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

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, JANET NAPOLITANO, AND THE CITY OF SAN JOSÉ

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

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

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL.
Respondents.

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

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QUESTIONS PRESENTED

1. Whether the decision of the Acting Secretary of Homeland Secretary to rescind the Deferred Action for Childhood Arrivals (DACA) policy is subject to judicial review under the Administrative Procedure Act.

2. Whether the decision to rescind the DACA policy was arbitrary and capricious.

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INTRODUCTION

After the President stated repeatedly that DACA participants had nothing to fear and should rest easy, the Acting Secretary of Homeland Security abruptly announced the rescission of DACA. There is no dispute that this decision has life-changing implications for nearly 700,000 DACA participants and their families. Yet the Acting Secretary provided only a single vague sentence of explanation for the decision that leaves basic questions unanswered.

The government argues that this highly consequential decision is immune from judicial review under the Administrative Procedure Act. But the government has not overcome the strong presumption favoring judicial review of agency action. Nor has it demonstrated that this case fits into one of the few and narrow categories of agency action traditionally viewed as "committed to agency discretion by law." When an agency determines that an action is *required* by law, as the agency did here, it is not exercising discretion. Instead, the agency is concluding that it has no discretion to exercise. It makes no sense to hold that such legal determinations cannot be reviewed by a court.

On the merits, the Acting Secretary's explanation is too vague and cursory to satisfy the APA's arbitrary-and-capricious standard. These deficiencies are not cured by Secretary Nielsen's post hoc effort, in the midst of litigation, to rehabilitate Acting Secretary Duke's explanation.

In addition, the interlocutory posture of *Regents* and *Batalla Vidal*, the evident incompleteness of the administrative record, and evidence that the actual

reasons for rescinding DACA are different from the stated reasons, are additional reasons for affirming the preliminary injunctions in those cases.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions not reproduced in Petitioners' brief are reproduced in an appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

1. Deferred Action Policies. The Immigration and Nationality Act (INA) establishes requirements governing the admissibility of noncitizens into the United States, see, *e.g.*, 8 U.S.C. §§ 1181-88, as well as procedures for the detention and removal of noncitizens, see, *e.g.*, *id.* §§ 1226-29c. Subject to those provisions, Congress has assigned the Secretary of Homeland Security responsibility for "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5).

Since 1956, every presidential administration has exercised this authority by adopting policies under which the government forgoes immigration enforcement against certain categories of immigrants. See SER265-66 (summarizing 17 pre-DACA discretionary relief policies).[1] President Eisenhower "paroled" into the United States tens of thousands of otherwise-excludable Hungarian refugees after the Soviet Union crushed the Hungarian Revolution. Dkt. 121-1 at 11,

[1] "ER" and "SER" refer to the Ninth Circuit Excerpts and Supplemental Excerpts of Record. "Dkt." refers to docket entries in the district court.

13 (Statements of President Eisenhower). Presidents Eisenhower, Kennedy, Johnson, and Nixon paroled more than 600,000 Cuban immigrants into the United States through a series of discretionary policies. American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present* (Oct. 2014), *available at* https://bit.ly/2hIzgX8.

In 1987, the Reagan Administration instituted the Family Fairness Program, which provided eligibility for extended voluntary departure to spouses and children of individuals in the process of legalizing their immigration status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (IRCA), even though the Act itself did not cover spouses and children. Dkt. 121-1 at 20-24 (INS Commissioner Alan C. Nelson, *Legalization and Family Fairness — An Analysis* (Oct. 21, 1987)). In 1990, President George H. W. Bush expanded that program. *Id.* at 26-27 (Memorandum from Gene McNary, Comm'r, INS, to Reg'l Comm'rs, INS, *Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990)). The Family Fairness Program ultimately extended relief to approximately 1.5 million people, an estimated 40 percent of the undocumented population at the time. See U.S. Cert. Pet. at 7, *United States v. Texas*, No. 15-674 (2015).

The Clinton Administration established a deferred action policy for individuals petitioning for relief under the Violence Against Women Act of 1994. Dkt. 121-1 at 56-62 (Memorandum from Paul W. Virtue, Acting Exec. Assoc. Comm'r, INS., to Reg'l Dirs. et al., INS, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* (May 6, 1997)).

The George W. Bush Administration similarly provided deferred action to certain applicants for T and U visas (victims of human trafficking and crimes such as domestic violence, respectively), *id.* at 67-68 (Memorandum from Stuart Anderson, Exec. Assoc. Comm'r, INS, to Johnny N. Williams, Exec. Assoc. Comm'r, INS, *Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* (May 8, 2002)), which subsequently were ratified by statute, see 8 U.S.C. § 1227(d)(2) (U visa and T visa applicants are eligible for "deferred action").

These policies, and others like them, reflect the reality that the government lacks sufficient resources to "enforce all of the [immigration] rules and regulations presently on the books," and that in "some situations, application of the literal letter of the law would simply be unconscionable and would serve no useful purpose." SER1215 (Memorandum from Sam Bernsen, INS General Counsel, to Commissioner, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976)). For decades, the legality of these policies was widely accepted and none was challenged in court.

Congress has also expressly acknowledged the existence of deferred action policies. See, *e.g.*, 8 U.S.C. § 1227(d)(2); *id.* § 1154(a)(1)(D)(i)(II), (IV) (petitioners under the Violence Against Women Act are eligible for "deferred action and work authorization"); *id.* § 1151 note (certain immediate family members of certain United States citizens "shall be eligible for deferred action").

2. DACA. The Department of Homeland Security (DHS) established the DACA policy in 2012. *Regents* Pet. App. 97a-101a. The memorandum establishing

the policy provides that "certain young people who were brought to this country as children and know only this country as home" are eligible to apply for case-by-case discretionary relief from removal if they (1) came to the United States under the age of sixteen; (2) have continuously resided in the United States since June 15, 2007, and were present in the United States both on June 15, 2012, and on the date they requested DACA; (3) are in school, have graduated from high school, have obtained a GED, or have been honorably discharged from the United States military or Coast Guard; (4) do not have a significant criminal record and are not a threat to national security or public safety; (5) were under the age of 31 as of June 15, 2012; and (6) do not have lawful immigration status. *Id.* at 97a-98a. Eligible applicants are required to provide the government with sensitive personal information, including their home address and fingerprints, submit to a rigorous DHS background check, and pay a substantial application fee. SER1308, 1325-26, 1328 (USCIS Form I-821D, *Consideration of Deferred Action for Childhood Arrivals*, and Instructions).

Before DACA was announced, the Office of Legal Counsel (OLC) advised that "such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis." JA 827-28 n.8. This advice was memorialized in a comprehensive 2014 OLC opinion. JA 797-856. In accordance with OLC's advice, the memorandum creating DACA directs that, for applicants meeting the threshold criteria, "requests for relief pursuant to this memorandum are to be decided on a case by case basis," as "part of th[e] exercise of

prosecutorial discretion." *Regents* Pet. App. 99a. The memorandum further provides that "DHS cannot provide any assurance that relief will be granted in all cases." *Ibid.* In defending against legal challenges to the DACA policy, the government argued that DACA is "a valid exercise of the Secretary's broad authority and discretion to set policies for enforcing the immigration laws." U.S. Br. *1, *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017), 2015 WL 5120846.

The government does not dispute that DACA has created enormous benefits for participants and the country as a whole. Nearly 700,000 young immigrants currently have deferred action under the policy. Dkt. 290-2 (Demographics Report). Pursuant to longstanding regulations, DACA participants, like the beneficiaries of prior deferred action policies, may obtain employment authorization and a social security number. See 8 C.F.R. § 274a.12(c)(14) (promulgated in 1987); *id.* § 109.1(b)(7) (1982); *id.* § 1.3(a)(4) (promulgated in 1996). These benefits have allowed DACA participants to achieve a 91 percent employment rate, and to increase their wages by 69 percent. SER1145-48 (Wong Decl.). Access to lawful work allows DACA participants to support their families, including their estimated 200,000 U.S.-citizen children, SER1155, and to receive employer-sponsored health insurance. Dkt. 118-1 at 260 (McLeod Decl.). The rescission of DACA would cost the country an estimated $215 billion in lost GDP and $60 billion in lost federal tax revenue over a ten-year period. SER359 (Brannon & Albright Decl.). In addition, DACA participants contribute more than $1.25 billion in state and local tax revenue each year. SER447 (Essig, et al. Decl.).

DACA has allowed 94 percent of participants to pursue educational opportunities previously unavailable to them; 72 percent are pursuing a bachelor's or higher degree. SER1152 (Wong Decl.). For example, Mitchell Santos Toledo arrived in the United States from Mexico when he was less than two years old. JA 954 (Santos Toledo Decl.). Despite growing up in difficult circumstances, he excelled in school. *Id.* at 954-56. Upon graduation from high school, he was accepted at the University of California, Berkeley, but could not attend because his family was poor and he was unable to lawfully work in the United States. *Id.* at 957-58. Once DACA was created, Santos Toledo was granted deferred action in 2013. *Id.* at 959. For the first time, he was allowed to lawfully work, and earned enough as a bank teller and paralegal to begin his studies at UC Berkeley, while also helping to support his family. *Id.* at 960-61. Santos Toledo graduated with Highest Distinction in Legal Studies in 2016, and was the commencement speaker for his program. *Id.* at 962-63. He now attends Harvard Law School. *Id.* at 963. If DACA is rescinded, Santos Toledo will be unable to lawfully work in the United States and could be deported at any time to a country he has not lived in since he was less than two years old. *Id.* at 964.

Evelyn Valdez-Ward arrived in the United States when she was six months old. SER1109 (Valdez-Ward Decl.). She did not know that she was undocumented until she applied for college. *Id.* at 1110. When she received her work authorization after obtaining deferred action through DACA, she "got [her] first real job as a cashier at Kroger's," then worked as a tutor

and restaurant server—all while paying undergraduate tuition and giving money to her family. She has since become an acclaimed doctoral student in Ecology and Biology at UC Irvine. *Id.* at 1111-13. Her doctoral research, which is supported by a grant from the Ford Foundation, cannot be completed if DACA is terminated. *Id.* at 1113.

3. The Government's Decision to Rescind DACA. Early in his Administration, President Trump affirmed that the "policy of [his] administration [is] to allow the dreamers to stay" and declared that "dreamers should rest easy."[2] In February 2017, then-Secretary of Homeland Security Kelly exempted DACA from a repeal of other immigration directives, JA 857-67, and stated that "DACA status" is a "commitment * * * by the government towards the DACA person," Dkt. 121-1 at 273.

