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

IN THE
Supreme Court of the United States

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

BRIEF FOR THE D.C. RESPONDENTS

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(Additional Captions and Counsel Listed on Inside Cover)

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

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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

The questions presented are:

1. Whether the rescission of the Deferred Action for Childhood Arrivals (DACA) policy is immune from judicial review.
2. Whether the rescission of the DACA policy violated the Administrative Procedure Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

The D.C. Respondents agree with the other Respondents that Deferred Action for Childhood Arrivals (DACA) is lawful. But the focus of this brief is narrower. Regardless of one's view of DACA's legality, Judge Bates was correct to vacate its rescission. The Government's explanation of *why* it thought DACA unlawful was incoherent. And that failure of reasoned decision-making mattered: It led the agency to neglect consideration of remedial approaches short of abandoning DACA outright—approaches that might well have resolved whatever legal concerns the Government had.

The Government frames its brief around the proposition that a new Administration ought to be able to reevaluate the discretionary policy choices of its predecessors. Respondents agree. But Secretary Duke's rescission of DACA was not based on a discretionary policy judgment. Instead, it was grounded in a legal determination by the Attorney General that DACA is unlawful. That approach allowed the Administration to tell the public that it could not permissibly maintain DACA, and that Congress and the courts, rather than the President, thus bore responsibility for the rescission's human consequences.

The Government must now live with the consequences of claiming that its hands were tied. For starters, the Administration's determination that it *lacked* discretion is reviewable. An agency cannot claim that its action was compelled by law and at the same time that the action was "committed to agency discretion by law." As Judge Bates correctly recognized, the

Government can avoid accountability or reviewability, but not both.

Nor can the Government avoid judicial review by relying on the Nielsen Memorandum to recast the rescission as a policy call. The Government was (and is) free to issue a new rescission memorandum on policy grounds. But under this Court's precedents, an agency may not defend an existing action on grounds it invents after the fact. This rule promotes both the accountability of agency decision-making and the orderly process of judicial review.

This case shows the wisdom of that rule. Judge Bates invited the Government to issue a new rescission decision based on an appropriate administrative record assembled for that purpose. The Government instead elected to re-defend the Duke Memorandum, thereby steering the case toward what it perceived as a path to faster review. The result is a jumble of conclusory, *post hoc* policy justifications made for litigation advantage, resting on an old administrative record assembled for an entirely different purpose. The APA demands more.

As for the actual basis of the rescission decision—the determination that DACA is unlawful—Judge Bates correctly concluded that the Administration's reasoning was incoherent. It is impossible to discern what, exactly, the Government found unlawful about DACA. And because the Administration did not analyze its own legal concerns in a reasoned fashion, it was premature for the Administration to conclude that rescission of DACA in its entirety was required or appropriate.

To be clear, vacatur is not an empty gesture, the first volley in a game of court-agency "ping-pong," or a request for a better "bench memo." The failure of reasoned explanation here goes to the heart of the case. As the Government's brief explains, DACA's core is simply enforcement forbearance: "Deferred action is a practice in which the Secretary exercises enforcement discretion to notify an alien of the agency's decision to forbear from seeking the alien's removal for a designated period." U.S. Br. 4. Other "DHS regulations"—each pre-dating DACA and grounded in its own statutory authority—then allow "aliens granted deferred action [to] receive certain benefits." *Id.* at 5. The Government's threadbare assertion that it lacked legal authority to maintain DACA entirely failed to consider the distinction between pure deferred action—that is, notifying the DACA recipient of the decision to forbear from enforcement—and the collateral consequences of deferred action.

No one contends here that a policy of pure deferred action for childhood-arrivals, standing alone, is unlawful. That policy is of immense significance in its own right. Yet this baby went out with the bathwater. To the extent the Administration believed DACA recipients could not lawfully receive certain additional benefits that DHS has associated with deferred action, it made no effort to identify which ones or to analyze the statutory authority for the relevant regulations, which are independent of DACA. Instead, the Administration simply leaped to the conclusion that DACA needed to be rescinded. No wonder that Judge Bates concluded the

Government had failed the basic requirements of reasoned decision-making. No other conclusion was possible.

This case, in short, is about accountability. Judge Bates made crystal clear that the Government has the power to rescind DACA, but only if it takes responsibility for its actions, offers forthright justifications, and explains them in a reasoned fashion. Because the Government failed to do so, the decision below should be affirmed.

STATEMENT OF THE CASE

A. Legal and Factual Background

1.a. "Deferred action" is a term of art for an administrative decision not to "'proceed against an apparently deportable alien.'" *Reno v. Am.-Arab Anti-Discrimination Comm. (AAADC)*, 525 U.S. 471, 483-84 (1999) (citation omitted). It is, in other words, "an informal administrative stay of deportation … bestowed as a matter of prosecutorial grace." *Matter of Quintero*, 18 I. & N. Dec. 348, 349 (B.I.A. 1982). By engaging in this "regular practice" of prioritizing its limited prosecutorial resources, *AAADC*, 525 U.S. at 484, the Government allows those whom it does not intend to remove to live without the constant fear of deportation. But because deferred action is, by definition, just a decision about enforcement, it does not change a person's underlying status as removable.

b. Although deferred action itself is only a non-enforcement decision, DHS has also chosen to treat its deferred-action decisions as relevant to certain other

matters within the agency's purview. Because these collateral effects of deferring action appear to have loomed large in the Government's assessment of DACA, they provide vital context here.

First, the statute prohibiting employment of any "unauthorized alien" defines that term to exclude persons "authorized to be so employed by [the INA] *or by* the [DHS Secretary]." 8 U.S.C. 1324a(h)(3) (emphasis added). Since 1987, the Secretary has exercised this authority to permit employers to hire numerous categories of noncitizens—ranging from certain persons with pending asylum applications, to non-immigrant students who face unforeseen economic hardship, to "[a]n alien who has been granted deferred action … if the alien establishes an economic necessity for employment." 8 C.F.R. 274a.12(c)(14). Both the statute granting the Secretary this authority and the regulation exercising it long postdate the practice of deferred action itself.

Second, the INA bars most noncitizens from participating in Social Security and Medicare, but allows their participation if they are "lawfully present in the United States *as determined by the [Secretary]*." 8 U.S.C. 1611(b)(2) (emphasis added). Since 1996, the Government has deemed that statute to encompass various categories of noncitizens for whom it "has decided for humanitarian or other public policy reasons not to initiate removal proceedings," including through deferred action—while stressing that this definition of "lawfully present" was "[f]or purposes of 8 U.S.C. 1611(b)(2) only." 8 C.F.R. 1.3(a)(4); *see Definition of the Term Lawfully Present in the United States for Purposes of Applying*

for Title II Benefits Under Section 401(b)(2) of Public Law 104-193, 61 Fed. Reg. 47,039 (Sept. 6, 1996). Once again, that regulation arose long after, extends beyond, and is distinct from deferred action itself.

Third, since 2002, DHS has treated a deferred-action decision as one of the circumstances that tolls periods of "unlawful presence" for purposes of any future inadmissibility determination. *See* 8 U.S.C. 1182(a)(9)(B)(ii) (specifying when "an alien is deemed to be unlawfully present" for this purpose). In adopting this reading, the Government made clear that the interpretation "does not in any way alter the nature of deferred action" itself. Memorandum from Johnny N. Williams, *Unlawful Presence* 1 (June 12, 2002).

In contrast to these policies, Congress and federal agencies have chosen not to extend other benefits to persons with deferred action and not to treat such persons as "lawfully present" for other purposes. For example, such individuals are not "qualified" for most public benefits programs. *See* 8 U.S.C. 1611(a), 1641(b); *see also infra* at 42. And they are treated as "present in the United States in violation of … law" for purposes of removability. 8 U.S.C. 1227(a)(1)(B).

c. The Government sometimes elects to defer action on an *ad hoc* basis, and other times pursuant to general policies that guide individual officials' discretion. The Government has adopted numerous policies of the latter variety over many decades. *See generally* H.R. Rep. No. 100-627, at 4-6 (1988). For example, a 1990 "Family Fairness" program deferred removal of approximately 1.5 million individuals whose spouses or parents had been

granted legal status in the United States. JA 850 n.15.

2.a. In 2012, then-DHS Secretary Napolitano issued a memorandum (the DACA Memorandum) instituting a deferred-action policy known as "Deferred Action for Childhood Arrivals" (DACA). DACA is a "nonenforcement policy" that "provide[s] deferred action to 'certain young people who were brought to this country as children.'" U.S. Br. 5. Specifically, Secretary Napolitano identified a class of childhood-arrivals for whom a favorable exercise of "prosecutorial discretion" would be "especially justified"—barring any countervailing considerations, which officials were charged with identifying on a "case by case" basis. *Regents* Pet. App. 98a-101a. These young people generally did not act with "intent to violate the law," and the agency's priorities did not extend to "remov[ing] productive young people to countries where they may not have lived or even speak the language." *Id.* The DACA Memorandum thus established agency-wide guidance for the exercise of "prosecutorial discretion … by deferring action" for renewable two-year periods. *Id.* 100a. But it expressly "confer[red] no substantive right [or] immigration status." *Id.* 101a.

b. As of September 2017, nearly 700,000 young people had been granted deferred action based on DACA. U.S. Br. 36. The life-changing impact of those decisions is undisputed. First, DACA recipients no longer live in fear of contact with law-enforcement (including as a witness or victim) or others who might instigate their

removal.[1] Second, because DACA recipients know the Government has no intention to remove them imminently, they can plan their lives here accordingly—from starting college with the expectation of graduating, to forging long-term relationships, to investing in their communities. Third, most have established the "economic necessity" required by the pre-existing work authorization regulation, allowing them to work on-the-books and pursue productive careers. The positive impacts of DACA have therefore been shared by recipients' families, classmates, and co-workers; by educational institutions like Princeton University; and by employers like Microsoft Corporation.

