

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HOMELAND SECURITY,)
ET AL.,)
 Petitioners,)
 v.) No. 18-587
REGENTS OF THE UNIVERSITY OF)
CALIFORNIA, ET AL.,)
 Respondents.)

DONALD J. TRUMP, PRESIDENT OF THE)
UNITED STATES, ET AL.,)
 Petitioners,)
 v.) No. 18-588
NATIONAL ASSOCIATION FOR THE)
ADVANCEMENT OF COLORED PEOPLE, ET AL.,)
 Respondents,)

KEVIN K. McALEENAN, ACTING SECRETARY)
OF HOMELAND SECURITY, ET AL.,)
 Petitioners,)
 v.) No. 18-589
MARTIN JONATHAN BATALLA VIDAL, ET AL.,)
 Respondents,)

Pages: 1 through 92

Place: Washington, D.C.

Date: November 12, 2019

HERITAGE REPORTING CORPORATION

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Washington, D.C.

Tuesday, November 12, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

GEN. NOEL J. FRANCISCO, Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of the Petitioners.

THEODORE B. OLSON, ESQ., Washington, D.C.;
on behalf of the private Respondents.

MICHAEL J. MONGAN, Solicitor General,
San Francisco, California;
on behalf of the state Respondents.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 18-587, the
5 Department of Homeland Security versus Regents
6 of the University of California, and the related
7 cases.

8 General Francisco.

9 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO

10 ON BEHALF OF THE PETITIONERS

11 GENERAL FRANCISCO: Mr. Chief Justice,
12 and may it please the Court:

13 In 2017, the Fifth Circuit held that
14 DAPA and the expansion of DACA were likely
15 unlawful, a judgment this Court affirmed by an
16 equally divided Court. In the face of those
17 decisions, the Department of Homeland Security
18 reasonably determined that it no longer wished
19 to retain the DACA policy based on its belief
20 that the policy was illegal, its serious doubts
21 about its illegality, and its general opposition
22 to broad non-enforcement policies.

23 That decision did not violate the APA
24 for two reasons. First, it's not subject to
25 judicial review. The rescission simply ended a

1 previous non-enforcement policy whereby the
2 Department agreed to not enforce the INA against
3 hundreds of thousands of illegal aliens.

4 But the decision whether or not to
5 enforce the law is committed to the agency's
6 unreviewable discretion, unless a statute
7 restricts it. And nothing in the INA requires
8 the Department, a law enforcement agency, to not
9 enforce the law.

10 Second, the decision to end this
11 non-enforcement policy was eminently reasonable.
12 DACA was a temporary stopgap measure that, on
13 its face, could be rescinded at any time. And
14 the Department's reasonable concerns about its
15 legality and its general opposition to broad
16 non-enforcement policies provided more than a
17 reasonable basis for ending it.

18 After all, an agency isn't required to
19 push its legally dubious power to not enforce
20 the law to its logical extreme since it
21 undermines confidence in the rule of law itself,
22 and it conflicts with the agency's law
23 enforcement mission.

24 I'd like to begin with the
25 reviewability question. If the Attorney General

1 were to say that he wasn't going to seek death
2 penalty prosecutions because he thought the
3 death penalty was unconstitutional, that would
4 be immune from judicial review. And if a new
5 attorney general came in and reversed that
6 policy because he believed that the death
7 penalty was constitutional, that would likewise
8 be immune from judicial review because --

9 JUSTICE GINSBURG: General Francisco,
10 there's a strange element to your argument
11 because you're arguing this is a discretionary
12 matter; it's not reviewable because it's
13 committed to agency discretion.

14 But, on the other hand, you say the
15 agency had no discretion because this program
16 was illegal. In other words, the law requires
17 you to drop DACA. So how can it be committed to
18 your discretion when you're saying we have no
19 discretion; this is an illegal program?

20 GENERAL FRANCISCO: For two reasons,
21 Your Honor. First, we've put forward both legal
22 and policy reasons for the rescission, so this
23 case is on all fours with Chaney, where the FDA
24 likewise put forth legal and policy reasons.
25 Its principal argument was that it lacked

1 jurisdiction to reg -- to regulate state use of
2 drugs in carrying out the death penalty. Its
3 alternative argument was that even if it had the
4 legal authority to do so, it wouldn't have
5 exercised it.

6 And this Court found that that
7 decision was committed to the agency's
8 unreviewable discretion. Here, we are likewise
9 making alternative legal and policy arguments.

10 CHIEF JUSTICE ROBERTS: What's your --

11 GENERAL FRANCISCO: But, secondly --

12 CHIEF JUSTICE ROBERTS: Oh, I'm sorry.
13 Go ahead.

14 GENERAL FRANCISCO: Secondly, even if
15 we were making purely a legal argument, and
16 we're not, but even if we were, review would be
17 foreclosed by this Court's decision in BLE.
18 What the BLE case held was that if an action is
19 committed to an agency's unreviewable
20 discretion, then it doesn't matter what reason
21 it gives for taking that action; it's still
22 unreviewable. And the specific example this
23 Court provided in BLE was a prosecutor who
24 decided not to indict for a purely legal reason.
25 And the Court indicated that that was still

1 unreviewable because the underlying action, the
2 enforcement discretion, was committed to the
3 agency's unreviewable discretion.

4 So, here, we think we win under
5 Chaney, and we also think we win under BLE.

6 CHIEF JUSTICE ROBERTS: What if the
7 Attorney General said he, in his exercise of
8 prosecutorial discretion, was not going to
9 enforce any of the immigration laws?

10 GENERAL FRANCISCO: Uh --

11 CHIEF JUSTICE ROBERTS: Would that
12 still be non-reviewable?

13 GENERAL FRANCISCO: Your Honor, then I
14 think that you might run into Chaney's exception
15 for a complete abdication of authority, but
16 there's a critical difference between that and
17 this. Here, we are enforcing the law. You can
18 understand why Congress or the courts might say
19 that you can review a -- a decision not to
20 enforce the law. Congress, in fact, passes laws
21 so they'll be enforced, and you can understand
22 why it might restrict the government's ability
23 to not enforce the law.

24 Here, we are enforcing the law. And
25 it's very difficult to see why the Congress

1 would ever pass a law, say that something is
2 illegal, and then try to hamstring the
3 government's ability to enforce it. That's why
4 we think we clearly fall within the Chaney
5 presumption, that it's an exercise of
6 enforcement discretion, and we don't fall within
7 the Chaney exception, which would apply where
8 Congress itself restricts the discretion or
9 where there's a potential complete abdication of
10 enforcement authority, as Chaney made clear
11 might also be an exception.

12 JUSTICE ALITO: Was DACA --

13 JUSTICE KAGAN: Just to -- just to
14 understand what you're saying, General, you --
15 that would suggest that the original DACA is
16 reviewable, but the rescission of DACA is not.
17 In other words, are you suggesting that there's
18 an asymmetry in what's reviewable?

19 GENERAL FRANCISCO: There --

20 JUSTICE KAGAN: That they don't stand
21 and fall together?

22 GENERAL FRANCISCO: Yeah, there is,
23 because there's a difference in the two
24 policies. Both of them -- to be clear, both of
25 them fall within Chaney's presumption. Both of

1 them reflect an exercise of enforcement
2 discretion that are presumptively unreviewable.
3 The question then is whether Congress has done
4 anything to restrict that discretion.

5 With respect to DAPA, the case that
6 this Court had before it a couple of years ago,
7 Texas argued that the INA actually restricted
8 the agency's ability not to enforce the law.
9 And you can certainly understand why Congress
10 might try to hamstring the government's ability
11 not to enforce the laws that it passes. And the
12 Fifth Circuit agreed. So that fell within the
13 Chaney exception to the presumption.

14 Here, though, nobody is arguing,
15 nobody on either side, is arguing that the INA
16 somehow restricts our ability to enforce the
17 law. And it would be quite surprising if
18 Congress were to pass a law that says something
19 is illegal and then tries to somehow restrict
20 the government's ability from enforcing the laws
21 that it passes.

22 So, again, I think we fall four square
23 within the Chaney presumption, and the Chaney
24 exception doesn't apply. And that exception
25 applies -- that exception covers both where the

1 statute itself restricts the discretion, and,
2 Chief Justice, to your question, it could also
3 apply where there was a complete abdication of
4 law enforcement responsibilities. That was one
5 of the areas that Chaney reserved in that
6 critical Footnote 4.

