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 WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH, DISTRICT OF COLUMBIA, AND SECOND CIRCUITS

BRIEF FOR ADMINISTRATIVE LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are professors of administrative law and related public law subjects at institutions across the United States. In their scholarship and their teaching, they have carefully considered the legal doctrines implicated by this case. They submit this brief to address arguments and precedent that are relevant to a central question presented by this appeal: whether the Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals (DACA) policy is judicially reviewable. Amici join this brief solely on their own behalf and not as representatives of their universities. A full list of amici appears in Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under basic precepts of administrative law, the decision to rescind DACA is reviewable. Congress drafted the Administrative Procedure Act intending that, subject to narrow exceptions, agency actions would be judicially reviewable. Among the narrow exceptions carved out from that presumption are enforcement decisions that rest on an agency's exercise of discretion. As this Court has explained, discretionary enforcement decisions typically reflect a complex balancing of factors that lie within the agency's expertise. As such, courts lack any meaningful standards to review them.

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[1] No party authored this brief in whole or in part, and no one other than amici, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

By contrast, enforcement decisions that rely on an agency's view that the law compels a certain course are not insulated from judicial review. They do not rely on the sort of discretionary reasoning that judges are unable to assess. Indeed, they proclaim to be entirely *non-discretionary*. Moreover, the law they construe provides a meaningful standard by which courts may evaluate them.

It is not only permissible under the APA for courts to review agency actions that are purportedly compelled by law. It is imperative. Courts abdicate their constitutional duty when they allow the Executive Branch to have the last word on what the law requires. Judicial review of such actions promotes electoral accountability—a fundamental principle of administrative of law—and safeguards the separation of powers.

In September 2017, the Department of Homeland Security rescinded DACA based on its view that the law left it no other choice. The Department did not reach that view as an exercise of its discretion and none of the belated justifications put forward by the Department alters the fact that the agency's decision was based on its view that DACA was illegal. In keeping with the basic tenets of administrative law, this Court may review the Department's legal conclusion.

ARGUMENT

I. COURTS MAY REVIEW AN AGENCY'S LEGAL DETERMINATION THAT IT LACKS ENFORCEMENT DISCRETION

Administrative actions are presumptively reviewable. The exceptions to this rule are narrow and include enforcement decisions that reflect the exercise of agency discretion. Enforcement decisions that rest on an agency's interpretation of the law, by contrast, are sub-

ject to judicial review. And for good reason. As a practical matter, the final word on what the law says should go to legal experts. More important, judicial review of such actions is vital to preserve principles of constitutional and administrative law.

A. Judicial Review Is Presumptively Available For Agency Actions

The Administrative Procedure Act entitles those aggrieved by agency action to judicial review. 5 U.S.C. § 702. "From the beginning," this Court has found in the APA a "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *see also Weyerhaeuser Co.* v. *U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018); *Mach Mining LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015) ("Congress rarely intends to prevent courts from enforcing its directives to federal agencies."). The bedrock presumption of reviewability permits few exceptions, and it places the burden on the government to demonstrate that a particular agency action qualifies.

Relevant here, the APA draws an exception for an administrative action that is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). As this Court has explained, that exception is "very narrow" and pertains only "in those rare instances where … there is no 'law to apply.'" *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other grounds by Califano* v. *Sanders*, 430 U.S. 99 (1977). Stated differently, Section 701(a)(2) precludes judicial review of an administrative action when a court has "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985).

Included in that narrow exception is the "decision of an administrative agency to exercise its 'discretion' not to undertake certain enforcement actions." *Chaney*, 470 U.S. at 823. In *Chaney*, inmates sentenced to die by lethal injection petitioned the FDA. They maintained that the use of lethal injection drugs for their executions violated the Federal Food, Drug, and Cosmetic Act, and they asked the agency to initiate enforcement actions to prevent the alleged statutory violations that would follow from their executions. *Id.* The FDA Commissioner declined, noting that he was unsure of the agency's jurisdiction under the Act. *Id.* at 824. But even were the agency to have jurisdiction, the Commissioner concluded, the FDA would refuse to initiate enforcement proceedings under its "'inherent discretion to decline to pursue certain enforcement matters.'" *Id.*