3.a. In 2014, then-DHS Secretary Johnson issued another memorandum (the DAPA Memorandum) adopting "new policies for the use of deferred action." *Regents* Pet. App. 103a. In the name of "family unity," the DAPA Memorandum recommended 4.3 million adults for consideration for deferred action, on the ground that they were parents of U.S. citizens or lawful permanent residents. *Id.* 104a. It tweaked the eligibility criteria for DACA as well. *Id.*

The DAPA Memorandum had two other notable features that framed the litigation that followed. First, the memorandum asserted, without citation or qualification,

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[1] For example, before DACA, Respondent Maria De La Cruz Perales Sanchez "avoided the police, and would not have contacted them unless it was a life or death situation"; was "reluctant to seek out medical treatment"; and could not "travel[] without fear" even in her own community. JA 880-83.

that a decision to defer action under DAPA "means that … an individual is permitted to be lawfully present in the United States." *Id.* Second, the memorandum itself invoked and appeared to exercise the Secretary's statutory "authority to grant [work] authorization." *Id.* 108a (citing 8 U.S.C. 1324a(h)(3)). The DAPA Memorandum thus invited the characterization of DAPA as a unified policy or status under which deferred enforcement was inextricably tied to "lawful presence" and eligibility for work authorization. In contrast, as explained above, past agency guidance regarding deferred action (including the DACA Memorandum) had provided only for deferred action itself—that is, for enforcement forbearance—leaving any further consequences of that deferral to be determined by whatever the regulations addressing other subjects might provide at the time they are applied. *See supra* at 5-6.[2]

b. Before the DAPA Memorandum went into effect, Texas and other States secured a preliminary injunction. The Fifth Circuit affirmed, holding that the States would likely succeed on their notice-and-comment and substantive APA claims. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

With respect to the substantive APA claim, the Fifth Circuit "conclude[d] … that the INA does not grant the

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[2] In keeping with this traditional approach, the DACA Memorandum touched on work authorization only in passing—instructing agency officials to "accept applications" from those granted deferred action "to determine whether these individuals qualify for work authorization" under the pre-existing scheme. *Regents* Pet. App. 101a.

Secretary discretion to grant deferred action *and lawful presence* on a class-wide basis to 4.3 million otherwise removable aliens." *Id.* at 186 n.202 (emphasis added). In so holding, the court contrasted this Court's "description, in *AADC*, of deferred action as a nonprosecution decision," with the fact that "[u]nder DAPA, '[d]eferred action . . . means that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States.'" *Id.* at 167-68 (quoting the DAPA Memorandum). As the court explained, "the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present," but "absent from those specific classes is the group of 4.3 million illegal aliens who would be eligible for lawful presence under DAPA." *Id.* at 179; *see id.* at 180.

The Fifth Circuit was careful to note that "[p]art of DAPA involves the Secretary's decision … not to enforce the immigration laws as to a class of what he deems to be low-priority illegal aliens," and the court took no issue with that "part" of DAPA—*i.e.*, with deferred action itself, as described in *AADC*. *Id.* at 166. But, the court explained, the fact remained that the DAPA Memorandum purported to "make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits," and Congress would not have delegated a decision "'of such economic and political magnitude to an administrative agency.'" *Id.* at 181 (citation omitted).[3]

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[3] The Government did not ask the Fifth Circuit to distinguish or

c. This Court granted the Government's petition for certiorari. Like the Fifth Circuit, the Respondent States stressed that they did not object to DAPA insofar as it afforded deferred action in the traditional sense. As they put it, DHS was "free … to issue 'low-priority' identification cards to aliens" as it saw fit. Resp'ts Br. at 39, *United States v. Texas*, No. 15-674 (U.S. Mar. 28, 2016), 2016 WL 1213267. And the States agreed that DHS could lawfully take that kind of action on a class-wide basis and on DAPA's vast scale. *See* Oral Argument Tr. 50-53, *United States v. Texas*, No. 15-674 (U.S. Apr. 18, 2016). But "DAPA's granting of lawful presence," they argued, "pushes the concept of deferred action far beyond what this Court has recognized." Resp'ts Br. at 41-42.

This Court affirmed the Fifth Circuit's preliminary injunction by an equally divided vote. *See United States v. Texas*, 136 S. Ct. 2271 (2016). In June 2017, a new DHS Secretary rescinded the DAPA Memorandum, but left the DACA Memorandum in place.

4.a. Shortly thereafter, the attorneys general of some of the States that had challenged DAPA sent a letter to Attorney General Sessions contending that the DACA Memorandum was legally defective because, "just like DAPA, DACA unilaterally confers eligibility for work authorization and lawful presence without any

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sever the DAPA Memorandum's guidance for deferring action from any further consequences of that deferral. To the contrary, the Government insisted that "'[d]eferred action under DAPA'" and "'lawful presence'" were "'two sides of the same coin.'" *Texas*, 809 F.3d at 167.

statutory authorization from Congress." JA 873 (internal citation omitted). Unless the Administration rescinded the DACA Memorandum by September 5, 2017, the States said, they would challenge DACA as well.

b. On August 24, 2017, the relevant cabinet secretaries and agency heads met at the White House. *See Principals Committee, DACA: Summary of Conclusions* at 209, No. 1:18-cv-02445 (E.D.N.Y. Aug. 14, 2019), Dkt. 63-1. At that meeting, "[i]t was agreed" that "the previous Administration's [DACA] program is unlawful and will be ended." *Id.* Accordingly, "DOJ will send a memorandum to DHS outlining the legal reasons that the DACA program is unlawful." *Id.* Then, DHS would "draft a memorandum" to "withdraw the 2012 DACA memorandum … in light of DOJ's legal determination." *Id.* DHS would also "propose a plan to wind down the DACA program," within specified parameters. *Id.* Meanwhile, the Domestic Policy Council would "develop a unified list of legislative items" relating to immigration reform, setting up a potential bargain "that addresses individuals who had previously been eligible to receive DACA permits." *Id.*

c. The agencies carried out their assigned tasks. On September 4, 2017, Attorney General Sessions sent Acting DHS Secretary Duke a one-page letter stating that the DACA Memorandum was unlawful; noting the courts would "likely" agree; and instructing that DHS should therefore rescind it. JA 877-78.

The next day, Secretary Duke issued a memorandum to her subordinates rescinding the DACA Memorandum

(the "Duke Memorandum"), *Regents* Pet. App. 111a, which was later published in the *Federal Register*, *see Notice of Availability*, 82 Fed. Reg. 43,556 (Sept. 18, 2017). After describing the litigation over DAPA and the letter from the States, Secretary Duke recited the Attorney General's "legal determination" that the program lacked "proper statutory authority" and was "unconstitutional." *Regents* Pet. App. 116a. "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," she wrote, "it is clear that the June 15, 2012 DACA program should be terminated." *Id.* 117a. She therefore "rescind[ed] the June 15, 2012 memorandum." *Id.* "Nevertheless," she explained, "in light of the administrative complexities associated with ending the program, [the Attorney General] recommended that the Department wind [DACA] down in an efficient and orderly fashion." *Id.* 116a. Accordingly, Secretary Duke established a six-month window for DHS to grant final renewals of deferred action in certain cases. *Id.* 117a-118a.

Neither the Attorney General's letter nor Secretary Duke's memorandum identified what precisely they found unlawful about DACA—the mere decision to defer enforcement action (and notify individuals of the same), or some or all of the benefits that followed under separate DHS regulations and policies. Accordingly, neither official considered whether the DACA Memorandum's rescission—*i.e.*, the rescission of enforcement forbearance—was the necessary or appropriate cure, or

whether some other remedy was available that would have fewer disruptive impacts for the agency, DACA recipients, and the public.

d. In their public-facing explanations of the decision to rescind DACA, the President and his subordinates repeatedly insisted that their hands were tied by Congress and the Constitution.

As the White House Press Secretary stated just after the rescission's announcement: "The President made the best decision in light of the fact that the system was set up by the Obama administration, in clear violation of federal law." *Press Briefing by Press Secretary Sarah Sanders* (Sept. 5, 2017), https://bit.ly/2kxBJld. When reporters asked whether the President was trying to avoid public responsibility by leaving the main announcement (on live television) to the Attorney General, she reiterated that "*[i]t was a legal decision*, and that would fall to the Attorney General." *Id.* (emphasis added); *see id.* ("[I]t would be the Department of Justice to make a legal recommendation, and that's what they did."). Another reporter asked where "the President stand[s] on the program itself," apart from "objections to the constitutionality of DACA." *Id.* The Press Secretary answered that "it's something that he would support if Congress puts it before him"; his concern was simply that "this has to be something where the law is put in place." *Id.*

The President's written statement reiterated the same message. "I do not favor punishing children … for the actions of their parents," he explained. *Statement from President Donald J. Trump* (Sept. 5, 2017), https://bit.ly/2ExWxCQ. But "[t]he legislative branch,

not the executive branch, writes these laws." *Id.* The States' threat of litigation "requir[ed] my Administration to make a decision regarding [DACA's] legality," and the Administration concluded that "the program is unlawful and unconstitutional and cannot be successfully defended in court." *Id.* Far from suggesting that the Administration was terminating DACA in an exercise of policymaking discretion, the President emphatically asserted the opposite.

The Administration returned to this refrain as the "wind down" unfolded. When the President was pressed on the "[e]ighty-six percent of the American people" who favor relief for "DACA-protected kids," he responded that he "doesn't have the right to do this" without "go[ing] through Congress." *Remarks by President Trump* (Jan. 9, 2018), https://perma.cc/5QHA-97S6. The Assistant DHS Secretary similarly advised the Senate Judiciary Committee that "we are not authorized to exercise [authority] against the advice of the Attorney General," and thus "when we were advised [DACA] was unlawful," only the terms of "draw[ing] it down" were discussed. *Oversight of the Administration's Decision to End DACA: Hearing Before S. Comm. on the Judiciary*, 115th Cong. (Oct. 3, 2017) (statement of Michael Dougherty, Assistant Sec'y). Likewise, when Acting Secretary Nielsen (who took office in December 2017) was pressured in another Senate hearing to extend the "wind down" period, she "stress[ed] how strong[ly] [she] feel[s] about finding a permanent solution for this population," but insisted that she had no discretion in the matter. *See Hearing Before S. Judiciary Comm. on*

Oversight of the U.S. Dep't of Homeland Sec., 115th Cong. (Jan. 16, 2018). She stated: "I believe the attorney general has made it clear that he believes such exercise is unconstitutional. It's for Congress to fix." *Id.*

B. Proceedings Below

1. Respondents challenged the Duke Memorandum in the U.S. District Court for the District of Columbia. The administrative record consisted of just fourteen publicly available documents totaling 256 pages, three-quarters of which were the judicial opinions in the DAPA litigation.

