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.

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

REPLY BRIEF FOR THE PETITIONERS

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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.

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REPLY BRIEF FOR THE PETITIONERS

In 2012, the Department of Homeland Security (DHS) adopted DACA, a temporary policy of enforcement discretion that created a mechanism for up to 1.7 million aliens to receive forbearance from removal and federal benefits, even though existing laws make it illegal for them to remain in the United States. That policy was itself illegal, and at a minimum legally questionable. For those reasons, and a host of policy concerns, DHS has been trying to rescind DACA for more than two years. Although respondents claim to accept DHS's authority to do so, they ask this Court to review the change in policy under such rigorous requirements as to effectively preclude it. In their view, the "true cost-benefit analysis" that the Administrative Procedure Act (APA) purportedly requires "could not possibly justify this change." Ind. Br. 59. Respondents' approach to the APA bears no resemblance to this Court's. DHS's decision to rescind a purely discretionary nonenforcement policy is not reviewable under the APA. And even if it were, the decision of a law-enforcement agency to rescind this legally dubious policy *not* to enforce the law plainly satisfies any narrow review the APA provides.

A. The Nielsen Memorandum Should Be Considered

Although the Duke Memorandum provides ample basis to reverse the judgments below, the Court can and should also consider Secretary Nielsen's explanation for DACA's rescission, which confirms that it is both unreviewable and lawful. U.S. Br. 28-31. No one argues that the Nielsen Memorandum is not properly before the Court at all. And although respondents argue that the Court should disregard the parts of it that doom their case, they are wrong for three related reasons.

1. As the D.C. district court correctly concluded, most of Secretary Nielsen's explanation is simply an

"amplified articulation" of Acting Secretary Duke's explanation. *NAACP* Pet. App. 92a (citation omitted). No respondent meaningfully argues that the Court cannot consider Secretary Nielsen's explanation of the unlawfulness rationale contained in the Duke Memorandum. And respondents offer (D.C. Br. 22) only one reason for disregarding her further explanation that, even if DACA ultimately might be found lawful, it should be rescinded based on the costs of maintaining such a legally questionable nonenforcement policy—namely, that the Duke Memorandum purportedly did not sufficiently articulate those concerns. That is wrong. See p. 11, *infra*. Regardless, respondents acknowledge that, at a court's invitation, an agency may offer a fuller explanation of a rationale that existed at the time of its decision but was too "curt[ly]" expressed. D.C. Br. 50 (citation omitted). That is precisely what Secretary Nielsen did when she explained that, "[l]ike Acting Secretary Duke," she "lack[ed] sufficient confidence in the DACA policy's legality" to maintain it. *Regents* Pet. App. 123a.

2. More fundamentally, considering even new policy rationales offered by Secretary Nielsen would not violate the rule prohibiting a reviewing court from accepting "*post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962). That principle prevents thrusting courts "into the domain which Congress has set aside exclusively for the administrative agency," *id.* at 169 (citation omitted), and generally precludes "judicial inquiry into 'executive motivation' [that] represents 'a substantial intrusion' into the workings of another branch," *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2573 (2019) (citation omitted). It is not implicated when, as

here, the agency itself offers the explanation for agency action through proper agency procedures.

Camp v. *Pitts*, 411 U.S. 138 (1973) (per curiam), is not to the contrary. There, the Court discussed the appropriate scope of "affidavits or testimony" that the agency could offer in defense of its action directly to the reviewing court, regardless of the required procedures for taking the action in the first place. *Id.* at 143. The Court, however, placed no limitations on the explanation an agency might offer if a court found the reasons initially offered were insufficient and the agency provided additional ones in accordance with all relevant procedures. *Ibid.*; cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420-421 (1971) (permitting consideration of the agency's additional "formal findings," even if considered "to some extent" "*post hoc* rationalization"). And, here, neither the Immigration and Nationality Act (INA) nor the APA requires any particular procedures at all for changes in enforcement policies.