On September 4, 2017, however, then-Attorney General Sessions sent a half-page letter to then-Acting Secretary of Homeland Security Duke, advising that DHS "should rescind" DACA because it was "effectuated * * * without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." JA 877-78. The letter asserted that DACA "has the same legal and constitutional defects" as a different deferred action policy, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which had been preliminarily enjoined in a decision affirmed by the Fifth Circuit in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015),

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[2] SER1346-47 (Tr. of AP Interview with Trump (Apr. 24, 2017), https://www.cbsnews.com/news/transcript-of-ap-interview-with-trump/).

aff'd by an equally divided Court, 136 S. Ct. 2271 (2016). JA 878. The Attorney General's letter does not elaborate on the purported "constitutional defects" in DACA. Neither the Fifth Circuit nor any other court has ever found any deferred action policy unconstitutional.

On September 5, the day after the Attorney General's letter, Acting Secretary Duke issued a memorandum rescinding DACA. *Regents* Pet. App. 111a-12a. The memorandum instructed DHS to cease accepting new DACA applications and advance parole applications and to accept renewal applications only through October 5, 2017, and only from individuals whose deferred action would expire before March 5, 2018. *Id.* at 117a-18a. The memorandum provided a one-sentence justification for ending DACA: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." *Id.* at 117a.

That same day, the President tweeted: "Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can't, I will revisit this issue!" Donald J. Trump (@realDonaldTrump), Twitter (Sept. 5, 2017, 8:38 PM), https://tinyurl.com/y7f2y6tj. The President later tweeted that "[t]he Democrats have been told, and fully understand, that there can be no DACA without the desperately needed WALL at the Southern Border and an END to the horrible Chain Migration & ridiculous Lottery System of Immigration etc." Donald J. Trump (@realDonaldTrump), Twitter (Dec. 29, 2017, 5:16 AM), https://goo.gl/aZ19im.

4. The California Litigation. The University of California and other Respondents brought actions in the Northern District of California contending that the decision to rescind DACA violated the Administrative Procedure Act (APA). *Regents* Pet. App. 19a-22a. Some Respondents also challenged the rescission on due process and equal protection grounds. *Id.* at 22a.

a. The administrative record produced by the government consists of 14 publicly-available documents totaling 256 pages, including 187 pages of judicial opinions. See Dkt. 64-1. The lower courts have determined that this administrative record is incomplete.[3] This Court has directed the lower courts to adjudicate the government's threshold reviewability arguments before proceeding with litigation to complete the administrative record. *In re United States*, 138 S. Ct. 443 (2017).

b. Petitioners moved to dismiss the complaints; Respondents opposed Petitioners' motion and sought a preliminary injunction on their APA claims. See Dkt. 111 at 10; Dkt. 205. The district court granted both motions in part. *Regents* Pet. App. 66a-69a. The court held that Respondents are likely to succeed on their claim that the rescission was arbitrary and capricious. *Id.* at 54a, 62a. In finding that Respondents also satisfied the remaining preliminary injunction factors, the court relied on Respondents' extraordinary showing of irreparable harm, see *id.* at 62a-63a, which establishes, for example, that the rescission would cause

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[3] See Dkt. 79 (ordering completion of the administrative record); *In re United States*, 875 F.3d 1200, 1205 (9th Cir.) (denying mandamus petition), *judgment vacated*, 138 S. Ct. 443 (2017); *In re Nielsen*, No. 17-3345, slip op. at 2-3 (2d Cir. Dec. 27, 2017).

roughly 1,400 DACA participants to lose their jobs each business day, SER1459 (Center for America Progress, *Study: The Impact of Deferred Action for Childhood Arrivals (DACA) Program Repeal on Jobs*), and force tens of thousands of DACA participant undergraduate and graduate students to discontinue their studies for lack of support, SER1152-53 (Wong Decl.). The University of California alone has approximately 1,700 DACA students whose educations and contributions to the University would be imperiled by the rescission. SER365-69 (Brick Decl.).

The court's injunction required the government to "allow[] DACA enrollees to renew their enrollments" under the terms applicable prior to the rescission. *Regents* Pet. App. 66a. For "each renewal application," the district court permitted the government to continue to "take administrative steps to make sure fair discretion is exercised on an individualized basis." *Ibid*. The injunction does not prohibit DHS "from proceeding to remove any individual, including any DACA enrollee, who it determines poses a risk to national security or public safety, or otherwise deserves, in its judgment, to be removed." *Ibid*. Nor does the injunction require DHS to process DACA applications from individuals who had not previously received deferred action, or to restore DACA participants' ability to obtain advance parole to travel abroad and return home to the United States. *Ibid*.

c. The Ninth Circuit affirmed the district court's orders. *Regents* Pet. Supp. App. 1a-87a. The court held that the rescission decision is not "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2). The court reasoned that the rescission was based on a non-discretionary legal determination that "DACA

was beyond the authority of DHS." *Regents* Pet. Supp. App. 41a. It concluded that administrative decisions premised "on a belief that any alternative choice was foreclosed by law" are not "committed to agency discretion." *Id.* at 29a.

The court next held that Respondents are likely to succeed on the merits of their APA claims, because DACA is "a permissible exercise of executive discretion" that is consistent with the INA, *id.* at 56a-57a, and "where an agency purports to act solely on the basis that a certain result is legally required, and that legal premise turns out to be incorrect, the action must be set aside," *id.* at 46a. The court emphasized that it was "not hold[ing] that DACA *could not* be rescinded as an exercise of Executive Branch discretion," but only that the legal grounds identified by the agency were erroneous. *Id.* at 57a.

On appeal, the government did not dispute the district court's holdings that the likelihood of irreparable harm, the balance of hardships, and the public interest all strongly favor a preliminary injunction. *Id.* at 45a-46a.

The court of appeals also affirmed the denial of the government's motion to dismiss Respondents' equal protection claims, holding that "the likelihood of success on [Respondents'] equal protection claim is a second, alternative ground for affirming the entry of the injunction." *Id.* at 61a-77a & n.31.

Judge Owens concurred in the judgment, concluding that the APA claim was immune from judicial review but that the preliminary injunction should be affirmed on equal protection grounds. *Id.* at 84a-87a.

5. The New York, Maryland, and District of Columbia Litigation. While the *Regents* cases were proceeding, additional challenges to the rescission of DACA proceeded in other courts and reached the same result.

- In February 2018, the District Court for the Eastern District of New York preliminarily enjoined the rescission of DACA in an order that tracks the terms of the *Regents* injunction. *Batalla Vidal* Pet. App. 126a-128a.

- In March 2018, the District Court for the District of Maryland granted summary judgment to the government, concluding that the rescission was reviewable, but not arbitrary and capricious. *Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758 (D. Md. 2018). On appeal, the Fourth Circuit reversed, concluding that the rescission was reviewable, arbitrary and capricious, and should be vacated under the APA. *Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684 (4th Cir. 2019).

- In April 2018, the District Court for the District of Columbia granted partial summary judgment against the government and vacated the rescission of DACA, concluding that it violated the APA. *NAACP* Pet. App. 72a-74a.

In *NAACP*, the district court stayed its order for 90 days to give DHS the opportunity to "issue[] a new decision rescinding DACA." *NAACP* Pet. App. 76a. Rather than issue a new decision, Secretary of Homeland Security Nielsen issued a memorandum "concur[ring]

with and declin[ing] to disturb" the Duke Memorandum's rescission of the DACA policy. *Regents* Pet. App. 126a. The memorandum states that it "reflects [Secretary Nielsen's] understanding of the Duke memorandum" and purports to offer "further explanation" of the rescission of DACA. *Id*. at 121a.

5. The Government's Petitions for Certiorari. In January 2018, the government filed a petition seeking certiorari before judgment to review the preliminary injunction entered by the district court in *Regents*. This Court denied the petition. 138 S. Ct. 1182.

In November 2018, the government filed a second petition for certiorari before judgment in *Regents*, and also sought certiorari before judgment in *NAACP* and *Batalla Vidal*. On June 28, 2019, this Court granted certiorari in *Regents*, and granted certiorari before judgment in *NAACP* and *Batalla Vidal*.[4]

SUMMARY OF ARGUMENT

1. The decision to rescind DACA is judicially reviewable. The strong presumption favoring judicial review of administrative action, rather than the very narrow exception for actions "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), applies here.

First, the rescission rests on a determination that DACA is unlawful. In reviewing that legal determination, a court clearly has "law to apply." Moreover, when an agency concludes that an action is prohibited by law, it is not exercising discretion. Instead, it has found that it has no discretion to exercise. To say that an agency's determination that it lacks discretion is

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[4] The government also filed a petition for certiorari in *Casa de Maryland*, No. 18-1469, which remains pending.

committed to the agency's discretion verges on the nonsensical.

Second, DACA is a generally-applicable policy that affects hundreds of thousands of people. Decisions to terminate such policies have not traditionally been regarded as among the very few categories of agency decisions that are committed to agency discretion by law.

The Nielsen Memorandum does not alter the reviewability analysis. The "discretionary" reasons it offers for ending DACA are impermissibly post hoc, inextricably linked to the lawfulness of DACA, or both. Moreover, the APA expressly contemplates that agency actions based on discretionary considerations are reviewable for "abuse of discretion." 5 U.S.C. § 706(2)(A).

2. The rescission was arbitrary and capricious.

a. Acting Secretary Duke's one-sentence explanation cannot withstand judicial review. The Duke Memorandum does not explain the basis for concluding that a Fifth Circuit decision concerning DAPA compels the conclusion that DACA is unlawful, nor does it address the differences between those policies. The Duke Memorandum leaves unexplained the Attorney General's erroneous assertion that the Fifth Circuit held DAPA to be unconstitutional. It does not address whether the Secretary regarded the Attorney General's letter as "controlling." See 8 U.S.C. § 1103(a)(1). And it never explains why a carefully-reasoned OLC opinion reaching the opposite conclusion is incorrect.

The post hoc Nielsen Memorandum does not cure these defects. That memorandum fails to address,

among other things, the OLC opinion and the differences between DAPA and DACA. Moreover, its reasoning is inextricably tied to the lawfulness of DACA and its "messaging" rationale is insupportable.

DHS also failed to demonstrate that it gave adequate consideration to the welfare of the individuals affected by the decision or the reliance of DACA participants on the policy, rendering its decision arbitrary.