In April 2018, the District Court (Bates, J.) granted summary judgment to Respondents and vacated the Duke Memorandum. The court first concluded that the rescission was reviewable because it was predicated on a legal judgment that the agency lacked discretion to do otherwise. *NAACP* Pet. App. 25a-43a. The court then held that the Government had "failed adequately to explain its conclusion that the program was unlawful"—instead offering only "barebones" and "inapposite" analysis—and had "egregious[ly]" failed to account for the interests of existing DACA recipients. *Id.* 2a, 51a, 54a, 55a. The court did not reach the question of DACA's lawfulness.

The court stayed the effect of its vacatur for ninety days to allow DHS to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." *Id.* 66a. It "anticipated that DHS would do so by way of a new agency action," in

which DHS would be free to revise its policy or invoke new reasons in support of its decision. *Id.* 90a.

2. On June 22, 2018, DHS instead filed in the District Court a memorandum, addressed to no one, from Secretary Nielsen (the "Nielsen Memorandum"). *Regents* Pet. App. 120a-126a. The Nielsen Memorandum acknowledged that Secretary Duke's decision had been "vacated," *id.* 121a, but it did not rescind the DACA Memorandum anew or take any other new action. Instead, it offered "further explanation" that "reflects [Secretary Nielsen's] understanding of the Duke memorandum and why the decision to rescind the DACA policy was, and remains, sound." *Id.* 121a. The Nielsen Memorandum was neither supported by any administrative record nor published in the *Federal Register*.

The Government then moved the District Court to "revise" its earlier order vacating the Duke Memorandum and instead "leave in place DHS's September 5, 2017 decision to rescind the DACA policy." Motion to Revise at 19, *NAACP v. Trump*, No. 17-cv-2325 (D.D.C. July 11, 2018), Dkt. 74 ("Motion to Revise"). The District Court denied that motion. Rather than "issu[ing] a new decision rescinding DACA" as the earlier "order had contemplated," the court explained, DHS had chosen "to stand by its September 2017 rescission decision." *NAACP* Pet. App. 82a, 86a, 90a & n.6. Accordingly, the court could consider the Nielsen Memorandum only insofar as it further explained the agency's actual reasons for that prior decision. *Id.* 92a. And to the extent the Nielsen Memorandum was grounded in the Duke Memorandum at all, it still failed to offer a reasoned

explanation of Secretary Duke's decision. *Id.* 105a.

In August 2018, the District Court entered final judgment. *NAACP* Pet. App. 110a-111a. The Government appealed, and the D.C. Circuit heard oral argument. This Court then granted certiorari before judgment.

3. Six months after filing her in-court memorandum, Secretary Nielsen testified regarding DACA's rescission before Congress. She reiterated that the Administration rescinded DACA because it "was an unlawful use of executive authority" and predicted that the courts would ultimately agree. *Written Testimony of DHS Secretary Kirstjen Nielsen* (Dec. 20, 2018), https://bit.ly/2lWjQ3X. She did not say that DACA was rescinded for other "independently sufficient reasons." *Regents* Pet. App. 122a.

In September 2019, after the Government filed its brief in this Court, the President reiterated that his Administration rescinded the DACA Memorandum because it was a "[t]otally illegal document" and that the public should "rest assured" he favors a "bipartisan deal" to protect childhood-arrivals from removal through lawful means. Twitter, *@realDonaldTrump* (Sept. 6, 2019), https://bit.ly/2m6JSRY & https://bit.ly/2lcwkEy.

SUMMARY OF ARGUMENT

I. For two independent reasons, Secretary Duke's rescission of DACA is not "committed to agency discretion by law." First, the action did not involve any

exercise of discretion. Rather, the Attorney General determined that DACA could not lawfully be maintained. In light of that legal determination, Secretary Duke had no discretion to continue the policy. And when the Government disclaims, rather than exercises, its discretion, nothing in the APA or this Court's cases immunizes its legal judgment from judicial review. The Government seeks to avoid these problems by recasting the rescission as a discretionary decision about "litigation risk," but the binding nature of the Attorney General's determination, the text of the Duke Memorandum, and the Administration's contemporaneous public statements all belie that description.

Second, and in any event, the Duke Memorandum is reviewable because it is a general enforcement policy. As the D.C. Circuit has long held, there are sound reasons to treat such general policies—unlike the FDA's decision to deny a particular enforcement request in *Heckler v. Chaney*, 470 U.S. 821 (1985)—as presumptively reviewable. Such policies are less frequent than individual enforcement decisions, likelier to involve legal as opposed to factual analysis, and more often accompanied by a public explanation that provides a focus for review. This case is a perfect example.

II. On the merits, Judge Bates correctly held that the Government failed to offer the reasoned explanation that the APA demands. It is impossible to discern from the materials before the Court just what the Government regards as illegal about DACA or its collateral effects. And the Government failed to draw any rational

connection between its vague legal concerns and the action—rescinding DACA altogether—that it took. Accordingly, the Court should affirm Judge Bates' order vacating the rescission.

Although that judgment will leave the Government free to articulate its legal objection to DACA anew, there is no reason to think the Government necessarily will reach the same result. Insofar as the Government's legal concerns can be discerned, they appear to pertain not to DACA's policy of deferred action (*i.e.*, of enforcement forbearance and notice to the recipient of that forbearance), but instead to the benefits that deferred-action recipients may obtain as a consequence of other regulations. As the Government acknowledges, however, those benefits are distinct from both DACA in particular and deferred action in general. Accordingly, when the Government finally evaluates the issues here in a reasoned fashion, it will likely recognize that any perceived illegality can be cured *without* rescinding the DACA Memorandum and the deferred-action policy it adopted. Because the Government thought itself legally bound to take that step, however, it overlooked all other remedial possibilities.

III. The Court should not consider the Nielsen Memorandum for anything other than its attempt at explicating the Government's legal reasoning. Although the Government could have issued a new rescission decision on policy grounds after Judge Bates vacated the Duke Memorandum, it chose to double-down on defending Secretary Duke's decision instead. As a result of that choice, the Government may not defend its action

on grounds other than those invoked by Secretary Duke. That rule is both well-settled and well-justified. In any event, the Nielsen Memorandum's new "policy" rationales could not justify DACA's rescission even if they were properly before the Court.

ARGUMENT

I. THE DUKE MEMORANDUM IS REVIEWABLE.

This Court has "'long applied a strong presumption favoring judicial review of administrative action.'" *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (citation omitted). Rebutting this presumption ordinarily requires showing that a court "'would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Id.* (citation omitted). But the Government makes no attempt to show that here, and for good reason: The Duke Memorandum rests on legal reasoning that a court could readily review.[4]

Instead, the Government argues that the Duke Memorandum is analogous to the non-enforcement decision held presumptively unreviewable in *Chaney*. U.S. Br. 17-20. This argument fails for two independent reasons. First, an agency action predicated on the agency's own lack of authority—as DACA's rescission was here—is reviewable. Second, unlike *Chaney*, this case concerns a

[4] Though the Nielsen Memorandum's "policy" rationales are not properly before the Court, *see infra* Section III.A, if the Court nevertheless considers them, they relate to a general enforcement policy and are therefore reviewable for reasoned decision-making under the APA, *see infra* Sections I.B, III.B.

general enforcement policy, and such policies are presumptively reviewable.

A. The Non-Discretionary Rescission of DACA Is Not Committed to Agency Discretion by Law.

1. Secretary Duke did not rescind DACA in an exercise of enforcement discretion. Rather, as she explained, the Attorney General made a "legal determination" that the policy was unlawful. *Regents* Pet. App. 116a. And as the Government agrees, that "determination … of law" was binding on her. 8 U.S.C. 1103(a)(1); *accord Regents* Pet. App. 122a-123a. The Government cannot seriously contend that Secretary Duke had discretion to maintain a policy that she was bound to treat as illegal.

Nonetheless, the Government argues that because Secretary Duke also "recounted … the [DAPA] litigation," quoted the Attorney General's prediction that courts would "likely" agree with him, and ultimately used the word "should" rather than "must," she made a freestanding, discretionary judgment of "litigation risk." U.S. Br. 26-27. That makes too much of too little.

First, had Secretary Duke perceived such discretion, one would expect to see an assessment of the costs of rescinding the policy weighed against the legal risk of maintaining it. But there is no such assessment in the memorandum or the administrative record. Indeed, when pressed in the D.C. Circuit to point to any language suggesting the agency relied on litigation risk, the Government had no answer. *See* Oral Arg. Recording 2:00-4:07 ("[Judge Griffith:] It's not there … It's the answer, it's an easy, it's not there. … [Government:] Okay.

Let's assume that's true."), https://bit.ly/2kFWEqf.

Second, assessing "litigation risk" would have made little sense. Given the Attorney General's binding determination that the policy was unlawful, the only reason to consider "litigation risk" would be to assess whether the agency could get away with administering an unlawful policy—or perhaps instead, as Judge Bates observed, to lay a predicate for artificially "insulat[ing] [the legal decision] from judicial review." *NAACP* Pet. App. 40a.

Third, the Government's reading fails to distinguish between the decision *whether* to end DACA and the decision *how quickly* to end it. At most, Secretary Duke asserted discretion to devise an "orderly" process for "ending the program"—subject to the Attorney General's "review[] [of] the terms on which" she would do even that. *Regents* Pet. App. 116a. But there is no hint of discretion to preserve the DACA Memorandum (or, relatedly, to resolve any legal concerns by adjusting other features of the regulatory scheme while leaving the DACA Memorandum in place, *see infra* at 39-43).