7 But, here, we're not not enforcing the
8 law. We're enforcing the law. And there is
9 simply nothing in the INA that somehow says to
10 the Department of Homeland Security you are
11 restricted in any way or shape or form --

12 JUSTICE GINSBURG: Can I go back --

13 GENERAL FRANCISCO: -- from enforcing
14 the laws we pass.

15 JUSTICE GINSBURG: The response that
16 you -- that you gave to me, I didn't see -- I
17 thought that what you call it, the Duke
18 Memorandum, Duke Memorandum said DACA is
19 illegal. I didn't see where it said, whether
20 it's illegal or not, as a matter of
21 administration policy, we are withdrawing it.

22 GENERAL FRANCISCO: So --

23 JUSTICE GINSBURG: I didn't see that.

24 GENERAL FRANCISCO: Yeah.

25 JUSTICE GINSBURG: You said there were

1 alternate arguments. I saw only the first, we
2 can't enforce DACA; we can't adhere to DACA
3 because it's illegal.

4 GENERAL FRANCISCO: So two responses,
5 Your Honor. First of all, Secretary Nielsen's
6 memoranda clearly encompasses all of the
7 different arguments. It sets them forth in
8 great detail. And we think that the Nielsen
9 memorandum is clearly properly before the Court.
10 The district court in Washington, D.C.,
11 specifically asked for it. We specifically
12 provided it. The district court reviewed it.
13 So the only question really is, what does it
14 mean?

15 And Secretary Nielsen in her
16 memorandum effectively ratified Secretary Duke's
17 decision for the reasons given using precisely
18 the same mechanism that Secretary Duke used
19 herself to issue the memo in the first place,
20 the same mechanism that was issued -- used to
21 issue the DACA memo, and the same mechanism used
22 to issue the DAPA memo.

23 So this isn't a post hoc
24 rationalization of agency action. It is agency
25 action. The whole point of the post hoc

1 rationalization rule is to prevent courts from
2 invading into executive branch decision-making.

3 JUSTICE BREYER: I thought the point
4 -- this is an old argument.

5 GENERAL FRANCISCO: Yeah.

6 JUSTICE BREYER: And there have been
7 two bases. The first base is a big argument
8 between Ken Davis and Burger, you know, and is
9 -- is it that you can't review an agency, does
10 that little thing about you cannot -- commit it
11 to agency discussion by law, does it mean that
12 there's certain -- just mean that there are
13 certain things an agency might do. Don't review
14 them even if they're totally wrong, like Panama
15 Canal tolls.

16 GENERAL FRANCISCO: Right.

17 JUSTICE BREYER: Okay? That isn't
18 here, I don't think.

19 The Chaney argument, I thought was the
20 reason this is unreviewable, is because there's
21 a long history and tradition of a prosecutor
22 saying I know that guy over there, or that woman
23 here, and they may be guilty, but, in my
24 discretion, no, I don't want to prosecute them.
25 There's a long history of that.

1 GENERAL FRANCISCO: Uh-huh.

2 JUSTICE BREYER: And if that history,
3 an understandable power to give to a prosecutor,
4 is to be valid, courts, stay out of it. Now
5 that does not apply where what's at issue is not
6 a prosecutor making an individualized decision
7 but, rather, an agency's policies --

8 GENERAL FRANCISCO: Right.

9 JUSTICE BREYER: -- generalized,
10 written down, and I can't think of a reason why
11 in such a case you wouldn't review it in a
12 court.

13 GENERAL FRANCISCO: So, respectfully,
14 Your Honor, I strongly disagree because Chaney
15 itself involved not a prosecutor but an agency
16 and not a single shot enforcement action but a
17 general policy.

18 Here's what the FDA said in the letter
19 denying the petition brought by the inmates to
20 have it regulate the state exercise of the death
21 penalty. This is their principal conclusion.

22 JUSTICE BREYER: Yeah.

23 GENERAL FRANCISCO: "For the reasons
24 given below, we conclude that the use of lethal
25 injection by state penal systems is a practice

1 over which FDA has no jurisdiction and,
2 therefore, that FDA has no authority to take the
3 actions your petition requests. Accordingly,
4 your petition is denied."

5 It later provided as the alternative
6 rationale a policy rationale, and it says later:
7 "Thus, as a secondary and separate basis of
8 denial, we decline as a matter of enforcement
9 discretion to pursue supplies of drugs under
10 state control that will be used for execution by
11 lethal injection."

12 So, in Chaney, the FDA clearly was
13 announcing a categorical policy that it wasn't
14 going to regulate the state use of drugs in
15 carrying out the death penalty. And it wasn't a
16 criminal prosecution. So I think it's on all
17 fours in favor of us.

18 Here, we have an exercise of
19 enforcement discretion that is committed to the
20 agency's unreviewable discretion under Chaney.
21 It doesn't fall with any -- within any of the
22 exceptions to Chaney, where Congress either
23 restricts the exercise of that discretion,
24 because, here, we're talking about enforcement,
25 not non-enforcement, and it doesn't fall under

1 the complete abdication exception to Chaney
2 because, again, we're talking about enforcement
3 and not non-enforcement. And Judge --

4 JUSTICE KAVANAUGH: Wouldn't what --
5 wouldn't what you just read also have made DACA
6 itself unreviewable, to pick up on Justice
7 Kagan's question from earlier?

8 GENERAL FRANCISCO: No, Your Honor,
9 and, again, because, critically, it falls within
10 --

11 JUSTICE KAVANAUGH: What -- what's the
12 distinction between DACA and the FDA policy?

13 GENERAL FRANCISCO: Oh, the DACA and
14 the FDA policy?

15 JUSTICE KAVANAUGH: Yeah.

16 GENERAL FRANCISCO: Well, because, in
17 the FDA policy, nobody was claiming that somehow
18 a statute restricted the FDA's ability to not
19 enforce the law. Nobody made that argument.

20 In the DAPA litigation, I think is
21 maybe what you're referencing, Texas
22 specifically argued that the INA did, in fact,
23 restrict the agency's authority to exercise its
24 enforcement discretion to not enforce the law.

25 And, again --

1 JUSTICE ALITO: Well, one of the
2 things that -- one of the things that Texas
3 argued in the DAPA case was that the agency
4 action in question there conferred certain
5 benefits on the individuals who were affected.

6 And if that was sufficient to make
7 that reviewable, does the wind-down of DACA
8 remove certain benefits that individuals would
9 have?

10 GENERAL FRANCISCO: Right.

11 JUSTICE ALITO: And, if it does, would
12 that make this reviewable?

13 GENERAL FRANCISCO: I -- I -- I think
14 the answer is no and no. And the reason why is,
15 first of all, the rescission of DACA doesn't
16 rescind any benefits. Those benefits are
17 allowed to expire on their own terms.

18 But, even putting that to the side,
19 the work authorization and the other benefits
20 are simply a collateral consequence of the
21 exercise of prosecutorial discretion itself.

22 So they don't recognize -- they don't
23 make the prosecutorial discretion itself
24 reviewable; otherwise, every grant or denial of
25 deferred action would be subject to APA review

1 because every grant and denial of deferred
2 action has collateral consequences that impact
3 work authorization.

4 If I could give you a hypothetical
5 that I think makes it more concrete: Suppose a
6 prosecutor has a drug diversion program, and he
7 says that I'm not going to prosecute this
8 particular category of drug offenses if the
9 individuals agree to enter into drug treatment.

10 The drug treatment is a collateral
11 consequence of and a benefit that flows from the
12 prosecutorial decision, but it doesn't render
13 the prosecutorial decision itself subject to
14 review. And, likewise, if a new prosecutor
15 comes in and says, I don't like drug diversion
16 programs, I want to have a zero tolerance policy
17 for drug offenses, that isn't reviewable either.

18 But I do think that the challenge to
19 DAPA in the prior litigation was reviewable, to
20 be clear, it was reviewable because it fell
21 within the Chaney exception. Texas argued, the
22 Fifth Circuit agreed, that the INA, in fact,
23 restricted the Department of Homeland Security's
24 ability to not enforce the law. And, frankly,
25 we -- we -- we agree with that.

1 But the problem here is that there's
2 no argument by anybody or any possible argument
3 that could be made that somehow the INA
4 restricts the Department of Homeland Security's
5 authority to enforce the law. After all,
6 Congress typically wants the executive branch to
7 enforce the laws --

8 JUSTICE GORSUCH: General --

9 GENERAL FRANCISCO: -- that it passes.

10 JUSTICE GORSUCH: -- are you -- is
11 this an appropriate moment to move to, assuming
12 reviewability, the merits?

13 GENERAL FRANCISCO: Any time you want
14 to move there, Your Honor --

15 JUSTICE GORSUCH: All right.

16 GENERAL FRANCISCO: -- I'll move
17 there.

18 JUSTICE GORSUCH: One -- one -- one
19 argument that the other side makes along those
20 lines is similar to this one we've just been
21 considering, the reliance interests that have
22 grown up around DACA.

