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

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Petitioners,

v.

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

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE ADMINISTRATIVE LAW PRACTITIONERS IN SUPPORT OF RESPONDENTS

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Additional Captions Listed on Inside Cover

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

Petitioners,

v.

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

Respondents.

On Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the District of Columbia Circuit

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

Petitioners,

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL.,

Respondents.

On Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the Second Circuit

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INTEREST OF AMICI CURIAE[1]

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SUMMARY OF ARGUMENT

I. The supplementary memorandum of former Department of Homeland Security (DHS) Secretary Kirstjen Nielsen is not properly before the Court and should not be considered in assessing the lawfulness of the repeal of the Deferred Action for Childhood Arrivals (DACA) program.

A. It is settled law that "in reviewing agency action, a court is ordinarily limited to evaluating the agency's *contemporaneous explanation* in light of the existing administrative record." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (emphasis added) (collecting authorities). Any other rule would be unadministrable, making the subject of review a moving target for litigants and the courts. Moreover, upholding agency decisions on the basis of new reasons developed during litigation would undermine

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel contributed money to fund the brief's preparation or submission. All parties lodged letters of blanket consent to the filing of amicus briefs.

public confidence in the administrative process, suggesting to the public that the agency deliberative process was a sham and that the agency's initial explanation was pretextual.

The Nielsen memo is the kind of post-hoc explanation that is generally prohibited—issued months after the initial decision and self-consciously designed to add reasons that were never mentioned in the original agency explanation.

B. The Court has created a narrow exception to the contemporaneous explanation rule, for cases in which an agency's original rationale is so unclear as to prevent judicial review. *See Camp v. Pitts*, 411 U.S. 138 (1973) (per curiam). But even in that context, the Court has prohibited the agency from adding new rationales in the guise of clarifying the original basis for its decision. *See id*. at 143. Accordingly, if the Court *were* to consider the Nielsen memo, it should at a minimum, consistent with *Camp*, refuse to consider the memo's attempt to add new "policy" reasons for DACA's withdrawal.

II. In any event, even if the Court were to consider Secretary Nielsen's memo, the additional reasons it gives are arbitrary and capricious.

A. Secretary Nielsen asserts that Congress, rather than DHS, should enact programs like DACA. But she recognizes that in 6 U.S.C. § 202(5) Congress has given DHS the power to establish broad enforcement policies and priorities, and ignores the Government's repeated use of that power over the decades to create programs like DACA through the categorical use of prosecutorial discretion, some of which DHS continues to administer to this day. Nor

does Secretary Nielsen acknowledge that Congress has effectively ratified the use of deferred action to create protections for categories of individuals.

In the same vein, Secretary Nielsen's explanation that deferral discretion should be exercised only on an individualized, case-by-case basis is arbitrary. That reasoning ignores that DACA already requires a substantial degree of individualized consideration. Moreover, the Secretary failed to consider obvious and less drastic alternatives to full rescission, such as simply directing her employees to implement DACA with a greater degree of case-by-case consideration. The failure to consider obvious, less-drastic alternatives is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-48 (1983).

Secretary Nielsen also claims that repealing DACA is necessary to deter the flow of illegal immigration by migrant teens. But she fails to acknowledge that DACA is available only to individuals who have lived in the United States since 2007. The Government's lawyers attempt to provide the missing reasoning, arguing that retaining DACA would give immigrants hope for other amnesty programs in the future. But that explanation is an impermissible post-hoc invention of appellate counsel. And, in any event, counsel does not explain why an immigrant who is willing to come to this country based on nothing more than the hope of a future amnesty program would be deterred by the repeal of DACA when the Secretary herself insists that all comers are still entitled to seek deferred status on a case-by-case basis and when subsequent administrations and

Congress remain free to reinstate or create similar programs in the future.

The Secretary's conclusory statement that the "asserted reliance interests [do not] outweigh the questionable legality of the DACA policy and other reasons for ending the policy," *Regents* Pet. App. 125a, is wholly inadequate as well. That boilerplate assertion is not the kind of consideration of reliance interests this Court's decisions require. That failure is not saved by the Secretary's assertion that DACA recipients could still apply for deferred action on a case-by-case basis. The memo does not explain what the replacement system will entail nor assess whether that system will offer a real chance for relief to any meaningful number of those presently relying on DACA.

Finally, having justified her decision on the basis of a cost-benefit analysis, the Secretary was obligated to engage in a rational weighing of the competing interests, which she failed to do. As noted, the memo's assessment of the purported benefits (*e.g.*, deterring future unlawful immigration) is irrational. Its consideration of the human and other costs of deporting tens of thousands of individuals from the only country they've ever known is nonexistent.

B. If any of Secretary Nielsen's justifications are arbitrary and capricious, the agency's rescission of DACA must be vacated and the matter remanded for reconsideration. Although the memo contains boilerplate language asserting that each of the reasons set forth is "independently sufficient," that claim is belied by the substance of the memo itself, which weighs the costs and benefits of repeal collectively.