Fourth, the Solicitor General's interpretation of the Duke Memorandum is inconsistent with the Administration's numerous statements to the public and to Congress, which asserted unambiguously that the Administration eliminated DACA because it was "unlawful and unconstitutional." *See supra* at 13-15.

Finally, while the statement that DACA would "likely" fail in court cannot plausibly be cast as a distinct rationale for the Government's decision, it was in any event a judgment expressly predicated on the Attorney

General's legal determination, and so would not carry independent weight regardless. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54-55 (1983) (invalidating rationale that was "expressly dependent on" another, invalid premise).

In short, the question before this Court is whether the decision the Government actually made and announced—that it was legally required to rescind DACA—is immune from judicial review.

2. When an agency action simply gives effect to the agency's determination that it lacks discretion to do otherwise, nothing in the APA bars judicial review. The APA precludes review "to the extent that … agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). But it is nonsensical to say that an agency's *disavowal* of its own discretion is "*committed* to agency discretion." "To [that] extent," at least, the agency's action is plainly not committed to its unreviewable discretion. *Cf. Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (holding that an agency's allocation of funds "to meet permissible statutory objectives" is unreviewable because "'[t]o [that] extent,' the decision to allocate funds 'is committed to agency discretion by law'" (brackets in original)). No text, tradition, or principle weighs against such limited review. And apart from its mistaken claims that *Chaney* or *ICC v. Bhd. of Locomotive Eng'rs ("BLE")*, 482 U.S. 270 (1987), settled the issue (*see infra* at 25-29), the Government does not even argue otherwise. *See* U.S. Br. 23-26.

3. Two principles of this Court's jurisprudence further confirm the propriety of judicial review when an

agency opts to disavow its discretion.

a. First, judicial review of agency action disclaiming discretion can only enhance that discretion—and so furthers the ends of Congress and the legitimate ends of the Executive Branch alike. When Congress confers authority on an agency, it "desire[s] the agency … to possess whatever degree of discretion the [statute] allows," *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 741 (1996), not some lesser degree. And when courts demand that an agency "exercise[] the discretion with which Congress has empowered it," they "affirm most emphatically the authority of the [agency]" itself. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941).

b. Second, review in such cases is essential to the separation of powers and to clear lines of accountability. This Court has afforded agencies deference when they *exercise* discretion based on their sense of good policy, even when they resolve statutory ambiguities pertaining to the limits of their own authority. *See City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). But the Court has never extended such deference—let alone insulation from all review—to cases in which the Government purports to *lack* discretion in light of what it claims to be inflexible legal commands. *See, e.g.*, *Negusie v. Holder*, 555 U.S. 511, 523 (2009). To that extent, at least, courts "do not to leave it to the agency to decide when it is in charge." *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting).

An agency decision that it is *not* in charge—and that it therefore must take a particular action, however ill-advised or unpopular—poses special concerns. When an

agency makes a discretionary decision, its choice is reviewed "in the court of public opinion." *NAACP* Pet. App. 72a-73a. But when the Government claims instead that the law forced its hand, it shifts responsibility to Congress and the courts. Review in such cases is thus essential to ensuring that the Executive Branch "may escape political accountability or judicial review, but not both." *Id.* 73a. Put otherwise, the APA should be interpreted to ensure that a President "can[not] escape responsibility for his choices by pretending that they are not his own." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010).

3. Neither *Chaney* nor *BLE* is to the contrary.

a. First, the Government mischaracterizes both the facts and the holding of *Chaney*. In that case, eight death-row inmates filed a petition "requesting that the FDA take various enforcement actions" to prevent Oklahoma and Texas from using certain drugs in their executions. 470 U.S. at 823. The agency "refused their request." *Id.*

Contrary to the Solicitor General's description, the FDA did not "reason[] that it lacked jurisdiction." U.S. Br. 17. Rather, the agency concluded that its "jurisdiction in the area was generally unclear" but "in any event should not be exercised" on policy grounds. *Chaney*, 470 U.S. at 824-25. The Court therefore framed the case as "present[ing] 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." *Id.* at 823 (emphasis added). And that is why *Chaney* reserved the question

of whether a non-enforcement decision would be reviewable if it were "based solely on the belief that [the agency] lacks jurisdiction." *Id.* at 833 n.4.

In fact, *Chaney* hinted at the logical answer to that reserved question: The very existence of "[t]he statute *conferring* authority on the agency" might indicate that a *disavowal* of that same authority was not "'committed to agency discretion.'" *Id.* (emphasis added); *see also id.* at 833 ("Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers."). That answer makes sense, as none of the practical reasons favoring unreviewability in *Chaney* have any application to an agency's judgment that it lacks authority altogether. *See id.* at 831.

b. The Government's remaining argument—indeed, its principal argument—is that "whatever doubt *Chaney* left, the Court's subsequent decision in *BLE* resolved it." U.S. Br. 24. That vastly over-reads *BLE*.

BLE concerned an agency's denial of reconsideration. 482 U.S. at 278-79. When such a denial is based solely on a judgment that the prior decision was correct, the Court reasoned, allowing review of the refusal to reconsider would only circumvent time limits. *Id.* at 279-80. The Court made clear, however, that insofar as an agency denies reconsideration based on its assessment of new evidence or changed circumstances, the agency's decision *is* reviewable. *Id.* at 278. In its main analysis, therefore, *BLE* underscores that the reasons underlying a given agency action can determine whether (or to what extent) it is reviewable.

The Government focuses instead on the Court's response to Justice Stevens' concurrence. That separate opinion argued that a refusal to reconsider should be reviewable *whenever* it is based on an explicit analysis of the substantive law at issue. The Court rejected the concurrence's sweeping premise "that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Id.* at 283. "To demonstrate the falsity of that proposition," the Court explained, it was "enough" to offer a single counterexample: A prosecutor's "failure to prosecute" would be unreviewable even if based on his belief "that the law will not sustain a conviction." *Id.* According to the Government, this riposte—which did not mention *Chaney*—resolved the important issue that *Chaney* left open. That is incorrect.

First, a criminal prosecutor's decision not to indict is so thoroughly insulated from judicial review that it is impossible to draw any lesson from *BLE*'s hypothetical broader than the one *BLE* itself drew. The hypothetical shows that the presence of a reason "that courts are well qualified to consider," 482 U.S. at 283, does not necessarily establish reviewability. But in the case of the *BLE* hypothetical, such an inference fails so clearly because of the longstanding rule against suits to compel criminal prosecutions. As then-Judge Scalia—the author of *BLE*—had previously explained, the "discretion of [a] *criminal* prosecutor" who "deci[des] *not* to prosecute" has long been held "not merely … *generally* unreviewable, but *entirely* so." *Chaney v. Heckler*, 718

F.2d 1174, 1195-96 & n.4 (D.C. Cir. 1983) (Scalia, J., dissenting) (some emphasis added; citations omitted), *rev'd*, 470 U.S. 821 (1985). So, while the example sufficed to prove *BLE*'s point, it equally underscores that *BLE* did not take up the question posed in this case. In particular, *BLE* did not address whether a court may review an agency's assertion that it would *violate* the law if it acted otherwise, let alone outside the criminal context, let alone when the contemplated review would not compel any enforcement action at all.

As for that question—the relevant one here—a different hypothetical is more illuminating. Suppose that the agency in *BLE* had denied reconsideration not based on its view of the substantive labor law, but rather in the mistaken belief that its governing statute prohibited reopening proceedings to correct material errors. Nothing in *BLE* suggests that erroneous abdication would have been accepted as unreviewable based on "the type of decision" (U.S. Br. 25) at issue. "[G]iven the strangeness of that rule … [one] cannot think that the Court adopted it without any explanation." *Cooper v. Harris*, 137 S. Ct. 1455, 1481 (2017). And here, the Government's determination that DACA exceeded Secretary Napolitano's authority to "[e]stablish … enforcement policies and priorities," 6 U.S.C. 202(5), is just such a disavowal of the agency's own authority.[5]

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[5] There is no dispute about this last point: As the Government said below, its legal rationale interpreted not "the substantive scope of the [INA]" but rather "the scope of [DHS's] own enforcement discretion." Motion to Revise 9.

In effect, this understanding of section 701(a)(2) holds that, when it comes to an agency's claim of *unreviewable* discretion—as opposed to deference—the dissenters in *City of Arlington* had it right. That is, when an agency seeks exemption from all review of its legal judgment, there must at least be a "judicial determination of whether *the particular issue* was committed to agency discretion." *City of Arlington*, 569 U.S. at 306. In light of the APA's "basic presumption of judicial review," *Weyerhaeuser*, 139 S. Ct. at 370 (quotation marks omitted), there is no basis for concluding that Congress gave DHS unreviewable discretion to identify the legal limits of its own non-enforcement discretion. And it bears reiterating that the Government has not even attempted to conjure a reason why Congress would have made such a peculiar choice.

B. Additionally, General Enforcement Policies Are Not Committed to Agency Discretion by Law.

DACA's rescission is also reviewable for a second, independent reason: It is a general enforcement policy, not an individualized enforcement decision. *Chaney* involved only the latter. And there are good reasons why general enforcement policies should not be added to the very short list of agency actions that are presumptively unreviewable.