23 And what do -- what do you say to that
24 and whether they've been adequately considered
25 in this case?

1 GENERAL FRANCISCO: Sure. Two things,
2 Your Honor: First, I would say that to the
3 extent there are any reliance interests, they're
4 extremely limited. DACA was always meant to be
5 a temporary stop-gap measure that could be
6 rescinded at any time, which is why it was only
7 granted in two-year increments. So I don't
8 think anybody could have reasonably assumed that
9 DACA was going to remain in effect in
10 perpetuity.

11 Even putting that to the side here,
12 the agency considered the reliance interests.
13 Secretary Nielsen did so quite clearly and
14 explicitly.

15 The agency mitigated the reliance
16 interests through the orderly wind-down, and it
17 simply concluded that beyond that it didn't
18 justify maintaining in perpetuity a program that
19 actively facilitated violations of the law by
20 hundreds of thousands of individuals.

21 JUSTICE SOTOMAYOR: May I ask --

22 JUSTICE GORSUCH: If I --

23 JUSTICE SOTOMAYOR: I'm sorry.

24 JUSTICE GORSUCH: I'm sorry.

25 JUSTICE SOTOMAYOR: No, no, continue.

1 JUSTICE GORSUCH: Thank you. If I
2 understand, though, your colleague's argument on
3 the other side, it's not that Secretary Nielsen
4 failed to consider reliance interests. There's
5 that paragraph, I believe, in the petition
6 appendix around 125, somewhere in there.
7 There's a -- there's a paragraph.

8 But that -- but that given the extent
9 of the reliance interests and the size of the
10 class, more needed to be said, more could be
11 said, and it wouldn't be a huge burden to
12 require the government on remand to -- to say
13 more.

14 What -- what -- what -- what do you
15 say to that?

16 GENERAL FRANCISCO: So --

17 JUSTICE GORSUCH: As I understand
18 that, that's the nature of the argument.

19 GENERAL FRANCISCO: Right. And I
20 guess I'd have a couple of responses to that.
21 The first is that I -- I don't think it reflects
22 an accurate understanding of APA review. As
23 this Court has repeatedly made clear, really,
24 the only thing that matters is whether the
25 agency -- and I think I'm quoting from the case

1 law -- completely failed to consider an
2 important aspect of the question.

3 And I don't think that you can even
4 remotely argue here, under State Farm, that we
5 completely failed to consider an important
6 aspect of the question.

7 Secondly, I think that Secretary
8 Duke's memorandum under the proper standard
9 clearly satisfies the APA standard for -- for
10 considering reliance interests. She does so
11 explicitly in -- in the portion of the
12 memorandum that you referenced.

13 And, in addition, what I'd point out
14 is that at the very beginning of her memorandum,
15 page 2, she specifically says that one of the
16 things that she considered were the judicial
17 opinions reviewing the Duke Memorandum, all of
18 the district court decisions.

19 And so then, when she gets to the
20 specific discussion of reliance interests, she
21 says that she is keenly aware that people have
22 ordered their lives in light of the DACA
23 decision. So I think it's quite clear that she
24 is fully taking into account the whole panoply
25 of reliance interests that were discussed ad

1 nauseam in the district court decisions and
2 simply concluding that they didn't just --
3 justify maintaining the policy.

4 JUSTICE BREYER: If I could continue
5 the same question because, look, the best
6 statement of the law in my mind is a very old
7 principle, again, was Justice Scalia's writing
8 for the Court in Fox.

9 He says, when an agency's "prior
10 policy has engendered serious reliance
11 interests, it must be taken into account." All
12 right. That's this case, I think.

13 GENERAL FRANCISCO: Uh-huh.

14 JUSTICE BREYER: All right. So I
15 counted. I had my law clerks count, actually,
16 not just the people who came in, you know, the
17 700,000 --

18 GENERAL FRANCISCO: Right.

19 JUSTICE BREYER: -- that had never
20 been anywhere else. They -- they never have to.
21 But there are all kinds of reliance interests.

22 I counted briefs in this Court, as I'm
23 sure you have, which state different kinds of
24 reliance interests. There are 66 healthcare
25 organizations. There are three labor unions.

1 There are 210 educational associations. There
2 are six military organizations. There are three
3 home builders, five states plus those involved,
4 108, I think, municipalities and cities, 129
5 religious organizations, and 145 businesses.

6 GENERAL FRANCISCO: Uh-huh.

7 JUSTICE BREYER: And they all list
8 reliance interests, or most of them list
9 interest reliance --

10 GENERAL FRANCISCO: Right.

11 JUSTICE BREYER: -- interests
12 applicable to them, which are not quite the
13 same, they are not quite the same as those of
14 the 700,000 who have never seen any other
15 country. And so then I did read what you just
16 read to me.

17 GENERAL FRANCISCO: Uh-huh.

18 JUSTICE BREYER: Now you want to say
19 anything about the statement you just read to me
20 being adequate to take into account that broad
21 range of interests?

22 GENERAL FRANCISCO: Yes, Your Honor, I
23 do, because the first thing I want to say is
24 that State Farm itself says, and, here, I've got
25 the quote, you violate the APA only where you

1 "entirely fail to consider an important aspect
2 of the problem." Here, Secretary Nielsen
3 explicitly considered the reliance interests,
4 including all of the things that you just listed
5 that were set forth in -- in excruciating detail
6 in the numerous district court decisions that
7 have ruled -- had ruled against us --

8 JUSTICE KAGAN: But -- but not --

9 GENERAL FRANCISCO: -- which she says
10 --

11 JUSTICE KAGAN: -- but not in her --

12 GENERAL FRANCISCO: -- she
13 specifically considered.

14 JUSTICE KAGAN: -- but not in her
15 memo.

16 GENERAL FRANCISCO: Well, Your Honor,
17 I, frankly, think that she does. But the other
18 thing that I would say is that under this
19 conception of APA review, DACA and DAPA likewise
20 would have failed arbitrary and capricious
21 review because there is not a single word in the
22 DACA memo itself or the DAPA memo itself
23 explaining any of the potential costs or
24 benefits or impacts on other people that the
25 implementation of the --

1 JUSTICE KAVANAUGH: Just -- just back

2 --

3 JUSTICE KAGAN: If --

4 GENERAL FRANCISCO: -- DACA program
5 would have had.

6 JUSTICE KAVANAUGH: Go ahead.

7 JUSTICE KAGAN: Go ahead.

8 (Laughter.)

9 GENERAL FRANCISCO: I'll take either
10 one, Your Honor.

11 (Laughter.)

12 JUSTICE KAGAN: If -- if I understand
13 Secretary Nielsen's memo correctly, Secretary
14 Nielsen said that she -- she did have a -- a
15 conclusory statement about weighing the reliance
16 interests, but she weighs them against what she
17 calls -- I think it's the questionable legality
18 of the program.

19 Now that assumes one of the things
20 that we're all here to discuss, which is that
21 the program was of questionable legality. If
22 the program turns out not to be of questionable
23 legality, in other words, if some or many of us
24 think that the original program was legal, how
25 does her memo suffice to do that balancing?

1 GENERAL FRANCISCO: Sure. For a
2 couple of reasons, Your Honor. First, because
3 she sets forth separate and independent bases
4 justifying the rescission: first, her belief
5 that it's illegal; second, her belief that there
6 are serious doubts about its illegality; and,
7 third, her conclusion that, as a matter of
8 enforcement policy, the Department of Homeland
9 Security is against these kinds of broad-based
10 non-enforcement decisions.

11 Any one of those, as her memo
12 explicitly says --

13 JUSTICE KAGAN: But in her --

14 GENERAL FRANCISCO: -- is a separate
15 and independent reason.

16 JUSTICE KAGAN: -- in her statement
17 about reliance, she particularly says it
18 outweighs this questionably legal program.

19 GENERAL FRANCISCO: I think what she
20 is saying here is that it outweighs -- is that,
21 given that there are extremely limited reliance
22 interests in the first place, any limited
23 reliance interests that exist are outweighed --
24 are -- are outweighed by all of the different
25 reasons that she has articulated as separate and

1 independent grounds for rescinding DACA.