ARGUMENT

In September 2017, then-Acting DHS Secretary Elaine Duke issued a memorandum ordering an end to the DACA program. As respondents and others explain, the reasons given in that contemporaneous memo are arbitrary and capricious. Perhaps aware of the weakness of the original rationale, the Government also relies in this Court on a post-hoc memo from Acting Secretary Duke's successor, Kirstjen Nielsen, purporting to provide additional support for her predecessor's decision. That memo is not properly before the Court and should not be considered. Even if the Court were to consider the memo, however, the additional reasons it gives are no less arbitrary or capricious than the agency's original explanation.

I. The Nielsen Memo Should Not Be Considered In Assessing The Lawfulness Of DACA's Repeal.

It is settled that judicial review of agency action ordinarily must be based on the explanation the agency provided at the time of its decision. The Nielsen memo may not be considered in reviewing the legality of DACA's repeal under that principle and does not fall under any recognized exception to the basic rule. If the Court nonetheless considers the memo, it should confine its review to Secretary Nielsen's elaboration of the reasons originally given in support of DACA's repeal and disregard the new "policy" reasons given as additional support.

A. Post-Hoc Agency Explanations Like The Nielsen Memo Cannot Be Considered In Reviewing An Agency Action Under The APA.

1. It is a "settled proposition[]" of administrative law that "in reviewing agency action, a court is ordinarily limited to evaluating the agency's *contemporaneous explanation* in light of the existing administrative record." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (emphasis added) (collecting authorities). If the court determines that the agency action is arbitrary or capricious based on that contemporaneous explanation, it "shall . . . set aside" the agency action. 5 U.S.C. § 706(2). Ordinarily, the matter is then remanded to the agency, which may elect to reopen the administrative record and take a new administrative action on the basis of new evidence or rationales. *See, e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Sometimes, the agency will reach the same decision as it did before. In that case, its renewed action is subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 701-706, on the basis of the new administrative record and the agency's revised rationale. *See, e.g.*, *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1068 (D.C. Cir. 2003).

Under this established regime, a court generally may not consider additional reasons proffered after the fact in defense of the original decision. *See Dep't of Commerce*, 139 S. Ct. at 2573; *see also, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), and explaining

that affidavits presented in litigation that purported to explain basis for agency decision were "merely '*post hoc*' rationalizations, which have traditionally been found to be an inadequate basis for review"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

There are sound reasons for this standard practice. To start, constraining judicial review to the "grounds upon which the administrative agency acted [and] clearly disclosed" is necessary to preserve the "orderly functioning of the process of review." *Chenery*, 318 U.S. at 94. Otherwise, the subject of review could become a moving target, with the agency constantly changing its justifications as the weakness of the initial rationale becomes apparent when tested in litigation. It is in neither the interest of the public nor the courts for APA review to become a game of whack-a-mole.

Moreover, allowing the Government to develop new rationales for its actions during litigation could reduce agencies' incentive to think through their actions thoroughly in the first instance. Indeed, it could even encourage agencies to engage in gamesmanship by issuing vague explanations of their actions, believing they can develop the rationale further during litigation, tailored to the challengers' specific objections.

But perhaps most importantly, upholding an agency decision on the basis of new reasons developed during litigation would undermine public confidence in the administrative process. "The reasoned explanation requirement of administrative law," the Court recently explained, "is meant to ensure that agencies offer genuine justifications for important

decisions, reasons that can be scrutinized by courts and the interested public." *Dep't of Commerce*, 139 S. Ct at 2575-76. Allowing an agency to develop new reasons for its actions during litigation suggests to the public that the agency deliberative process was a sham and that the public explanation at the time of the decision was just a pretext. Perhaps courts could guard against this prospect by inquiring into whether the new rationale is genuinely held. But that alternative has its own undesirable effects, as "judicial inquiry into 'executive motivation' represents a 'substantial intrusion' into the workings of another branch of Government and should normally be avoided." *Id.* at 2573 (citation omitted).

Beyond facilitating public oversight, the APA also seeks to further public participation in administrative policymaking (*e.g.*, by requiring public notice of certain kinds of proposed administrative action and requiring the agency to accept and take into account public comment). *See, e.g.*, 5 U.S.C. § 553; *see also id*. §§ 554, 556. It would make a mockery of that system to allow an agency to jettison the rationale emerging from that public process in favor of a new explanation developed behind closed doors in response to litigation.

It is thus far more orderly, more conducive to public confidence and participation in the Government, and more in line with the Constitution's separation of powers for a court to review the agency justifications as given when a decision was made and, if the record or rationale is found wanting, vacate the order and allow the agency a chance to revise its decision, the record, or its explanation on remand.

2. The Nielsen memo is the kind of post-hoc explanation that is generally prohibited. It was issued

more than nine months after the initial decision, directly in response to litigation. And it was self-consciously designed to add reasons that were never mentioned in the original agency explanation. *See Regents* Pet. App. 120a-125a.