The government's reliance on "litigation risk," which is never mentioned in the Duke Memorandum, is not an adequate, independent basis for the rescission. Agencies cannot evade meaningful judicial review of legal conclusions by repackaging them as "litigation risk" assessments. In any event, DHS failed to show that it considered important aspects of litigation risk.

b. The Acting Secretary erred in concluding that DACA is unlawful. Congress granted DHS authority to "[e]stablish[] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). Beginning with President Eisenhower, every administration has exercised this authority to grant deferred action to groups of otherwise removable immigrants. Congress has expressly recognized that the Executive Branch possesses this authority. It did so knowing that longstanding regulations confer benefits, such as work authorization, on individuals granted deferred action. See 8 U.S.C. § 1324a(h)(3).

The government's assertion that DACA automatically grants deferred action to a vast category of undocumented individuals is incorrect. The DACA Mem-

orandum expressly provides that immigration officials must evaluate each application on an individualized basis, and the evidence confirms that this is how the policy has been implemented.

c. At a minimum, this Court should not reach a final decision on the merits in the absence of a complete administrative record. The current record is incomplete on its face, and multiple courts have so found. The arguments against making a final decision on the merits in the absence of a complete record are strengthened by indications that the Executive Branch had other reasons, apart from its view of the lawfulness of DACA, for rescinding the policy.

ARGUMENT

I. The Rescission Of DACA Is Reviewable.

There is a "strong presumption" that administrative actions are subject to judicial review. *Weyerhauser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). That presumption applies to the decision to rescind DACA. Where, as here, an agency concludes that its action is required by law, it is not exercising discretion. Instead, it is concluding that it has no discretion to exercise. Moreover, when an agency asserts that an action is required by judicial decisions, it shifts responsibility for its actions onto the courts. In such cases, it is "the province and duty" of this Court, not the agency, "to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803); see 5 U.S.C. § 706 ("the reviewing court shall decide all relevant questions of law").

A. Acting Secretary Duke's Decision Is Reviewable.

The starting point for analyzing reviewability is the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015); *INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001) (applying presumption in the immigration context). The APA's expansive judicial review provision provides that any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA's "generous review provisions must be given a hospitable interpretation." *Abbott Labs. v. Gardner*, 387 U. S. 136, 140-41 (1967) (citations omitted).

The government's brief never mentions the strong presumption favoring judicial review, or the "heavy burden" the government must carry to overcome that presumption. *Mach Mining*, 135 S. Ct. at 1651. Instead, it moves directly to an argument that judicial review is precluded by 5 U.S.C. § 701(a)(2), which applies to actions "committed to agency discretion by law." Section 701(a)(2) creates only a "very narrow exception" to the strong presumption of judicial review, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), that applies only in "'rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion,'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019) (quoting *Weyerhaeuser*, 139 S. Ct. at 370).

So long as there is "law to apply" in reviewing a challenged action, the exception does not apply and judicial review is available. *Id.* at 2568-69.

This Court has limited section 701(a)(2) to a very short list of categories of "administrative decisions that courts traditionally have regarded as 'committed to agency discretion.'" *Dep't of Commerce*, 139 S. Ct. at 2568 (citing *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); *Webster v. Doe*, 486 U.S. 592, 600-01 (1988); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)). The rescission of DACA is not an intelligence agency personnel decision, see *Webster*, 486 U.S. at 600-01, a denial of a reconsideration motion alleging material error, see *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (*BLE*), or a re-allocation of funds from a lump-sum appropriation, *Lincoln*, 508 U.S. at 192. The government contends, however, that the rescission of DACA falls within the traditionally unreviewable category of a decision not to institute enforcement proceedings. U.S. Br. 23. That argument fails for several reasons.

1. The Court undoubtedly has "law to apply" in evaluating the rescission. Acting Secretary Duke gave a one-sentence explanation for her action: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." *Regents* Pet. App. 117a. This explanation, such as it is, rests entirely on the law. It invokes a legal determination by the then-Attorney General that DACA was "effectuated * * * without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." *Id.* at

116a. It also relies on judicial opinions concerning another deferred action policy, DAPA. The Acting Secretary offered nothing else as a basis for her decision.

Courts are well equipped to review the legal conclusion that DACA is unlawful. Indeed, it is "almost ludicrous to suggest that there is 'no *law* to apply' in reviewing whether an agency has reasonably interpreted a *law*." *Int'l Union, UAW v. Brock*, 783 F.2d 237, 246 (D.C. Cir. 1986). The APA expressly provides that courts, not agencies, are to "decide all relevant questions of law." 5 U.S.C. § 706. This case thus presents "the sort of routine dispute that federal courts regularly review." *Weyerhauser*, 139 S. Ct. at 370. See, *e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 529-34 (2007) (setting aside EPA decision premised on the agency's misinterpretation of its legal authority); *SEC v. Chenery Corp.* ("*Chenery I*"), 318 U.S. 80, 94 (1943) ("an order may not stand if the agency has misconceived the law").

Moreover, when an agency concludes that an action is required by law, it is not exercising discretion. Instead, it has determined that it *lacks* any discretion. It thus make no sense to say that the agency's action is "committed to agency discretion by law." Cf. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) ("Agencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground."). If the government's position were accepted, it would have the bizarre consequence that when an agency mistakenly concludes that it lacks discretion, the courts are powerless to correct the agency's legal error, leaving the

agency to exercise less than the powers actually provided by law.

Here, moreover, the agency deflected responsibility for ending DACA to the courts, by declaring that judicial decisions require that DACA be ended. When an agency makes such a declaration, judicial review upholds not only the design of the APA but the structure of the Constitution. As the Ninth Circuit noted, judicial review in these circumstances upholds "values fundamental to the administrative process," serving "the critical function of promoting * * * democratic accountability to the people," by preventing the Executive Branch from shirking accountability for its actions. *Regents* Pet. Supp. App. 31a-32a.

2. The government relies on this Court's decisions in *Chaney* and *BLE*, but those decisions do not resolve the reviewability issue in this case, and in fact cast doubt on the government's expansive interpretation of section 701(a)(2).

a. In *Chaney*, eight death-row inmates petitioned the FDA to initiate enforcement proceedings to prevent the use of drugs in their executions that they alleged were not "safe and effective." 470 U.S. at 823-24. The FDA denied their request, concluding that its enforcement authority "was generally unclear" and that, assuming it possessed such authority, it was "authorized to decline to exercise it under [its] inherent discretion to decline to pursue certain enforcement matters." *Id.* at 824-25. Reasoning that "an agency's decision not to take enforcement action should be presumed immune from judicial review," the Court held that the FDA's refusal to take enforcement action was unreviewable. *Id.* at 832. That holding was limited in several important respects.

First, *Chaney* concerned an agency's decision not to institute *specific* requested enforcement proceedings, which the Court found "has traditionally been 'committed to agency discretion.'" *Ibid.* *Chaney* did not concern the creation or rescission of a generally applicable policy like DACA. *Id.* at 823 ("This case presents the question of the extent to which a decision of an administrative agency to exercise its 'discretion' not to undertake *certain enforcement actions* is subject to judicial review * * * ." (emphasis added)); see also *Dep't of Commerce*, 139 S. Ct. at 2568 (describing *Chaney* as involving "a decision not to institute enforcement proceedings"). Both the Court and the FDA viewed the requested agency action as a one-time enforcement decision "involv[ing] a complicated balancing of a number of factors which [were] peculiarly within [the FDA's] expertise." *Chaney*, 470 U.S. at 831. As the Ninth Circuit correctly observed, "[n]owhere does [*Chaney*] suggest the broader proposition that any decision simply related to enforcement should be presumed unreviewable." *Regents* Pet. Supp. App. 34a n.13.

Unlike the one-time enforcement decision at issue in *Chaney*, the rescission was not a decision to initiate, or not initiate, enforcement proceedings in any specific immigration case. Nor did the Acting Secretary's decision involve "a complicated balancing of a number of factors * * * peculiarly within [DHS's] expertise." Instead, the rescission rests on a legal conclusion concerning the scope of DHS's authority. Cf. *Massachusetts*, 549 U.S. at 527 (declining to extend *Chaney* to decisions not to institute a rulemaking and noting that "agency refusals to initiate rulemaking 'are less

frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation'" (citation omitted)).

In contrast to the individual enforcement decisions in *Chaney*, there is no established tradition of non-reviewability for programmatic policy decisions. The rescission of DACA directly affects nearly 700,000 participants, and has even more widespread indirect effects. Such decisions repeatedly have been held reviewable. *E.g.*, *Dep't of Commerce*, 139 S. Ct. at 2567-69 (reviewing decision to reinstate citizenship question to standard census form); *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) ("an agency's statement of a general enforcement policy" is reviewable even though a "single-shot nonenforcement decision" may not be (citation and emphases omitted)); cf. also *Texas*, 809 F.3d at 163-69.

Moreover, when a court reviews a single-shot non-enforcement decision, it considers whether the agency *must* enforce a statute against a specific target. If the inmates' claim in *Chaney* had succeeded, the "implausible result" would have been that a court would have *required* FDA "to exercise its enforcement power to ensure that States only use drugs that are 'safe and effective' for human execution." 470 U.S. at 827. In contrast, judicial review of whether an agency has the authority to implement a discretionary non-enforcement policy involves no such intrusion into agency authority. Far from forcing the agency to do anything, a judicial finding that an agency possesses certain authority provides the agency with greater policy flexibility.

Second, this Court's decision in *Chaney* recognized a critical distinction between enforcement decisions

and *non*-enforcement decisions, noting that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights." *Id.* at 832. That reasoning does not extend to the rescission of DACA. By *eliminating* a non-enforcement policy, the government paves the way for the subsequent exercise of coercive power over individuals, including arrest and deportation. See U.S. Br. 45 (arguing that DACA participants should face "fear of enforcement").

Third, the Court's opinion in *Chaney* expressly noted that review may be appropriate where, as here, the agency's decision was "based solely on the belief that it lacks jurisdiction" to act. 470 U.S. at 833 n.4. Thus, "*Chaney* itself left open the possibility that review might be available even for a nonenforcement decision if that decision is predicated solely on the agency's interpretation of a statute. The rationale for this exception is clear: the court has law to apply in determining whether the agency erred." *Brock*, 783 F.2d at 245 n.10 (citation omitted).

b. The government contends that *BLE* answers the question left open in *Chaney's* footnote 4, but it reads far too much into that decision. In *BLE*, the Court held that a denial of a petition to reconsider for material error was unreviewable, based on a "tradition of nonreviewability" of such denials. 482 U.S. at 282. The Court's holding was narrow, and limited to the circumstances of the case. Critical to the Court's analysis in *BLE* was the explanation that, so long as the petition for reconsideration is timely, the agency's original order remains subject to judicial review after the agency denies the reconsideration petition. By con-

trast, the Court explained, denials of petitions for reconsideration based on "new evidence" or "changed circumstances" *are* reviewable, because barring review of such denials would eliminate "all opportunity for judicial consideration" of new facts or circumstances. *Id.* at 279.