1. *Chaney* concerned whether the Court could review an agency decision "not to undertake *certain enforcement actions*." 470 U.S. at 823 (emphasis added). In holding the FDA's decision unreviewable, the Court emphasized the various factors relevant to the exercise

of enforcement discretion in any particular case: "whether a violation has occurred"; "whether agency resources are best spent on *this* violation or another"; "whether *the particular enforcement action requested* best fits the agency's overall policies"; and whether the agency has the resources "to undertake *the action*." *Id.* at 831 (emphases added). The Court also referred throughout its opinion to a "refusal to institute proceedings" in a particular case, which it analogized to an individual prosecutor's decision "not to indict" a particular offender. *Id.* at 832; *id.* at 827-38.[6]

The Government nevertheless contends that *Chaney* involved a "programmatic determination" because the Government's *reasons* for declining to enforce could be applied to other cases that are relevantly similar. U.S. Br. 21-22. But that is true of any reason. What matters, for present purposes, is that the FDA did not set or announce any general policy governing a class of enforcement cases; it simply denied the petitions before it. In fact, one issue in *Chaney* was whether the FDA's decision was consistent with the agency's *existing* general rules and policy statements—a question that would make no sense if the FDA had revised its general policy in denying the petitions. *See* 470 U.S. at 826, 836.

2. The D.C. Circuit has thus long held that general

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[6] Justice Brennan's concurrence underscored that the Court's holding was limited to the "[i]ndividual, isolated nonenforcement decisions" that "must be made by hundreds of agencies each day." 470 U.S. at 839 (Brennan, J., concurring).

enforcement policies, announced apart from any particular matter, are presumptively reviewable. *See Edison Elec. Inst. v. U.S. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993); *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994); *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998). As Judge Williams explained in *Crowley*, there are good reasons for distinguishing between a "single-shot" non-enforcement decision and a "general enforcement policy … articulated … in some form of universal policy statement." 37 F.3d at 676.

First, "expressions of broad enforcement policies are abstracted from the particular combinations of facts the agency would encounter in individual enforcement proceedings," and thus are "more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision." *Id.* Second, broad policy pronouncements pose the risk that the agency may be "abdicat[ing] … its statutory responsibilities," whereas one-off decisions, by their nature, do not raise the same concern. *Id.* at 677 (quotation marks omitted). Finally, "an agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy, whereas such statements in the context of individual decisions to forego enforcement tend to be cursory, ad hoc, or post hoc." *Id.*

This Court relied upon essentially the same reasoning in declining to extend *Chaney* to decisions not to

institute a rulemaking. *See Massachusetts v. EPA*, 549 U.S. 497, 527 (2007). Compared to the myriad ad hoc nonenforcement decisions that agency officials must make, refusals to initiate a rulemaking are "'less frequent, more apt to involve legal as opposed to factual analysis,'" and more often accompanied by a "'public explanation'" that provides a focus for review. *Id.* (citation omitted). In each of these respects, general enforcement policies are more like decisions to forgo rulemakings than they are like the particular non-enforcement decisions in *Chaney*.

3. Finally, this case is unlike *Chaney* in another significant respect. The individual non-enforcement decisions in *Chaney* were decisions *not* to act (and in response to petitions that the affected parties had no obvious procedural right to file). *See id.* Accordingly, after the FDA denied those petitions (which it equally could have ignored), everything stood just as if they had never been filed at all. In substance, then, the agency simply opted to do nothing. Indeed, the leading treatise understands *Chaney* as standing for the proposition "that agency inaction is subject to a presumption of unreviewability." 3 Kristin E. Hickman & Richard J. Pierce, *Administrative Law Treatise* § 19.7, at 1965-66 (6th ed. 2019). Here, by contrast, the Duke Memorandum is an affirmative policy statement that dramatically alters the status quo. The agency's action thus provides the "focus for judicial review," 470 U.S. at 832, that the non-enforcement decisions in *Chaney* did not. For this reason, too, the APA's ordinary presumption—that Congress did not set agencies free to make decisions of great

consequence without any judicial backstop—should prevail here.[7]

II. THE DUKE MEMORANDUM IS ARBITRARY AND CAPRICIOUS.

The D.C. Respondents agree with other Respondents that DACA and all of its consequences are lawful. But the Court need not reach that question to affirm. This brief focuses instead on the path forged by Judge Bates: the Administration's garbled explanation for its legal determination fails the test of reasoned decision-making. Under this Court's longstanding precedent, that is reason enough to vacate the action and leave the agency free to try again if it wishes. And that is no mere formality here: If and when the Government articulates what exactly it finds problematic, there will surely be many solutions far short of the action it said it was compelled to take.

A. The Duke Memorandum Offers No Reasoned Explanation for Rescinding the DACA Memorandum.

To validly rescind the DACA Memorandum, Secretary Duke was required to "articulate[] 'a satisfactory explanation' for [her] decision." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *State Farm*, 463 U.S. at 43). This requirement has two aspects. First, the agency's explanation "must be set forth

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[7] Although the Government makes an oblique appeal to 8 U.S.C. 1252(g), that argument fails for the reasons stated by the District Court, *see NAACP* Pet. App. 19a-21a, and other Respondents.

with such clarity as to be understandable," *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947), so that a court can proceed to "fulfill its duties" under the APA. *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990). Second, if the agency passes that threshold test, its explanation (together with the administrative record) must show that it "pursue[d] [its] goals reasonably," including by drawing a "'rational connection between the facts found and the choice made.'" *Dep't of Commerce*, 139 S. Ct. at 2569, 2576 (quoting *State Farm*, 463 U.S. at 43). Here, the Government's rescission decision fails at the first step. And to the extent that its reasoning can be understood, it fails at the second step as well.

1. First, the District Court correctly held that the Government "offer[ed] nothing even remotely approaching a considered legal assessment." *NAACP* Pet. App. 105a. Although the rescission decision plainly rested on a judgment that the DACA Memorandum was unlawful, that judgment is so ill-explained that this Court could not review it short of "guess[ing] at the theory underlying the agency's action." *Chenery*, 332 U.S. at 196-97.

a. Even if the Court searches for a coherent explanation of the Government's legal reasoning in the Attorney General's letter, the Duke Memorandum, *and* the relevant portions of the Nielsen Memorandum, it will not find one.[8] Begin with the Attorney General's letter,

[8] Although it is unnecessary to resolve the issue here, only the Attorney General's letter should actually be considered in this inquiry. The APA requires that the actual basis of the controlling judgment

which stated his binding determination that the DACA Memorandum lacked "proper statutory authority" and was "unconstitutional." JA 877. That letter observed that the DAPA Memorandum was enjoined on "multiple legal grounds" and asserted, without any explanation, that the DACA Memorandum "has the same legal and constitutional defects that the courts recognized as to DAPA." JA 877-78.

This comparison to the Fifth Circuit's *Texas* decision is inscrutable. First, no court identified any "constitutional defect[] … as to DAPA." JA 878. And second, although one of the Fifth Circuit's two "legal grounds" for enjoining the DAPA Memorandum was a failure to complete notice-and-comment, *see supra* at 9, the Attorney General never mentioned that concern; Secretary Duke mentioned it at most obliquely, *see Regents* Pet. App. 114a; and both Secretary Nielsen and the Solicitor General ignored it. That leaves the comparison to *Texas* resting solely on the Fifth Circuit's holding that DAPA conflicted with the INA. But none of the agency documents offer any intelligible explanation of how the Government actually understands that holding.

According to one view—seemingly voiced at one point by Secretary Nielsen—the Fifth Circuit's holding "turned on the incompatibility of such a major non-enforcement policy with the INA's comprehensive

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be "clearly disclosed," *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), and here the controlling legal judgment was the Attorney General's. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (to warrant deference, an interpretation must "emanate from those actors … [who] make authoritative policy").

scheme." *Regents* Pet. App. 122a. But the Fifth Circuit and State plaintiffs conceded the legality of a non-enforcement policy on DAPA's scale; they only took issue with the accompanying provision of so-called "lawful presence" and, to a lesser extent, work authorization. *See supra* at 9-11. Given that disconnect, it is at least unclear whether the Government's position is actually that mere deferrals of enforcement action become unlawful when undertaken on too "major" a scale. *Cf.* U.S. Br. 45-46 (not appearing to take that position).

Perhaps, then, the Government's legal objection is instead limited (as the Fifth Circuit's and the States' was) to the *affirmative benefits* that other regulations associate with a decision to defer action. There is evidence for this interpretation, too. *See Regents* Pet. App. 114a (Duke); *id.* 122a (Nielsen); JA 877-78 (Sessions). But if these benefits underlie the alleged problem, the Government's position is only more obscure. For one thing, and as discussed in detail below, the Government has never said why this would require rescinding the *DACA Memorandum* and thereby ending enforcement forbearance, as opposed to modifying the application of other regulations. *See infra* at 39-43.

But even with respect to those other regulations, the Government has never said *which* benefits it does not believe it may lawfully confer or to whom. The Government has not said, for example, whether it now believes that the regulation treating various classes of noncitizens as "lawfully present" "[f]or purposes of 8 U.S.C. 1611(b)(2) only" is invalid—or, perhaps, is invalid in

some of its myriad applications. Nor has the Government explained whether or to what extent it now believes the DHS work-authorization regulation is unlawful. *See supra* at 5. And, finally, if the problem is the *combination* of certain of these features—*i.e.*, numerical scale, "lawful presence" for certain purposes, and potential eligibility for work authorization—the Government has not said whether the alleged legal problem is triggered by any particular combination, nor has it made any attempt to explain "'[h]ow much [deferred action] is too much,'" *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019).

b. In substance, then, all the Government has said is that it agrees with enough of the Fifth Circuit's reasoning to conclude that DACA is unlawful. Each of the Government's attempts at articulating *what* it actually agrees with, however, has yielded more questions than answers. There is an obvious reason for that: While the Administration is committed to terminating *DACA* on legal grounds, it does not wish to articulate a legal rule that would curtail the agency's future authority and cast a pall over decades-old regulations. Presumably that is also why the Government has not withdrawn and replaced the on-point, 33-page OLC opinion and replaced it with one tracking and explicating the Fifth Circuit's reasoning in *Texas*: If the Executive Branch is going to argue against its own power, it prefers to address the issue only in the cryptic fashion of the three agency documents here. *Cf. NAACP* Pet. App. 104a (describing the Government's decision to "ignore[] the 2014 OLC Memo

laying out a comprehensive framework" as "mystifying").[9]

In any event, the Government's failure to meaningfully explain itself precludes effective judicial review at this time. As this Court has said: "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *Chenery*, 332 U.S. at 197 (citation omitted). The District Court correctly vacated the rescission decision on this ground alone.