The Solicitor General insists that the rule against post-hoc justification applies only to rationalizations of appellate counsel in litigation, not the agency itself. *See* U.S. Br. 29. When the explanation is given by the relevant agency official rather than her lawyers, the United States argues, the reasoning "*is* agency action, not a *post hoc* rationalization of it." *Id*. (quoting *Martin v. OSHRC*, 499 U.S. 144, 157 (1991)).

This Court's precedents hold otherwise. In *Citizens to Preserve Overton Park*, for example, the Government submitted affidavits representing the position of the Secretary of Transportation. *See* 401 U.S. at 409. The Court nonetheless rejected them as "merely '*post hoc*' rationalizations" that provided "an inadequate basis for review," *id*. at 419. Likewise, in *Camp v. Pitts*, 411 U.S. 138 (1973) (per curiam), discussed in greater detail below, the Court made a limited exception to permit an agency to better explain the basis of a prior decision, but forbade the agency from adding to the rationale originally given. *See id*. at 143. That limitation would make no sense if the Court viewed a subsequent explanation by an agency (as opposed to its lawyers) as constituting the relevant agency action, as the Government now contends.[2]

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[2] The only authority the Government cites, *Martin v. OSHRC*, is inapposite. There, the Court deferred to an agency's interpretation of a regulation developed during agency

The situation would be different if Secretary Nielsen had revoked the prior order and issued a new one, as the District Court for the District of Columbia had urged. After finding the repeal arbitrary and capricious based on the reasoning in the Duke memo, that court "vacate[d] DACA's rescission but stay[ed] its order of vacatur for 90 days." *NAACP* Pet. App. 66a. The point of the delay was to allow the agency to "cure the defects that the court has identified," *id*. at 62a, by "reissu[ing] a memorandum rescinding DACA, this time providing a fuller explanation," *id*. at 66a. Had Secretary Nielsen done so, her renewed order would be the relevant agency action, and the present challenges to the old order would likely be moot. But here Secretary Nielsen made the strategic decision *not* to replace the original order precisely to *avoid* mooting the litigation challenging the old one. *See Regents* Pet. App. 121a. The Administration may have had legal or political reasons for making that choice. But it was a strategic decision that has consequences under established law.

DHS also could have asked the reviewing courts for a voluntary remand for further proceedings to supplement the administrative record. *See generally Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 386-88 (D.C. Cir. 2017). Doing so would have allowed the agency to provide additional support for its decision while maintaining the orderliness of APA review. It also would have preserved public confidence that any

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enforcement proceedings. *Martin*, 499 U.S. at 156-57. There is a world of difference between deferring to an agency's interpretation of the legal *meaning* of its prior regulation and accepting a new post-hoc, supposedly fact-based policy *rationale* for the issuance of that regulation in the first place.

revision in the Administration's position was the result of a genuine, deliberative process. But DHS passed up that opportunity as well.

Finally, some courts have held that when an agency action is arbitrary or capricious on the contemporaneous administrative record, but it appears likely that the agency will be able to justify its existing decision on remand, the court can remand without vacating. *See, e.g.*, *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009); *see generally* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291 (2003). But that did not happen here either. In the District of Columbia litigation, the Government argued that the district court's stay of its vacatur order amounted to a remand without vacatur. 17-cv-02325 Doc. 76, at 1-3 (D.D.C. July 27, 2018). But the court corrected that misimpression, *NAACP* Pet. App. 90a-91a, and the Government does not challenge that explanation here. Instead, on the basis of the Nielsen memo, DHS asked the district court to "revise its Order to reject Plaintiffs' challenges" to the original decision to rescind DACA. 17-cv-02325 Doc. 74, at 1 (D.D.C. July 11, 2018). Likewise, in this Court, the Solicitor General does not claim that the Nielsen memo created a new agency action in response to a remand order, but instead argues that the Nielsen memo shows that the district court *erred* in ordering a remand in the first place. As discussed, that position

runs aground on this Court's established contemporaneous explanation rule.[3]

B. Even When Post-Hoc Explanations Are Allowed, They May Not Extend Beyond The Original Rationale Offered For An Agency Decision.

This Court has permitted agencies to provide post-hoc explanations for their decisions in certain rare circumstances. But even then, the agency is limited to elucidating its original rationale and may not provide new reasons, as the Nielsen memo attempts to do.

1. The controlling authority here is *Camp v. Pitts*. There, the Comptroller of the Currency denied the respondent a banking charter. In a brief letter, the Comptroller explained that he was "unable to reach a favorable conclusion as to the need factor," referring to

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[3] The questionable lawfulness of the remand-without-vacatur procedure provides additional reason for this Court not to treat the Nielsen memo as the product of such a remand. The circuits are divided over whether that remedy is appropriate in light of the APA's plain language, which provides that upon finding an agency action arbitrary, capricious, or contrary to law, the court "*shall* . . . set aside [the] agency action." 5 U.S.C. § 706 (emphasis added); *compare Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 257-58 (3d Cir. 2010) (remand without vacatur permitted), *Comcast*, 579 F.3d at 8 (same), *and Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (same), *with Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 (10th Cir. 1999) (rejecting remand without vacatur doctrine), *Comcast*, 579 F.3d at 10 (Randolph, J., concurring) ("'Set aside' means vacate, according to the dictionaries and the common understanding of judges, to whom the provision is addressed. And 'shall' means 'must.' I see no play in the joints."), *and Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757-58 (D.C. Cir. 2002) (Sentelle, J., dissenting) (same).