The Court held that under Section 701(a)(2) of the APA, an agency's discretionary decision not to initiate an enforcement action was not reviewable. Emphasizing that such decisions had "traditionally been 'committed to agency discretion,'" 470 U.S. at 832, the Court likened the FDA's decision to that of a prosecutor not to indict, an action "long [] regarded as the special province of the Executive Branch." *Id.* Apart from tradition, the Court went on to list other considerations that made discretionary enforcement decisions unsuitable for judicial review. *Id.* Typically, the Court explained, in a decision not to enforce, the agency's exercise of discretion reflects "a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* at 831. Those factors include how best to allocate the agency's resources and where the requested enforcement action lies on the agency's list of priorities. *Id.* at 831-832. Hesitant to involve itself in such "administra-

tive concerns" outside its expertise, the Court observed that decisions not to enforce also generally do not entail an exercise of "*coercive* power over an individual's liberty or property rights," areas that courts frequently are "called upon to protect." *Id.* at 832.

Chaney considered Section 701(a)(2) in the cabined context of an enforcement decision resting on the exercise of an agency's discretion. At the same time, the Court left undisturbed the "strong presumption" of judicial review for agency actions that do not reflect an exercise of administrative discretion or a tradition of non-reviewability. Indeed, *Chaney* expressly stated that the case did not present a situation where an agency had refused to act based only on a non-discretionary *legal* determination "that it lacks jurisdiction." 470 U.S. at 833 n.4. Since *Chaney*, the Court has made clear that the "strong presumption" of judicial review endures, narrowly circumscribing the category of non-reviewable actions to those that have historically been entrusted to an agency's discretion or involve sensitive areas in which courts are loath to intrude. *Lincoln* v. *Vigil*, 508 U.S. 182, 191-192 (1993).

B. An Enforcement Decision That Rests On An Agency's Legal Conclusion That It Lacks Authority To Act Is Reviewable

Where an enforcement decision reflects a legal determination that the law affords the agency no discretion, judicial review is available. In that instance, the deference to agency discretion that counseled against review in *Chaney* does not pertain for the simple reason that the agency has not exercised *any discretion at all*. Rather, it has said what the law is, and that is the province and the duty of the judiciary. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "The rise of

the modern administrative state has not changed that duty." *City of Arlington* v. *FCC*, 569 U.S. 290, 316 (2013) (Roberts, C.J., dissenting).

Unlike the discretionary enforcement decision in *Chaney*, enforcement decisions based on an agency's view of what the law compels are "less frequent" and "more apt to involve legal as opposed to factual analysis." *Massachusetts* v. *EPA*, 549 U.S. 497, 527 (2007). They are "more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments" of discretionary factors that are, "as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Crowley Caribbean Transp., Inc.* v. *Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994). Grounded in an analysis of the statute (or some other source of law), these policy-type pronouncements "delineat[e] the boundary between enforcement and non-enforcement," *id.* at 676-677, and provide a clear and "meaningful standard" against which a court may evaluate the agency's action, *Chaney*, 470 U.S. at 830. All those characteristics are present in this case.

Lower courts, too, have long recognized the distinction between legal decisions that an agency lacks authority to enforce and those that reflect the exercise of its enforcement discretion. Where an agency's "interpretation has to do with the substantive requirements of the law," the D.C. Circuit has said, "it is not the type of discretionary judgment concerning the allocation of enforcement resources that *Heckler* shields from judicial review." *Edison Elec. Inst.* v. *EPA*, 996 F.2d 326, 333 (D.C.Cir.1993); *see also Crowley Caribbean Transp.*, 37 F.3d at 676-677; *OSG Bulk Ships, Inc.* v. *United States*, 132 F.3d 808, 812 (D.C. Cir. 1998).

Similarly, the Eighth Circuit held reviewable certain poultry processing standards by the Department of Agriculture that were "express general policies" based on the Secretary's interpretation of the relevant statute. *Kenney* v. *Glickman*, 96 F.3d 1118, 1122, 1123 n.4 (8th Cir. 1996). And the Ninth Circuit has concluded that "agency nonenforcement decisions are reviewable when they are based on a belief that the agency lacks jurisdiction." *Montana Air Chapter No. 29, Ass'n of Civilian Technicians, Inc.* v. *Federal Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990).