Respondents appear to acknowledge that Secretary Nielsen was free to offer entirely new rationales in a "new agency action." D.C. Br. 52. But nothing in the APA required that the new action reinstate DACA and rescind it again, rather than ratify the rescission and state her reasons for doing so. And the latter is precisely what Secretary Nielsen did, explicitly stating that the prior decision "remains" sound, that the DACA policy "should be" rescinded, and that she both "decline[d] to disturb" the rescission and "concur[red] with" it for the reasons she articulated. *Regents* Pet. App. 121a, 123a, 126a. Secretary Nielsen's Memorandum is a "rule" setting forth "an agency statement of general * * * applicability and future effect designed to implement * * * policy." 5 U.S.C. 551(4). It thus *is*

"agency action," 5 U.S.C. 551(13), not solely an explanation of a past action.

There is no need to "reset" the litigation for any new reasons to be considered. D.C. Br. 53 (citation omitted). Secretary Nielsen expressly based her decision on an already available administrative record—namely, the Duke Memorandum, the administrative record proffered for that decision, Acting Secretary Duke's accompanying statement, and the then-existing judicial opinions reviewing the Duke Memorandum, see *Regents* Pet. App. 121a—and the questions before the Court are purely legal. In resolving them, the Court can and should consider new agency actions "to the extent they supplement or displace [DHS's] original directive." *National Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 661 n.1 (1989).

Respondents offer no sound reason why it should matter for purposes of considering the Nielsen Memorandum that the D.C. district court's vacatur of the Duke Memorandum had not taken effect or that the government continues to defend the Duke Memorandum. Such a rule would not serve "principle[s] of agency accountability." D.C. Br. 51 (citation omitted). Contrary to respondents' suggestion (*id.* at 52), Secretary Nielsen did not offer her explanation only in court filings. She publicly issued it in the same manner as the Duke Memorandum (and the original DACA memorandum). DHS, *Memorandum from Secretary Kirstjen M. Nielsen on the Rescission of DACA* (June 22, 2018), https://go.usa.gov/xp3BE. There is no "reason to suspect" that it "does not reflect the agency's fair and considered judgment." D.C. Br. 52-53 (citation omitted).

And respondents' assertion (Cal. Br. 51) that considering Secretary Nielsen's reasons for rescinding the

DACA policy would "reduce the agency's incentives for offering a sustainable rationale in the first instance" is not realistic. Even if it were costless to redo agency action, it is implausible that an agency would risk delaying the implementation of new policy by intentionally withholding a well-reasoned explanation in the first instance. That is particularly so where, as is often true, doing so would require the agency to undertake time-consuming and costly efforts such as notice-and-comment rulemaking or adjudicative procedures.

3. At a minimum, if the Nielsen Memorandum provides an adequate basis to uphold DACA's rescission, remanding the matter based on an inadequacy in the Duke Memorandum "would be an idle and useless formality." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion). The APA "does not require" courts to "convert judicial review of agency action into a ping-pong game." *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 545 (2008) (citation omitted); see *PDK Labs., Inc.* v. *DEA*, 362 F.3d 786, 800, 808-809 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment) ("No principle of administrative law or common sense requires us to remand a case in quest of a perfect opinion unless there is reason to believe that the remand might lead to a different result.") (citation omitted). To the contrary, the APA requires courts to take "due account * * * of the rule of prejudicial error." 5 U.S.C. 706; see *Department of Commerce*, 139 S. Ct. at 2573;

Respondents contend (D.C. Br. 56) that it is "impossible * * * to predict" how DHS would respond if the Court remanded the matter to it. But that is manifestly untrue. DHS already has determined that the rescission of the DACA policy was "proper" and therefore

that the policy "should" be terminated. *Regents* Pet. App. 122a. That judgment did not depend on whether DACA was lawful. *Ibid.* And DHS continues to defend all of Secretary Nielsen's reasons before this Court. There is no basis for concluding that the agency's position might change if it were required to consider the question a third time.

B. DACA's Rescission Is Not Reviewable

As reflected in both the Duke and Nielsen Memoranda, DHS's decision to rescind its nonenforcement policy is a quintessential enforcement decision of the sort traditionally "committed to an agency's absolute discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). It is therefore unreviewable absent a statute "circumscribing [the] agency's power to discriminate among issues or cases it will pursue." *Id.* at 833; see U.S. Br. 17-32. Respondents do not claim that the INA restricted DHS's authority to rescind DACA. Their arguments that the rescission nevertheless is reviewable—because of the *type* of decision or the *reasons* given—are all flawed.