2. If the Court nonetheless decides to reconstruct the agency's reasoning as best it can and review that reasoning on its merits, the Court should hold that the agency failed to draw a "'rational connection between the facts found and the choice made'" and "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

Although the contours of the Government's position are far from clear, it seems the Government concluded that the DACA Memorandum was unlawful because it

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[9] The same dynamic is playing out in the pending litigation challenging DACA. *See Texas v. Nielsen*, 1:18-cv-68 (S.D. Tex. filed May 1, 2018). In its initial answer, the Government agreed that DACA is unlawful but declined to admit or deny specific allegations. Only after the district court struck that pleading as deficient did the Government articulate its actual position on the legal theory advanced to challenge DACA. It then "aver[red] that benefits tied to a DACA grant are the result of pre-existing regulations or other guidance, not the conferral of deferred action itself," and "that DACA is a policy permitting prosecutorial discretion, not a program conferring benefits." Corrected Answer, ¶¶ 61, 150, 329, *Texas v. Nielsen*, 1:18-cv-68 (S.D. Tex. Mar. 6, 2019), Dkt. 370.

not only resulted in a large number of decisions to defer action, but also triggered the further consequences that presently attend *all* decisions to defer action. *See supra* at 36. But even assuming (for the sake of argument) that some conjunction of these policies was indeed unlawful, that in no way explains the judgment that the DACA Memorandum itself was unlawful, or that the policy of allowing childhood-arrivals to apply for enforcement forbearance therefore had to be rescinded.

As the parties agree, the DACA Memorandum established a "nonenforcement policy" that "provide[s] deferred action to 'certain young people who were brought to this country as children.'" U.S. Br. 5 (quoting *Regents* Pet. App. 97a-101a). And as the parties also agree, "deferred action" is "a practice in which the Secretary exercises enforcement discretion to notify an alien of the agency's decision to forbear from seeking the alien's removal for a designated period." *Id.* at 4. "Deferred action" has carried that same meaning—*i.e.*, a deferral of enforcement action—from its inception. *See supra* at 4. But, as noted above, neither the Fifth Circuit nor the States that challenged the DAPA Memorandum have raised any objection to the large-scale provision of deferred action in that sense. *See supra* at 9-11. In other words, the legality of the sole action described within the four corners of the DACA Memorandum is essentially undisputed.

Furthermore, the Government agrees that a decision to defer enforcement action by itself need not inherently result in any affirmative benefits. Instead, any benefits flowing from a decision to defer action are the result of

separate regulations that post-date the practice of deferred action, pre-date DACA, and can be modified wholly independent of both. *See* U.S. Br. 5; *supra* at 5-6, 38 n.9.

Thus, the Attorney General and DHS failed to draw any rational connection between their apparent judgment that DACA recipients could not be treated as "lawfully present" for certain purposes (and/or made eligible for work authorization), on the one hand, and their conclusion that the Government could not lawfully maintain its policy of enforcement forbearance, on the other. At the very least, their failure to consider whether their objection was actually properly aimed at the DACA Memorandum's guidance for the exercise of enforcement forbearance—or instead at certain other policies they acknowledge to be separate—means that they "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

To be sure, there is a natural explanation for the Government's failure to consider that its legal objection was not properly directed at the *DACA Memorandum*: The Fifth Circuit had enjoined the *DAPA Memorandum*. But if that explains the Attorney General's or DHS's oversight, it only underscores the shallowness of their analysis. As explained above, the DAPA case was litigated on the premise that the underlying deferred-action policy and its collateral effects (which allegedly included an unbounded grant of "lawful presence") rose or fell together—a premise seemingly invited by the DAPA Memorandum itself. *See supra* at 8-11. There was no reason for the Government to take the same

stance in its internal assessment of DACA. And still worse, the agency documents give no hint that the Government even realized the choice it was making.

3. Far from being a volley in a predictable "'ping-pong game,'" *Time, Inc. v. U.S. Postal Serv.*, 667 F.2d 329, 335 (2d Cir. 1981), the decision to vacate and remand here carries immense real-world importance. The APA requires an ill-considered decision to be reconsidered in part because "proceeding on the right path may require or at least permit the agency to make qualifications and exceptions that the wrong one would not." Henry J. Friendly, Chenery *Revisited*, 1969 Duke L.J. 199, 223. Indeed, in *State Farm* itself, this Court unanimously set aside an agency decision that opted for "rescission" of an existing policy but "gave no consideration whatever to modifying" the policy to redress the agency's own concern. 463 U.S. at 46-50. Here, if and when the Government develops a cogent theory of *what* it believes to be unlawful, it will be faced with numerous remedial paths that it has so far failed to consider (or, perhaps, perceive).

Most notably, if the Government believes that the conjunction of enforcement forbearance and some form of "lawful presence" is unlawful—the principal submission of the State plaintiffs in *Texas*, *see supra* at 11—DHS could modify its policies regarding "lawful presence."[10] For example, the Government could decide

[10] Alternatively, if the Government ultimately decides that its objection is based on work authorization, it would presumably consider parallel modifications to the relevant 1987 regulation. *See*

that, on reflection, deferred-action recipients are not "lawfully present" in the sense relevant to one or another statute. *See supra* at 5-6. Or, if it preferred a more surgical approach, it could carve out those who obtain deferred action pursuant to the DACA Memorandum. In fact, DACA recipients are already defined as not "lawfully present" for purposes of the Affordable Care Act. *See* 45 C.F.R. 152.2(8). Nor does the Government treat them as "lawfully residing in the United States" for purposes of Medicaid. *See* Letter from Cindy Mann to State Health Officials (Aug. 28, 2012), https://bit.ly/2kJZgn5. But because the Government has never settled on a determinate legal theory, it has never even considered whether its concerns could be resolved by adjusting the regulation to reflect its current view of "lawful presence" (whatever that view is) or following these DACA-specific examples.

Of course, Respondents do not favor any of these modifications—but that is beside the point. Hundreds of thousands of childhood-arrivals would benefit incalculably if the Government merely continued the DACA Memorandum's assurances against removal, let alone their eligibility for work authorization. The Government has never explained why even its own concerns preclude preserving DACA to that extent—particularly in light of the substantial disruptive effects of outright rescission for DACA recipients and their families, schools, and employers. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) ("'[S]erious reliance interests

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supra at 5.

… must be taken into account.'"). Accordingly, it is vital for this Court to enforce the APA's requirement of reasoned decision-making and thereby prompt the Government to finally consider whether it is "entirely sure the evil [it sees] calls for any remedy, let alone the drastic one [it] ha[s] chosen." Friendly, *supra*, at 209.[11]

B. The Solicitor General's Arguments Do Not Explain Why DACA Is Unlawful.

The Solicitor General contends that, even if the Government gave an "inadequate explanation" at the agency level, this Court should uphold the rescission decision on the ground that "DACA is unlawful." U.S. Br. 51; *see id.* at 43-50. But the Solicitor General's attack on DACA's legality fails for essentially the same reasons that the Government's prior explanations were inadequate. If anything, the Solicitor General's brief only underscores that the Department of Justice and DHS *still* have not come to any considered position regarding the legality of large-scale deferred-action policies, the legality of the regulations that associate collateral benefits with deferred-action decisions, or the relationship between the two.

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[11] The same explanatory deficiencies dispose of the Government's remarkable argument (U.S. Br. 50-51) that the Executive Branch's legal views could justify its action even if they are wrong. Even if that premise were true, *but see Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803), the Government does not dispute that the APA's requirement of reasoned explanation would apply all the same. Here, the absence of a reasoned explanation precludes a judgment that the Government was "wrong but reasonable" in believing itself bound to rescind the DACA Memorandum.

1. First, the Solicitor General's account of the Fifth Circuit's reasoning in *Texas* "is like Hamlet without the prince." *Cooper*, 137 S. Ct. at 1496 (Alito, J., dissenting in part). The Solicitor General extracts "four reasons" from the Fifth Circuit's opinion but, through artfully truncated quotations, manages to avoid any mention of "lawful presence"—or, for the most part, work authorization. *Compare* U.S. Br. 33-36, *with supra* at 9-10 (describing Fifth Circuit's actual reasoning). This oddity appears to reflect the more basic predicament in which the Government finds itself. On the one hand, the Attorney General and DHS pinned their objection to DACA to the Fifth Circuit's decision, and the Solicitor General needs to defend their doing so. But on the other hand, the Government remains committed to its longstanding (and correct) position that the benefits that concerned the Fifth Circuit "are the result of pre-existing regulations or other guidance, not the conferral of deferred action itself." Corrected Answer, ¶ 61, *Texas v. Nielsen*, 1:18-cv-68 (S.D. Tex. Mar. 6, 2019), Dkt. 370; *see* U.S. Br. 4-5. And if that is so, these benefits could not explain why a deferred-action policy is itself unlawful or must be rescinded.

Rather than engaging with this tension, the Solicitor General papers it over. By describing the Fifth Circuit's decision in generic terms—as concerned with "deferred action and associated benefits," or "categories of aliens of vast economic and political significance"—he avoids grappling with the actual legal foundations of the "associated benefits" that gave rise to the alleged "vast economic and political significance." U.S. Br. at 34, 36

(quotation marks omitted). But as a result of this evasion, he does not articulate any serious reason for inferring from the *Texas* decision—which rested on lawful presence and work authorization—that DACA's policy of enforcement forbearance is unlawful.[12]

2. When the Solicitor General turns to articulating his *own* reasons for finding DACA unlawful, the Government's position becomes murkier still. *See id.* 43-50. What DHS may not do, he says, is "maintain a [1] categorical deferred-action policy [2] affirmatively sanctioning the ongoing violation of federal law by [3] up to 1.7 million aliens to whom [4] Congress has repeatedly declined to extend immigration relief." *Id.* at 43-44.