It makes no difference whether an agency's decision reflects a legal determination about the scope of authority that a statute unquestionably permits (*Kenney*) or a determination that the law strips the agency of any authority to act (*Montana Air*). As this Court has explained, "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage." *City of Arlington*, 569 U.S. at 297. In either event, the agency has made a legal evaluation as to whether it "*has stayed within the bounds of its statutory authority*," *id.*, and that sort of evaluation falls squarely within the expertise of the judiciary.[2]

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[2] *City of Arlington* considered whether *Chevron* deference applied to an agency's interpretation of a statutory ambiguity that pertained to "the scope of its regulatory authority (that is, its jurisdiction)." 569 U.S. at 293. Here, the government does not argue that its legal interpretation of a particular statute is entitled to *Chevron* deference. Nor would that argument shield its decision from scrutiny, because judicial review is twice baked into *Chevron* deference. As the Court explained in *City of Arlington*, *a court* awards *Chevron* deference only after (1) *a court* asks whether the intent of Congress is clear in the statute and, if not, (2) after *a court* determines that the agency's construction of an ambiguous statute is permissible. *Id; see also id.* at 318-319 (Roberts, C.J.,

C. Judicial Review Of Agency Decisions That Rest On Legal Conclusions Is Necessary To Ensure Accountability And The Separation Of Powers

It is common that courts review administrative policy decisions that rest on an agency's interpretation of what the law commands or forbids. And that makes good sense: Experts in the law, judges—not administrators—are best suited to say what, if anything, the law commands or forbids. But judicial review is more than a matter of common sense in this circumstance. It is more than a matter of protecting the province of the judiciary. It is a matter of this Court fulfilling its obligation to ensure that the other branches of government are confined to their correct constitutional roles and held accountable to the people.

Far from limiting the executive's discretion, judicial review promotes it. Consider an agency decision that does not reflect discretion but instead the agency's mistaken view that the law denies it any discretion to act. In reviewing the relevant law, a court may correct that misimpression and thereby empower the agency to exercise its discretion to reach an outcome it had previously thought unavailable. *See Regents of the Univ. of Cal.* v. *U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 498

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dissenting) ("We have never faltered in our understanding of this straightforward principle, that whether a particular agency interpretation warrants *Chevron* deference turns on the *court's* determination whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue." (emphasis added)). If the Court does not take an agency's word that *Chevron* deference applies to an ambiguous statute, even less should it take an agency's word that the law—whether the Constitution or a statute—requires a certain outcome.

(9th Cir. 2018) ("If an agency head is mistaken in her assessment that the law precludes one course of action, allowing the courts to disabuse her of that incorrect view of the law does not constrain discretion, but rather opens new vistas within which discretion can operate."), *cert. granted sub nom. Department of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019).

Judicial review is also crucial to promote democratic accountability. A "principal value" of administrative law, the concept of accountability contemplates that voters may hold the President responsible for an unpopular agency action. Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2251-2252 (2001). That concept, however, is undermined where an agency claims it was legally required to take that unpopular action and the judiciary is precluded from saying otherwise. As the Ninth Circuit succinctly explained below, where an agency states that a law deprives it of any discretion to act, it "shifts responsibility for the outcome from the Executive Branch to Congress (for making the law in question) or the courts (for construing it)." 908 F.3d at 499. If the Executive Branch is mistaken in its interpretation of the law and also able to preclude a court from correcting that interpretation, then the agency will have escaped electoral recourse for an unpopular "choice that was the agency's to make all along." *Id.*

Judicial review also promotes congressional accountability. When Congress has in fact made a decision to impose a legal constraint on an agency, judicial review enforces and safeguards that decision, making clear that Congress—and not the Executive—is responsible for it. No matter where the Court lands on

the correct interpretation of the law, judicial review thus increases transparency and accountability.