In the course of a detailed discussion, the Court noted that the "vast majority of denials of reconsideration * * * are made *without statement of reasons*." *Id.* at 283. It was in this context that the Court remarked that its cases did not stand for "the principle that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Ibid*. Read in context, this statement applies to the denial of reconsideration motions, where the underlying decision remains subject to judicial review, and means only that a traditionally nonreviewable decision that would be unreviewable if no reason had been given would not become reviewable merely because the agency chose to give a reason. As explained above, the decision to rescind DACA does not fall into a recognized category of traditionally unreviewable agency action.

c. In the courts below, the government advanced a separate argument that review of the decision to rescind DACA is precluded by 8 U.S.C. § 1252(g). The lower courts uniformly rejected this argument, explaining that it is contrary to this Court's holding that section 1252(g) applies only to "three discrete actions" antecedent to a reviewable final removal order, namely actions to "commence proceedings, adjudicate cases, or execute removal orders," and not to the "many other decisions or actions that may be part of

the deportation process." *Reno v. Am.-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 482 (1999) (*AADC*) (citation and emphases omitted). Respondents are not seeking review of any of these discrete actions, and therefore section 1252(g) does not preclude review.

In this Court, the government has effectively abandoned its INA-based argument. Instead, it briefly contends that Congress's decision to preclude review of three discrete actions supports the government's argument that immigration enforcement policy decisions are generally unreviewable. U.S. Br. 20. The government's reasoning is backwards: Section 1252(g) demonstrates that Congress knows how to preclude judicial review when it wishes to do so. The fact that section 1252(g) applies only to three discrete actions suggests that judicial review of other actions, such as the rescission of DACA, is not precluded.

B. The Nielsen Memorandum Does Not Alter The Reviewability Analysis.

Nine months after Acting Secretary Duke issued the decision to rescind DACA, and in response to litigation setbacks, Secretary Nielsen issued a second memorandum that purports to expand on the explanation provided in the Duke Memorandum. The Nielsen Memorandum does not render Acting Secretary Duke's decision unreviewable.

As explained above, the decision to rescind DACA falls outside the few categories of agency action traditionally recognized as unreviewable. Even if the government could rely on the Nielsen Memorandum to show that the decision to rescind DACA was based on discretionary factors as well as legal considerations, that still would not render the decision unreviewable.

The APA provides that agency actions are reviewable for "abuse of discretion," 5 U.S.C. § 706(2)(A), and courts routinely review discretionary agency actions to ensure that they are reasonable and reasonably explained. See, *e.g.*, *Dep't of Commerce*, 139 S. Ct. at 2568; *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

Additionally, the Nielsen Memorandum is not a new agency action. Instead, it is a post hoc document created by the agency for the purpose of gaining an advantage in ongoing litigation, and issued because the government did not wish "to reset this protracted litigation by issuing a 'new' independent agency decision on DACA." U.S. Reply Br. 4, *Trump v. NAACP*, No. 18-588 (U.S. Jan. 4, 2019).

It is a long-established principle that judicial review of agency action is limited to the reasons the agency gave when it took the action in question. See, *e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) (agency action may be "upheld, if at all, on the same basis articulated *in the order* by the agency itself"); *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2710 (2015) ("[A] court may uphold agency action only on the grounds that the agency invoked *when it took the action*.") (emphases added). The operative order rescinding the DACA policy is the Duke Memorandum. Therefore, the Court should consider only the grounds invoked in that memorandum.

If agencies were free to alter the rationale for their actions in the middle of judicial review, courts could be required to review a continuously moving target. Faced with possible defeat in litigation, agencies could render briefs, oral argument, and even lower court opinions obsolete by issuing post hoc documents unsupported by an administrative record. In this case,

for example, the Nielsen Memorandum was issued after the district court entered a preliminary injunction in *Regents*, and after oral argument in the Ninth Circuit.

Consideration of post hoc agency explanations is particularly inappropriate where, as here, courts have found that the administrative record is incomplete. The agency should not be able to manipulate judicial review by changing the rationale for its decisions while withholding the full administrative record that was before the original decisionmaker.

The Nielsen Memorandum expressly "decline[s] to disturb" the Duke Memorandum, and merely provides "further explanation" that "reflects [Secretary Nielsen's] understanding" of the Duke Memorandum. *Regents* Pet. App. 121a. This "further explanation" consists of three "enforcement" rationales to justify the Duke Memorandum's rescission of DACA: (1) "DHS should enforce the policies reflected in the laws adopted by Congress"; (2) "DHS should only exercise its prosecutorial discretion not to enforce * * * on a truly individualized, case-by-case basis"; and (3) DHS must "project a message that leaves no doubt" that DHS will enforce the immigration laws, given that "tens of thousands of minor aliens have illegally crossed or been smuggled across our border in recent years." *Id.* at 123a-24a. None of these rationales is articulated in the Duke Memorandum, and two of them are inextricably tied to the lawfulness of DACA. The rationale that "DHS should enforce the policies reflected in the laws adopted by Congress" rests on a legal conclusion that DACA is inconsistent with the laws adopted by Congress. Similarly, the rationale

that "DHS should only exercise its prosecutorial discretion not to enforce * * * on a truly individualized, case-by-case basis" rests on a conclusion that DACA is not, and cannot be, applied in such a manner. As the government acknowledges (with considerable understatement), those rationales "overlap" with the legality rationale. U.S. Br. 30.

The Nielsen Memorandum does not identify the "messaging" rationale as an independent basis for rescinding DACA. Instead, it claims to offer three independent reasons for the rescission, preceded by paragraphs beginning with "First," "Second," and "Third." "Messaging" is one of multiple justifications that together form the third asserted reason for rescission. Thus, the Nielsen Memorandum does not assert that the "messaging" rationale alone was sufficient to rescind the policy.

The government's current arguments concerning the Nielsen Memorandum are also sharply at odds with its prior statements to this Court that the rescission was based exclusively on legal concerns. See U.S. Mandamus Pet. at 21, No. 17-801 ("The Acting Secretary's explanation for her decision rested on her assessment of the risks presented by (and the ultimate legality of) maintaining a policy (original DACA) that was materially identical to ones (expanded DACA and DAPA) struck down by the Fifth Circuit in a decision affirmed by this Court, and that the plaintiffs who prevailed in that earlier suit intended to challenge before the same court on the same grounds."); U.S. Cert. Pet. at 16, No. 17-1003 ("The Acting Secretary opted to wind down DACA after reasonably concluding that the policy was likely to be struck down by courts and indeed was unlawful."); see also *id.* at 24.

For these reasons, the Nielsen Memorandum does not alter the conclusion that the rescission of DACA is subject to judicial review.

II. The Rescission Of DACA Was Arbitrary And Capricious.

In *Regents* and *Batalla Vidal*, the district courts granted Respondents' motions for a preliminary injunction.[5] The government has not sought a stay of these injunctions. Nor has it challenged the lower courts' determinations that Respondents meet three of the four preliminary injunction factors. In particular, the undisputed record on irreparable harm is nothing short of overwhelming. Absent an injunction, hundreds of thousands of DACA participants face devastating and life-changing harm, including loss of employment, loss of educational opportunities, and removal from the only country they have known since they were young children. These harms will also have cascading effects on the families of DACA participants, including their nearly 200,000 U.S.-citizen children, as well as their employers, schools, and communities.

The balance of hardships likewise tips decisively in favor of Respondents. The injunctions place no limitation on the government's authority to remove any DACA participant who "poses a risk to national security or public safety, or otherwise deserves, in its judgment, to be removed." *Regents* Pet. App. 66a. Although

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[5] See *Regents* Pet. App. 62a-66a; *Batalla Vidal* Pet. App. 119a-126a. The Ninth Circuit affirmed the *Regents* injunction, and this Court granted certiorari before the Second Circuit ruled on the *Batalla Vidal* injunction.

the government's counsel complains about "sanctioning an ongoing violation of federal immigration law by nearly 700,000 aliens," U.S. Br. 16, the President has affirmed that the "policy of [his] administration [is] to allow the dreamers to stay." SER1346-47; accord, ER45 ("Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really!....").

Having conceded three of four preliminary injunction factors, the government argues that Respondents are unlikely to succeed on the merits because the decision to rescind DACA was not arbitrary and capricious. That argument fails for three principal reasons. *First*, the decision to rescind DACA was inadequately explained. *Second*, the rescission rests on an incorrect determination that DACA is unlawful. *Third*, the incompleteness of the administrative record, and evidence that the stated reasons for ending DACA are not the true reasons, provide additional grounds for this Court to reject the government's arguments.

A. The Rescission Of DACA Was Not Adequately Explained.

Meaningful judicial review requires that "the grounds upon which the administrative agency acted [be] clearly disclosed and adequately sustained." *Chenery I*, 318 U.S. at 94. The basis for agency action must be "set forth with such clarity as to be understandable." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*); see also *Judulang*, 565 U.S. at 64. Under the arbitrary and capricious standard, the agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v.*

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted). An agency may choose to reverse an existing policy but must first "provide a reasoned explanation for the change, * * * show that there are good reasons for the new policy," and "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (citation omitted).

The rescission of DACA fails to meet these requirements.

1. The Duke Memorandum Fails To Adequately Explain The Rescission.

Acting Secretary Duke provided a one-sentence explanation for the rescission of DACA: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." *Regents* Pet. App. 117a. The rest of the Duke Memorandum consists of "background" discussion and instructions for winding down the policy. It is truly remarkable that a Cabinet-level officer would offer such a cursory explanation for a decision that affects hundreds of thousands of lives and reverses a longstanding and carefully-reasoned government position. The APA requires more.