Initially, two of these conditions are clear makeweights. The Solicitor General never mentions the "categorical" criterion again and does not explain why the DHS Secretary is not permitted to limit the room for subjective whims and personal preferences by setting consistent, agency-wide criteria for the exercise of nonenforcement discretion—while mandating individualized review of all genuinely case-specific factors. In fact, the Solicitor General lauds such general policies. *See id.* 22; *see also infra* at 57. And the fact that Congress has not passed the DREAM Act—also ignored in the balance of the Solicitor General's discussion—proves

[12] One reason the Government remains firmly (and correctly) committed to distinguishing deferred action from its collateral effects is that, if the two were collapsed, every decision to grant or deny deferred action would presumably be subject to judicial review—just as Texas claims regarding DACA and its rescission. *See* Brief Amici Curiae of Texas et al. 31.

nothing. "[U]nsuccessful attempts at legislation" are unilluminating. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969). But even if that rule were otherwise, surely the more illuminating "unsuccessful" congressional action was the failure of legislation *to end DACA*. *See* JA 828 n.9. That speaks more directly to the policy at issue here than does the failure of legislation that would have granted childhood-arrivals full-blown legal status, a status that DACA does not provide.

The core of the Solicitor General's argument, then, is captured by the other two conditions: DHS may not "affirmatively sanction[]" or "facilitate[]" the continuing presence of too large a number of noncitizens who lack lawful immigration status. U.S. Br. 43-44. But, just as with his discussion of *Texas*, the Solicitor General is studiously vague about what this means. He does not contend that deferred action *itself* "affirmatively sanctions" anyone's presence or is for that reason unlawful. To the contrary, he acknowledges that "[a] grant of deferred action does not confer lawful immigration status or provide any defense to removal." *Id.* at 5. And he does not appear to contend that mere enforcement forbearance becomes unlawful when it is conducted on too large a scale or pursuant to an affirmative application process. *See id.* at 44-45. That position, as earlier noted, would go far beyond what even the Fifth Circuit and the State plaintiffs ever claimed, *see supra* at 36—and it would have sweeping ramifications for other non-enforcement policies, well beyond the immigration context, that the Government is predictably unwilling to invite.

If only by process of elimination, then, the Solicitor

General's objection seems to be to the collateral consequences that currently attend deferred-action decisions, at least as applied to large-scale deferred-action policies. *See* U.S. Br. 44-45 (suggesting that these consequences make a policy more than "interstitial"). But once again, the Solicitor General says virtually nothing about where these benefits come from. He thus fails to explain why they make the DACA Memorandum unlawful, rather than (at most) call for thoughtful consideration of the separate regulations and policies establishing "a procedure to make [deferred-action recipients] eligible for additional benefits." *Id.* at 45.

3. In any event, this Court should not take up the delicate merits issues posed by the legality of deferred-action policies or associated benefits based on briefing that is cursory at best, and obfuscatory at worst. Those legal issues implicate a complex statutory and regulatory scheme that governs the lives and livelihoods of millions of people, across numerous categories, in varied ways. Yet the relevant statutes and regulations make barely a cameo appearance in the Government's brief. That is all the more reason simply to hold that the Government failed to offer a reasoned explanation of its decision to rescind the DACA Memorandum. *See supra* Section II.A. If the Court goes further, however, it should hold that the DACA Memorandum itself is lawful—and leave questions pertaining to other agency regulations to be addressed if and when the need arises.

III. THE NIELSEN MEMORANDUM'S "POLICY" RATIONALES DO NOT RENDER THE DUKE MEMORANDUM EITHER UNREVIEWABLE OR LAWFUL.

Despite having rescinded DACA on legal grounds, the Government now invokes a "number of reasons" of enforcement policy offered by Secretary Nielsen. U.S. Br. 16. The Court should not permit this change in tune. After the District Court vacated the Duke Memorandum, the Government chose *not* to take a new agency action rescinding DACA—as the court's order had contemplated—but instead to insist that Judge Bates should un-vacate the Duke Memorandum and uphold that prior agency action after all. That was no accident: As the Nielsen Memorandum acknowledged, this approach allowed the Government to "continue to seek appellate review" of decisions holding Secretary Duke's action unlawful—rather than mooting those cases and facing a second round of litigation that would begin anew. *Regents* Pet. App. 121a. But having chosen to defend the validity of Secretary Duke's action, the Government cannot resort to hypothetical policy rationales invented by Secretary Nielsen nine months later. Finally, even if Secretary Nielsen's new rationales were properly before the Court, they would still fail arbitrary-and-capricious review.

A. The Nielsen Memorandum's Non-Legal Rationales Should Be Disregarded.

1. To determine whether an agency action was arbitrary or capricious, a court must "evaluate the agency's rationale *at the time of decision*." *LTV*, 496 U.S. at 654

(emphasis added). Contrary to the Solicitor General's suggestion (U.S. Br. 29), that rule does not merely prohibit new explanations by the agency's lawyers. Rather, in a series of cases, this Court has directly addressed—and strictly limited—an agency's *own* authority to augment its explanation of a prior action after the fact.

As this Court recently explained, "a court is ordinarily limited to evaluating the agency's contemporaneous explanation" of its action. *Dep't of Commerce*, 139 S. Ct. at 2573. That rule does have an exception—but it does not help the Government. In particular, if "there was such failure to explain administrative action as to frustrate effective judicial review," *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973), a court may "remand to the agency for a fuller explanation of the agency's reasoning *at the time of the agency action*," *LTV*, 496 U.S. at 654 (emphasis added). Such a remand allows after-the-fact explanation of the agency's *original* reasons, but it does not afford an opportunity to propose *new* reasons. Whether new material is obtained from the agency via in-court affidavits or via a "remand … for a fuller explanation," it must "shed light on the Secretary's reasoning *at the time [s]he made the decision*." *Id.* at 654 (emphasis added); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

This Court has already explained how these principles apply to a case like this one. If an agency gives a "contemporaneous explanation" of its action that, however "curt," "indicate[s] the determinative reason for the final action taken," then any subsequent attempt to better *explain* that prior agency action may not venture

beyond the "determinative reason" already given. *Camp*, 411 U.S. at 143; *see id.* (applying this rule to the Comptroller of Currency's "finding that a new bank was an uneconomic venture"). The Court has thus made it "abundantly clear" that "when there is a contemporaneous explanation of the agency decision, the validity of that action must 'stand or fall on the propriety of that finding,'" *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) (quoting *Camp*, 411 U.S. at 143), not some other finding devised later.

2. This rule is not only well-settled, but well-justified. For starters, the text of the APA requires it. As a matter of plain English, whether a decision was "arbitrary" or "capricious" depends on whether "the actual choice made … was based on a consideration of the relevant factors." *Overton Park*, 401 U.S. at 416. If it was not, then the decision was necessarily an "arbitrary" (or "capricious") one. It makes no difference whether the decisionmaker (or her successor) later comes to think that she happened upon the right bottom-line.

Beyond the text, this Court's longstanding rule against upholding old actions based on new reasons serves three central values of administrative law—each exemplified by this case.

a. First, the rule serves "the principle of agency accountability." *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986) (plurality opinion). "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer … reasons that can be scrutinized by courts *and the interested public*."

Dep't of Commerce, 139 S. Ct. at 2575-76 (emphasis added). That core objective would be frustrated if the agency could act on one basis and present that rationale to the public, only to have the action upheld based on different reasons it articulates in a court filing months or years later.

This case is a perfect example. The Administration went to great lengths to present DACA's rescission as a "legal decision" that was "for Congress to fix." *See supra* at 13-15. If the Administration now wishes to rescind DACA on other grounds—with different political implications—it should be required to take a new agency action that the public will understand to take the place of the last one. Although the Government objects that a new action would come at the cost of "reset[ting] this protracted litigation," *NAACP* Cert. Reply Br. 4, that is, in part, the point. Such a "reset" would make clear to the interested public that the Government has made a distinct decision worthy of equal attention and scrutiny as the first. By contrast, if the *original* action is now upheld, many will understandably conclude that the "legal decision" advertised to the public was vindicated by the courts.

b. Just as importantly, the APA's bar on *post hoc* rationalizations ensures that agency decisions are guided by fair and considered judgment. This Court has recognized that agencies (not just their lawyers) will naturally be drawn to rationalize their prior actions. The fact that a position is "'advanced by an agency seeking to defend past agency action against attack'" is thus a "reason to suspect that [it] 'does not reflect the agency's fair and

considered judgment.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (citations omitted); *see Kisor*, 139 S. Ct. at 2417 (same). By requiring that the agency make a new decision if it wishes to rest on a new reason, the traditional rule mitigates the gravitational pull of the existing decision on the agency's thinking.

Once again, this case exemplifies the logic of the rule. As a practical matter, Secretary Nielsen's assessment of the reasons for and against rescinding DACA was surely colored by the fact that she was actively litigating the merits of her agency's existing decision to rescind DACA. That is not to accuse the Executive Branch of "[ir]regularity" (U.S. Br. 30), but simply to recognize that agency officials are not immune to human psychology. When an agency takes a new action, by contrast, it necessarily abandons the hope (and temptation) of vindicating its last one in further litigation. And here again, the Government's candid concession that it did not wish "to reset this protracted litigation by issuing a 'new' independent agency decision," *NAACP* Cert. Reply Brief at 4, proves the point. New reasons given in the midst of "protracted litigation" that the agency is eager to resolve are likely to represent a "'convenient litigating position,'" *Christopher*, 567 U.S. at 155, rather than a considered judgment.

