Nos. 18-587, 18-588, 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.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Respondents.

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

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Writs of Certiorari Before Judgment to the United States Courts of Appeal for the District of Columbia and Second Circuits

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are educational organizations deeply concerned about the significant consequences that state and local government agencies will suffer if this Court does not apply its usual standards of judicial review under the Administrative Procedure Act ("APA") to hold that the actions of the Department of Homeland Security ("DHS") are arbitrary and capricious. As entities involved in the provision of public education, amici's members are impacted by complex federal agency regulations and actions. Amici thus have a strong interest in ensuring that federal agencies respect statutory and regulatory limitations and engage in reasoned decision-making, so as not to issue regulations or take actions that unnecessarily harm state and local educational interests. Judicial review ensures that agencies provide transparency to and allow for meaningful participation by organizations such as amici.

Amici have grave concerns about DHS's decision to rescind Deferred Action for Childhood Arrivals ("DACA"). This decision would have severe ramifications and devastating costs for public education and the students it serves—impacting thousands of school districts and their communities. The following education associations respectfully submit this *amici curiae* brief in support of respondents:

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[1] The parties filed blanket consents to the filing of briefs *amici curiae*. No counsel for a party authored this brief in whole or part; and no such counsel, party, or other person or entity—other than amici and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

The National School Boards Association ("NSBA"), founded in 1940, is a non-profit organization representing state associations of school boards across the country. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as amicus curiae in numerous cases before this Court. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA is particularly concerned about the ramifications for public education and the students it serves that will result from the rescission of DACA.

The School Superintendents Association ("AASA") represents over 13,000 school system leaders and advocates. For over 150 years, AASA has advocated for the highest quality public education for all students, and provided programming to develop and support school system leaders nationwide. The Nation's superintendents and the districts and students they represent would be harmed by the rescission of DACA. As the largest employer in many communities, school districts will be impacted by the cost of this reversal and it will hinder their ability to provide high quality educational opportunities to children they educate.

The National Association of Secondary School Principals ("NASSP") is the leading organization of and voice for principals and other school leaders across the Nation. NASSP seeks to transform education through school leadership, recognizing that the fulfillment of each student's

potential relies on great leaders in every school committed to the success of each student. NASSP believes that each child is entitled to an excellent public school education, regardless of their immigration status.

The American School Counselor Association ("ASCA") represents more than 36,000 school counseling professionals. School counselors promote equal opportunity, a safe and nurturing environment, and respect for all individuals regardless of citizenship status, including undocumented students and students with undocumented family members, understanding that this population faces unique stressors. School counselors work to eliminate barriers impeding student development and achievement, and help today's students become tomorrow's productive members of society.

SUMMARY OF ARGUMENT

For the past half century, as the administrative state has grown more complex and increasingly pervasive, Congress and this Court have cabined the vast power of executive agencies with one fundamental check: that an agency must adequately explain its actions. The government's position in this case is a frontal attack on that basic requirement.

Since DACA was established in 2012, the policy has been relied upon by hundreds of thousands of residents who entered the United States as children, have no criminal records, and meet various educational or military service requirements, to apply for two-year renewable periods of deferred action. On September 5, 2017, DHS rescinded DACA on the ground that the agency believed the policy was unlawful. But the entirety of the agency's explanation for that decision was a cross-reference to a threadbare, single-paragraph statement by the Attorney General, which did not cite any statutory or constitutional provision, did not acknowledge the government's change in position, and did not even mention the reliance interests engendered by the prior policy.

Under the ordinary rules governing agency decision-making, that explanation was manifestly deficient. This case can and should be resolved on that ground, without any need for this Court to address either the agency's substantive discretion to revoke DACA or the legality of the DACA program itself.

As this Court has recognized time and again, the APA requires that "[n]ot only must an agency's decreed result be within the scope of its lawful

authority, but the *process* by which it reaches that result must be logical and rational." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (emphasis added) (citation omitted). Even when a court has "no reason to doubt" an agency's authority to take a challenged action, the action must be vacated if the court "cannot discern" *why* the agency made the decision it did. *Select Specialty Hosp.-Bloomington, Inc. v. Burwell*, 757 F.3d 308, 314 (D.C. Cir. 2014). Furthermore, when an agency *changes* position, it must "display awareness" of that change and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). And when the agency's prior position has "engendered serious reliance interests," those interests "*must* be taken into account." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (emphasis added) (citation omitted). Here, the whiplash from this dramatic shift in executive branch policy will, as amici can attest, have a devastating impact not only on the young people who have come to rely on DACA, but on schools, school communities and countless other educational and social institutions that depended on the stability of the agency's interpretation.

The APA's procedural requirements stand apart from whether the agency's decision was substantively reasonable or even correct. A court assessing a FERC ratemaking decision, for example, evaluates not only whether the particular rate is reasonable, but also the quality of the agency's explanation for why it approved the particular rate. *Interstate Nat. Gas Ass'n of Am. v. FERC*, 617 F.3d 504, 508 (D.C. Cir. 2010). Even if the figure approved is reasonable, that does *not* immunize the agency's decision from legal

challenge if its explanation is inadequate. *See United Airlines, Inc. v. FERC*, 827 F.3d 122, 131 (D.C. Cir. 2016).

The subject matter is different but the same rules apply where, as here, an agency purports to act based on its belief that a particular course of action is unlawful. *Encino Motorcars*, 136 S. Ct. at 2125. The question for a reviewing court is not whether the agency's view of the law is *in fact* correct; rather, it is whether the agency has explained its view of the law with sufficient clarity so the "path" to its conclusion may reasonably be "discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974). Irrespective of the ultimate correctness of an agency's legal view, if the proffered explanation is inadequate, its decision must be vacated. *Encino Motorcars*, 136 S. Ct. at 2127; *United Airlines, Inc.*, 827 F.3d at 131.