The Duke Memorandum states that the decision to rescind DACA was based on three sources: the Fifth Circuit's DAPA decision, this Court's order affirming that decision by an equally divided Court, and the Attorney General's letter. The memorandum does not

explain how or why these sources led to the Secretary's decision. Because this superficial explanation fails to explain the Acting Secretary's reasoning, it does not withstand APA review. See *Encino*, 136 S. Ct. at 2125.

a. The Duke Memorandum's bare reference to the Fifth Circuit's DAPA decision does not supply the requisite explanation. The memorandum does not explain whether the Acting Secretary was relying on the Fifth Circuit's procedural ruling (which could have been addressed by providing an opportunity for notice and comment) or its substantive ruling. Nor does it address the significant distinctions between DAPA and DACA. The primary substantive defect identified by the Fifth Circuit was that DAPA encroached upon an "intricate [statutory] process" in the INA for immigrants "to derive a lawful immigration classification from their children's immigration status." *Texas*, 809 F.3d at 179. Under that statutory process, "an applicant must (i) have a U.S. citizen child who is at least twenty-one years old, (ii) leave the United States, (iii) wait ten years, and then (iv) obtain one of the limited number of family-preference visas from a United States consulate." *Id.* at 179-80. The Fifth Circuit held that DAPA would allow undocumented individuals "to receive the benefits of lawful presence solely on account of their children's immigration status without complying with any of the requirements, enumerated above, that Congress has deliberately imposed." *Id.* at 180.

There is no comparable "intricate statutory process" for the individuals eligible for DACA. As a result, there is no basis to conclude, as the Fifth Circuit did

with respect to DAPA, that "Congress has 'directly addressed the precise question at issue.'" *Id.* at 186 (citation omitted).[6] The Duke Memorandum's failure to address this distinction raises the possibility that the Acting Secretary acted on a "mistaken assumption" that the Fifth Circuit's reasoning applies directly to DACA. See *Negusie v. Holder*, 555 U.S. 511, 522 (2009).

The Fifth Circuit also concluded that DAPA was a policy of "vast economic and political significance," and that if Congress intended to create such a policy, it would have done so by express legislation. *Texas*, 809 F.3d at 188 (internal quotation marks omitted). DAPA made approximately four million individuals eligible for deferred action—more than one-third of all undocumented individuals in the United States. *Id.* at 181. By contrast, DACA applies to many fewer individuals and is similar in scale to at least one past discretionary relief program adopted during the Reagan Administration. U.S. Br. at *49, *United States v. Texas*, 136 S. Ct. 2271 (2016), 2016 WL 836758 (discussing Family Fairness Program).

Moreover, the memorandum that created DAPA expressly stated that participants would be "lawfully present in the United States." *Regents* Pet. App. 104a. In contrast, the DACA Memorandum does not discuss, or even mention, "lawful presence." Instead, DACA is a policy of deferred action under which the government forbears for renewable two-year periods from enforcement action against individuals considered low

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[6] The Fifth Circuit enjoined the entire DAPA memorandum, including provisions that moderately expanded DACA, but the court did not say anything about those provisions.

priorities for enforcement. To be sure, longstanding and unchallenged regulations separately provide that individuals receiving deferred action are permitted to work to support themselves during the deferral period. See 8 C.F.R. § 274a.12(c)(14) (providing for work authorization). But DACA, by its express terms, does not create a path to immigration status or establish lawful presence. *Regents* Pet. App. 101a ("This memorandum confers no substantive right, immigration status or pathway to citizenship.").

The Duke Memorandum does not acknowledge or discuss these differences.

b. The Duke Memorandum's reference to this Court's order affirming the Fifth Circuit's decision, by an equally divided Court, adds nothing of substance. Such orders have no precedential value. See *Neil v. Biggers*, 409 U.S. 188, 192 (1972). The Duke Memorandum fails to acknowledge this basic point.

c. The Duke Memorandum's reference to the Attorney General's letter makes matters worse by raising additional questions that require an explanation from the Secretary. The Attorney General's half-page letter states that DACA was "effectuated * * * without proper statutory authority," and was "an unconstitutional exercise of authority by the Executive Branch." JA 877. The letter asserts, without explanation, that DACA has the same "constitutional defects that the courts recognized as to DAPA." JA 878. But neither the Fifth Circuit nor any other court has held that DAPA (or DACA) has any "constitutional defects." Neither the Attorney General nor Acting Secretary

Duke acknowledged or discussed OLC's detailed opinion concluding that DAPA was constitutional.[7]

The Attorney General's letter also asserts that DACA was implemented "without proper statutory authority," JA 877, but it neither acknowledges nor addresses the long and unchallenged history of such policies and Congress's statutory recognition of deferred action.

The Duke Memorandum's reference to the Attorney General's letter also raises another problem: the Acting Secretary failed to address 8 U.S.C. § 1103(a)(1), which provides that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling" on the Secretary of DHS. *Ibid.* By listing multiple sources and placing the Attorney General's letter last on the list, the Duke Memorandum suggests that the Acting Secretary did not regard herself as bound by the Attorney General's letter. But this, along with much else, is unclear. The Acting Secretary should have explained whether she was making an independent determination to rescind DACA, or regarded herself as required to reach that decision under 8 U.S.C. § 1103(a)(1).

In addition to providing an inadequate explanation for the legal sources it cites, the Duke Memorandum fails to address highly relevant legal sources that cut against the decision. The memorandum does not acknowledge that its conclusion is directly contrary to a detailed 2014 OLC opinion and the government's longstanding litigation position. See JA 797-856; U.S.

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[7] The government has not attempted to defend the Attorney General's unexplained statement that DACA is unconstitutional, and has not challenged the constitutionality of DACA.

Br. at *1, *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017), 2015 WL 5120846. It never explains why the 2014 OLC opinion reached the wrong conclusion, or why the considerations the government previously relied on to defend DHS's authority to establish a policy such as DACA are no longer valid.

For all of these reasons, the Duke Memorandum's explanation of the decision to rescind DACA is inadequate. As this Court has explained, it "will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Chenery II*, 332 U.S. at 196-97.

2. The Nielsen Memorandum Does Not Cure The Defects In The Duke Memorandum.

The Court should decline to consider the Nielsen Memorandum because it is a post hoc rationalization issued without any supporting administrative record. But even if the Court were to consider the Nielsen Memorandum, it fails to adequately explain the rescission.

Secretary Nielsen asserts that "[t]he Fifth Circuit's rejection of DAPA and expanded DACA did not turn on whether the covered aliens had a pathway to lawful status (which not all of them had). Rather, it turned on the incompatibility of such a major non-enforcement policy with the INA's comprehensive scheme." *Regents* Pet. App. 122a. This statement falls well short of an adequate explanation for the rescission. It still fails to address the differences between DACA and DAPA, Congress's acknowledgement of deferred

action, the government's prior defenses of DAPA and DACA, the half-century practice of deferred action, and the detailed OLC opinion.

As discussed above, see *supra* at 28-29, the Nielsen Memorandum's additional "policy" rationales for rescinding DACA are largely a repackaging of the rationale that DACA is unlawful. The sole rationale that does not depend on DACA's lawfulness is that DHS must "project a message that leaves no doubt" that DHS will enforce the immigration laws, given that "tens of thousands of minor aliens have illegally crossed or been smuggled across our border in recent years" and "then have been released into the country owing to loopholes in our laws." *Regents* Pet. App. 124a.

The Nielsen Memorandum does not assert that the "messaging" rationale is sufficient to support the rescission, nor could it. First, the "messaging" rationale states, in effect, that the government should inflict grievous harm on nearly 700,000 young immigrants living in the United States, each of whom was individually determined to be a low priority for enforcement, in order to send a message to potential immigrants living outside the United States. If such a policy could ever be rational, it would have to be supported by some explanation of what "message" the government intended to send, an evaluation of whether the benefits of such a "message" outweigh the obvious and large costs to DACA participants, their families, and communities, and whether the "message" could be delivered through other less harmful means. If agencies could inflict such grievous harm based solely on a "messaging" rationale unsupported by any facts or

analysis, there would be virtually no limit to the harm they could inflict.

Second, the "messaging" rationale is unreasonable on its own terms. DACA has nothing to do with the vaguely described "loopholes in our laws" that have permitted minors to be released rather than detained during the pendency of asylum or other immigration proceedings. DACA applies only to a subset of individuals who were residing in the United States as of June 15, 2007. It has no bearing on minors that have illegally crossed or been smuggled into the United States in "recent years." An agency cannot base its policies on such irrelevant factors. See *Judulang*, 565 U.S. at 55 ("agency action must be based on non-arbitrary, 'relevant factors'" (citation omitted)).

Third, the "messaging" rationale lacks any support in the administrative record. The Nielsen Memorandum cites no record support for the proposition that "thousands of minors" have "illegally crossed or been smuggled" into the United States in "recent years." The government tries to fill this gap with a Federal Register notice from this summer, see U.S. Br. 40-41, but that notice cannot retroactively justify an action taken nearly two years earlier. The government also fails to explain what beneficial effect the "message" will have. Neither the Nielsen Memorandum nor the government's brief asserts that the "message" will deter or decrease illegal immigration, and there is no analysis, data, or fact-finding supporting such an assertion. In the absence of relevant facts, there can be no "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation omitted).

The government also cites a single 15-year old law review article about legalization under IRCA. U.S. Br. 41 (citation omitted). The authors state, without citation, that a "fundamental problem with an amnesty is that it creates an expectation of future amnesties." Pia Orrenius & Madeline Zavodny, *What Are the Consequences of an Amnesty for Undocumented Immigrants?*, 9 Geo. Pub. Pol'y Rev. 21, 31 (2004). Extending this argument to DACA requires unsupported speculation. DACA does not provide legalization and applies to a fixed population already in the United States as of 2012. There is no reason for potential immigrants outside the United States, if they are even aware of DACA, to expect that there will be future policies similar to DACA, to foresee that they would be the beneficiaries of such policies, and to change their decisions about immigration as a result. Nor is there any explanation how this hypothesized sequence of events would be prevented by rescinding DACA. Neither the Nielsen Memorandum nor the Duke Memorandum addresses any of these issues.

In sum, even if the Nielsen Memorandum were properly considered, the government's explanation for rescinding DACA remains "so ambiguous that it falls short of that standard of clarity that administrative orders must exhibit." *Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 395-96 (1974).

3. The Agency Failed To Give Adequate Consideration To Reliance Interests.

The rescission of DACA is also arbitrary and capricious because the agency failed to demonstrate that it gave adequate consideration to reliance interests.

When an agency reverses a policy previously in effect, a "reasoned explanation" must include reasons "for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations*, 566 U.S. 502, 516 (2009). Where "serious reliance interests [are] at stake," the agency must offer more than "conclusory statements." *Encino*, 136 S. Ct. at 2127.

The Duke Memorandum never mentions the reliance interests created by the DACA policy. For more than five years, DACA participants have enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance on the benefits of the DACA policy, principally that they would be free from arrest and deportation and could lawfully work. See, *e.g.*, SER1470-72, Topics 1, 2, 4, 5. Employers and educational institutions likewise will lose their extensive investments in DACA participants if those participants became ineligible to work or are deported. See, *e.g.*, SER832-33.