To force instead the judicial and legislative branches to reap what the executive branch has sown strikes at the heart of democratic accountability and the separation of powers. And yet that is precisely what an administrative official does when she "claim[s] that the law ties her hands while at the same time denying the courts' power to unbind her." *NAACP* v. *Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018), *cert. before judgment granted*, 139 S. Ct. 2779 (No. 18-588). A critical duty of the judiciary is to ensure that the increasing power of the administrative state does not go unchecked. Fulfilling that duty means courts cannot "leave it to the agency to decide when it is in charge." *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting).

II. THE DECISION TO RESCIND DACA IS REVIEWABLE BECAUSE IT RESTS ON A NON-DISCRETIONARY BELIEF ABOUT WHAT THE LAW REQUIRES

The decision to universally end deferred status for 800,000 people is based on the Department's view that the law required that result. It does not reflect an exercise of discretion but a legal judgment, which this Court may evaluate by reference to meaningful standards. Even if this Court were to consider the Secretary's supplemental justifications for rescinding DACA, they are not the sort of discretionary justifications that *Chaney* suggested would be unreviewable. Rather, they stem from (and ratify) the Department's ultimate legal conclusion. To find that legal conclusion unreviewable would represent a dramatic expansion of Section 701(a)(2).

A. The Department Concluded That The Law Required It To Rescind DACA

In her memorandum of September 5, 2017, then-acting Secretary of Homeland Security Elaine C. Duke explained that the law required her to rescind DACA. Taking into consideration rulings from the Supreme Court and the Fifth Circuit "in the ongoing litigation," she wrote, and "the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." *Regents*, Pet. App. 117a (Duke memorandum). The letter of the Attorney General itself had been crystal-clear that DACA was illegal: "DACA was effectuated … without proper statutory authority." It was "an open-ended circumvention of immigration laws" and an "unconstitutional exercise of authority by the Executive Branch." JA 877 (Sessions letter).

What the government calls "litigation risk" cannot serve as the sort of discretionary consideration that precludes judicial review. Pet. Br. 27. As an initial matter, it is unclear what role—if any—"litigation risk" played in the decision to rescind DACA. To be sure, the Sessions letter noted that DAPA had been enjoined nationwide and that DACA would likely face a similar result. JA 877-878. Yet the Duke memorandum, while noting the Attorney General's prediction, did not expressly include it as a "consideration" driving the Secretary's decision.

In any event, the "litigation risk" alluded to in the Duke memorandum is not the type of discretionary consideration discussed in *Chaney* (*i.e.*, one that takes into account a "complicated balancing of a number of factors … peculiarly within [the Department's] expertise."). *Chaney*, 470 U.S. at 831. Instead, the Duke

memorandum tied the threat of litigation to the conclusion that DACA suffered the same legal infirmities as DAPA and so would be enjoined. *See NAACP*, 298 F. Supp. 3d at 234, *adhered to on denial of recons.*, 315 F. Supp. 3d 457 (D.D.C. 2018) ("[T]he Department's conclusion that the Fifth Circuit's decision to uphold a preliminary injunction of DAPA suggests that a court would likely also impose a preliminary injunction of DACA necessarily relies on the Department's legal analysis of the similarities between the two policies—which, like the Department's view of DACA's legality itself, does not qualify for *Chaney's* presumption of unreviewability."). While acting on the consideration of litigation risk could conceivably be a discretionary decision in another context, here the alleged "litigation risk" is no more than an outgrowth of the agency's legal conclusion about the illegality of DACA. Where that is the case, judicial review is proper.[3]

Even assuming the Court sees fit to consider the belated justifications in then-Secretary Nielsen's memorandum of June 22, 2018, none of her reasons insulates the decision to rescind DACA from judicial review. At the outset, the Nielsen memorandum ratifies the reasoning given in the Duke memorandum. It "decline[s] to disturb the Duke memorandum," and notes that the decision of then-acting Secretary Duke to rescind DACA "was, and remains, sound." *Regents*, Pet. App. 121a. The Nielsen memorandum then goes on to detail

[3] To hold otherwise would insulate from judicial review any agency action based on a legal conclusion, provided the action also includes "as an additional, 'discretionary' justification the assertion that a court would likely agree with the agency's interpretation." *NAACP*, 298 F. Supp. 3d at 233.

several justifications for rescinding DACA, which do nothing to convert the rescission of DACA from a legal decision to a discretionary one.