one of the statutory criteria for obtaining a federal bank charter. 411 U.S. at 139. The court of appeals concluded that the basis of the denial was not spelled out with sufficiently clarity to permit judicial review. *Id.* at 140. It therefore ordered the trial court to hold a de novo hearing on the respondent's eligibility. *Id*. This Court reversed. The Court explained that "the focal point for judicial review should be the administrative record already in existence." *Id.* at 142. For that reason, the court of appeals had erred in ordering the district court to decide the case on the basis of a record to be developed for the first time in court. *Id*. Instead, this Court held that if

> there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a *de novo* hearing but, as contemplated by *Overton Park*, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.

Id. at 142-43.

The Court then added a critical "caveat." 411 U.S. at 143. It explained that although the original decision "may have been curt," it nonetheless "indicated the determinative reason for the final action taken," (i.e., failure to satisfy the "needs" requirement under the statute). *Id*. In that circumstance, the Court held, the "validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review." *Id*. In other words, any new materials must "be explanatory of the decisionmakers' action at the time it occurred. No new

rationalizations for the agency's decision should be included, and if included should be disregarded." *Sierra Club v. Marsh*, 976 F.2d 763, 772-73 (1st Cir. 1992) (collecting citations); *see also, e.g.*, *Envtl. Def. Fund, Inc v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) ("The new materials should be merely explanatory of the original record and should contain no new rationalizations.").

2. The Government does not claim that the Nielsen memo is properly considered under *Camp*, and for good reason. None of the courts below invoked *Camp* or otherwise ordered DHS to submit affidavits clarifying the reasoning of the Duke memo. While the District Court for the District of Columbia attempted to provide DHS an opportunity to cure the defects in the original order and memo, it did not do so by invoking the *Camp* procedure, but instead by staying its judgment to allow DHS to issue a new order (an invitation the agency rejected). *See supra* at 10.

In any event, the extraordinary procedures allowed by *Camp* are permitted only when the agency's original rationale is *unclear*, not when it is clear but unconvincing. *See Camp*, 411 U.S. at 142-43; *Cotton Petroleum Corp. v. U.S. Dep't of Interior*, 870 F.2d 1515, 1528 n.5 (10th Cir. 1989). Here, there's no question what the original order's rationale was—DHS thought DACA was likely illegal. Nielsen did not issue her memo to clarify that point, but instead to add "policy" reasons why the agency would take the same action even if it was wrong in its views of DACA's

lawfulness. *See Regents* Pet. App. 123a-125a. That is exactly what *Camp* forbids.[4]

3. Accordingly, the Court should not consider the Nielsen memo at all. But if the Court does consider the memo, it should at least, consistent with *Camp*, refuse to consider the memo's attempt to add new reasons for the agency action.

a. The supplementary affidavit procedure contemplated by *Camp* is, and should be, rarely invoked. In fact, "[s]ubsequent cases have made clear that remanding to the agency in fact is the preferred course." *PBGC v. LTV Corp.*, 496 U.S. 633, 654 (1990); *see also Lorion*, 470 U.S. at 744 ("[I]f the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."). And, as discussed, in the rare instance in which *Camp* permits an exception to the general contemporaneous explanation rule, the agency is still prohibited from advancing new reasons for its original

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[4] Indeed, Secretary Nielsen was in an especially poor position to offer any insight into the reasons motivating the original withdrawal. For one thing, she was not the author of the original memo. In addition, her predecessor was not, in fact, the principal source of the reasoning behind DACA's withdrawal—the Duke memo makes clear that DHS was simply complying with a one-page letter then-Attorney General Jefferson B. Sessions III had sent the day before, suggesting that DACA be withdrawn in light of this Court's non-precedential summary affirmance of the Fifth Circuit's decision in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016) (per curiam). *See Regents* Pet. App. 117a.

decision. It would be remarkable if an agency could avoid that restriction simply by beating a reviewing court to the punch, issuing a revised set of rationales for its actions before a court orders production of a *Camp* affidavit.[5]

Allowing agencies to issue new explanations for their decisions once challenged in litigation would have significant practical consequences for courts and the administrative process. There should be little doubt that if this Court authorizes agencies to supplement their reasoning whenever their original rationale proves vulnerable in court, agencies will take advantage of that rule in many, many cases. And doing so will create all of the costs and hazards the contemporaneous explanation rule is designed to prevent.