There are nearly 700,000 DACA participants and they support nearly 200,000 U.S.-citizen children through their lawful work. SER1155 (Wong Decl.). Beginning the day the rescission were permitted to go into effect, and every day thereafter, nearly one thousand DACA participants would lose their DACA grants and their work authorizations as the two-year term of the grants expired. SER1459.

For Mitchell Santos Toledo, who arrived in the United States when he was less than two years old, "DACA has been and continues to be central to [his] ability to financially support [him]self and [his] family." JA 954, 964 (Santos Toledo Decl.). DACA enabled

him to complete his studies at the University of California and enroll at Harvard Law School. *Id.* at 960-63. He is working to support himself and has taken out loans to permit him to complete his studies. *Id.* at 960, 963. If the rescission were permitted to go into effect, he would be unable to lawfully work in the United States. He would lose whatever job he has, along with any employer-sponsored health insurance. *Id.* at 960-61. On any day, at any time, at home or in public, he could be arrested by federal immigration authorities and deported to a country he has not lived in since he was two years old. The rescission of DACA would result in similarly catastrophic consequences to hundreds of thousands of individuals.

The consequences of rescinding DACA would not be limited to DACA participants themselves, but would radiate outward to their families, schools, and employers. For example, many DACA participants are school teachers. SER382-83 (Carrizales Decl.). Their students would lose their classroom teachers when their DACA grants expire. Other DACA participants are studying to become doctors, and many will work in under-served communities. SER761. They could not treat patients if DACA is rescinded. In the aggregate, DACA participants' work in the lawful labor force is estimated to generate $215 billion in economic activity and $60 billion in tax revenue over the next ten years. SER359 (Brannon & Albright Decl.).

The Duke Memorandum never even acknowledges, let alone weighs, these reliance interests and the devastating consequences of the rescission on the hundreds of thousands of DACA participants and the countless other stakeholders who have come to rely on the policy. *Regents* Pet. App. 111a-19a. Nor does the

administrative record contain any assessment of those interests. The wholesale disregard for the serious reliance interests of hundreds of thousands of individuals, their families, their employers, and their communities renders the decision to rescind DACA arbitrary and capricious decisionmaking. See *Encino*, 136 S. Ct. at 2127 ("In light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision.").

The Nielsen Memorandum's brief reference to reliance interests is both too little and too late. This post hoc document, issued without any supporting record, fails to provide anything more than conclusory statements about the enormous reliance interests implicated by DACA. Secretary Nielsen's passing statement that she is "keenly aware" of DACA participants' reliance interests is insufficient. *Regents* Pet. App. 125a. She completely failed to identify the nature and extent of the reliance interests implicated by the rescission, instead referring in a vague and conclusory fashion to the "sympathetic circumstances of DACA recipients." *Ibid.* The issue is not "sympathetic circumstances," but rather an agency decision that will systematically immiserate 700,000 people and their families, taken without any serious discussion of those consequences or whether they could be mitigated. Indeed, her stated reason for disregarding the serious reliance interests is because "issues of reliance would best be considered by Congress." *Ibid.* That is not an evaluation of reliance interests, but an abdication of the agency's responsibility to conduct an evaluation.

B. DACA Is Lawful.

To date, no court has issued a final decision on whether DACA is legal. Because this Court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), it should not decide that issue at this stage of the litigation. If the Court were nevertheless to reach the issue, it should hold that DACA is lawful.

The issue is not whether the rescission of DACA was "reasonable," U.S. Br. 33, but whether the agency's legal rationale is correct. The APA provides that courts "shall" set aside agency action that is "not in accordance with law." 5 U.S.C. § 706(2)(A). This Court has not hesitated to set aside agency action for legal error. *E.g.*, *Negusie*, 555 U.S. at 516 (remanding for agency to "confront the same question free of [its] mistaken legal premise"); *Massachusetts*, 549 U.S. at 532-34 (setting aside agency decision premised on misinterpretation of its legal authority); *Chenery I*, 318 U.S. at 94 ("an order may not stand if the agency has misconceived the law").

1. DACA Is A Lawful Exercise Of Authority Conferred By The INA.

The INA confers authority to "[e]stablish[] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). Beginning with President Eisenhower, every administration has exercised this authority to "defer action" against otherwise removable immigrants, both in individual cases and with respect to particular categories of immigrants deemed to be low priorities for enforcement. See *supra* at 2-4 (summarizing history of deferred action policies). As this

Court has recognized, the executive has been "engaging in a regular practice (which had come to be known as 'deferred action')" of exercising enforcement discretion "for humanitarian reasons or simply for its own convenience." *AADC*, 525 U.S. at 483-84.

"Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice." JA 828 (OLC opinion); see also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015) (relying on "[t]he weight of historical evidence" as indicating that "Congress has accepted" executive's power). Indeed, Congress has expressly recognized deferred action in several statutes. See, *e.g.*, 8 U.S.C. §§ 1227(d)(2), 1151 note, 1154(a)(1)(D)(i)(II), (IV); 49 U.S.C. § 30301 note. In the Real ID Act of 2005, Congress accepted "approved deferred action status" as "[e]vidence of [l]awful [s]tatus" for purposes of determining whether state-issued driver's licenses or identification cards could be used at the federal level. 49 U.S.C. § 30301 note. And Congress expressly recognized the executive's use of deferred action in authorizing DHS to grant administrative stays of final orders of removal to T and U visa applicants. 8 U.S.C. § 1227(d)(2) ("denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for * * * deferred action"). As the government previously argued to this Court, these statutes "highlight Congress's continued acceptance of this flexible and discretionary practice." U.S. Br. at *58, *Texas*, 136 S. Ct. 2271, 2016 WL 836758 (internal quotation marks omitted).

Congress enacted these statutes against the backdrop of longstanding regulations that enable those with deferred action to access benefits like work authorizations. See 8 C.F.R. § 274a.12(c)(14) (1987). And Congress itself has expressly allowed employers to hire any undocumented individual "authorized to be * * * employed by th[e INA] *or by* [the Secretary of DHS]." 8 U.S.C. § 1324a(h)(3) (emphasis added).

The government recognizes that DHS has "broad discretion" to implement deferred action so long as it does so through the use of case-by-case determinations. See U.S. Br. 40, 45; see also JA 827 n.8 (OLC opinion) (DACA "would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis."). The DACA Memorandum satisfies this standard. It expressly provides that "requests for relief pursuant to this memorandum are to be decided on a case by case basis." *Regents* Pet. App. 99a; see also *id.* at 99a-100a (discretion should be exercised "on an individual basis"; "DHS cannot provide any assurance that relief will be granted in all cases").

Case-by-case discretion has also been exercised in practice. The OLC opinion observes that "DHS evaluates applicants' eligibility for DACA on a case-by-case basis." JA 827. As the Ninth Circuit noted, "in fiscal year 2016, * * * 17.8% of the applications acted upon were denied." See *Regents* Pet. Supp. App. 51a ("the denial rate has risen as the DACA program has matured"). Although the Fifth Circuit in *Texas* relied on a conclusion that, based on experience in the DACA policy, DAPA would not be applied on a true-case-by-case basis, the evidence now demonstrates that DACA has been administered in precisely that way. See Br.

for Amici *Texas v. United States* Defendant-Intervenor DACA Recipients and State of New Jersey at 9-25 ("N.J. Br.") (collecting evidence).[8] For example, the Associate Director for USCIS Service Center Operations has testified that "USCIS has denied DACA even when all the DACA guidelines, including public safety considerations, have been met." Neufeld Decl., *Texas* Dkt. 130-11 ¶ 18 (S.D. Tex. 2015); see also N.J. Br. 11 ("DACA can be denied if [USCIS] determine[s] that the person doesn't merit a favorable exercise of discretion," including due to "the totality of the circumstances." (citation and emphasis omitted)).[9] And, as of 2015, "approximately 200,000 requests for additional evidence had been made upon receipt of DACA applications." *Texas*, 809 F.3d at 175. The government does not dispute any of this evidence, but instead asserts that DACA creates "an implicit presumption" that eligible applications will be granted. U.S. Br. 39. Even if that were true, however, it would not distinguish

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[8] The Fifth Circuit relied in part on the 2014 declaration of a union representative who subsequently testified that that he has no firsthand knowledge of reviewing DACA applications. N.J. Br. 25-27. The government's brief asserts that the "approval rate for initial requests for DACA is 91% since its adoption in 2012." U.S. Br. 39 n.7. The 91% figure is not in the administrative record and appears to leave out individuals denied at the "lockbox" stage. Moreover, the government does not argue that this approval rate demonstrates that DACA is non-discretionary.

[9] The Duke Memorandum asserts in a footnote that "USCIS has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria as outlined in the June 15, 2012 memorandum, but still had his or her application denied based solely upon discretion." *Regents* Pet. App. 112a-13a n.1. That statement is contrary to the testimony of the responsible government personnel, and the government's brief does not rely on it.

DACA from the many previous discretionary relief policies implemented by the government.

The DACA policy is congruent with historical and current government practice. For example, the government currently maintains a deferred-action policy for the "spouse, widow(er), parent, son, or daughter" of military members and veterans. See Discretionary Options for Military Members, Enlistees and Their Families, *available at* https://bit.ly/2kLe3ho. In addition, the Family Fairness Program exceeded the size of the current DACA-participant population. See U.S. Br. at *49, *Texas*, 136 S. Ct. 2271, 2016 WL 836758 (estimating that program "targeted as many as 1.5 million people, about 40% of the undocumented population at the time").

The Family Fairness Program was established following the passage of IRCA, in which Congress granted lawful status to millions of undocumented immigrants meeting certain criteria. The statutory legalization did not extend to those immigrants' spouses and children. Nevertheless, the INS, in 1987, decided to "indefinitely defer deportation" for (1) ineligible spouses and children who could show compelling or humanitarian factors; and (2) ineligible unmarried minor children who could show that both parents (or their only parent) had obtained lawful temporary resident status. SER1231-32.

In 1990, the INS adopted an expanded version of the program establishing programmatic criteria that *bound* agency officers, and granted extended voluntary departure *and* work authorization. See Dkt. 121-1 at 26-27 ("Voluntary departure *will be granted* to the spouse and to unmarried children under 18 years of

age" meeting certain requirements and "[w]ork authorization will be granted" (emphasis added)). Any ineligible spouse or minor child of an individual legalizing under IRCA would be entitled to relief upon showing that he or she (1) had been residing in the country by the date of IRCA's enactment; (2) was otherwise inadmissible; (3) had not been convicted of a felony or three misdemeanors; and (4) had not assisted in persecution of persons. *Ibid.*

After the expanded program was implemented, Congress ratified it by passing legislation providing relief to the participants in the program. The legislation effectively recognized the validity of INS's mandatory, programmatic policy by delaying the effectiveness of the legislation for one year, but providing that the one-year delay "shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date." Pub. L. No. 101-649, Tit. III, § 301(g), 104 Stat. 5030. Congress thus conveyed its view that a broad-based *mandatory* relief policy is within the executive's authority.