First, the Nielsen memorandum considers (again) and finds convincing the Attorney General's conclusion that DACA was contrary to law. *Regents*, Pet. App. at 122a. Second, the memorandum cites "serious doubts about" the legality of DACA, noting that there are "sound reasons" for an agency not to pursue a legally questionable policy. *Id.* at 123a. But the stated reasons—maintaining public confidence in the rule of law, the "threat of burdensome litigation"—are plainly tethered to the legal conclusion about the questionable legality of the DACA policy. *Id.* Indeed, the "threat of burdensome litigation" is no different than the "potentially imminent litigation" cited in the Duke memorandum. *Regents*, Pet. App. at 116a.

Finally, the Nielsen memorandum includes several "reasons of enforcement policy" that counsel in favor of ending DACA. By and large, these alleged policy reasons relate back to the conclusion that DACA is unlawful. The first policy rationale—that DHS should not adopt DACA until that policy is permitted by statute—of course rests on the premise that DACA is *not* permitted by statute. The second stated policy reason—that deferral should be granted only on an individual basis—was discussed in the Duke memorandum as indicia of the policy's unlawfulness. *Regents*, Pet. App. 112a. Leaving no doubt as to the basis for that justification, the Nielsen memorandum is express that DACA's blanket deferral approach is not "consistent with the INA." *Id.* at 124a.

The final stated policy reason in the Nielsen memorandum—the importance of messaging that the immi-

gration laws will be enforced against "all classes and categories of aliens"—is an impermissible post-hoc justification that this Court should not consider. *Regents*, Pet. App. 124a. It cannot be traced to any stated rationale in the Duke memorandum or the Sessions letter. But even were it not offered too late, the "solitary sentence" about messaging cannot "wholly transmute[] the explanation for DACA's rescission from an issue of law into an issue of policy." *NAACP*, 315 F. Supp. 3d at 471.

B. This Court Can And Should Review The Department's Conclusion That DACA Violates The Law

Guided by the INA, the Executive's historic discretion over immigration, and its own precedent on deferred action, this Court has clear standards by which to evaluate the legal conclusion that DACA must be terminated. This is not a "*single-shot* non-enforcement decision." *Crowley Caribbean Transp.*, 37 F.3d at 676. It is a sweeping enforcement policy that "purport[s] to speak to a broad class of parties." *Id.* at 677. Indeed, it does more than purport to speak; it invokes the coercive power of the government against hundreds of thousands of individuals who now stand to lose their deferred action status and its attendant benefits. *Chaney*, 470 U.S. at 832. "[R]escissions of commitments, whether or not they technically implicate liberty and property interests as defined under the fifth and fourteenth amendments, exert much more direct influence on the individuals or entities to whom the repudiated commitments were made." *Robbins* v. *Reagan*, 780 F.2d 37, 47 (D.C. Cir. 1985).

Judicial review is not simply appropriate in this case. It is urgent. Agency decisions about enforcement

typically do not leave aggrieved parties seeking the court's protection from the coercive power of the government. For that reason, they may be understood not to require judicial review. *Chaney*, 470 U.S. at 832. This case presents precisely the opposite situation. Claiming the law left no choice, the Executive Branch ended a program that granted deferred status to nearly 800,000 people brought to the United States as children, making Dreamers subject to a coercive power from which they were previously exempt absent special individual circumstances. The President himself expressed support for DACA, calling on Congress to legalize the program and insisting that blame for the Secretary's unpopular action lay with the Legislature. Donald Trump (@realDonaldTrump), Twitter (Sept. 14, 2017, 5:28 AM) ("Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really!"), https://preview.tinyurl.com/y378dsy9; Donald Trump (@realDonaldTrump), Twitter (Sept. 5, 2017, 5:38 PM) ("Congress now has 6 months to legalize DACA"), https://tinyurl.com/y2auprfo.

The Executive may not declare that the law requires an unpopular outcome, lament that outcome, and then proclaim that outcome to be insulated from judicial review. That sort of buck passing is an affront to our constitutional system.

CONCLUSION

The Court should affirm the reviewability of petitioners' decision to rescind DACA.

Respectfully submitted.

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