The effect that would have on public confidence in the administrative system should give the Court particular pause. Allowing an agency to freely jump from one justification to the next in response to legal challenges strongly conveys to the public that the agency's deliberative process and the resulting initial explanation were shams. Moreover, permitting that

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[5] The Government has not cited any case in which an agency has been permitted to provide a supplementary explanation without being ordered to do so by the reviewing court. In *Department of Commerce*, the agency was permitted to voluntarily supplement the administrative record not with an additional explanation of the decision, but with underlying documentation relating to the explanation the Department had publicly given in the first place. *See* 139 S. Ct. at 2564. When that documentation proved that the original explanation was pretextual, the district court vacated the agency action and remanded, *id.* at 2564, a ruling this Court affirmed, *id.* at 2576.

tactic would lend the courts' credibility to the enterprise, resulting in judicial affirmance of agency decisions on the basis of reasoning that the public will (often rightly) perceive as something other than the Government's genuine reasons. *Cf. Dep't of Commerce*, 139 S. Ct. at 2575-76 (refusing to uphold agency decision based upon alleged rationale that "ordinary citizens" would deem pretextual).

b. If the *Camp* rule were applied here, it would require this Court to ignore the Nielsen memo altogether.

To the extent the Nielsen memo addresses the grounds advanced in the Duke memo, it adds nothing to them. The original memo gave a single reason for repealing DACA—its alleged unlawfulness. *Regents* Pet. App. 112a-119a. The Nielsen memo simply summarizes that reason and agrees with it. *Id.* at 122a-123a.

The remainder of the Nielsen memo must be ignored under *Camp*. After rehashing the prior memo's consideration of DACA's legality, the Nielsen memo moves on to additional "reasons of enforcement policy" in support of repeal, reasons found nowhere in the original memo. *Regents* Pet. App. 123a-125a. The Solicitor General acknowledges as much, separately addressing the Duke memo's concerns about DACA's legality and Secretary Nielsen's "*additional* policy concerns." *Compare* U.S. Br. § II(A) (entitled "The Rescission Is Reasonable In Light Of DHS's Serious Doubts About DACA's Lawfulness"), *and id.* § II(C) (entitled "The Rescission Is Reasonable In Light Of DHS's Conclusion That DACA Is Unlawful"), *with id.* § II(B) (entitled "The Rescission Is Reasonable In Light Of DHS's *Additional* Policy Concerns")

(emphasis added). In addressing the "policy concerns," the Government cites the Nielsen memo, not Duke's. *See id.* at 37-43. At the same time, the Solicitor General directly rejects the conclusion of the District of Columbia District Court that the new policy arguments simply rehashed the prior memo's legality concerns. *See id.* at 29. Instead, the Government insists that "Secretary Nielsen could not have been clearer that the policy reasons she offered . . . were independent from her legal concerns." *Id.*

II. The Reasons Given In The Nielsen Memo Are Arbitrary And Capricious.

Were the Court to consider the substance of the Nielsen memo, it should conclude that the supplemental rationales are no less arbitrary and capricious than the agency's original explanation.

A. Secretary Nielsen's New Policy Reasons Are Each Arbitrary and Capricious.

1. *Preference for Congressional Action.* The Nielsen memo first asserts that DHS "should not adopt public policies of non-enforcement . . . for broad classes and categories of aliens" because acting on such categorical bases should be left to Congress, which can create a deferral program with the "permanence and detail of statutory law," which a program like DACA lacks. *Regents* Pet. App. 123a-124a. But the memo fails to acknowledge that Congress expressly delegated authority to DHS to develop programmatic enforcement policies, that DHS has long created enforcement policies on a categorical basis, that DHS continues to apply its enforcement discretion on a categorical basis in other areas, and

that Congress has ratified those categorical practices, including deferred action programs.

The Secretary herself recognizes that Congress has given her the power to "[e]stablish[] national immigration enforcement policies and priorities." *Regents* Pet. App. 121a (quoting 6 U.S.C. § 202(5)) (alterations in original). She fails to acknowledge, moreover, that this authority has been used for over 50 years to exercise prosecutorial discretion on a categorical basis, including in programs the Administration has retained to this day. For example, the agency has made deferred action available to victims of human trafficking and domestic violence and to surviving spouses of U.S. citizens.[6] Moreover,

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[6] *See* Memorandum from Donald Neufeld, Acting Assoc. Dir., Office of Domestic Operations, USCIS, to Field Leadership, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* (Sept. 4, 2009) (deferred action for widows and widowers of U.S. citizens); USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* (Nov. 25, 2005), https://www.uscis.gov/sites/default/files/archive/faq-interim-student-relief-hurricane-katrina.pdf (deferred action for foreign students affected by Hurricane Katrina); Memorandum from Michael D. Cronin, Acting Exec. Assoc. Comm'r, Office of Programs, INS, to Michael A. Pearson, Exec. Assoc. Comm'r, Office of Field Operations, INS, *Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 – "T" and "U" Nonimmigrant Visas* (Aug. 30, 2001) (deferred action for certain victims of human trafficking and their family members, and victims of certain other crimes and their family members); Memorandum from Paul W. Virtue, Acting Exec. Assoc. Comm'r, INS, to Reg'l Dirs. et al., INS, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related*

while the Solicitor General implies that the Administration has ended all categorical deferred action programs, U.S. Br. 56, this is not, in fact, the case.[7] And Secretary Nielsen did not explain why she believes the programs she has retained are appropriate despite Congress's failure to enact legislation permanently enshrining them, while DACA is not. Such an "'[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

Nor did the memo even acknowledge that Congress has effectively ratified the use of deferred action to create protections for certain categories of individuals as an exercise of prosecutorial discretion. As discussed, that practice has been open and longstanding for decades and across administrations. Far from disapproving or limiting it, Congress has

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Issues (May 6, 1997) (deferred action for battered aliens under the Violence Against Women Act).