Accordingly, this case provides no occasion to assess the ultimate legality of DACA. Rather, this Court can and should hold that DACA's rescission was invalid because DHS plainly failed to adequately explain its legal position. To hold otherwise would be to fashion a dramatically lower standard of judicial review for agencies when they invoke putative legal rationales for their decisions than when they invoke other rationales. And that, in turn, would create incentives for agencies to invoke the law as a mask for their policy preferences, shirk responsibility for the impact of their decisions, and ultimately shift public accountability onto the federal courts. That result would be inconsistent with the proper division of responsibility in our constitutional order and with core separation of powers principles. The decision of DHS should be vacated.

ARGUMENT

I. THE RESCISSION OF DACA MUST SATISFY NORMAL APA STANDARDS

Under the APA, a reviewing court must "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In determining whether an agency decision is lawful, a court must engage in a "searching and careful" inquiry of whether the agency considered the relevant factors and whether a clear error of judgment was made. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). "[U]nsupported agency action normally warrants vacatur . . . ." *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005).

The APA's requirement of reasoned decision-making imposes three core requirements on an agency that are relevant here. *First*, agency action must be adequately explained, such that the agency's path to its decision can be reasonably discerned. *Second*, an agency must display awareness of any change from its prior position, and explain the basis of that change. *Third,* the agency must take account of the reliance interests created by an existing policy. A failure to meet any of these three requirements justifies a finding that the agency's decision is arbitrary and capricious.

These principles apply with full force when an agency's purported explanation is that it is compelled to act by law. In such circumstances, an agency must explain its view of the law in sufficient detail to provide assurance that the result was the product of

reasoned decision-making. And it must account for any prior conflicting legal interpretations, and any reliance interests created by those interpretations. Indeed, because stability of interpretation is expected in the law, it is especially important in the legal context that changes in interpretation are explained and reliance interests accounted for. *See Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117, 2127 (2016); *cf. Kimble v. Marvel Entm't, LLC,* 135 S. Ct. 2401, 2409 (2015) (noting the importance of "evenhanded, predictable, and consistent development" of legal interpretations because of the "reliance" they engender (citation omitted)).

Finally, regardless of the nature of an agency's rationale—whether it be driven by policy, technical factors, or law—a reviewing court may not substitute its own alternative explanation for the one actually proffered by the agency itself. Thus, even if a court is inclined to think that an agency's legal conclusion was correct, it cannot affirm the agency's action if the agency's own explanation is deficient. Instead, the court must remand for the agency to explain its reasoning. In that posture, the ultimate legality of the policy would be beyond the scope of the court's review.

A. Reasoned decision-making requires that an agency's rationale be adequately explained, that any change in policy be acknowledged, and that reliance interests are accounted for.

The most basic procedural requirement of administrative rulemaking is that an agency "give adequate reasons for its decisions." *Encino Motorcars*, 136 S. Ct. at 2125. This means that an

agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). An agency rule is arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* On the other hand, an agency satisfactorily explains a decision when its decision-making "path may reasonably be discerned" from the explanation provided. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974); *see also Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 344 (D.C. Cir. 1989) (an agency must provide "a decision that permits the reviewing court to trace the path of the agency's decisionmaking process").

Agencies must also provide a reasoned explanation for any *change* in policy, including a change based on a purely legal rationale. *Encino Motorcars,* 136 S. Ct. at 2125-26. Specifically, an agency must "display awareness that it *is* changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Republic Airline Inc. v. U.S. DOT*, 669 F.3d 296, 299 (D.C. Cir. 2012) ("One of the core tenets of reasoned decision-making is that 'an agency [when] changing its course . . . is obligated to supply a reasoned analysis for the change.'" (alterations in original) (citation omitted)). The failure of an agency to explain a change in its policy is "reason for holding [the agency's decision] to be an arbitrary and capricious." *Nat'l Cable & Telecomms.*

Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

Finally, "[i]n explaining its changed position, an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars,* 136 S. Ct. at 2126 (quoting *Fox Television Stations*, 556 U.S. at 515). An agency's disregard for such reliance interests is likewise arbitrary and capricious. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) ("[T]he APA requires an agency to provide more substantial justification . . . 'when its prior policy has engendered serious reliance interests that must be taken into account.'" (citation omitted)). Agency action that does not meet each of these three criteria is arbitrary and capricious within the meaning of the APA and must be vacated. *See id.*, *Encino Motorcars,* 136 S. Ct. at 2125-26; *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43.

B. The requirements of reasoned decision-making are fully applicable when an agency's stated basis for its decision is a change in its interpretation of the law.

The procedural requirements of the APA apply with full force where, as here, an agency asserts that it was legally compelled to act. Just as with other motivations for agency action, the question for purposes of APA review is not only the substantive reasonableness of the agency's decision—*i.e.*, whether its view of the law is *correct*—but also whether the agency "articulate[d] a satisfactory explanation" justifying its legal rationale, *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43, taking into account its prior positions and any reliance interests.

For example, in *Encino Motorcars*, this Court invalidated a 2011 decision of the Department of Labor ("DOL") interpreting the Fair Labor Standards Act ("FLSA") to require overtime payments to certain automobile service providers, after decades of treating these employees as exempt. The DOL had interpreted the statutory language of the FLSA permitting an "exemption from [the statute's] overtime compensation requirement" for "'any salesman . . . engaged in selling or servicing [vehicles]'" to exclude "service advisors," who are employees that "sell[] repair and maintenance services but *not* the vehicle itself." *Encino Motorcars*, 136 S. Ct at 2122 (emphasis added) (citation omitted).