1. Respondents principally attempt to distinguish DACA's rescission from the type of decision at issue in *Chaney* on the ground (Ind. Br. 18-21) that the rescission concerned a general enforcement policy, rather than an enforcement decision in an individual case. But *Chaney* itself concerned a categorical enforcement policy. Although the Food and Drug Administration (FDA) reached its decision in response to a request by individual inmates, in rejecting that request, FDA categorically stated that "the use of lethal injection by State penal systems is a practice over which FDA has no jurisdiction" and, regardless, it would "decline, as a matter of enforcement discretion, to pursue supplies of

drugs under State control that will be used for execution by lethal injection." Pet. App. at 82a, 85a, *Chaney*, *supra* (No. 83-1878). Indeed, *none* of the relief that the inmates sought was specific to their cases; they sought system-wide relief. See *id.* at 81a-82a; *e.g.*, *id.* at 82a (requesting that FDA "[a]dopt a policy" for seizing lethal-injection drugs "from prisons or State departments of correction"). That forecloses respondents' implausible suggestion (Cal. Br. 16) that *Chaney* would have been decided differently if FDA had announced its nonenforcement policy, like DHS did here, as a general "framework" before applying it to specific individuals.

Respondents cite lower-court decisions that distinguish between single-shot enforcement decisions and general policies on the ground that the latter are more likely to contain "direct interpretations of the commands of the substantive statute." D.C. Br. 32 (citation omitted). But the Duke and Nielsen Memoranda address only the scope of DHS's enforcement discretion, not the INA's substantive commands. U.S. Br. 25-26. To the extent that some lower-court decisions may be read to authorize review of an enforcement policy itself, rather than an otherwise-reviewable substantive interpretation contained within it, they "simply cannot be reconciled with *Chaney*." *Casa de Maryland* v. *DHS*, 924 F.3d 684, 713 (4th Cir. 2019) (Richardson, J., dissenting in relevant part). As for respondents' reliance (D.C. Br. 33) on *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), that case concerned an agency's denial of a petition for rulemaking, which the Court specifically distinguished from the type of "nonenforcement decision[]"at issue in *Chaney* and here. *Id.* at 527.

Finally, respondents are wrong to suggest (Ind. Br. 19) that DACA's rescission itself is coercive because it

denies "DACA recipients the ability to work." The Duke Memorandum explained that the agency would not "revoke Employment Authorization Documents solely based on the" rescission. *Regents* Pet. App. 118a. And the inability to obtain new or renewed work authorization is simply a collateral consequence of the termination of the deferred-action policy—no different than if a prosecutor ends a nonenforcement policy that diverts certain low-level offenders into job-training or drug-rehabilitation programs.

2. Respondents are also wrong to contend (Cal. Br. 17-21) that, even if DACA's rescission fits within the tradition identified in *Chaney*, it is reviewable because it was based solely on the conclusion that DACA was unlawful. U.S. Br. 23-32.

a. Legally, where "the type of agency decision in question 'has traditionally been "committed to agency discretion,"'" it does not "become[] reviewable" whenever the agency "gives a 'reviewable' reason" for the action. *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282-283 (1987) (*BLE*) (quoting *Chaney*, 470 U.S. at 832). Particularly where, as here, the government has no legal obligation to give any public explanation for its otherwise-unreviewable decision, it would be perverse to subject the decision to years of litigation because the government volunteered one. In determining whether an action is committed to agency discretion, "it is the [agency]'s formal action, rather than its discussion, that is dispositive." *Id.* at 281. Section 701(a)(2) precludes review of "agency action," not agency "reasons."

Respondents observe (Cal. Br. 21) that the agency action at issue in *BLE* was not a "non-enforcement decision" and was not "based on any purported lack of au-

thority." But the Court refused to review the legal analysis in the agency's reconsideration decision in *BLE* by analogizing to precisely such a nonenforcement decision. It explained that "a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction. * * * [Y]et it is entirely clear that the refusal to prosecute cannot be the subject of judicial review." *BLE*, 482 U.S. at 283.