In accordance with these precedents, the Executive Branch, until September 2017, had concluded that DACA falls within its authority to employ deferred action to effectuate its enforcement priorities. See *Regents* Pet. App. 99a (DACA Memorandum); JA 827 n.8 (OLC opinion).

2. The Government's Arguments That DACA Is Unlawful Lack Merit.

The government seems to agree that DHS has broad authority to implement deferred action, but

now contends that it is not authorized to grant the relief provided by the DACA Memorandum. In straining to portray DACA as unlawful, the government misstates what DACA does. The government's brief describes DACA as "grant[ing] deferred action to a vast category of aliens," U.S. Br. 34, and "informing roughly 1.7 million aliens that they may continue violating federal law without fear of enforcement," *id.* at 45. But the DACA Memorandum does no such thing. As explained above, it does not require that deferred action be granted to a "category" of individuals. Even those who have received DACA may have it revoked or non-renewed if circumstances warrant. Dkt. 121-1 at 201 (DACA Toolkit); cf. *Regents* Pet. App. 66a-67a.

In describing the DACA policy, the government disregards the actual language of the DACA Memorandum, which does not dictate a categorical outcome, but rather sets out criteria to guide the exercise of discretion by subordinate agency officials in evaluating particular cases. See *supra* at 46-47. These guidelines implement rather than supplant the Secretary's discretion. As the government acknowledges, some "supervisory control over [agency] discretion is necessary to avoid arbitrariness and ensure consistency." U.S. Br. 22 (citation omitted). The government knows how to *require* subordinate officials to provide relief from removal. It did so in the Family Fairness Program, see *supra* at 48-49, but did not do so in the case of DACA.

Even if DACA could properly be understood as a "categorical" policy, the government acknowledges that it has adopted numerous such "categorical" policies in the past. See U.S. Br. 46-47. The government attempts to distinguish these policies as either "coun-

try-specific" or "interstitial." *Id.* at 34, 48. But the deferred action policies described above do not fit either description. See *supra* at 48-49. And the government does not explain why a "country-specific" deferred-action policy is more or less lawful than other "categorical" policies.

Likewise, the government's "interstitial" standard fails to meaningfully distinguish DACA from other discretionary relief policies. For instance, the government consigns to a footnote a reference to its *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children*. U.S. Br. 47 n.8. Individuals eligible for deferred action under this policy—certain surviving spouses of deceased U.S. citizens where the surviving spouse and the U.S. citizen were married less than two years at the time of the citizen's death—had "no avenue of immigration relief." Dkt. 121-1 at 85 (Memorandum from Donald Neufeld, Acting Assoc. Dir., Office of Domestic Operations, USCIS, to Field Leadership, USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children* (Sept. 4, 2009)). Although there was "proposed legislation in the U.S. Congress" to address these spouses and children, USCIS nonetheless allowed them to receive deferred action. *Ibid.* Although Congress eventually passed legislation addressing this issue, JA 826 n.7, there was no way of knowing in advance whether the policy was "interstitial" when it was adopted. Should Congress eventually pass legislation granting immigration status to DACA participants, DACA would similarly be seen as "interstitial" in hindsight.

The government's efforts to distinguish the Family Fairness Program are unpersuasive. According to the government, the difference between that program and

DACA is that there was an arguable statutory basis for "extended voluntary departure" in the INA at the time of the Family Fairness Program. But deferred action *also* has a statutory basis, as the government recognizes, see U.S. Br. 43 (citing 6 U.S.C. § 202(5), 8 U.S.C. § 1103(a)(3)).

The government also asserts that DACA rests on the agency's "discover[y]" of an "unheralded power," resulting in a decision of "vast 'economic and political significance' without any warrant from Congress." U.S. Br. 45 (citations omitted). But nothing about DACA is "unheralded." Discretionary relief from removal is well-trodden ground, whether granted through case-by-case discretion with guidelines, see, *e.g.*, *AADC*, 525 U.S. at 484 n.8, or through mandatory programmatic criteria, see *supra* at 48-49.

This case differs from *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014) and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), in which an agency asserted newly unearthed powers to regulate previously unregulated activities. Here, in contrast, the government does not dispute that DHS could grant deferred action to each of the individuals eligible for DACA. See *Regents* Pet. App. 125a ("the rescission of the DACA policy does not preclude the exercise of deferred action in individual cases if circumstances warrant"). There is likewise agreement that the government lacks the resources to remove every undocumented immigrant in the United States and must accordingly set "policies and priorities." 6 U.S.C. § 202(5). Unlike the truly "unheralded" powers at issue in *Utility Air* and *Brown & Williamson*, the DACA Memorandum adopts common-sense criteria to

prioritize DHS's enforcement through its recognized deferred-action authority.

In sum, DHS erroneously concluded that it lacks authority to maintain the DACA policy. As a result, the rescission of DACA was "not in accordance with law," and must be set aside. 5 U.S.C. § 706(2)(A).

3. "Litigation Risk" Is Not A Valid, Independent Basis For Rescinding DACA.

The government argues that "litigation risk," as opposed to a determination that DACA is unlawful, provided a separate rationale for the rescission. That argument fails for several reasons.

First, the Duke Memorandum never mentions "risk," and never identifies, much less weighs, any risks or benefits of litigation. Indeed, the drafter of the Duke Memorandum testified that a policy of responding to "litigation risk" would be "the craziest policy you could have in a department." JA 1007.

Second, "litigation risk" is not an adequate, independent rationale for agency action. If it were, agencies could avoid meaningful APA review of their legal conclusions simply by relabeling them as "litigation risk" assessments. See *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 44 (D.C. Cir. 2004) (litigation risk was not valid ground upon which to act); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (en banc) (rejecting litigation risk rationale). Moreover, "litigation risk" is simply a prediction about legality. See *Regents* Pet. Supp. App. 35a n.14. Allowing agencies to circumvent judicial review of that ultimate issue would violate the APA's instruction that "the reviewing court,"

rather than the agency, "shall decide all relevant questions of law." 5 U.S.C. § 706.

Third, even if "litigation risk" could qualify as a valid reason for agency action in some circumstances, DHS utterly failed to engage in a reasoned assessment of litigation risk. See *State Farm*, 463 U.S. at 43. For example, the government asserts that DHS was concerned about an "immediate[]" judicial end of DACA, U.S. Br. 37, but it never addressed the obvious point that the risk that Texas and other states could obtain a preliminary injunction abruptly ending DACA was greatly reduced by the years-long delay in seeking such an injunction, as well as the powerful equities weighing against such an injunction. Indeed, when the plaintiffs in *Texas* finally sought a preliminary injunction, the district court denied the motion because it came too late and was inequitable. *Texas v. United States*, 328 F. Supp. 3d 662, 736-42 (S.D. Tex. 2018).

The government also failed to address the litigation risks created by *rescinding* DACA. This aspect of litigation risk undermines the government's claim that the rescission was necessary because "'burdensome litigation' * * * could distract from the agency's work." U.S. Br. 33. In any event, Secretary Duke never articulated such a concern, and Secretary Nielsen merely speculated that "*a* law enforcement agency" may want to avoid legally questionable policies for several reasons, including "the *threat* of burdensome litigation." *Regents* Pet. App. 123a (emphasis added).

Fourth, the post hoc Nielsen Memorandum states only that Secretary Nielsen "lack[ed] sufficient confidence in the DACA policy's legality to continue this

non-enforcement policy, whether the courts would ultimately uphold it or not." *Ibid*. Such a vague and conclusory statement is insufficient. An agency cannot "merely recite the terms 'substantial uncertainty' as a justification for its actions" and comply with the APA. *State Farm*, 463 U.S. at 52.

C. This Court Should Not Rule For The Government Without A Complete Administrative Record, Particularly Given The Evidence Of Pretext.

1. The Administrative Record Is Incomplete.

Judicial review of agency action under the APA is on "the whole record," 5 U.S.C. § 706, which requires that the Court have access to "the full administrative record that was before the Secretary at the time he made his decision," *Overton Park*, 401 U.S. at 420.

That requirement has not been satisfied here. Two district courts have determined that the administrative record is incomplete, and two courts of appeals have upheld that determination.[10] Those rulings are entirely reasonable. It is implausible that Acting Secretary Duke rescinded a policy directly affecting 700,000 individuals based on nothing more than a handful of judicial opinions and other public documents. Documents obtained in response to Freedom of

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[10] Dkts. 79, 266; *In re United States*, 875 F.3d at 1205, *judgment vacated*, 138 S. Ct. 443; *Batalla Vidal* Dkt. 89 at 3; *In Re: Kirstjen M. Nielsen*, No. 17-3345 (2d. Cir. Dec. 27, 2017).

Information Act requests, and subject to judicial notice, confirm that the administrative record is incomplete.[11]

Without access to the full body of evidence and analysis that was before Acting Secretary Duke at the time of her decision, the Court is not in a position to determine that her decision survives arbitrary and capricious review. See *State Farm*, 463 U.S. at 43 (arbitrary and capricious review considers whether agency "entirely failed to consider an important aspect of the problem" or "offered an explanation * * * that runs counter to the evidence before the agency"). Given the interlocutory posture of *Regents* and *Batalla Vidal*, a ruling by this Court that the rescission was not arbitrary and capricious would be premature.

2. There Is Evidence That DHS's Explanation Is Pretextual.

The need for a complete administrative record is confirmed by disturbing indications that the government's stated reasons for rescinding DACA are not the true reasons for its decision. Judicial review under the APA requires the agency to disclose the actual basis for its action. *Dep't of Commerce*, 139 S. Ct. at 2573. "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer *genuine* justifications for important decisions, reasons that can be scrutinized by courts and the in-

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[11] For example, these documents describe a "Principals Committee Deferred Action for Childhood Arrivals" meeting on August 24, 2017, where it "was agreed that" DACA "is unlawful and will be ended." *Make the Road N.Y. v. DHS*, No. 18-cv-2445, Dkt. 63-1 at 209 (E.D.N.Y.).

terested public." *Id.* at 2575-76 (emphasis added). Accordingly, agency action must be set aside where the "explanation for agency action * * * is incongruent with what the record reveals about the agency's priorities and decisionmaking process." *Id.* at 2575. Here, the government's explanation does not square with what appear to be its actual priorities and decisionmaking process.