The DOL explained that, in its view, "the statute does not include such position[s]." *Id.* at 2127 (citation omitted); *see also Updating Regulations Issued Under the Fair Labor Standards Act,* 76 Fed. Reg. 18,832-01 (Apr. 5, 2011). This Court held that this conclusory assessment amounted to "no reason[] at all," because "the Department did not analyze or explain why the statute should be interpreted" to support the agency's reading. 136 S. Ct. at 2127. Accordingly, this Court vacated the agency's decision without deciding whether the agency's statutory interpretation was in fact correct. *Id.*

Lower courts have similarly applied the APA's requirement of reasoned decision-making in analyzing agency actions based on purely legal rationales. *See*, *e.g.*, *Tourus Records, Inc. v. Drug Enf't Admin.*, 259 F.3d 731, 737 (D.C. Cir. 2001) (agency action was not "the product of reasoned decisionmaking" where it was justified by statement of legal "conclusion" as opposed to a "statement of reasoning"); *E. Tex. Med. Ctr.-Athens v. Azar*, 337 F.

Supp. 3d 1, 19 (D.D.C. 2018) (agency decision violated APA where the "Secretary has failed to adequately explain his interpretation and application of the [relevant statute] and implementing regulation . . . or the final rules predating it" (citation omitted)); *Water Quality Ins. Syndicate v. United States*, 225 F. Supp. 3d 41, 71-72, 76 (D.D.C. 2016) (setting aside agency decision based on "the insufficiency of its legal analysis" and noting that agency's "gap in legal analysis" rendered its legal conclusions "shaky at best").

These cases confirm that no special rule applies when an agency anchors its decision in an interpretation of law. A reviewing court must still "examin[e] the reasons for [the agency's] decisions—or, as the case may be, the absence of such reasons." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). And, just as when an agency justifies its decision on non-legal grounds, the lawfulness of agency action depends "on the agency's ability to demonstrate that it engaged in reasoned decisionmaking." *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017).

C. A court's independent assessment of whether an agency's policy is unlawful is inappropriate.

Finally, as with other types of agency explanation, if an agency's legal explanation is "inadequate or improper, [a] court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper [legal] basis." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Catholic Healthcare W. v. Sebelius*, 748 F.3d 351, 354 (D.C. Cir. 2014). Accordingly, even if a reviewing court is inclined to believe the agency

came to the right legal *result*, it must nonetheless vacate the agency action if its explanation for reaching that result is inadequate. Indeed, to permit a court to supply a different legal rationale through *de novo* review of a policy's underlying legality would be to violate the cardinal principle of administrative law that judicial review is limited "solely [to] the grounds invoked by the agency." *See Chenery Corp.*, 332 U.S. at 196.

An explanation proffered at a high level of generality is not an invitation for a court to fill out that explanation with more precise rationales. A court cannot "affirm agency decisions on a legal *analysis* other than that expressed by the agency" itself—even if that analysis broadly accords with the agency's proffered explanation. *Catholic Healthcare*, 748 F.3d at 354 (emphasis added).

DHS's assertion that this decision was driven by its view of the law, rather than technical or policy concerns, should make no difference. Regardless of whether the putative rationale is legal, technical, or policy-laden, it will virtually always be the case that a court could convert an agency's vague assertions into a more sophisticated rationale; but to do so would undercut the core function of APA review, which is to provide a meaningful check on the agency's *own* decision-making process. The fact that a court may be able to formulate a reasoned justification for action says nothing about whether the agency itself engaged in reasoned decision-making and provides no check on arbitrary agency action.

For this reason, when an agency asserts a legal justification for its action and fails to provide a reasoned basis for its legal conclusion, a court cannot uphold the agency's action based on its own resolution

of the underlying legal issue. Because the APA imposes distinct procedural requirements that stand apart from the substantive correctness of the agency's ultimate decision, even if a court believes the agency's decision correct, it still *must* vacate the decision when the agency's explanation is inadequate. And because the absence of reasoned decision-making means the agency's action *must be vacated in any event*, any judicial opinion on a policy's underlying legality would be purely advisory. Worse still, it would be an advisory opinion that violates *Chenery* by functionally affirming the agency on the basis of a different rationale than the one it proffered.

It may appear counter-intuitive for a court to vacate an agency action that the agency claims was required by law, when the court believes the agency's legal conclusion is correct. But that is the inescapable result of Congress's decision to impose independent procedural constraints on an agency's decision-making. Those procedural constraints are much more than empty formalism. Administrative agencies wield enormous power, pervasively impact citizens' lives, and largely operate outside the glare of public scrutiny. In enacting the APA, Congress recognized that, regardless of the substantive reasonableness of agencies' decisions, that they must also reach those decisions in a way that is transparent, publicly justifiable, and democratically accountable.

Those principles have equal—indeed special—force when an agency asserts that its decision was driven by legal concerns, because these circumstances implicate additional separation of powers concerns. Enforcing a lesser degree of scrutiny for agency actions justified by legal rationales would create powerful incentives for agencies to advance

purportedly legal grounds for their actions, shifting accountability for an agency's most controversial decisions to the federal courts. Making an unelected branch of government the public face of unpopular decisions both undercuts democratic accountability and endangers the public legitimacy of the judiciary. By compelling agencies to publicly explain and justify their decisions, the APA forbids precisely such a maneuver.

Applying these principles, this Court should not assess the ultimate legality of DACA unless it first deems DHS's articulated legal reasoning to be adequate. If that reasoning is inadequate, the agency's decision should be vacated without any further advisory opinion regarding the scope of the executive branch's statutory or constitutional power to implement DACA. Here, as in any other context, "[i]t is not the role of the courts to speculate on reasons that might have supported an agency's decision." *Encino Motorcars*, 136 S. Ct. at 2127.