That was not because of any "longstanding rule against suits to compel criminal prosecutions." D.C. Br. 28. It was based on the longstanding tradition of not subjecting "decision[s] *whether or not* to prosecute" to judicial review, reflecting concerns about invading the "special province" of the Executive and the general unsuitability of that class of decisions for judicial review. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (emphasis added) (quoting *Chaney*, 470 U.S. at 832). The same concerns apply to decisions to enforce federal immigration laws and, indeed, are "greatly magnified" given that the consequence of review is to "prolong a continuing violation" of federal law. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999) (*AADC*).

Moreover, while it is true that *BLE* identified distinct reasons for the tradition of not reviewing requests to reopen for material error, Regents Br. 25-26, the salient point is that, whatever the particular reason for a tradition of unreviewability, Section 701(a)(2) "was meant to preserve" it. *BLE*, 482 U.S. at 282. And while the *BLE* Court did note that some types of refusal to reopen are reviewable (D.C. Br. 27), that is not due to the reasons the agency chooses to provide, but rather the substantive basis of the petitioner's request.

482 U.S. at 278 (distinguishing "petitions alleging 'new evidence' or 'changed circumstances'").

b. In any event, as a factual matter, DACA's rescission was not based solely on a legal conclusion. Acting Secretary Duke emphasized the threat of impending litigation, the Attorney General's conclusion that it was "likely" that such litigation "would yield similar results" to the earlier litigation, and her resulting decision that the DACA policy "should" be wound down. *Regents* Pet. App. 115a-117a. The Duke Memorandum alone thus demonstrates that the decision has always been based, in part, on the Secretary's "exercise of [her] authority in establishing national immigration policy," *id.* at 117a, not just the Attorney General's authority to issue "controlling" determinations of relevant "questions of law," 8 U.S.C. 1103(a)(1).

Respondents suggest (D.C. Br. 22-23) that Acting Secretary Duke must not have exercised such discretion because her memorandum does not contain an explicit "assessment of the costs of rescinding the policy weighed against the legal risk of maintaining it." But such an exercise would serve little purpose where, as here, the relevant costs of maintaining the policy were not only monetary, but the damage to public confidence in DHS and in the rule of law, as well as the potential distraction from the agency's important work. *Regents* Pet. App. 123a. And even if that criticism were relevant to whether the litigation-risk rationale was valid on the merits, it fails to show that the decision was not actually based on serious doubts about DACA's legality.

It is likewise irrelevant that the concerns about maintaining a legally questionable policy were paired with a conclusion that the DACA policy is, in fact, un-

lawful. It is not uncommon for courts or agencies to offer independent, alternative rationales for their decisions. Indeed, FDA in *Chaney* similarly concluded both that the agency "ha[d] no jurisdiction" over the States' "use of lethal injection," and that, even if it did, "as a secondary and separate basis of denial," the agency would not, "as a matter of enforcement discretion," take the requested actions. Pet. App. at 82a, 85a, *Chaney*, *supra* (No. 83-1878). That fact provides no basis to call into question the sincerity of either ground.

c. The Nielsen Memorandum, moreover, makes clear that DACA's rescission is not based exclusively on legal rationales and thus is unreviewable. See *Regents* Pet. App. 123a-124a. Respondents are wrong that DACA's rescission would still be reviewable to ensure that it was not "'arbitrary' and 'capricious' or an 'abuse of discretion.'" Ind. Br. 26-27 (quoting 5 U.S.C. 706(2)(A)). "[B]efore any review at all may be had, a party must first clear the hurdle of § 701(a)," and Section 701(a)(2) bars "abuse of discretion" review for actions traditionally committed to agency discretion. *Chaney*, 470 U.S. at 828, 830.

Judulang v. *Holder*, 565 U.S. 42 (2011), does not hold otherwise. That case did not involve enforcement discretion. Instead, in an appeal from a final order of removal, the alien challenged the denial of a form of discretionary relief that conferred lawful status. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001) ("If relief is granted, * * * the alien remains a permanent resident."). The agency's policy was reviewable because it did not fit within the tradition of unreviewability identified in *Chaney*, not because Section 706(2)(A) applies to all discretionary decisions. Indeed, the case did not even address Section 701(a)(2).