[7] *See, e.g.*, USCIS, *Battered Spouse, Children & Parents*, https://www.uscis.gov/humanitarian/battered-spouse-children-parents (last updated Feb. 16, 2016) (deferred action program for victims of domestic abuse still in place); USCIS, *Victims of Criminal Activity: U Nonimmigrant Status*, https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status (last updated June 12, 2018) (deferred action program for victims of certain crimes still in place).

enacted several pieces of legislation that have assumed that deferred action would be available to classes of immigrants in certain circumstances.[8] The memo's failure to address this history is all the more inexcusable because the Office of Legal Counsel had explored it in detail in an opinion addressing deferred action programs prior to Secretary Nielsen's decision. *See The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C. __ (Nov. 19, 2014), 2014 WL 10788677, at *14.[9] This failure to consider "an important aspect of the problem" renders the Secretary's decision arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

2. *Preference for Case-by-Case Consideration.* Relatedly, the Nielsen memo asserts that deferral discretion should be exercised only on "a truly individualized, case-by-case basis." *Regents* Pet. App. 124a. In contrast, the memo insists, DACA has "the

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[8] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1503(d)(2), 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)) (expanding the agency's deferred action program in the 2000 Violence Against Women Act reauthorization legislation); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060 (codified at 8 U.S.C. § 1227(d)(2)) (clarifying that denial of request for administrative stay of removal under new authority "shall not preclude the alien from applying for . . . deferred action").

[9] The care exhibited in the prior Office of Legal Counsel memorandum stands in sharp contrast with the one-page legal analysis from Attorney General Sessions that prompted Acting Secretary Duke to repeal DACA. J.A. 877-78.

practical effect of inhibiting assessments of whether deferred action is appropriate" in light of "individual considerations." *Id*. Repealing DACA, the memo continues, will ensure that deferral remains available "in individual cases if circumstances warrant." *Id.* at 125a. The memo again fails the test of reasoned decisionmaking.

To start, as just discussed, the memo fails to acknowledge that DHS has long and routinely created enforcement policies that provide deferral eligibility to categories of individuals.

Further, the memo ignores that DACA *does* require a substantial degree of individualized consideration. Memorandum from Janet Napolitano, Sec'y, DHS, to David V. Aguilar, Acting Comm'r, CBP, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 2 (June 15, 2012)[10] (requiring that "[a]s part of this exercise of prosecutorial discretion, the [DACA eligibility] criteria are to be *considered*" and that "requests for relief pursuant to this memorandum are to be decided on a case by case basis") (emphasis added); *see also* USCIS, *Deferred Action for Childhood Arrivals (DACA) Toolkit: Resources for Community Partners* 7, 12 (noting that "[e]ach request for consideration of deferred action for childhood arrivals

[10] https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

will be reviewed on an individual, case-by-case basis").[11]

The memo suggests that the Secretary believes that a greater degree of individualized assessment would be more appropriate. *Regents* Pet. App. 124a. But it fails to consider whether that concern could be addressed through modifications to the program short of complete repeal. As the federal district court in D.C. put it, "if Secretary Nielsen believes that DACA is not being implemented as written, she can simply direct her employees to implement it properly." *NAACP* Pet. App. 100a. The failure even to consider any "obvious and less drastic alternatives" is arbitrary and capricious. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 & n.36 (D.C. Cir. 1986) (the "failure of an agency to consider obvious alternatives has led uniformly to reversal") (collecting cases); *see, e.g.*, *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 48 (failure to "even consider the possibility" of "alternative way of achieving the objectives of the Act" was arbitrary and capricious).

3. *Avoiding Incentives for Future Unlawful Immigration.* The Nielsen memo further claims that repealing DACA is necessary to deter the flow of "tens of thousands of minor aliens [who] have illegally crossed or been smuggled across our border in recent years and then have been released into the country owing to loopholes in our laws." *Regents* Pet. App. 124a. According to the memo, this "pattern continues to occur at unacceptably high levels," and therefore it

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[11] https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/DACA_Toolkit_CP_072914.pdf (last visited Oct. 3, 2019).

is "critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens." *Id*. That justification is arbitrary and capricious for several reasons.

First, the memo fails to acknowledge that DACA is only available to individuals who have lived in the United States since 2007. *NAACP* Pet. App. 102a. The memo is silent on how a program that is no longer open to new immigrants could create an incentive for new immigration. That silence is fatal, for the APA requires the Secretary to "articulate" a "rational connection between the facts found and the choice made." *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (internal quotation marks omitted).