2 I think that's the only fair way --

3 JUSTICE SOTOMAYOR: General --

4 GENERAL FRANCISCO: -- that you can
5 read that memorandum.

6 JUSTICE SOTOMAYOR: -- I'm -- I have
7 always had some difficulty in understanding the
8 illegality of DACA. DAPA I put aside because,
9 in DAPA --

10 GENERAL FRANCISCO: Right.

11 JUSTICE SOTOMAYOR: -- there was
12 actually a process for attaining a pathway to
13 residency. And I saw the argument that what
14 DAPA did was contrary, directly contrary, to
15 that path.

16 GENERAL FRANCISCO: Uh-huh.

17 JUSTICE SOTOMAYOR: But there -- I
18 don't see anything in the INA that takes away
19 the discretion of the agency in ordering its
20 enforcement policies.

21 GENERAL FRANCISCO: Right.

22 JUSTICE SOTOMAYOR: We all know it has
23 limited resources. It can't, even when it wants
24 to --

25 GENERAL FRANCISCO: Uh-huh.

1 JUSTICE SOTOMAYOR: -- remove the vast
2 majority of aliens we have here. And so I've
3 always had some difficulty in understanding
4 what's wrong with an agency saying, we're going
5 to prioritize our removals, and for those
6 people, like the DACA people --

7 GENERAL FRANCISCO: Right.

8 JUSTICE SOTOMAYOR: -- who haven't
9 committed crimes, who are lawfully employed, who
10 are paying taxes, who pose no threat to our
11 security, and there's a whole list of
12 prerequisites, we're not going to exercise our
13 limited resources --

14 GENERAL FRANCISCO: Yeah.

15 JUSTICE SOTOMAYOR: -- to try to get
16 rid of those people. I -- I still have an
17 impossible time. I know you're going to argue
18 contrary to what I just said.

19 GENERAL FRANCISCO: Sure. So I guess
20 I have three responses, Your Honor.

21 JUSTICE SOTOMAYOR: All right. But
22 let me just finish my question.

23 GENERAL FRANCISCO: Oh, sure.

24 JUSTICE SOTOMAYOR: Okay?

25 GENERAL FRANCISCO: Yeah.

1 JUSTICE SOTOMAYOR: So putting aside
2 that, the Secretary, in giving these extra
3 reasons because none of this was in the Duke
4 memo, and I thought basic administrative law is
5 you look at what's first given to you, not what
6 this -- you add later, but assuming you ignore
7 that and even look at the Nielsen memo, I think
8 my colleagues have rightly pointed there's a
9 whole lot of reliance interests that weren't
10 looked at, including the very President of --
11 current President telling DACA-eligible people
12 that they were safe under him and that he would
13 find a way to keep them here.

14 And so he hasn't and, instead, he's
15 done this. And that, I think, has something to
16 be considered before you rescind a policy.

17 GENERAL FRANCISCO: Right.

18 JUSTICE SOTOMAYOR: Not just say I'll
19 give you six months to do it --

20 GENERAL FRANCISCO: Right. So --
21 so --

22 JUSTICE SOTOMAYOR: -- to destroy your
23 lives.

24 GENERAL FRANCISCO: So --

25 JUSTICE SOTOMAYOR: Putting all of

1 that aside -- and I'm going to get to my
2 question.

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: And maybe we'd
5 have an opportunity to hear the three answers.

6 JUSTICE SOTOMAYOR: Well, don't forget
7 the three. I know you won't.

8 But, really, where is all of this in
9 the memo?

10 GENERAL FRANCISCO: Sure, Your Honor.

11 JUSTICE SOTOMAYOR: Where -- where is
12 all of this really considered and weighed?

13 GENERAL FRANCISCO: So --

14 JUSTICE SOTOMAYOR: And where is the
15 political decision made clearly?

16 GENERAL FRANCISCO: So -- so I --

17 JUSTICE SOTOMAYOR: That this is not
18 about the law; this is about our choice to
19 destroy lives.

20 GENERAL FRANCISCO: Yeah. So, Your
21 Honor, four responses now. I think I've added
22 one.

23 (Laughter.)

24 GENERAL FRANCISCO: The first one is
25 that I -- I think that the prior President

1 didn't, couldn't, and hasn't made any kind of
2 promise that DACA would remain in effect in
3 perpetuity because it would have been impossible
4 to make that promise. In fact, every one of my
5 friends on the other side, I think, has agreed
6 that we could rescind DACA at any time if, at
7 least in their view, we did provide a little bit
8 more detailed of an explanation.

9 So I think that is four square against
10 the notion that there are some significant
11 reliance interest because all that they seem to
12 be saying is we have to write a few more words.

13 Putting that entirely to the side and
14 turning to the legality question, ultimately, I
15 don't think you -- my first point is I don't
16 think you have to decide ultimately whether DACA
17 is legal or illegal because I think the other
18 reasons we've given are more than sufficient to
19 justify the rescission, both our serious doubts
20 about its legality, as well as our general
21 opposition to broad-based non-enforcement
22 policies.

23 After all, the Department of Homeland
24 Security is a law enforcement agency, and a law
25 enforcement agency doesn't have to push its

1 dubious power to not enforce the law to its
2 logical extreme. So --

3 JUSTICE GINSBURG: But don't you have
4 to -- don't you have to set up some kind of
5 categories? I mean, everybody agrees, what is
6 that, how many, 11 million people?

7 GENERAL FRANCISCO: Right.

8 JUSTICE GINSBURG: They don't have the
9 resources, so you have to prioritize. Everybody
10 agrees you have to prioritize.

11 GENERAL FRANCISCO: Absolutely, Your
12 Honor.

13 JUSTICE GINSBURG: How do you -- how
14 do you do it other than categorically?

15 GENERAL FRANCISCO: Well, and that's
16 my second point, Your Honor. My second point is
17 that DACA goes far beyond simply diverting
18 resources to higher priority targets, which you
19 are absolutely right, every law enforcement
20 agency has to divert resources to higher
21 priority targets. DACA goes materially further
22 than that because it actively facilitates
23 violations of the law by providing advance
24 forbearance, coupling it with affirmative
25 benefits like work authorization and Social

1 Security benefits, doing it on a categorical
2 basis.

3 And, significantly -- and this was my
4 third point -- it has no limiting principle. On
5 the --

6 JUSTICE GINSBURG: So the -- the
7 forbearance would be okay if it -- there weren't
8 attendant benefits? This -- we're not going to
9 -- we're not going to immediately deport the
10 Dreamers, period?

11 GENERAL FRANCISCO: I think that would
12 be -- if -- if you provided just the advanced
13 forbearance, I think that would be a lot closer
14 of a question, but, here, it's a lot easier
15 because you're coupling that with work
16 authorization.

17 And my final and critical point is
18 that there's no limiting principle. The theory
19 on which DACA rests effectively allows the
20 government to create a shadow INA for any
21 category of aliens that it chooses to make
22 low-priority targets, a shadow second-tier INA.

23 And you, at the very least, need to
24 locate something in the INA that confers that
25 kind of broad and unfettered discretion. And

1 there is simply nothing there. But, again --

2 JUSTICE KAGAN: Well -- well, if --

3 GENERAL FRANCISCO: -- I don't think
4 you --

5 JUSTICE KAGAN: You know, the INA does
6 give quite a lot of discretion to administrative
7 officers, as you yourself admit and have argued
8 on previous occasions and, indeed, in part here.

9 GENERAL FRANCISCO: Right.

10 JUSTICE KAGAN: So are you saying that
11 -- are you saying that DACA was -- violated any
12 particular provision of the INA? What are you
13 saying it violated?

14 GENERAL FRANCISCO: Sure.

15 JUSTICE KAGAN: Because --

16 GENERAL FRANCISCO: So I'm saying --

17 JUSTICE KAGAN: -- because there's a
18 big delegation, right, that says you get to make
19 national policy. So what did DACA violate?

20 GENERAL FRANCISCO: I'm saying two
21 things, Your Honor: First, I'm saying you don't
22 really have to address this issue because we
23 think all of the other --

24 JUSTICE KAGAN: I got that.

25 GENERAL FRANCISCO: -- reasons are

1 more than sufficient.

2 But, secondly, we're not saying that
3 there's a specific provision that it conflicts
4 with. But what we are saying is that when you
5 adopt this kind of broad and historically
6 unprecedented program, you need to at least
7 locate the authority to do so somewhere in the
8 INA.

9 JUSTICE KAGAN: Well, they did --

10 GENERAL FRANCISCO: And this goes --

11 JUSTICE KAGAN: -- you know, they
12 located the authority in the INA's grant of
13 broad discretion over national immigration
14 enforcement policy.

15 GENERAL FRANCISCO: Your Honor, I
16 think that the most that does is it gives you
17 the authority to set policies and priorities,
18 but there's a big leap between that and saying
19 that you can affirmatively facilitate violations
20 of the INA by hundreds of thousands of
21 individuals to whom Congress has repeatedly
22 declined a pathway to lawful status.