II. THE DECISION TO RESCIND DACA WAS ARBITRARY AND CAPRICIOUS

DHS's decision to rescind DACA was based *solely* on the agency's view that the policy was unlawful. It now seeks to defend that decision by effectively asking this Court to weigh in on DACA's underlying legality. But, despite three opportunities to do so, DHS provided virtually none of the "reasoning that underlies its conclusion," as the APA requires. *See Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995). To the contrary, even a cursory review of the DHS memorandum rescinding DACA reveals that the rescission "was issued without the reasoned explanation that was required in light of the

Department's change in position and the significant reliance interests involved." *See Encino Motorcars,* 136 S. Ct. at 2126.

DHS's explanation is inadequate for three reasons under settled principles of administrative law. *First*, DHS failed to adequately explain the reasoning that led it to conclude DACA was legally deficient. *Second*, DHS neglected to acknowledge or explain the change from its prior policy of enforcing DACA. *Third,* DHS did not take into account the serious reliance interests impacted by the rescission of DACA. Under a neutral application of these settled principles, the agency's decision must be vacated. This case provides no occasion for this Court to decide the substantive question of DACA's legality.

A. DHS failed to adequately explain why it believes DACA is unlawful.

DHS stated its rationale for rescinding DACA in a *single sentence*, which cross-referenced a letter by the Attorney General, which itself contained only a single paragraph of reasoning. Under settled APA precedent, these "conclusory statements will not do." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014).

Recognizing the facial deficiency of these reasons, DHS issued a new memorandum well after this litigation began. A reviewing court may not consider those post-hoc assertions. But even if it could, that memorandum—though more fulsome in its analysis—still fails to satisfy the APA's requirements for reasoned decision-making.

1. On September 5, 2017, then-Acting Secretary of Homeland Security Elaine Duke issued a memorandum rescinding DACA ("Duke

memorandum"[2]). The Duke memorandum contains background information regarding DACA, DAPA, and the litigation in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). However, the only relevant part of the memo, the legal analysis justifying the rescission of DACA, is one sentence long: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017, letter from the Attorney General, it is clear that the June 15, 2012, DACA program should be terminated." Duke memorandum.

The Duke memorandum therefore contained no reasoning of its own, and instead rested on the reasoning of three other sources: (1) the Fifth Circuit's opinion in *Texas v. United States*, which struck down the related, but different, DAPA policy, (2) the Supreme Court's 4-4 affirmance of that decision, and (3) the September 4, 2017, letter from Attorney General Sessions ("Attorney General's letter"[3]). The Attorney General's letter, in turn, contained only one paragraph justifying the rescission of DACA:

> DACA was effectuated by the previous administration through executive action, without proper statutory authority and

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[2] Memorandum from Elaine Duke, Acting Secretary, DHS, Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children" (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

[3] Letter from Jefferson B. Sessions III, U.S. Attorney General, to Acting Secretary Elaine Duke (Sept. 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf

> with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch. The related [DAPA] policy was enjoined on a nationwide basis in a decision affirmed by the Fifth Circuit on the basis of multiple legal grounds and then by the Supreme Court by an equally divided vote. . . . Because the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA.

Attorney General's letter.

The Duke memorandum and the Attorney General's letter, which together constitute DHS's entire contemporaneous explanation for the rescission of DACA, fail to provide a "path" from which the agency's decision "may reasonably be discerned." *See Bowman*, 419 U.S. at 285-86. Instead, the Duke memorandum and the Attorney General's letter offer five conclusory assertions devoid of "even [a] minimal level of analysis." *See Encino Motorcars*, 136 S. Ct. at 2125. These assertions are: (1) DACA was enacted without statutory authority, (2) DACA suffers from the same legal defects as DAPA, (3) DACA is unlawful based on the Fifth Circuit's ruling with respect to DAPA, (4) this Court affirmed the Fifth Circuit, and (5) DACA is unconstitutional. As explained below, these five

explanations are not "statement[s] of reasoning, but of conclusion," and thus they "do[] not meet the APA standard" for reasoned decision-making. *Tourus Records*, 259 F.3d at 737.

1. DHS failed to explain why there was no "statutory authority" for DACA.

The Attorney General's letter summarily asserts that DACA was enacted "without proper statutory authority." But that assertion is hardly self-explanatory. The Immigration and Nationality Act ("INA") broadly delegates to the executive branch the power to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and to carry out the "administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens," 8 U.S.C. § 1103(a). "Since the INA was enacted, the Executive Branch has on numerous occasions exercised discretion to extend various forms of immigration relief to categories of aliens for humanitarian, foreign policy, and other reasons." Office of Legal Counsel ("OLC") Opinion[4] at 6. As part of the authority provided by the INA, "it is well settled that the Secretary can exercise deferred action, a form of prosecutorial discretion whereby the Department of Homeland Security declines to pursue the removal of a person unlawfully present in the United States." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017).

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[4] 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 (Nov. 19, 2014), https://www.justice.gov/file/179206/download ("OLC Opinion").

The Attorney General's letter does not discuss, or even display awareness of those statutory provisions, the history of numerous administrations exercising deferred action, or precedent affirming such authority. Simply asserting that the policy "lacks statutory authority," without more, is no different from describing a policy as "unlawful" without providing any explanation for why that is so. In both situations, there is a "failure to connect the dots" between the conclusion and its underlying reasoning. *See Select Specialty Hosp.-Bloomington, Inc. v. Burwell*, 757 F.3d 308, 312-13 (D.C. Cir. 2014). And, as this Court recognized in *Encino Motorcars*, the unadorned conclusion that a particular approach is "unlawful" or not authorized is an inadequate basis for agency action. *See* 136 S. Ct. at 2127.