The Solicitor General attempts to supply the missing analysis, claiming that retaining DACA would give future immigrants hope that another, later "amnesty" program would apply to them. U.S. Br. 41. But the memo says nothing like that, and even the Solicitor General acknowledges that the agency's lawyers cannot supplement the agency's reasoning after the fact. *See id.* at 29; *supra* at 9. Nor did the memo make the predicate factual finding that significant numbers of immigrants would, in fact, come to this country with the hope that the Trump Administration will create a new program that is even more generous than DACA, based on their knowledge of an existing program for which they do not qualify. *See Regents* Pet. App. 124a-125a; *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 659 (1980) (plurality opinion) ("The [agency action] must, of course, be supported by findings actually made by

the Secretary, not merely by findings that we believe he might have made."). The closest the memo comes is to claim that "tens of thousands of minor aliens" have been "released into the country owing to loopholes in our laws," and that this "pattern continues to occur at unacceptably high levels." *Regents* Pet. App. 124a. But those statements say nothing about what drew the immigrants to the United States in the first place, much less that they were aware of DACA and hoped for its expansion.

Nor does the Solicitor General (let alone the Nielsen memo) explain why an immigrant who is willing to come to this country based on nothing more than the hope of a future amnesty program would be deterred by the repeal of DACA when the Secretary herself insists that all comers are still entitled to seek deferred status on a case-by-case basis. *Regents* Pet. App. 125a. And, of course, to the extent people fleeing violence and deprivation in their home countries actually think about such things, they would understand that the repeal of DACA does nothing to prevent another administration, or Congress, from reinstating DACA or another program that would allow them legal status.

4. *Reliance Interests.* When an agency repeals an existing program, the APA compels the agency to take adequate account of reliance interests. *See, e.g.*, *Encino Motorcars*, 136 S. Ct. at 2126; *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015). Enforcing that requirement is all the more important when, as here, the liberty and safety of tens of thousands of people is at stake.

The Nielsen memo's discussion of reliance falls short. The memo states that the Secretary is "keenly

aware that DACA recipients have availed themselves of the policy in continuing their presence in this country and pursuing their lives." *Regents* Pet. App. 125a. Regardless, the memo concludes that these "asserted reliance interests [do not] outweigh the questionable legality of the DACA policy and other reasons for ending the policy" presented in the memo. *Id*.

That discussion is wholly inadequate. A rational agency head cannot just refer to balancing; she must actually conduct the balancing in a reasonable, reality-based way. Here, although the Secretary purported to take reliance interests into account, in her next breath she disavowed that responsibility, stating that "issues of reliance would best be considered by Congress." *Regents* Pet. App. 125a. Perhaps for that reason, the memo's only other mention of reliance is to suggest (but not explain) that DACA recipients have no reasonable reliance interests because of the assertedly "temporary" nature of the program. *Id*. But that characterization fails to account for the fact that DACA was intended to be "temporary" only in the sense that it was expected that Congress would provide a permanent solution in the near future;[12] the memo points to no evidence that it was intended to be repealed if Congress failed to act. *Id.* Accordingly, recipients could reasonably expect that their status was subject to renewal until a

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[12] The White House, President Barack Obama, *Remarks by the President on Immigration* (June 15, 2012), https://obama-whitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration.

permanent solution was reached. Indeed, the current Administration shared that expectation when it first took office.[13]

The memo also suggests that the harm to reliance interests is diminished by the fact that DACA recipients can still apply for "deferred action in individual cases if circumstances warrant." *Regents* Pet. App. 125a. But the memo utterly fails to describe how that alternative program will function. The memo does not say, for example, whether the factors that make individuals presumptively eligible for deferred action under DACA will regularly, sometimes, or rarely make them serious candidates for deferred action after DACA is repealed. If the Secretary believes that many of those eligible for relief under DACA will be entitled to deferral after its repeal, she does not square that with other statements in the memo—*e.g.*, that only Congress should be making such broad determinations and that there is a need to deter unlawful immigration by repealing programs that could be perceived as a broad amnesty. *Regents* Pet. App. 125a. On the other hand, if the Secretary believes that deferral should be rare and for idiosyncratic reasons, the memo does not say so

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[13] Nolan D. McCaskill, *Trump Says He Will Treat Dreamers 'with Heart'*, Politico (Feb. 16, 2017, 2:37 PM), https://www.politico.com/story/2017/02/trump-press-conference-dreamers-heart-235103; Russell Berman, *Trump Reverses His Stand on DACA*, The Atlantic (Sept. 14, 2017), https://www.theatlantic.com/politics/archive/2017/09/daca-deal-or-no-deal-trump-democrats-dreamers/539784/ (noting deal Trump tentatively reached with Democrats in House and Senate to protect Dreamers).

explicitly or defend that position.[14] And if that were the Secretary's belief, her assertion that the harm to reliance interests is mitigated by the possibility of individualized deferrals would be arbitrary and pretextual, flaws that warrant vacatur and remand. *See Dep't of Commerce*, 139 S. Ct. at 2575-76.