23 JUSTICE KAVANAUGH: What about --

24 JUSTICE KAGAN: I guess --

25 GENERAL FRANCISCO: Again, though, I

1 -- I don't think this is an issue you need to
2 ultimately resolve because I think the other
3 reasons we've given for rescinding DACA are more
4 than sufficient to justify it, including our
5 serious doubts about its legality alone.

6 Simply as a matter of law enforcement
7 policy, it is eminently reasonable for a law
8 enforcement agency to say, I'm not going to push
9 this doubtful authority to its logical extreme
10 when it does three things: It undermines
11 confidence in the rule of law itself. It
12 conflicts with the agency's law enforcement
13 mission. And, in a case like this, it creates
14 the serious possibility of a court-ordered
15 shutdown of the program, rather than an orderly
16 wind-down within --

17 CHIEF JUSTICE ROBERTS: Counsel, you
18 --

19 GENERAL FRANCISCO: -- the agency's
20 control.

21 CHIEF JUSTICE ROBERTS: -- if -- if
22 DACA was illegal, that means that when the
23 government was giving out these benefits it was
24 acting illegally, right?

25 GENERAL FRANCISCO: Yes.

1 CHIEF JUSTICE ROBERTS: Now it's not
2 always the case when the government acts
3 illegally in a way that affects other people
4 that we go back and untangle all of the
5 consequences of that.

6 Did Secretary Nielsen, when she was
7 considering the reliance interests, was she
8 looking simply to the question of a wind-down,
9 or was she looking more generally, for example,
10 to the application of something like the de
11 facto officer doctrine --

12 GENERAL FRANCISCO: Right. I think --

13 CHIEF JUSTICE ROBERTS: -- when
14 officers acted illegally, but we don't go back
15 and invalidate their prior actions?

16 GENERAL FRANCISCO: I think both, Your
17 Honor, both. The orderly wind-down to a certain
18 extent takes into account reliance interests.
19 It doesn't fully account for everything. But
20 the whole idea was that you're giving people an
21 opportunity to -- to -- to order their lives in
22 -- in -- in a time period to allow them to do
23 that.

24 But she also specifically states in
25 the memorandum that, in addition, the notion of

1 ad hoc deferred action will be able to take care
2 of reliance interests in truly extraordinary
3 circumstances, the way that it has been used
4 sporadically in the past to address those types
5 of scenarios.

6 JUSTICE BREYER: So now the basic --
7 the basic hornbook rule -- we have three
8 hornbook rules in this case, is -- is -- was
9 mentioned, Chenery: "It is a foundational
10 principle of administrative law that a court may
11 uphold agency action only on the grounds that
12 the agency invoked when it took the action."

13 GENERAL FRANCISCO: Right.

14 JUSTICE BREYER: In which case we look
15 to Ms. Duke's memo, not to Ms. Nielsen's. Isn't
16 that when it took the action? And, if so -- I
17 want to hear you say no, it isn't so -- but --
18 but, if so, why don't we just affirm the
19 district court, which sends it back? And if you
20 have all these reasons and you really want to
21 consider the reliance and all those things
22 should be considered carefully, you can do it.

23 So -- so what's wrong?

24 GENERAL FRANCISCO: For two related --

25 JUSTICE BREYER: With very -- yeah, go

1 ahead.

2 GENERAL FRANCISCO: For two related
3 reasons, Your Honor.

4 JUSTICE BREYER: Yeah.

5 GENERAL FRANCISCO: First, sending it
6 back would make no sense because the agency has
7 already acted. Secretary Nielsen has already
8 ratified Secretary Duke's decision for the
9 reasons set forth in her memorandum. It's not a
10 post hoc rationalization. It's the official
11 position of the agency set forth by the agency
12 itself.

13 And, secondly, there is no reason why
14 Secretary Nielsen should have had to reinstate
15 DACA and then rescind it again.

16 JUSTICE BREYER: Not reinstate it.

17 GENERAL FRANCISCO: Well, but -- but
18 --

19 JUSTICE BREYER: What you do is, there
20 are 50 cases on this, if it's important, what
21 you do is you say it is good reason for holding
22 the status quo until we can go back, and courts
23 have affirmed that, we hold the status quo, and
24 we go back now and we look if there are reasons
25 beyond the contemporaneous reason, which is the

1 Duke memo.

2 GENERAL FRANCISCO: Well, that's --

3 JUSTICE BREYER: And we see if there
4 will --

5 GENERAL FRANCISCO: -- that's
6 precisely what Secretary Nielsen's memo did. It
7 did two things.

8 First, it explained the basis for
9 Secretary Nielsen -- Secretary Duke's decision,
10 but, secondly, it set forth her own independent
11 judgment.

12 And if I could point you to --

13 JUSTICE BREYER: We have all these 100
14 and 350 briefs with all these different reasons
15 and she had that in front of her?

16 GENERAL FRANCISCO: Your Honor, that
17 may go to whether you think her memo is
18 sufficient, but it doesn't go to whether you
19 think her memo is an operative document with
20 this -- in this litigation. I'd like to point
21 you to two places in her memorandum.

22 First, page 121A of the Regents
23 Petitioners' appendix. This is the second page
24 of her memorandum: The explanation reflects,
25 the first thing, my understanding of the Duke

1 Memorandum, and, second thing, why the decision
2 to rescind the DACA policy was and remains
3 sound.

4 If you look at the end of her
5 memorandum, she states in the very last
6 sentence: For the reasons in -- for these
7 reasons in setting -- in setting DHS enforcement
8 policies and priorities, I concur with and
9 decline to disturb Acting Secretary Duke's
10 decisions to rescind the DACA policy.

11 JUSTICE KAVANAUGH: Can I pick up on
12 Justice Kagan's question earlier? Does the
13 Nielsen memo ever say, even if DACA was lawful,
14 I would still exercise my policy discretion to
15 discontinue?

16 GENERAL FRANCISCO: Yes, Your Honor.
17 So, if you look at the memo --

18 JUSTICE KAVANAUGH: What -- what --
19 what sentence are you looking at?

20 GENERAL FRANCISCO: Okay. I'm looking
21 at two sentences. Page 123A -- this is after
22 she says it's illegal -- page 123A.

23 Second, regardless of whether the DACA
24 policy is ultimately illegal, it was
25 appropriately rescinded by the DHS because there

1 are at a minimum serious doubts about its
2 legality. May I make one more sentence?

3 And then, third, if you look further
4 down the page, it says: Regardless of whether
5 these concerns about the DACA policy render it
6 illegal or legally questionable, there are sound
7 reasons of enforcement policy to rescind the
8 DACA policy.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 MR. Olson.

12 ORAL ARGUMENT OF THEODORE B. OLSON ON
13 BEHALF OF THE PRIVATE RESPONDENTS

14 MR. OLSON: Thank you, Mr. Chief
15 Justice, and may it please the Court:

16 The government's termination of DACA
17 triggered abrupt, tangible, adverse consequences
18 and substantial disruptions in the lives of
19 700,000 individuals, their families, employers,
20 communities, and Armed Forces.

21 That decision required the government
22 to provide an accurate, reasoned, rational, and
23 legally sound explanation.

24 It utterly failed to do so, asserting
25 only the Attorney General's unexplained

1 assertion that he had no discretion because DACA
2 was an unconstitutional exercise of authority by
3 the executive branch.

4 The decision overturned a five-year
5 enforcement policy of deferred action that had
6 enabled DACA recipients under other unchallenged
7 laws and regulations to apply for employment
8 authorization, seek driver's licenses, and other
9 benefits.

10 Its abrupt reversal removed a
11 condition precedent to these rights and exposed
12 DACA recipients and their employers to
13 immediate, potential, coercive government
14 measures.

15 It was impermissible to do so based on
16 an unexplained, unsupported, and erroneous legal
17 conclusion that the policy that two
18 administrations had enforced and implemented,
19 had supported and implemented for five years,
20 was unlawful and unconstitutional.

21 The decision to rescind DACA was
22 reviewable. This Court has said several times
23 in the -- just in the past few years that
24 there's -- we start with a strong presumption of
25 reviewability of agency decisions. This is the

1 strong presumption that the Court described in
2 the Weyerhaeuser case just one year ago.

3 Unless agency discretion is limited by
4 law, and there's no citation to any limitation
5 in the law, limitations on administration --
6 reviewability by the courts are quite narrowly
7 construed, and there are rare circumstances.
8 These are the Mach Mining case and the Judulang
9 case.