C. DACA's Rescission Is Lawful

Even if judicially reviewable under the APA, DHS's decision to rescind a nonenforcement policy that was at best legally uncertain—and, at worst, unlawful—was plainly rational. U.S. Br. 32-56.

1. DACA's rescission is justified by DHS's concerns about maintaining the legally questionable nonenforcement policy, particularly in the face of impending litigation. U.S. Br. 33-37.

One set of respondents suggests that "litigation risk" can never be "an adequate, independent rationale for agency action." Regents Br. 53-54. But not even the D.C. district court was willing to go that far. See *NAACP* Pet. App. 40a. And other respondents rightly disavow it. See Cal. Br. 21 (acknowledging that, in some contexts, a litigation-risk rationale "might" render the rescission unreviewable). Indeed, it is commonplace for an agency to acquiesce in a federal court's determination that a prior action is unlawful, even if it disagrees. After all, an agency is not required to push its questionable legal authority to its logical extreme.

Recognizing such a possibility does not permit an agency to evade judicial review (assuming such review is even available). It simply shifts the focus of any review from the agency's legal determination to its evaluation of the costs of maintaining a policy in the face of legal uncertainty. Abandoning administrative efforts on that basis will not always survive scrutiny because the legal doubts must be rational. But in the face of the Fifth Circuit's decision affirming a preliminary nationwide injunction against DAPA and expanded DACA, and this Court's equally divided affirmance, DHS was (more than) reasonably concerned about the legality of DACA, the possibility of an immediate court-ordered shutdown,

and the intangible costs to this *law-enforcement agency* of maintaining a legally dubious policy *not to enforce the law*, regardless whether courts might ultimately uphold it. *Regents* Pet. App. 123a; accord *id.* at 117a.

Like the lower courts, respondents fault DHS for failing to address possible distinctions between DAPA and DACA that might have led the Fifth Circuit to reach a different conclusion with respect to DACA. N.Y. Br. 36-39. But respondents do no better in identifying any material distinction. U.S. Br. 35-36. And in nearly 300 pages of briefing, none of the respondents meaningfully grapples with the fact that the Fifth Circuit held that both DAPA *and* expanded DACA were substantively unlawful—a judgment this Court affirmed by an equally divided court. That was not a judicial oversight. Everyone in that case simply agreed that the policies stood or fell together. See, *e.g.*, U.S. Br. at 10-11, 45, *United States* v. *Texas*, No. 15-674.

Some respondents assert that, unlike DACA, DAPA "would have classified recipients as 'lawfully present in the United States.'" Ind. Br. 51 (citation omitted). But as other respondents effectively recognize (Cal. Br. 26 n.5, 35), DACA is no different with respect to "lawful presence" than DAPA: while neither policy *in fact* makes it lawful to remain in the country, deferred action under either policy is *deemed* to satisfy statutory "lawful presence" requirements for purposes of certain federal benefits (*e.g.*, social security) and the INA's reentry bars. Indeed, the highlighted portion of the DAPA memorandum explained the consequences of "deferred action" generally, not DAPA specifically. *Regents* Pet. App. 104a.

Respondents criticize (Ind. Br. 52) DHS for failing to consider whether the *Texas* district court would have

exercised its discretion not to order an immediate shutdown of the DACA policy based on a balancing of the equities. Even if so, that would not address the intangible costs of maintaining a legally questionable nonenforcement policy. And in any event, as long as DHS reasonably determined that the court likely would declare DACA substantively unlawful (as it did), it cannot be irrational for DHS to have concluded that—one way or another—the policy likely would be brought to an end. The question was whether the policy's termination would be pursuant to a court-ordered plan or one set by DHS. The fact that the *Texas* court recently declined on equitable grounds to enjoin the DACA policy at an interlocutory stage of the latest challenge does not undermine that judgment. Cf. Regents Br. 54. Indeed, the court's conclusion that the Fifth Circuit's prior decision controls the unlawfulness of DACA on the merits powerfully vindicates DHS's legal concerns.