Indeed, the Nielsen Memorandum poses this familiar worry with unusual sharpness. Given Secretary Nielsen's acknowledgment that the Attorney General's legal determination remained binding on her, *see Regents* Pet. App. 122a-123a, her assertion that she also favored

DACA's rescission as a matter of policy lacked any real-world consequence. The only reason even to undertake such a hypothetical exercise of discretion was to seek an advantage in this litigation. Tellingly, the new policy rationales were not supported by any new administrative record, nor grounded anywhere in the prior administrative record—and yet, in Secretary Nielsen's asserted judgment, each made for a "separate and independently sufficient" reason why the agency had been right all along. *Id.* 122a. This Court's ordinary concerns about an agency's *post hoc* rationalizations apply with particular force to this kind of litigation-oriented thought experiment.

c. Finally, the traditional bar on new reasons for old actions also promotes "the orderly functioning of the process of review." *Chenery*, 318 U.S. at 94. "[T]he courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." *Id.* And they cannot exercise their duty in an orderly fashion if the "considerations underlying the action under review," *id.*, are a perpetual moving target. In fact, an agency anticipating litigation would have perverse incentives: Rather than crafting the best possible defense for its action at the outset, the agency instead would be best served by promulgating a trial-balloon rationale, waiting until it is sued, and then crafting reasons to circumvent the challengers' arguments. That not only enlists courts in a game of Whac-a-Mole, but also further undermines the values of accountable and considered decision-making.

Just as with those other values, this case illustrates

the disorder threatened by the Government's approach. The District Court rendered summary judgment and vacated the Duke Memorandum in April 2018. Whatever new reasons for rescinding DACA the agency later adduced, they could not warrant "revising" a prior judgment that was in no way erroneous. *See* Motion to Revise at 19. Meanwhile, the Government also sought to interject and rely upon the new memorandum in two pending appeals of district court decisions rendered before the memorandum even existed. Orderly review under the APA is better achieved by hewing to this Court's simple and venerable rule: An agency action may not be upheld based on *post hoc* rationalizations.

3. Because the Duke Memorandum may not be upheld based on new reasons, the Government's choice to "stand by its September 2017 rescission decision," *supra* at 17, places it in a self-imposed bind. The Duke Memorandum rested solely on a judgment of legal invalidity. *See supra* at 21-23. Accordingly, insofar as the Nielsen Memorandum advances any other arguments, they are not properly at issue here. At the same time, the Nielsen Memorandum's actual legal explanation remains inadequate. *See supra* at 35-40. And the Duke Memorandum thus remains both reviewable and arbitrary and capricious. That resolves this case.[13]

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[13] Contrary to the Solicitor General's assertion (U.S. Br. 29-30), the District Court agreed with the critical aspects of this analysis. As the court explained, insofar as Secretary Nielsen had recast the agency's decision as a "policy" choice, she had impermissibly "alter[ed]," rather than "elaborat[ed] on," Secretary Duke's reasoning.

To be sure, even when a prior agency action was arbitrary, this Court has occasionally found it unnecessary to remand because the outcome of future proceedings was wholly foreordained. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion). That is not so here. As explained above, DHS still has not yet reckoned with the range of options for remedying the asserted legal problem that has so far driven its decision-making. *See supra* at 41-42. And any new decision to rescind the DACA Memorandum on policy grounds would implicate delicate "considerations of politics, the legislative process, [and] public relations." *Dep't of Commerce*, 139 S. Ct. at 2573. Indeed, the President continues to assert that he supports relief for DACA recipients—and that his Administration rescinded the existing policy not based on substantive disagreement, but because it is "totally illegal." *Supra* at 18. Thus, it is impossible for the Solicitor General, former-Secretary Nielsen, or anyone else to predict how the President and now-Secretary McAleenan will respond to a decision affirming the judgment below.

B. Even if the Nielsen Memorandum's Non-Legal Rationales Are Considered, They Do Not Justify Upholding the Duke Memorandum.

1. The District Court correctly held that, even if the Nielsen Memorandum's "policy" arguments were to be

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NAACP Pet. App. 101a; *see id.* at 95a-98a. True, the court treated this conclusion only as establishing reviewability, rather than as rendering the non-legal assertions completely irrelevant. But the court nevertheless proceeded to correctly reject the new arguments on the merits. *See id.* at 98a-103a; *infra* Section III.B.

considered, they should not be permitted to preclude judicial review—particularly in light of "the broader context of this litigation." *NAACP* Pet. App. 95a-100a; *supra* n.13; *see also Overton Park*, 401 U.S. at 420 (explaining that, even in the limited circumstances when an agency's augmented explanation may be considered, it "must be viewed critically"). That judgment was, at a minimum, well within the court's discretion in resolving a motion for reconsideration. Moreover, because the rescission of DACA is a change in a general enforcement policy, it is presumptively reviewable regardless of whether it rests on an asserted lack of discretion. *See supra* Section I.B. Like other discretionary judgments, Secretary Nielsen's "policy" rationales can at least be reviewed to determine whether DHS "exercise[d] its discretion in a reasoned manner." *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

2. Each of the new arguments adduced by Secretary Nielsen is arbitrary and capricious.

a. Secretary Nielsen said she had "serious doubts" about the legality of the DACA Memorandum. *Regents* Pet. App. 123a. But the arbitrariness of the Government's legal explanation, *see supra* Section II.A, is fatal regardless of whether it is offered in support of a claim of "doubt" or a bottom-line conclusion. Likewise, the suggestion that the agency rescinded DACA outright for fear of repeating the *Texas* case rests on the same non sequitur discussed above. *See supra* at 38-41, 44-45.

b. Secretary Nielsen's purported "reasons of enforcement policy" fare no better. One asserted reason is that "DHS should enforce the policies reflected in the

laws adopted by Congress." *Regents* Pet. App. 123a. But the law most on point, 6 U.S.C. 202(5), affirmatively *authorizes* DHS to set enforcement policies and priorities—and does so against a backdrop of numerous past deferred-action policies that are not different from DACA in any respect noted by Secretary Nielsen. The closest Secretary Nielsen came to identifying a contrary legislative "policy" was to draw an inference from the non-passage of the DREAM Act, but that inference fails for the reasons given above. *See supra* at 46.

Secretary Nielsen also asserted that DHS "should only exercise its prosecutorial discretion" free of agency-wide criteria that "tilt the scales" in favor of deferring action in certain cases. *Regents* Pet. App. 124a. But, again, Congress made the DHS Secretary "responsible" for "[e]stablishing … enforcement policies and priorities," 6 U.S.C. 202(5)—and for exercising "control, direction, and supervision" over DHS employees, 8 U.S.C. 1103(a)(2) and (3). An unexplained preference for abdicating those responsibilities and leaving employees to act on whim is irrational. For that matter, the Government itself argues that "'supervisory control over [individual] discretion is necessary to avoid arbitrariness.'" U.S. Br. 22 (citation omitted). In any event, Secretary Nielsen did not offer any evidence that the residual case-by-case review prescribed by the DACA Memorandum had actually proved inadequate.[14] Nor

[14] In fact, the evidence establishes that discretionary review of DACA applications is far from perfunctory. *See* Brief Amici Curiae of *Texas v. United States* Defendant-Intervenors DACA Recipients and State of New Jersey.

did she explain why, if it had, she could not "simply direct her employees to implement it properly." *NAACP* Pet. App. 100a.

Secretary Nielsen also suggested that DHS must "project a message" about DHS's intent to enforce the law, given that "thousands of minor aliens have illegally crossed … our border in recent years." *Regents* Pet. App. 124a. But nothing in the record supports the claim that DACA—which applies "only to those individuals who have lived in the United States since 2007," *NAACP* Pet. App. 102a—has any causal relationship to minors crossing the border. Secretary Nielsen failed even to acknowledge that the Government previously took a contrary position. *See* U.S. Br. at 47, *United States v. Texas*, No. 15-674 (U.S. Mar. 1, 2016), 2016 WL 835758. And, tellingly, rather than cite the administrative record to support the point, the Solicitor General cites a law-review article that the agency apparently never considered. U.S. Br. 41.

3.a. Finally, an additional defect cuts across the whole of the Nielsen Memorandum. As the District Court explained, Secretary Nielsen "fail[ed] to engage meaningfully with the reliance interests and other countervailing factors that weigh against" rescission. *NAACP* Pet. App. 106a. In fact, she did "not even identify what those interests are," *id.* 107a, even though they plainly bear on the remedial choice facing the Government, *see supra* at 41-43. Instead, contrary to this Court's admonition that *agencies* must carefully consider the effects of rescinding an existing policy, Secretary Nielsen simply opined that any such matters

"would best be considered by Congress." *Regents* Pet. App. 125a. She thus gave no hint that she considered the equitable considerations identified in the DACA Memorandum, the number of people who had obtained deferred action under DACA, the life-changing significance of those deferrals, or the derivative impacts of rescission on families, schools, churches, communities, and employers. The administrative record does not even include any information on these subjects.

If Secretary Nielsen's discussion of costs and reliance suffices here, this Court's instruction that "'[i]t would be arbitrary and capricious to ignore such matters,'" *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1209 (2015) (citation omitted), will be reduced to a box-checking exercise. When a *court's* remedial order offers only "minimal reasoning" and purports to have evaluated only "unspecified costs," this Court lacks "confidence that [it] adequately grappled with the interests on both sides" and is unable to perform "even deferential review." *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017) (*per curiam*). An agency charged with decisions of the magnitude at issue here should be held to no less a standard.

b. Finally, Secretary Nielsen's cursory discussion of rescission's disruptive effects also severely undermines her claims of severability. Although Secretary Nielsen asserted that each of her three rationales was "independently sufficient" as an affirmative reason to rescind DACA, *Regents* Pet. App. 122a, she did not attempt to weigh each of those reasons independently against the interests on the anti-rescission side of the balance. *See*

id. 125a (stating only that reliance interests "do not outweigh the questionable legality of the policy *and* other reasons for ending the policy discussed above" (emphasis added)). Thus, one cannot conclude that Secretary Nielsen meaningfully considered whether each of her grounds would independently justify rescission. The absence of any such analysis is less surprising when one remembers that Secretary Nielsen was engaged in a counterfactual assessment of how she would exercise discretion that she believed that she did not have. *See supra* at 52-53. As this Court has observed, "'legal lapses and violations occur, and especially so when they have no consequence.'" *Weyerhaeuser*, 139 S. Ct. at 370 (citation omitted).

CONCLUSION

The District Court's judgment should be affirmed.

Respectfully submitted,

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