10 These Weyerhaeuser, Mach Mining and
11 Judulang case are three cases within the past
12 eight years where this Court has talked about
13 the presumption of reviewability as a strong
14 presumption, narrowly -- exceptions narrowly
15 construed, and all three of those decisions were
16 unanimous decisions by this Court.

17 JUSTICE ALITO: But you say that
18 whenever a law enforcement agency has guidelines
19 for the exercise of prosecutorial discretion and
20 it then tightens those guidelines, so that cases
21 that previously would not have been prosecuted
22 may now be prosecuted, that is agency action
23 that is subject to review under the APA?

24 MR. OLSON: I would not say that,
25 Justice Alito. But this is a very, very

1 different circumstance. This is an agency
2 decision initially, and -- and the Attorney
3 General refers to it as an illegal decision, but
4 it's an initial decision that is responsive to
5 explicit congressional direction to DHS to
6 establish enforcement priorities.

7 That's what DACA was all about. It
8 said it did not establish any status, it did not
9 provide any benefits, it articulated an
10 enforcement priority which Congress not only
11 directed DHS to make but, in fact, required it
12 to make because only 400,000 people --

13 JUSTICE ALITO: Well, I'm not sure --

14 MR. OLSON: -- out of 11 --

15 JUSTICE ALITO: -- I'm not sure that
16 really responds to my question, so I'll give you
17 an example. Let's say that a -- that there is a
18 policy that certain -- a certain category of
19 drug cases will not be prosecuted in federal
20 court. Let's say they are cases involving less
21 than five kilos of cocaine. So case -- cocaine
22 cases with lesser amounts of drugs will not be
23 prosecuted in federal court as a matter of
24 enforcement priority. And then that is changed.
25 So the five kilos is reduced to three.

1 Would that be reviewable?

2 MR. OLSON: No, I don't think it would
3 be.

4 JUSTICE ALITO: What is -- well,
5 what's the difference?

6 MR. OLSON: Well, I think that the
7 Justice Department, through the attorney
8 general, every new attorney general establishes
9 new enforcement priorities with respect to
10 pornography or drug cases or things like that.

11 Those -- that's completely different
12 than this, which singled out a category of
13 persons, then pursuant to congressional
14 authorization, invited them into the program,
15 provided other statutes which have not been
16 challenged by the government, provided benefits
17 that were associated with that decision, and
18 other people -- and individuals relied upon that
19 for five years. The administration, when it
20 does that kind of a decision with respect to the
21 lives of hundreds of thousands of people, which
22 has engendered reliance, which reverses not only
23 a position of the -- of two administrations, but
24 the Office of Legal Counsel, changes policy,
25 then all we're saying is that there's a

1 presumption of reviewability of that decision.

2 JUSTICE ALITO: But you're -- you're
3 saying it's reviewable because DACA conferred
4 certain benefits.

5 MR. OLSON: DACA did not confer --

6 JUSTICE ALITO: Beyond deferred
7 prosecution.

8 MR. OLSON: DACA --

9 JUSTICE ALITO: Is that -- is that
10 what you just said?

11 MR. OLSON: DACA -- no, I said the
12 benefits were conferred -- were triggered by the
13 decision of enforcement policy in DACA, but
14 those benefits are triggered by other statutes
15 enacted by Congress, funded by Congress
16 throughout all this entire period of time, and
17 the government hasn't challenged those.

18 So those benefits, the driver's
19 license business and the -- and the work
20 authorization, if you apply for it, if you come
21 forward, identify yourself, put yourself into
22 the program, take risks --

23 CHIEF JUSTICE ROBERTS: But, Mr.
24 Olson, the whole thing was about work
25 authorization and these other benefits. Both

1 administrations have said they're not going to
2 deport the people. So the deferred prosecution
3 or deferred deportation, that's not what the
4 focus of the policy was. Yes, the other
5 statutes provided that, but it was triggered by
6 -- by the memo.

7 MR. OLSON: Yeah.

8 CHIEF JUSTICE ROBERTS: So I don't
9 understand sort of putting what the policy
10 really was about, which is the work
11 authorization and the other things, off to one
12 side is very helpful.

13 MR. OLSON: Well, I think that it --
14 you -- one has to focus on the fact that this
15 was -- Congress authorized the IN -- the
16 Department of Homeland Security to identify
17 enforcement priorities. Once it did -- because
18 it -- it was required to do so and it had no
19 choice because of the funding. Once it did so,
20 and it identified the persons -- and this is
21 helpful to the agents in the field to identify
22 which individuals are going to be subject to
23 enforcement and which individuals are not.

24 Other statutes provided that benefit.
25 You're correct that it triggers that, but it's

1 triggered by other benefits and so forth. If
2 the government is opposed to those benefits
3 given to individuals who are not in an
4 enforcement priority category to support
5 themselves, to go to work, rather than put
6 themselves in the hands of the government to
7 support them, and to become a part -- since
8 they're not going to be deported, at least for
9 the short period of time, those are the things
10 that if the government wanted to get rid of, the
11 government should be challenging those.

12 It should not be challenging a
13 decision that's essentially required by
14 Congress. And let there be no mistake about why
15 this decision was made.

16 The Attorney General specifically said
17 that DACA was illegal and unconstitutional. I
18 don't know where the unconstitutional came from
19 because it didn't come from the Fifth Circuit.
20 But let's say it was an un- -- an illegal
21 enforcement priority.

22 And there's no doubt about why this
23 happened. In the cert petition or in the
24 government's brief that refers to the questions
25 presented, it specifically says the original

1 DACA policy was unlawful and then goes on to
2 say, thus, it had to be terminated.

3 There's no question about that. So
4 the Duke Memorandum, which was -- the Attorney
5 General's decision and opinion under statute is
6 enforceable and binding on the government
7 agencies. There's a statute that specifically
8 says that. So the Duke Memorandum had no
9 discretion, no choice. The Attorney General of
10 the United States --

11 JUSTICE GORSUCH: Mr. Olson, I -- I
12 think you've moved on to the merits, and I -- I
13 guess I'm still struggling with Justice Alito's
14 question on -- on reviewability. Can you help
15 me understand what is the limiting principle?

16 I -- I -- I hear a lot of facts,
17 sympathetic facts, you put out there, and -- and
18 they speak to all of us. But what's the
19 limiting principle between, you say,
20 reviewability here for an enforcement, a classic
21 kind of prosecutorial discretion that one might
22 have thought would have fallen under Heckler
23 versus Chaney, and the example Justice Alito
24 gave or Heckler versus Chaney itself? What's --

25 MR. OLSON: Heckler --

1 JUSTICE GORSUCH: -- What's the --
2 what's the limiting legal principle --

3 MR. OLSON: Well, there's a --

4 JUSTICE GORSUCH: -- you'd have this
5 Court adopt?

6 MR. OLSON: -- it's a composite -- in
7 this case, it's a composite of principles, a
8 determination that -- a categorical
9 determination involving a substantial number of
10 people --

11 JUSTICE GORSUCH: Okay. But I -- I --

12 MR. OLSON: -- to make decisions --

13 JUSTICE GORSUCH: -- I think --

14 MR. OLSON: -- based upon that.

15 JUSTICE GORSUCH: All right. Let --
16 let -- let me just stop you there, though,
17 because, if it's categorical and a large number
18 of people, I can think of a lot of prosecutorial
19 decisions involving drug cases, the treatment of
20 marijuana in -- in -- in our society today under
21 federal law, perhaps it would be cocaine five
22 kilograms. Whatever is in the attorney general
23 memo affects lots of people on a categorical
24 basis every day.

25 And --

1 MR. OLSON: Yes.

2 JUSTICE GORSUCH: And you're not --
3 you -- you, I think, would not have us review
4 those decisions.

5 MR. OLSON: That's -- no, but may I
6 refer to --

7 JUSTICE GORSUCH: So, if it's not
8 categorical and it's not a large number of
9 people --

10 MR. OLSON: Well --

11 JUSTICE GORSUCH: -- what's the
12 limiting principle?

13 MR. OLSON: -- there -- as I said,
14 it's a combination of factors which include the
15 government inviting people to rely upon and make
16 decisions based upon that policy, the provision
17 of benefits connected with it, individuals
18 making choices, and -- and then -- and the
19 Heckler case --

20 JUSTICE GORSUCH: Don't -- don't other
21 --

22 MR. OLSON: -- specifically --

23 JUSTICE GORSUCH: -- people rely on
24 the attorney general guidance memos and
25 documents? There's an entire industry in a lot

1 of states involving marijuana that would argue
2 they're relying on memos issued by the attorney
3 general that we will not enforce marijuana laws,
4 for example. Do they now have a right to --

5 MR. OLSON: No, I think that is
6 completely different. They are not invited to
7 participate into a program, to reveal the
8 business that they're in, to come forward, to
9 take advantage --

10 JUSTICE GORSUCH: Well, they --

11 MR. OLSON: -- of benefits --

12 JUSTICE GORSUCH: -- have a lot of
13 economic interests at stake that, I think, under
14 Fox and -- what we heard about earlier from
15 Justice Breyer, they would say our economic
16 interests are very real, billions of dollars are
17 at stake, we've relied on the attorney general's
18 guidance memos.