2. DHS failed to acknowledge or account for the differences between DACA and DAPA.

The Attorney General's letter asserts that "the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA." That explanation is facially inadequate because it fails to identify *what* "defects" the agency had in mind, and instead tacitly assumes that DACA and DAPA are identical in scope and legal foundation. But that is not so. Indeed, the Fifth Circuit's opinion in *Texas v. United States* itself notes that "DACA and DAPA are not identical" and that "any extrapolation from DACA must be done carefully." *Texas*, 809 F.3d at 174, 173. Far from extrapolating "carefully," DHS extrapolated completely—and without any explanation at all.

As the Fifth Circuit recognized, DACA impacts "a younger and less numerous population" than DAPA,

"which suggests that DACA applicants are less likely to have backgrounds that would warrant a discretionary denial." *Id.* at 174. And, importantly, a critical reason why the Fifth Circuit held DAPA unlawful was that the INA already prescribed "an intricate process" for undocumented parents "to derive a lawful immigration classification from their children's immigration status." *Id.* at 179. There is, however, "no analogous provision in the INA defining how immigration status may be derived by undocumented persons who arrived in the United States as children." *Regents of the Univ. of Cal. v. U.S. DHS*, 908 F.3d 476, 508 (9th Cir. 2018).

Because some of the grounds for invalidating DAPA do not apply to DACA, it is inadequate for the agency to assert that the policies suffer from the "same" "defects." Instead, it is incumbent on the agency to explain *which* of DACA's "defects" it believes apply to DACA, and provide at least some explanation of why those "defects" alone are sufficient to render DACA illegal. A generalized reliance on problems that certain courts have identified with a materially different policy cannot constitute a reasoned basis for discontinuing a policy on the ground of illegality.

3. DHS's citation to the Fifth Circuit's DAPA ruling is inadequate to justify its decision to rescind DACA.

Next, the agency attempts to remedy its own lack of reasoning by seeking to incorporate the Fifth Circuit's ruling regarding DAPA. Duke memorandum. That asserted incorporation is inadequate for substantially the same reasons as the agency's contention that DAPA and DACA have the

"same defects." The Fifth Circuit did not strike down DACA and expressly recognized that its reasoning did not necessarily apply to DACA. Furthermore, DHS failed to "explain what (if anything) it found persuasive" in that opinion. *See Encino Motorcars,* 136 S. Ct. at 2127. An unexplained citation to a single case by a court of appeals (regarding a materially different policy) is clearly not enough to alone justify an agency decision.

For example, in *International Union, United Mine Workers of America v. United States DOL,* 358 F.3d 40 (D.C. Cir. 2004), the United Mine Workers of America challenged the decision of the Mine Safety and Health Administration ("MSHA") to withdraw a proposed Air Quality rule. MSHA stated that the withdrawal was based, in part, on a decision by the Eleventh Circuit to invalidate a similar, earlier air quality rule. *Id.* at 42. The agency claimed that, in light of this decision, its proposed rule was not "'a viable means' of addressing the health risks it had sought to remedy with the proposed Air Quality rule." *Id.* at 44 (citation omitted). The D.C. Circuit acknowledged that the Eleventh Circuit opinion was "indeed a caution for an agency embarking upon . . . regulation" in the area. *Id.* But, the court concluded, MSHA's decision to withdraw the proposed rule was nonetheless arbitrary and capricious because the agency "did not explain why it came to deem the Eleventh Circuit decision fatal to [its] effort." *Id.* Simply citing a court of appeals decision invalidating a similar or related rule does not, the court recognized, satisfy the APA's requirement of reasoned decision-making.

DHS likewise cannot rescind DACA simply by referring to the Fifth Circuit's holding in *Texas v. United States*. Instead, DHS must, at the very least,

explain what it was about the decision that would be "fatal" to DACA. The Fifth Circuit invalidated DAPA on multiple alternative grounds, and simply citing to the decision leaves it entirely indeterminate which of those grounds the agency had in mind, making it impossible to the "discern[]" the "path" to the agency's conclusion. *Bowman*, 419 U.S. at 286. Moreover, as discussed above, the Fifth Circuit itself recognized the substantive differences between DAPA and DACA and disclaimed any holding as to the latter. Under the circumstances, a simple citation to the Fifth Circuit's decision cannot alone satisfy the APA's requirements.

4. The Supreme Court's affirmance of the Fifth Circuit's DAPA ruling has no precedential value.

DHS also invokes the Supreme Court's "affirm[ance of] the Fifth Circuit's ruling" to justify its actions rescinding DACA. Duke memorandum. But that affirmance was by an equally-divided court and therefore is not "entitled to precedential weight." *Neil v. Biggers*, 409 U.S. 188, 192 (1972). Reference to this Court's affirmance also draws the improper inference that the "equally divided vote," Duke memorandum, was based on the ultimate *illegality* of DAPA. But the Court's affirmance could have been rendered on a host of other bases, such as the threshold ground of reviewability. This observation is all the more true where, as here, the Supreme Court affirms the grant of a preliminary injunction motion, which itself is "an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *See Trump*

v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017).

5. DHS fails to identify any constitutional defect of DACA.

Finally, DHS claims that DACA suffers from "constitutional defects." Duke memorandum (citation omitted). But, yet again, DHS fails to explain this assertion or even identify which provision of the Constitution is violated by the continued enforcement of DACA—let alone "cogently explain" any constitutional theory. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 48.