5. *Overall Weighing of Costs and Benefits.* Going beyond reliance interests, the memo announces that neither reliance interests "nor the sympathetic circumstances of DACA recipients as a class overcomes the legal and institutional concerns" identified in the memo. *Regents* Pet. App. 125a. Having justified her decision on the basis of a cost-benefit analysis, the Secretary was compelled to engage in a rational weighing of the competing interests. *Michigan v. EPA*, 135 S. Ct. 2699, 2706-08 (2015).[15] But her brief analysis fails that requirement.

As discussed, the memo's assessment of the purported benefits of repeal suffers from multiple

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[14] Here, once again, the Government's lawyers try to fill the gap, arguing that Secretary Nielsen preferred a "presumption" that DACA recipients "should be removed," and a "truly individualized" approach to deferred action "seeks to identify, on a case-by-case basis, individuals who should be excused from that presumption." U.S. Br. 40. Whatever the merits of this preference, it comes post hoc, not from the Secretary. In any event, it fails to address its inconsistency with other policies or the costs/benefits of switching to such a system.

[15] *See also, e.g.*, *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732-33 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("[A]bsent a congressional directive to disregard costs," which no one argues is the case here, "common administrative practice and common sense require an agency to consider the costs and benefits of its proposed actions, and to reasonably decide and explain whether the benefits outweigh the costs.").

flaws, such as its failure to assess in any meaningful way whether, and to what extent, repeal will actually affect the inflow of migrants. *See supra* at 23-25. To the extent the Secretary views avoidance of litigation as a benefit of repeal, *see Regents* Pet. App. 123a, the memo makes no effort to determine whether the repeal created more litigation costs than it avoided.

Nor does the memo adequately account for the costs. Indeed, beyond suggesting that DACA recipients have no reasonable reliance interests, the memo's only acknowledgement of the costs of the decision is to refer to the recipients' "sympathetic circumstances." *Regents* Pet. App. 125a. It makes no effort to assess the real-world consequences of deporting thousands of people from the only country they've ever known. Respondents and others fully detail the human cost of that decision on DACA recipients, their families, and their communities. The memo neither acknowledges nor denies these consequences. And having failed to identify the nature or extent of the costs of her decision, the Secretary failed to rationally weigh those unidentified costs against any benefit from DACA's repeal. *See, e.g.*, *Michigan v. EPA*, 135 S. Ct. at 2706 (requiring consideration of all "relevant factors"); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732-33 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (discussing importance that agency consider all costs in balancing).

B. If Any Of The Nielsen Memo Justifications Is Arbitrary And Capricious, The Agency Action Must Be Vacated And Remanded For Reconsideration.

If *any* of the Nielsen memo's justifications are found to be arbitrary and capricious, the Court should remand for DHS to consider whether the remaining justifications are themselves sufficient to uphold DACA's rescission.

In general, when "an agency has set out multiple *independent* grounds for a decision, [a reviewing court] will affirm the agency so long as any one of the grounds is valid." *Fogo De Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1149 (D.C. Cir. 2014) (emphasis added) (internal quotation marks omitted). "Where the agency has not afforded individual weight to the alternative grounds, however, the court may uphold the decision *only* as long as one ground is valid *and* the agency would *clearly* have acted on that ground even if the other were unavailable." *Id.* (emphasis added) (internal quotation marks and brackets omitted). Thus, an agency action should not be upheld when "there is reason to believe the combined force of these otherwise independent grounds influenced the outcome." *Carnegie Nat. Gas Co. v. FERC*, 968 F.2d 1291, 1294-95 (D.C. Cir. 1992).

The memo's boilerplate statement that each of the reasons for repeal are "independently sufficient," *Regents* Pet. App. 122a, is clearly belied by the substance of the memo. For example, the memo balances the cost of repeal against the *cumulative* benefits arising from *all* of the purported

justifications, instead of determining whether the benefits of each allegedly independent justification outweigh the reliance interest of DACA recipients and the other costs of repeal. *See id.* at 125a ("I do not believe that the asserted reliance interests outweigh the questionable legality of the DACA policy *and* other reasons for ending the policy discussed above.") (emphasis added); *id.* at 124a-125a ("*All of those considerations* lead me to conclude that [the] decision to rescind the DACA policy was, and remains, sound[.]") (emphasis added). The memo does not claim, for instance, that the harm to people who arrived in this country as children would be justified if the only benefit was to save the Government the cost of defending DACA in court. Further, the Secretary does not claim that total rescission of DACA would be appropriate if the only non-arbitrary justification was a lack of individualized consideration. Indeed, if the Secretary *had* reached such a conclusion, the decision would be arbitrary and capricious.

Because the Secretary failed to provide independent weight to each of her justifications, and did not conduct a separate balancing of the costs and benefits based on each supporting consideration, her decisions must be vacated if any of her justifications is found arbitrary or capricious.

CONCLUSION

For the foregoing reasons, the decisions below should be affirmed.

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