19 MR. OLSON: But there's -- but there
20 -- but -- and I just like would like to quote
21 this one paragraph -- or one sentence from the
22 Heckler versus Chaney decision itself. "When an
23 agency does act to enforce, the action itself
24 provides a focus for judicial review because it
25 imposes the coercive power of the government

1 with respect to individual liberty and
2 property," and that is the kind of decision that
3 judicial review is intended to give.

4 JUSTICE GORSUCH: Doesn't every
5 prosecutorial decision affect individual liberty
6 or property?

7 MR. OLSON: Prosecution --
8 prosecutorial --

9 JUSTICE GORSUCH: I think the answer
10 is yes, isn't it?

11 MR. OLSON: Prosecutorial decisions,
12 yes, of course.

13 JUSTICE GORSUCH: Okay.

14 MR. OLSON: This is a -- an
15 announcement of a policy -- this is a reversal
16 of a policy that the government created that
17 triggered -- to use the words of this Court,
18 engendered reliance interests. And all we're
19 saying is that it should be subject to review in
20 the context of this big picture.

21 It isn't to say that every decision by
22 a prosecutor that I'm now going to now enforce
23 murder cases or kidnapping cases or child porn
24 cases or serious drug cases. It doesn't cause
25 individuals to come forward to participate in a

1 program, to make decisions. Businesses, health,
2 educational institutions, the Armed Forces, all
3 are making decisions based upon this.

4 No one was saying that the policy
5 can't be changed. But when the policy does --
6 if the government wishes to change a broad
7 policy like this which affects so many people in
8 so many serious ways --

9 JUSTICE GORSUCH: Well, if I might ask
10 a question about that if we're talking about the
11 merits then, and then I -- I'll pass off the
12 baton. The reliance interests that we've --
13 we've talked about earlier, I -- I think your --
14 your friend on the other side would say we did
15 address reliance interests in a paragraph and we
16 could do it in 15 pages, but we'd say pretty
17 much the same thing at the end of the day, and
18 it would take another six years, and it would
19 leave this class of persons under a continuing
20 cloud of uncertainty and continue stasis in the
21 political branches because they would not have a
22 baseline rule of decision from this Court still
23 on this issue.

24 MR. OLSON: It's -- it's what this
25 Court has said --

1 JUSTICE GORSUCH: What do you say to
2 -- what do you say to that? And that's the line
3 of argument, as I understand it, from the
4 government.

5 MR. OLSON: Yes, I know it is. And
6 the government is saying all we needed was a few
7 more words. That is not what this Court has
8 said with respect to administrative review of --
9 of judicial review of the administrative
10 decision.

11 You must have a rational explanation.
12 It must make sense. It must be contemporaneous.
13 The -- I will get to the Nielsen memorandum
14 which was not contemporaneous. It was not a new
15 decision.

16 JUSTICE GORSUCH: I -- I understand
17 that. If you could just address it, though, on
18 the merits. Why was that insufficient, I think
19 is one of the questions, and the other is what
20 would -- what good would another five years of
21 litigation over the adequacy of that explanation
22 serve?

23 MR. OLSON: We don't -- we don't know
24 what the administration would do. The
25 administration did not want to own this

1 decision.

2 When the Attorney General decided that
3 this -- I'm making this decision because the
4 DACA --

5 JUSTICE GORSUCH: I guess I'm asking
6 about the reliance interests.

7 MR. OLSON: I -- I'm trying to get
8 that.

9 JUSTICE GORSUCH: I -- I wish -- I
10 wish you would.

11 MR. OLSON: The reliance interests
12 were triggered, to use the words of this Court
13 in the Fox case, the LTV case, and various other
14 cases, those reliance interests were engendered
15 by the decision by the government that caused
16 people to come forward --

17 JUSTICE GORSUCH: I understand that.
18 The question is: What more would you have the
19 government say about those reliance interests?
20 If it's a failure of adequacy of explaining,
21 what more is left to be said?

22 MR. OLSON: What -- what they could
23 have said is that we understand all of these
24 people, working for all these people, we
25 understand what people are going through,

1 provide a reason, rational explanation, to use
2 the words of this Court just a few months ago in
3 the Census case, to explain those things, to
4 explain why a policy is being changed and make a
5 contemporaneous decision.

6 The Nielsen memorandum came along nine
7 months later, was based upon a different
8 individual -- by a different individual.

9 JUSTICE KAVANAUGH: But --

10 MR. OLSON: It didn't have an
11 administrative record.

12 JUSTICE KAVANAUGH: Assuming -- well,
13 go ahead and finish.

14 MR. OLSON: Well, well, it will take
15 another sentence or two. But there were a lot
16 of things wrong.

17 The -- the Nielsen memorandum was not
18 an independent decision. She was bound just as
19 the earlier administrator, acting administrator,
20 was because the Attorney General said this is
21 illegal.

22 JUSTICE KAVANAUGH: But the Nielsen
23 memo then goes on to say, as you heard Mr.
24 Francisco say to my question, that regardless of
25 whether these concerns about the DACA policy

1 rendered it illegal or legally questionable,
2 there are sound reasons of enforcement policy to
3 rescind the DACA policy.

4 And it goes on to explain the policy
5 rationales to rescind it. So what is your --

6 MR. OLSON: Well --

7 JUSTICE KAVANAUGH: -- response to Mr.
8 Francisco?

9 MR. OLSON: Well, in the first place
10 they were not independent. They were not
11 contemporaneous. They were not accompanied by
12 an administrative record.

13 JUSTICE KAVANAUGH: She --

14 MR. OLSON: They were not --

15 JUSTICE KAVANAUGH: She says they are
16 independent in that sense.

17 MR. OLSON: She says they're
18 independent.

19 JUSTICE KAVANAUGH: At least that's
20 what Mr. Francisco says to you.

21 MR. OLSON: Well, Mr. Francisco said
22 that and she said that but they weren't
23 independent because she was bound by the
24 Attorney General's decision. And the government
25 itself in its brief, and I quoted a moment ago,

1 said DACA was unlawful; thus, we had to
2 terminate it.

3 Now, and it's not contemporaneous.
4 And then basically the policy decisions are
5 saying we understand people may have relied on
6 this, but that's just too bad.

7 JUSTICE SOTOMAYOR: Mr. Olson --

8 MR. OLSON: That's basically all it
9 was. There were not -- and then the litigation
10 risk issue --

11 JUSTICE KAVANAUGH: I got that.

12 MR. OLSON: -- is like a rubber stamp
13 that the agencies can put on anything. Every
14 decision an agency makes could involve --

15 JUSTICE KAVANAUGH: Do you -- do you
16 agree that the executive has the legal authority
17 to rescind DACA?

18 MR. OLSON: Yes.

19 JUSTICE KAVANAUGH: Okay. So the
20 question then comes down to the explanation.
21 And if it's the Nielsen memo paragraph on
22 reliance that it comes down to, so which is the
23 last --

24 MR. OLSON: Well, it wasn't, it --
25 first of all, it was not explained --

1 JUSTICE KAVANAUGH: Just -- can I just
2 ask the question in this way, which is, assume
3 the Nielsen memo comes in and assume it comes
4 down to whether the Nielsen memo adequately
5 explained the reliance interests.

6 What was the shortfall in the Nielsen
7 memo in addressing reliance interests, because
8 she does acknowledge that a lot of people have
9 relied. She does it --

10 MR. OLSON: And she --

11 JUSTICE KAVANAUGH: -- briefly.

12 MR. OLSON: Yeah, she says just too
13 bad. People relied, so too bad. Too bad about
14 that.

15 Camp versus Pitts specifically says,
16 when an explanation for an agency decision is
17 given, however curt, they must stand or fall on
18 that explanation.

19 JUSTICE KAVANAUGH: Do you -- do you
20 think -- do you think you could explain the
21 reliance or the justifications for the policy in
22 a way that would overcome the reliance
23 interests?