And the Attorney General's letter asserts only that the policy suffers "the same . . . constitutional defects" as DAPA. But no court has identified any "constitutional defects" with DAPA. Indeed, the Fifth Circuit's *Texas* decision, which again is the only source of legal reasoning to which the Duke memorandum cites, explicitly *declined* to address the constitutionality of that policy. *See Texas*, 809 F.3d at 154 ("We decide this appeal . . . without resolving the constitutional claim."). As with its bare assertion that DACA is "without statutory authority," the agency's contention that the policy is "unconstitutional" does not constitute an adequate explanation. Those are conclusions, not reasons, and cannot alone satisfy the APA's requirements.

B. DHS's post-hoc explanations should be disregarded and, in any event, do not meet the requirements for reasoned decision-making.

In the course of the litigation in the D.C. Circuit, DHS attempted to bolster its bare-bones explanations

for the rescission of DACA by issuing yet another memorandum, this time by Secretary of Homeland Security Kirstejen M. Nielsen (the "Nielsen memorandum"[5]). Because it is well settled that an agency cannot supply additional post-hoc explanations for its actions during litigation, the Nielsen memorandum should not be considered by this Court. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (agency's explanation must "enable the court to evaluate the agency's rationale at the time of decision"); *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) ("*[P]ost hoc* rationalizations 'have traditionally been found to be an inadequate basis for review' of agency decisions." (quoting *Citizens to Preserve Overton Park,* 401 U.S. at 419). Since review of agency action is limited to the agency's "rationale at the time of decision," the Nielsen memorandum is irrelevant. *See Pension Benefit Guar. Corp*, 496 U.S. at 654.

But, even if this Court were to consider the Nielsen memorandum, it adds nothing to DHS's reasoning. Instead of engaging in "any genuine reconsideration of the issues," the Nielsen memorandum is no more than "a barren exercise of supplying reasons to support a pre-ordained result," and should accordingly be rejected. *Food Mktg. Inst. v. ICC*, 587 F.2d 1285, 1290 (D.C. Cir. 1978).

The Nielsen memorandum begins by reiterating that "the Duke memorandum . . . remains . . . sound," and that DACA is "contrary to law." Nielsen memorandum at 1-2. It then goes on to list a number

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[5] Memorandum from DHS Secretary Kirstjen M. Nielsen (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf.

of purportedly "separate and independently sufficient reasons" justifying the rescission of DACA. *Id.* These reasons are: (1) there are risks associated with the enforcement of a "legally questionable" policy, (2) policies like DACA "should be enacted legislatively," and (3) deferred action should be implemented on a "truly individualized, case-by-case basis." *Id.* at 2-3. None of these explanations survive even minimal scrutiny.

First, the Nielsen memorandum points to purported harms stemming from DHS's "doubts" regarding DACA's legality. These include a "risk that [DACA] may undermine public confidence in and reliance on the agency and the rule of law, and the threat of burdensome litigation that distracts from the agency's work." *Id.* at 2. But in order to invoke litigation risks associated with the enforcement of a "legally questionable" policy, *see id.*, DHS was required to seriously *evaluate* those risks. That evaluation necessarily involves articulating a plausible basis to believe DACA is unlawful, such that there is a meaningful "risk" of it being struck down. But that is the very thing the agency failed to adequately explain in the first place. As discussed above, the agency failed to provide any reasoned explanation for why DACA is unlawful—and the Nielsen memorandum does not itself even try to provide any additional reasoning on that score. Without properly explaining why DACA is unlawful, the agency, *a fortiori*, cannot have provided a reasoned basis for why there was a litigation "risk" associated with its continuation.

Moreover, when an agency invokes "risk" as a basis for action, it typically must conduct an analysis weighing that risk against the policy's benefits

(including, here, the protection of substantial reliance interests)—which DHS clearly did not do. *See Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015) (an agency did not engage in reasoned decision-making where it "plainly did not" consider relevant benefits); *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 52, 54 ("reasoned decisionmaking" requires agencies to "look at the costs as well as the benefits"). The mere assertion that a particular course of action involves "risk"—without any assessment of the magnitude of that risk, the action's putative benefits, or the associated costs of discontinuation—cannot constitute reasoned decision-making.

Finally, as the various challenges to the rescission itself demonstrate, "litigation" and "public confidence" "risks" were inevitable whichever option the agency chose. To provide an adequate explanation, DHS therefore had to explain why there was *more* risk in enforcing DACA than in rescinding it—a dubious proposition when either action would "predictably le[ad] to [a] lawsuit." *See Organized Vill. of Kake v. U.S. DOA*, 795 F.3d 956, 970 (9th Cir. 2015) (invocation of litigation as a rationale for agency decision was inadequate because "[a]t most, the Department deliberately traded one lawsuit for another").

Second, the Nielsen memorandum asserts that DACA "should be enacted legislatively." Nielsen memorandum at 3. But that normative conclusion is wholly unexplained. When Congress created DHS, it expressly vested the agency with responsibility for "[e]stablishing national immigration enforcement policies and priorities." Homeland Security Act of 2002, Pub. L. No. 107-296, § 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. § 202(5)); *see also Reno v.*

Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 483-84 (1999) (observing the "regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience"). Congress therefore contemplated that at least some forms of deferred action would *not* be enacted legislatively. The agency's explanation critically fails to explain why *this* instance of deferred action "should" have been "enacted legislatively" when others, presumably, "should not." *See Burwell*, 757 F.3d at 312-13 (agency's "failure to connect the dots" was not reasoned decision-making).

The Nielsen memorandum states only that DACA "lack[s] the permanence and detail of statutory law." Nielsen memorandum at 2. But that statement provides no basis to *rescind* the policy; at most, it explains why a legislative solution for DACA recipients would be *better* than deferred action alone. But that is not a reasoned basis for rescinding deferred action without any such legislative solution.