2. The rescission is independently justified by Secretary Nielsen's enforcement-policy concerns. U.S. Br. 37-43.

Respondents inaccurately characterize Secretary Nielsen's policy concerns as "recapitulat[ing]" her legal concerns. Cal. Br. 50 (citation omitted). Secretary Nielsen explicitly stated that her policy concerns apply "regardless of whether the[] concerns about the DACA policy render it illegal or legally questionable." *Regents* Pet. App. 123a. There is nothing unusual in maintaining that, even if certain substantive values reflected in the law (*e.g.*, federalism or the separation of powers) do not legally foreclose a particular action, they provide an independent policy rationale for not pursuing that course. FDA did precisely that in its decision in *Chaney*, and no Member of the Court questioned its sincerity. U.S. Br. 30.

Respondents contend (Ind. Br. 55) that the Secretary's preference for truly individualized prosecutorial discretion is inconsistent with past categorical deferred-action policies and current categorical asylum rules. But DHS's past deferred-action policies were nothing like DACA. See pp. 17-19, *infra*. And in any event, DHS was free to change its position on the desirability of categorical nonenforcement policies. Indeed, although he had made an exception for DACA, Secretary Kelly had already announced such a change. J.A. 857-867. There is also no inconsistency between Secretary Nielsen's desire to avoid categorical deferred-action policies that tilt the scales *against* enforcing federal immigration law as written, and the agency's use of categorical rules in other contexts to *enforce* those laws.

Respondents complain (Cal. Br. 51) that the Secretary's desire to project a message of consistent immigration enforcement to discourage further illegal immigration is not supported by evidence in the administrative record. But the basis for the Secretary's policy preference is "an exercise in logic rather than clairvoyance." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 521 (2009). DHS is committed to vigorous enforcement of the federal immigration laws. Toward that end, it seeks to send a strong, consistent message that illegal immigration will not be tolerated. Policies like DACA plainly undermine the clarity of that message by facilitating ongoing illegality on a massive scale through prospective assurance that the immigration laws will not be enforced coupled with affirmative benefits.

In light of those reasonable policy goals, the Secretary adequately acknowledged and balanced the asserted reliance interests in the indefinite continuance of DACA. No one disputes that, from the outset, DACA

was a temporary, discretionary policy; was granted in only two-year increments; and created no lawful status or substantive rights. *Regents* Pet. App. 101a. Indeed, President Obama made clear that the policy represented only a "stopgap measure," not a "permanent fix." The White House, *Remarks by the President on Immigration* (June 15, 2012). Against this backdrop, the DACA policy could not engender any legally cognizable reliance interests in the government's continuing facilitation of DACA recipients' unlawful status. And while respondents assert that law-abiding institutions have "ordered their affairs" in response to DACA (Ind. Br. 34), those interests are concededly "derivative" (D.C. Br. 60) of the aliens' ongoing violations of the immigration laws.

In any event, DHS did not "entirely fail[] to consider" the asserted reliance interests. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To the contrary, Secretary Nielsen expressly acknowledged them and weighed them against her other concerns. Respondents would demand more, but the INA neither imposes any requirement on DHS to determine whether this policy is "appropriate and necessary" based on a formal study, *Michigan* v. *EPA*, 135 S. Ct. 2699, 2705 (2015) (citation omitted), nor provides any other reason to conclude that the Secretary is required to perform a technical cost-benefit analysis before enforcing the statute as written.

3. DACA's rescission is also independently justified by DHS's conclusion that the DACA policy itself is unlawful. U.S. Br. 43-52.

a. In arguing to the contrary, respondents rely on DHS's historical deferred-action policies and other discretionary-relief policies. But the nature and scope

of the DACA policy make it fundamentally different from the handful of prior class-based deferred-action policies. DACA does not simply delay removal until the alien can obtain (or recover) some lawful status already afforded by Congress; it provides a reprieve from removal to a class of aliens that Congress has repeatedly *declined* to grant permanent relief. And it offers deferred action, triggering additional affirmative benefits, on a much larger scale than any such prior policy. Thus, while DHS's prior deferred-action policies are fairly described as interstitial, DACA is not.

