's asserted principles is fundamentally arbitrary.

Fourth, maintaining DACA is fully compatible with Secretary Nielsen's view that deferred action decisions should be made on an "individualized" basis. The DACA policy requires all "requests for relief … to be decided on a case by case basis," affording ample "consideration … to the individual circumstances of each case." *Regents* Pet. App. 98a-99a. Satisfying DACA's criteria was only a prerequisite to being

"*considered*" for relief, *ibid.* (emphasis added)—it did not create a "presumption" that relief would be granted. Br. 39-40. The high percentage of applications granted reflects that many warranted discretionary relief, and that the most deserving applicants self-selected to apply. If Secretary Nielsen believed that fewer applications should have been granted, "she [could have] simply direct[ed] her employees to implement" the policy accordingly. *NAACP* Pet. App. 100a.

DHS's new policy, in fact, leaves no possibility for the "individualized" relief that Secretary Nielsen promises. Secretary Duke's memorandum directs DHS officers to deny *all* deferred action requests from DACA-eligible individuals, even where DHS might have granted the same relief before DACA's adoption in 2012. *Regents* Pet. App. 117a-18a. In practice, therefore, ending DACA is not a return to individualized discretion—it is a policy of categorical denial of relief.

Fifth, ending DACA to "project a message" of consistent enforcement makes little sense, since "DACA is available only to those individuals who have lived in the United States since 2007." *NAACP* Pet. App. 102a. DACA's termination would send no meaningful signal to undocumented individuals who arrived after 2007. The notion that the failure to rescind this program has caused even one person, much less many of them, to enter unlawful with the hope of obtaining amenities and a path to remain is unsupported by the record and contrary to recent empirical research. *See* Tom K. Wong & Hillary Kosnac, *Does the Legalization of Undocumented Immigrants in the US Encourage Unauthorized Immigration from Mexico? An Empirical Analysis of*

the Moral Hazard of Legalization, 55 International Migration 159 (2017).

c. In any event, Secretary Nielsen's analysis is insufficient because she did not grapple with the toll of Secretary Duke's action on the affected people and institutions. Her memorandum simply asserts that she is "keenly aware" that "DACA recipients" have "availed themselves" of the policy, and that their "interests" do not "outweigh" the agency's other concerns. *Regents* Pet. App. 125a.

This perfunctory analysis falls well short of the "detailed justification"—"consider[ing] *all* of the relevant costs"—that the APA requires. *Mingo*, 829 F.3d at 737 (Kavanaugh, J., dissenting) (emphasis added). Secretary Nielsen never identifies the "interests" of DACA recipients that she supposedly weighed or addresses the hardships they will face without DACA. Instead, she dismisses these concerns because DACA "conferred no substantive rights." *Regents* Pet. App. 125a. Nor does she purport to weigh the substantial burden her decision imposes on the economy as a whole and the many stakeholders—families, communities, workplaces, and schools—that structured their lives and businesses around the policy, just as the government intended them to do.

Ultimately, moreover, Secretary Nielsen's limited cost-benefit analysis depends on the validity of *each* of the reasons discussed in her memorandum. While Secretary Nielsen claimed each "separate" rationale was "independently sufficient" to justify the new policy, *Regents* Pet. App. 122a, her conclusion was that "the questionable legality of the DACA policy and other reasons for ending the policy" *collectively* outweigh DACA recipients' interests in maintaining the policy. *Id.* at 125a. *Any* error in her reasoning—

including her threshold legal error that DACA is unlawful—undermines that conclusion. This Court cannot dismiss Secretary Nielsen's numerous errors as harmless. *Mass. Trustees*, 377 U.S. at 248.

CONCLUSION

The beneficiaries of DACA—including individual recipients, communities, schools, and businesses—are as numerous and varied as the contributions DACA recipients make to our nation. DACA allows 700,000 vetted young people to live, work, and learn in this country without persistent fear of being sent to a place they may not remember or even speak the language. The government may replace DACA with a different policy, thus raising the specter of deportation, only if it satisfies the APA's requirement for reasoned decisionmaking so it can be held publicly accountable. That includes weighing the costs of eliminating this valuable humanitarian policy. Perhaps knowing that a true cost-benefit analysis could not possibly justify this change, the government argues that its hands were tied as a legal matter. That is wrong—DACA is lawful, and the government is free to maintain the program. If it does not wish to do so, the APA requires a reasoned explanation of why it is changing course supported by an administrative record. Because the government has provided no such explanation, this Court should affirm the decisions below.

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