Moreover, it is ultimately Congress, not the agency, that determines which forms of deferred action "should be enacted legislatively." If Congress had agreed with the agency, it could have responded "by enacting legislation to limit the Executive's discretion in enforcing the immigration laws," OLC Opinion at 6, which it did not do. The agency's substitution of its own judgment for Congress's as to what policies "should" be enacted legislatively is not a reasoned basis to act.

Third, DHS asserts that the agency "should only exercise its prosecutorial discretion not to enforce the immigration laws on a truly individualized, case-by-case basis." Nielsen memorandum at 3. But the

Nielsen memorandum does not define "truly individualized, case-by-case" adjudication or explain why the agency believes DACA falls short of that goal. It is well understood that the federal government cannot deport the over ten million undocumented persons within the United States. Accordingly. the INA mandates that the executive branch "shall" establish "immigration enforcement priorities and policies" to guide individualized discretion. 6 U.S.C. § 202(5). As with any such policy, DACA guides—but does not remove—the discretion of individual immigration officers. Memorandum from Janet Napolitano, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children at 1 (June 15, 2012), https://www.dhs.gov/sites/default/files/publications/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf ("[A]dditional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities."). Indeed, DHS statistics reveal that 17.8% of the DACA initial applications acted upon in 2016 were denied, 16.3% were denied in 2017, and 24.8% were denied in 2018. U.S. Citizenship & Immigration Services, Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012–2019 (Nov. 30, 2018), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_FY19_Q1_Data.pdf.

In calling for "truly individualized, case-by-case" assessment, the Nielsen memorandum might be advocating entirely *unguided* discretion, which would itself be in stark tension with the INA's requirements. In addition, the memorandum fails to provide any reasoned explanation why it would be superior to let individual officers make entirely discretionary decisions, rather than setting broad policies to guide that discretion. *See Burwell,* 757 F.3d at 312 (noting that when "an agency's failure to state its reasoning or to adopt an intelligible decisional standard is . . . glaring . . . we can declare with confidence that the agency action was arbitrary and capricious" (quoting *Checkosky v. SEC*, 23 F.3d 452, 463 (D.C. Cir. 1994)).[6]

In short, the Nielsen memorandum fails to explain what "truly case-by-case" discretion means, how it differs from DACA, or why, if it means wholly unguided discretion, it is superior to the guided discretion that has long been a hallmark of immigration law and policy. The Nielsen memorandum thus fails to provide any reasoned basis to explain DACA's rescission.

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[6] This failure is particularly telling in the immigration context, where policies and statutes commonly prescribe guided discretion. *See, e.g.*, 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)); 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)(1)).

C. DHS failed to acknowledge its changed policy position or provide reasons for that change.

In addition, none of the proffered explanations discussed above even mention*s*—let alone provides a "reasoned explanation" for—the Department's *change* in policy. *See Encino Motorcars,* 136 S. Ct. at 2127. An agency is not permitted to "depart from a prior policy *sub silentio*." *Fox Television Stations*, 556 U.S. at 515; *see also Manin v. NTSB*, 627 F.3d 1239, 1243 (D.C. Cir. 2011) ("When an agency departs from its prior precedent without explanation, . . . its judgment cannot be upheld."). Instead, it was "incumbent" upon DHS to "carefully to spell out the bases of its decision when departing from prior norms." *See Food Mktg. Inst. v. ICC*, 587 F.2d at, 1290; *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42 ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

These principles have special force where, as here, the OLC has weighed in on the issue. In 2014, the OLC prepared a detailed 33-page opinion, carefully explaining why DACA and DAPA are lawful. *See, e.g.,* OLC Opinion at 18 n.8 (noting OLC determination that DACA was "legally permissible"). The Attorney General's letter, Duke memorandum, and Nielsen memorandum all "completely ignore" the OLC Opinion—and the government's prior position—and wholly fail to acknowledge the dramatic shift in legal assessment. This flaw is alone fatal. Both this Court and the D.C. Circuit have "*never* approved an agency's decision to completely ignore relevant precedent." *See*

Jicarilla Apache Nation v. U.S. DOI, 613 F.3d 1112, 1120 (D.C. Cir. 2010) (emphasis added); *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (an agency is required to "come to grips with conflicting precedent").

The fact that OLC opinions constitute binding law within the executive branch provides all the more reason to vacate the agency's decision, because "[a] contrary result would permit agencies to toss aside OLC memoranda that contain legal conclusions contrary to the agency's preferred policy choices." *See Hispanic Affairs Project v. Acosta*, 263 F. Supp. 3d 160, 178 (D.D.C. 2017), *aff'd in part, rev'd in part*, 901 F.3d 378 (D.C. Cir. 2018). And it is, in the very least, highly suspect that DHS made a decision of enormous national importance—based *solely* on a legal rationale—without even consulting the office within the Department of Justice charged with determining the legality of executive branch practices. Had DHS truly believed that DACA was unlawful, the agency could have asked OLC to directly address the issue—as it had in 2014. DHS's failure to do so further underscores the shaky foundation of its legal rationale for rescinding DACA.

DHS's departure from "established precedent" without "a reasoned explanation" cannot be upheld. *LePage's 2000, Inc. v. Postal Regulatory Comm'n*, 642 F.3d 225, 233 (D.C. Cir. 2011) (citation omitted).