Respondents identify (Cal. Br. 30) one prior deferred-action policy—which applied to certain widows and widowers of U.S. citizens seeking visas—that they wrongly assert was "'interstitial' only in hindsight" because the INA at the time did not provide those aliens any "avenue of immigration relief." Memorandum from Donald Neufeld, Acting Assoc. Dir., Office of Domestic Operations, USCIS, to Field Leadership, USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children* 1 (Sept. 4, 2009). As DHS explained, although the agency did not interpret the INA to afford the affected aliens relief, several circuits had disagreed and bills were pending in both houses of Congress to ratify that view. *Ibid.* The pending legislation—which was expected to affect fewer than 100 aliens per year, H.R. Rep. No. 911, 110th Cong., 2d Sess. 4 (2008)—was enacted into law less than five months later, and the policy ended. Pub. L. No. 111-83, § 568(c), 123 Stat. 2186. At most, then, DHS effectively acquiesced in lower-court rulings to allow Congress to enact a legislative fix. By contrast, DACA recipients indisputably have no path to lawful status, and the

maintenance of DACA is impeding any path to legislative resolution.

The rest of the historical policies on which respondents rely all at least purported to implement either separate, specific statutory authority, see 8 U.S.C. 1252(b) (1988 & Supp. II 1990) (voluntary departure); 8 U.S.C. 1182(d)(5)(A) (parole), the President's Article II authority over foreign affairs, see USCIS, DHS, *Adjudicator's Field Manual* Ch. 38.2 (deferred enforced departure), or both. Any congressional approval or tolerance of such policies, at most, ratified or acquiesced in the asserted scope of that distinct authority. And, in fact, with respect to extended-voluntary-departure policies, like Family Fairness, any arguable statutory basis has since been foreclosed. U.S. Br. 48-49.

The affirmative benefits triggered by DACA are not irrelevant simply because they are afforded under separate, longstanding regulations. Cf. Cal. Br. 38-39. Although the benefit-conferring regulations predate DACA and apply to all deferred action, the DACA policy triggered those benefits in a manner that had never previously been done. Section 1324a may have ratified extending work authorization to aliens who received deferred action on an individualized basis or pursuant to interstitial class-based deferred-action policies. See 8 U.S.C. 1324a(h)(3) (referring to aliens "authorized to be so employed * * * by the Attorney General"). But it cannot reasonably be interpreted to have "br[ought] about [the] enormous and transformative expansion" in the Secretary's authority that would be required to support conferring work authorization in conjunction with a deferred-action policy like DACA. *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014). And that is so whether deferred action and associated benefits

are granted to everyone, or *nearly* everyone, who meets the eligibility criteria. Cf. N.Y. Br. 31-34.

b. Because the DACA policy is unlawful, DHS had no choice but to rescind it and the APA provides no basis for vacating its termination. Although respondents urge (Ind. Br. 37) the Court not to reach a conclusion on the policy's lawfulness, the Ninth Circuit's judgment rests on its unequivocal conclusion that "DACA was a permissible exercise of executive discretion." *Regents* Supp. Br. App. 56a. To be sure, the Court can hold that rescinding DACA based on the Executive's own view of its enforcement duties was not a "clear error of judgment," U.S. Br. 50 (quoting *State Farm*, 463 U.S. at 43), without addressing DACA's legality. But if the Court disagrees, DACA's ultimate legality is squarely presented.

Respondents argue (Regents Br. 44) that DHS's legal conclusion must survive *de novo* review. But they fail to identify any case finding an agency enforcement decision arbitrary and capricious merely because the court disagrees with the agency's reasonable interpretation of the scope of its legal authority to not enforce federal law. And in the context that respondents identify as most analogous—the denial of a petition for rulemaking—this Court explained that review under the APA must be "'extremely limited'" and "'highly deferential,'" and found the agency's decision not to exercise its authority arbitrary and capricious only after concluding that "[t]he statute [wa]s unambiguous." *Massachusetts*, 549 U.S. at 527-528, 529 (citation omitted).