For example, when Attorney General Sessions announced the rescission, he stated that DACA denies Americans jobs and contributes to crime. SER1354-55. These rationales were not included in the Duke Memorandum, and there is no support for them in the administrative record. Indeed, DACA participants are required as a condition of the policy not to have committed any serious crime, *Regents* Pet. App. 98a, and the undisputed evidence shows that the DACA policy makes a positive contribution to the economy, SER359.

There is also evidence that the Administration rescinded DACA to gain leverage in negotiations with Congress over funding for a border wall and other immigration matters. On October 8, 2017, for example, President Trump sent a letter to congressional leaders setting out "Immigration Principles and Policies" that "must be included as part of any legislation addressing the status of [DACA] recipients." JA 982. These "Principles and Policies" included funding for a border wall. See also Donald J. Trump (@realDonaldTrump), Twitter (Dec. 29, 2017, 5:16 AM), https://goo.gl/aZ19im ("The Democrats have been told, and fully understand, that there can be no DACA without the desperately needed WALL at the South-

ern Border and an END to the horrible Chain Migration & ridiculous Lottery System of Immigration etc."); Donald J. Trump (@realDonaldTrump), Twitter (Jan. 23, 2018, 8:07 PM), https://goo.gl/Zz46iq ("[I]f there is no Wall, there is no DACA."); Donald J. Trump (@realDonaldTrump), Twitter (Feb. 5, 2018, 6:36 AM), https://goo.gl/BpvHV6 ("Any deal on DACA that does not include STRONG border security and the desperately needed WALL is a total waste of time."). These statements indicate that the Administration rescinded DACA in order to create a legislative bargaining chip. See, *e.g.*, *Make the Road N.Y.* No. 18-cv-2445, Dkt. 63-1.

Finally, the President has indicated that he may "revisit" the rescission. See Donald J. Trump (@realDonaldTrump), Twitter (Sept. 5, 2017, 8:38 PM), https://tinyurl.com/y7f2y6tj. That statement is at odds with Acting Secretary Duke's explanation that the policy must be ended because it is unlawful, since if the policy were unlawful, there would be nothing to "revisit."

The evidence that the government's asserted reasons for rescinding DACA are not its actual reasons provides an additional basis for affirming the injunction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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APPENDIX

1. 8 U.S.C. § 1151 note provides:

* * *

EXTENSION OF POSTHUMOUS BENEFITS TO SURVIVING SPOUSES, CHILDREN, AND PARENTS

Pub. L. 108-136, div. A, title XVII, §1703(a)-(e), Nov. 24, 2003, 117 Stat. 1693, provided that:

* * *

(c) SPOUSES AND CHILDREN OF LAWFUL PERMANENT RESIDENT ALIENS.—

(1) TREATMENT AS IMMEDIATE RELATIVES.—

(A) IN GENERAL.—A spouse or child of an alien described in paragraph (3) who is included in a petition for classification as a family-sponsored immigrant under section 203(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(2)) that was filed by such alien, shall be considered (if the spouse or child has not been admitted or approved for lawful permanent residence by such date) a valid petitioner for immediate relative status under section 201(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i)). Such spouse or child shall be eligible for deferred action, advance parole, and work authorization.

(B) PETITIONS.—An alien spouse or child described in subparagraph (A) may file a

petition with the Secretary of Homeland Security for classification of the alien under section 201(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i)). For purposes of such Act [8 U.S.C. 1101 et seq.], such a petition shall be considered a petition filed under section 204(a)(1)(A) of such Act (8 U.S.C. 1154(a)(1)(A)).

(2) SELF-PETITIONS.—Any spouse or child of an alien described in paragraph (3) who is not a beneficiary of a petition for classification as a family-sponsored immigrant may file a petition for such classification under section 201(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i)) with the Secretary of Homeland Security, but only if the spouse or child files a petition within 2 years after such date. Such spouse or child shall be eligible for deferred action, advance parole, and work authorization.

(3) ALIEN DESCRIBED.—An alien is described in this paragraph if the alien—

(A) served honorably in an active duty status in the military, air, or naval forces of the United States;

(B) died as a result of injury or disease incurred in or aggravated by combat; and

(C) was granted posthumous citizenship under section 329A of the Immigration and Nationality Act (8 U.S.C. 1440-1).

(d) PARENTS OF LAWFUL PERMANENT RESIDENT ALIENS.—

(1) SELF-PETITIONS.—Any parent of an alien described in paragraph (2) may file a petition for classification under section 201(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i)), but only if the parent files a petition within 2 years after such date. For purposes of such Act [8 U.S.C. 1101 et seq.], such petition shall be considered a petition filed under section 204(a)(1)(A) of such Act (8 U.S.C. 1154(a)(1)(A)). Such parent shall be eligible for deferred action, advance parole, and work authorization.

(2) ALIEN DESCRIBED.—An alien is described in this paragraph if the alien-

(A) served honorably in an active duty status in the military, air, or naval forces of the United States;

(B) died as a result of injury or disease incurred in or aggravated by combat; and

(C) was granted posthumous citizenship under section 329A of the Immigration and Nationality Act (8 U.S.C. 1440-1).

* * *

2. 8 U.S.C. § 1154 provides:

Procedure for granting immigrant status

(a) PETITIONING PROCEDURE

* * *

(D)(i)(I) Any child who attains 21 years of age who has filed a petition under clause (iv) of subsection (a)(1)(A) of this section or subsection (a)(1)(B)(iii) of this section that was filed or approved before the date on which the child attained 21 years of age shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a petitioner for preference status under paragraph (1), (2), or (3) of section 1153(a) of this title, whichever paragraph is applicable, with the same priority date assigned to the self-petition filed under clause (iv) of subsection (a)(1)(A) of this section or subsection (a)(1)(B)(iii) of this section. No new petition shall be required to be filed.

(II) Any individual described in subclause (I) is eligible for deferred action and work authorization.

(III) Any derivative child who attains 21 years of age who is included in a petition described in clause (ii) that was filed or approved before the date on which the child attained 21 years of age shall be

considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a VAWA self-petitioner with the same priority date as that assigned to the petitioner in any petition described in clause (ii). No new petition shall be required to be filed.

(IV) Any individual described in subclause (III) and any derivative child of a petition described in clause (ii) is eligible for deferred action and work authorization.

* * *

3. 8 U.S.C. § 1227 provides:

Deportable aliens

* * *

(d) ADMINISTRATIVE STAY

(1) If the Secretary of Homeland Security determines that an application for nonimmigrant status under subparagraph (T) or (U) of section 1101(a)(15) of this title filed for an alien in the United States sets forth a prima facie case for approval, the Secretary may grant the alien an administrative stay of a final order of removal under section 1231(c)(2) of this title until-

(A) the application for nonimmigrant status under such subparagraph (T) or (U) is approved; or

(B) there is a final administrative denial of the application for such nonimmigrant status after the exhaustion of administrative appeals.

(2) The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.

* * *

4. 8 U.S.C. 1324a provides:

Unlawful employment of aliens

* * *

(h) MISCELLANEOUS PROVISIONS

* * *

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

* * *

5. 49 U.S.C. § 30301 note provides:

* * *

IMPROVED SECURITY FOR DRIVERS' LICENSES AND PERSONAL IDENTIFICATION CARDS

* * *

Pub. L. 109-13, div. B, title II, May 11, 2005, 119 Stat. 311, provided that:

* * *

SEC. 202. MINIMUM DOCUMENT REQUIREMENTS AND ISSUANCE STANDARDS FOR FEDERAL RECOGNITION.

(a) MINIMUM STANDARDS FOR FEDERAL USE. —

(1) IN GENERAL.—Beginning 3 years after the date of the enactment of this division [May 11, 2005], a Federal agency may not accept, for any official purpose, a driver's license or identification card issued by a State to any person unless the State is meeting the requirements of this section.

(2) STATE CERTIFICATIONS.—The Secretary shall determine whether a State is meeting the requirements of this section based on certifications made by the State to the Secretary. Such certifications shall be made at such times and in such manner as the Secretary, in consultation with the Secretary of Transportation, may prescribe by regulation.

(b) MINIMUM DOCUMENT REQUIREMENTS.—To meet the requirements of this section, a State shall include, at a minimum, the following information and features on each driver's license and identification card issued to a person by the State:

(1) The person's full legal name.
(2) The person's date of birth.
(3) The person's gender.
(4) The person's driver's license or identification card number.
(5) A digital photograph of the person.
(6) The person's address of principle residence.
(7) The person's signature.
(8) Physical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes.
(9) A common machine-readable technology, with defined minimum data elements.

(c) MINIMUM ISSUANCE STANDARDS. —

(1) IN GENERAL.—To meet the requirements of this section, a State shall require, at a minimum, presentation and verification of the following information before issuing a driver's license or identification card to a person:

(A) A photo identity document, except that a non-photo identity document is acceptable if it includes both the person's full legal name and date of birth.

(B) Documentation showing the person's date of birth.

(C) Proof of the person's social security account number or verification that the person is not eligible for a social security account number.

(D) Documentation showing the person's name and address of principal residence.

(2) SPECIAL REQUIREMENTS.—

(A) IN GENERAL.—To meet the requirements of this section, a State shall comply with the minimum standards of this paragraph.

(B) EVIDENCE OF LAWFUL STATUS.—A State shall require, before issuing a driver's license or identification card to a person, valid documentary evidence that the person-

(i) is a citizen or national of the United States;

(ii) is an alien lawfully admitted for permanent or temporary residence in the United States;

(iii) has conditional permanent resident status in the United States;

(iv) has an approved application for asylum in the United States or has entered into the United States in refugee status;

(v) has a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States;

(vi) has a pending application for asylum in the United States;
(vii) has a pending or approved application for temporary protected status in the United States;
(viii) has approved deferred action status; or
(ix) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.

* * *

6. 8 C.F.R § 274a.12 provides:

Classes of aliens authorized to accept employment.

* * *

(c) *Aliens who must apply for employment authorization.* An alien within a class of aliens described in this section must apply for work authorization. If authorized, such an alien may accept employment subject to any restrictions stated in the regulations or cited on the employment authorization document. USCIS, in its discretion, may establish a specific validity period for an employment authorization document, which may include any period when an administrative appeal or judicial review of an application or petition is pending.

* * *

(14) An alien who has been granted deferred action, an act of administrative convenience to

the government which gives some cases lower priority, if the alien establishes an economic necessity for employment;

* * *