D. DHS did not adequately take into account reliance interests.

Finally, DHS's decision contravened the APA because the agency did not take into account the considerable reliance interests of the parties impacted by DACA's rescission, including critical

stakeholders like children, public schools, and the affected communities. *See Encino Motorcars,* 136 S. Ct. at 2126-27. As this Court has emphasized, agency action "engender[s] serious reliance interests" amongst regulated parties who depend on the stability and predictability of agency guidance. *Id.* at 2126 (citation omitted). These reliance interests must be taken into account, even where an agency believes that the policy change is legally mandated. *See id.* at 2125-27 (considering reliance interests where change in agency position was based upon interpretation of governing statute). And "an agency may need to 'provide a more detailed justification than what would suffice for a new policy created on a blank slate . . . when, for example, . . . its prior policy has engendered serious reliance interests.'" *Altera Corp. & Subsidiaries v. Comm'r*, 926 F.3d 1061, 1100 (9th Cir. 2019) (alterations in original) (quoting *Fox*, 556 U.S. at 515).

The rescission of DACA will undoubtedly implicate serious reliance interests of regulated parties. For instance, many young people who were forced to prematurely exit the school system because of barriers related to their immigration status have, for years, relied upon DACA in order to maintain a livelihood. The policy's work authorization has enabled these young people to take jobs commensurate with their education, and has incentivized investments in such programs. Roberto G. Gonzales et al., Center for American Progress, *Taking Giant Leaps Forward: Experiences of a Range of DACA Beneficiaries at the 5-Year Mark* (June 22, 2017), https://cdn.americanprogress.org/content/uploads/2017/06/21142115/DACAat5-brief2.pdf.

Because of the program, DACA beneficiaries have experienced immediate and continued job mobility. *Id.* at 4-5. Indeed, many DACA beneficiaries have obtained significant job training and are using these new opportunities as building blocks to careers. The magnitude of DACA's impact has been most felt by these young people. And the personal success of these DACA beneficiaries has in turn provided them with more purchasing power, allowing them to invest in the United States at the local and state levels. *Id.* at 6.

Individual DACA recipients are not the only group with significant reliance interests on the continued viability of the policy. Requiring institutions "to adapt to the Department's new position could necessitate systemic, significant changes." *Encino Motorcars,* 136 S. Ct. at 2126. For example, DACA rescission will cost employers $6.3 billion in employee turnover costs, including recruiting, hiring, and training 720,000 new employees. David Bier, *Rescinding DACA, The Dream Act, Would Impose Massive Costs on Employers*, Newsweek.com (Sept. 5, 2017), https://www.newsweek.com/rescinding-dreamers-act-would-impose-massive-costs-employers-659813. If the rescission is allowed to stand, U.S. employers will have to terminate 6,914 employees currently participating in DACA every week for the next two years, at a weekly cost of $61 million. *Id.*

Pertinent to amici, public school districts are collectively the largest employer in the country and will be sharply affected by these costs. Specifically, public elementary schools, high schools, and universities stand to lose thousands of employees. According to one estimate, DACA protects close to 9,000 education employees from deportation. Jie

Zong et al., Migration Policy Inst., *A Profile of Current DACA Recipients by Education, Industry, and Occupation* (2017), https://www.migrationpolicy.org/research/profile-current-daca-recipients-education-industry-and-occupation (download fact sheet). The Migration Policy Institute estimates that there are 20,000 immigrants with DACA-protected status working as educators, including 5,000 in California and 2,000 each in New York and Texas. Moriah Balingit, *As DACA winds down, 20,000 educators are in limbo*, Wash. Post (Oct. 25, 2017), https://www.washingtonpost.com/local/education/as-daca-winds-down-20000-educators-are-in-limbo/2017/10/25/4cd36de4-b9b3-11e7-a908-a3470754bbb9_story.html. Many of these educators have helped to alleviate the shortage of qualified teachers, particularly in high-needs schools and communities.

The rescission of DACA will also have a devastating impact on schools and school communities. An estimated 365,000 high school students are eligible for DACA status, and another 241,000 of DACA-eligible students are in college. Together, that number accounts for 51% of the nearly 1.2 million DACA-eligible population. Jill Barshay, *Counting DACA students*, Hechinger Report (Sept. 11, 2017), https://hechingerreport.org/counting-daca-students/ (figures from the Migration Policy Institute based on 2014 census data). Overall, about 690,000 immigrants are enrolled in DACA and could face deportation if and when their work permits expire. David Nakamura, *How many people will Trump's DACA rollback affect? About 100,000 fewer than initially reported*, Wash. Post (Sept. 7, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/09/07/how-many-people-will-trumps-daca-

rollback-affect-about-100000-fewer-than-initially-reported/. These people are parents, neighbors, teachers, custodians, administrators, and students in public schools. If they are forced to leave the only country they call home, the communities in which schools do their crucial work will be devastated.

In short, DACA has entrenched enormous reliance interests in its seven years of operation and its removal threatens to destabilize virtually every sector of the Nation's economy and society. Yet, not only did DHS fail to discuss these potential impacts of DACA's rescission, it failed to even acknowledge *any* reliance interests at all. DHS's failure to even mention—let alone account for—the interests created by the prior policy is flatly inconsistent with this Court's holding in *Encino Motorcars*. *See also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (agency decision that "does not take account of legitimate reliance on prior interpretation" may be arbitrary and capricious). Indeed, the principles espoused in *Encino* and this Court's other precedent would be a virtual dead letter if an agency were permitted to rescind a policy upon which so many people rely without even one word acknowledging that reliance.

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If this Court's administrative law principles are to mean anything, they must be applied neutrally and impartially in even the most challenging cases. This Court's most fundamental check on unfettered agency discretion—the requirement of reasoned explanation—would mean nothing if the threadbare explanation here were deemed adequate to invalidate a policy of unquestioned national importance. DHS's decision to rescind DACA must be vacated.

CONCLUSION

For the foregoing reasons, the Court should vacate the decision of DHS.

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October 4, 2019