Respondents contend (N.Y. Br. 31-42) that DHS offered an inadequate explanation for its legal analysis. But the APA requires only that "the agency's path may reasonably be discerned." *State Farm*, 463 U.S. at 43

(citation omitted). Both memoranda reflect DHS's conclusion that the DACA policy exceeded the agency's "statutory authority." *Regents* Pet. App. 116a, 123a. That conclusion does not depend on whether DACA prevented DHS officials from exercising any discretion. See pp. 19-20, *supra*. And neither Secretary "place[d] any significant weight" on Attorney General Sessions' statement that DACA was unconstitutional, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 804 n.23 (1978)—which, in any event, simply underscored his strongly held view that DACA was based on a statutorily unauthorized exercise of Executive power.

DHS was not required to consider whether DACA's illegality could be addressed by separating deferred action—generally or under DACA specifically—from at least some of the benefits it triggers. D.C. Br. 39-44. Deferred action coupled with the associated benefits are the two legs upon which the DACA policy stands, as many of the briefs in support of respondents confirm. See, *e.g.*, Inst. of Higher Educ. Amicus Br. 5-11. Indeed, it is largely the eligibility for benefits triggered by deferred action that allows DACA recipients to "come out of the shadows and become productive members of their communities." N.Y. Br. 2. It was not arbitrary and capricious for DHS to view deferred action and its collateral benefits as importantly linked.

4. Finally, DACA's rescission does not violate equal protection principles. U.S. Br. 52-57. As an initial matter, all of the respondents in the California litigation and the non-State respondents in the New York litigation have forfeited any defense of the lower courts' refusal to dismiss their equal protection claims. Although the individual respondents assert (at 12 n.1) that their equal protection claims are not before the Court, the

district-court orders refusing to dismiss those claims were certified for interlocutory appeal and consolidated with the preliminary-injunction appeals, *Regents* Supp. Br. App. 22a; *Batalla Vidal* Pet. App. 147a-157a, 175a-176a; and the Ninth Circuit specifically affirmed the California district court's equal protection analysis in the judgment under review, *Regents* Supp. Br. App. 73a-77a.

The substantive defense from the New York State respondents (at 53-56) is also unpersuasive. Respondents do not even attempt to demonstrate that DACA's rescission is "so outrageous" that it overcomes this Court's concerns about recognizing a discriminatory-motive challenge to an exercise of immigration enforcement discretion. *AADC*, 525 U.S. at 491. Instead, they contend that *AADC* is not implicated because vacating the rescission would protect their proprietary interests and not interfere with DHS's exercise of enforcement discretion in any individual case. But vacating the rescission would interfere with DHS's categorical exercise of enforcement discretion *for all its cases*, and respondents' interests are protected only by "prolong[ing] * * * continuing violation[s]" of federal immigration law. *Id.* at 490. The reasoning of *AADC* fully applies. In any event, respondents offer nothing more than the lower courts' opinions to defend their equal protection claims even under the *Arlington Heights* standard. As explained, their allegations fall woefully short of stating a claim even under that standard. U.S. Br. 54-57.

D. The Judgments And Orders Should Be Reversed

Because DACA's rescission is unreviewable and in any event lawful, the judgments and orders before this

Court should be reversed. Respondents' incorrect arguments about the scope of the administrative record should not prevent the Court from doing so. As an initial matter, those arguments are irrelevant to the Court's review of the D.C. district court's final judgment. Respondents in that case did not challenge the completeness of the administrative record, *NAACP* Pet. App. 18a, and do not challenge it here. As for the other cases, respondents themselves recognize that the record dispute is irrelevant if DACA's rescission is unreviewable. Cal. Br. 54. Regardless, given the nature of the rescission, no dispute over the record could show that the rescission was arbitrary and capricious or sustain the district courts' nationwide preliminary injunctions.

There is no basis to think that reasons offered by either Secretary were pretextual. Cf. Regents Br. 56-58. At most, respondents identify unstated policy reasons why the President or the former Attorney General may have wanted to see DACA rescinded. But "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Department of Commerce*, 139 S. Ct. at 2573. *A fortiori*, it may not do so based on such alleged reasons of *other* officials.

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For the foregoing reasons and those stated in our opening brief, the judgments of the Ninth Circuit and the District Court for the District of Columbia, as well as the orders of the Eastern District of New York, should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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