24 MR. OLSON: They would -- yes, I -- I
25 believe that that's possible. They could have

1 -- they -- the analysis of costs and benefits
2 explaining why an OLC decision is being thrown
3 out the window, why a policy is being changed
4 that the administration is -- that's exactly
5 what you have said.

6 JUSTICE SOTOMAYOR: Mr. Olson, can I
7 go back to something Justice Gorsuch asked,
8 which is what's the benefit of delaying this
9 further?

10 It has been, at least looking at the
11 deferred action decisions, the dozens that have
12 gone on through the decades, Congress has
13 responded. Sometimes changing the policy.
14 Sometimes limiting it. Sometimes expanding it.
15 It -- it has responded.

16 But the dynamic is very different,
17 isn't it, when an executive says I don't have
18 the power and when it says even if I had the
19 power --

20 MR. OLSON: Hypothetical.

21 JUSTICE SOTOMAYOR: -- I choose not to
22 do this. Aren't the dynamics of what happens
23 between Congress and the President dramatically
24 different in those circumstances?

25 MR. OLSON: Exactly. This is what is

1 called virtual reality. One said I can't do --
2 I don't have the power to do it, but, if I did
3 in the sky, I might have done it for this
4 reason.

5 The answer, the short answer to your
6 question, Justice Sotomayor, is a very good one,
7 someone say I might have done it if I'd had the
8 power to do it, but I have no discretion, I have
9 no power to do it, it -- we don't know what the
10 administration would do if it had to make this
11 decision and take ownership and accountability
12 of this decision.

13 JUSTICE SOTOMAYOR: That's your point
14 about given the Attorney General decision and
15 the law that says they have to change it.
16 That's a very different circumstance than saying
17 even if I don't have to, I won't.

18 MR. OLSON: That's exactly right. The
19 administration would then have to explain we
20 want to take responsibility for throwing these
21 people out of work, removing people that came
22 here when they were maybe two-years-old, who
23 have not committed a crime, and who have -- and
24 volunteered for this program, have -- have --
25 have conducted themselves properly and so forth.

1 JUSTICE ALITO: Mr. Olson, I -- I
2 understand that litany. But do you seriously
3 want to argue that if this case were to go back
4 and the agency were to say, again, exactly what
5 General Francisco interprets the Nielsen memo as
6 saying, giving all of these reasons and saying
7 that each one is an alternatively -- is an
8 independently sufficient basis for the -- the
9 action, would -- would that be unlawful?

10 Let's say they -- they go into great
11 length in explaining every --

12 MR. OLSON: Well --

13 JUSTICE ALITO: -- every -- every
14 factor, every basis.

15 CHIEF JUSTICE ROBERTS: Certainly.

16 MR. OLSON: If they explained and
17 provided a rational explanation instead of just
18 pushing a button or putting a rubber stamp on
19 it, that's what judicial review was all about.
20 That means the agency would have taken
21 responsibility for making the consequences of
22 those decisions, explaining why it thought about
23 it and why it decided what to do.

24 That's what your decisions require by
25 judicial review.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Mongan.

4 ORAL ARGUMENT OF MICHAEL J. MONGAN ON
5 BEHALF OF THE STATE RESPONDENTS

6 MR. MONGAN: Mr. Chief Justice and may
7 it please the Court:

8 It was up to Petitioners to decide how
9 to frame their decision to terminate DACA. They
10 could have taken responsibility for a
11 discretionary decision, rescinding a policy that
12 affects hundreds of thousands of lives. Instead
13 they chose to end the policy based on the ground
14 that DACA was unlawful.

15 They told the public that the law
16 deprived them of any discretion to continue it.
17 And when Judge Bates invited them to make a new
18 decision, they stood by the old one.

19 That's their prerogative, but it has
20 the consequence that they have to defend that
21 decision based on the legal rationale they
22 originally offered, and the decision is
23 reviewable and cannot be sustained on that
24 basis.

25 Now, the problem with the rationale

1 is, yes, they don't take serious account of the
2 dramatic costs to DACA recipients and the
3 economy and their employers and families of
4 terminating this policy, and also that it is
5 founded on the incorrect legal premise that DACA
6 is unlawful.

7 This Court can review the lack of --
8 and affirm based on the lack of an adequate
9 explanation for that ground or the fact that it
10 is an incorrect conclusion and it is legal
11 error.

12 Now, if I can turn to the question of
13 reviewability, the APA says that it commits
14 agency actions that are committed to agency
15 discretion by law are unreviewable.

16 And the central point here is that
17 when an agency finds a decision on a public
18 announcement that it lacks any discretion to
19 continue a policy, that can't fairly be
20 described as committed to agency discretion in
21 any meaningful sense.

22 This is the concept that the Court
23 reserved in Footnote 4 of *Chaney*, because that
24 is not a discretionary choice that the law has
25 committed to agency discretion.

1 I think that it is critical for us to
2 consider on the merits what my friend's position
3 is with respect to DACA and deferred action. My
4 friend appears to agree that they can grant
5 deferred action to compelling individuals, that
6 they can grant work authorization to deferred
7 action recipients, and they seem to agree that
8 this is a very worthy class of individuals.

9 So their position boils down to the
10 assertion that the INA prohibits them from
11 adopting a transparent framework that guides the
12 exercise of individualized discretion with
13 respect to this very compelling population of
14 individuals.

15 And that's not consistent with the
16 broad authority that Congress has granted the
17 Secretary under the INA and under 6 U.S.C. 202,
18 and it's not consistent with historical
19 practice, where the agency, over the decades,
20 has frequently adopted class-based discretionary
21 relief policies that allow it to channel the
22 exercise of recognized forms of discretion with
23 respect to particular individuals in a defined
24 class.

25 CHIEF JUSTICE ROBERTS: Well, that --

1 that history is not close to the number of
2 people covered by DACA.

3 MR. MONGAN: Well, Your Honor, there's
4 a history of class-based deferred action
5 policies, and they are narrower, to be sure, but
6 there are other class-based policies that have
7 applied to hundreds of thousands of individuals.
8 The family fairness policy, when announced,
9 would have applied to up to 40 percent of --

10 CHIEF JUSTICE ROBERTS: Fifty --
11 50,000 people, right? That's the number that
12 availed themselves of that policy?

13 MR. MONGAN: That's right, because it
14 was short-lived. But, at the time it was
15 announced, it was not clear that Congress was
16 going to act, and the executive told Congress
17 that this would apply to up to 40 percent of the
18 undocumented population at the time.

19 When Congress did act in that statute,
20 they signaled their approval of the executive
21 policy. The statute didn't have an effective
22 date for another year. And Congress said that
23 this is not intended to express disapproval of
24 the existing executive policy.

25 And that's one example, but there are

1 more examples of --

2 JUSTICE SOTOMAYOR: That sounds --
3 that percentage was 1.5 million people, very
4 comparable to this decision.

5 MR. MONGAN: Yes, and at a time when
6 the total undocumented population was much
7 smaller than it is today.

8 Now it -- it is critical for the
9 executive, in an area where it has broad
10 discretionary authority, to be able to set
11 policies that channel the exercise of that
12 authority, and this is a transparent framework
13 that has the benefit of allowing for some
14 measure of consistency and an even-handed
15 approach in the exercise of deferred action.

16 JUSTICE KAGAN: General, suppose that
17 this administration had not relied on legal
18 grounds to rescind the policy, which is very
19 different from what they did, but let's just
20 suppose otherwise, that they had immediately and
21 only relied on policy considerations.

22 Are you saying even then it would --
23 the -- the rescission would be reviewable? And
24 why would that be?

25 MR. MONGAN: So, if it were a pure

1 policy rationale, it would fall outside of
2 Chaney. It would be presumptively reviewable,
3 as most agency actions are. I think it would be
4 challenged, and the challengers would likely
5 argue that there's sufficient general standards
6 in this area to allow for a minimal level of
7 rationality review.

8 JUSTICE KAGAN: Why would it fall
9 outside of Chaney, do you think?

10 MR. MONGAN: I think that Chaney was
11 very specific about the type of agency action
12 that it addressed. It was a concrete decision
13 by the agency not to enforce a statute with
14 respect to particular actors.

15 Now that is different from a broad
16 policy that guides the exercise of deferred
17 action decisions prospectively. And Chaney was
18 founded on a recognized tradition of non-review.
19 It pointed to cases going back to the 19th
20 Century.

21 JUSTICE ALITO: Well, when you say
22 "particular actors," did it not apply to anybody
23 who was facing execution using -- using -- by --
24 by lethal injection?

25 MR. MONGAN: Well, as General

1 Francisco has noted, there were broad policy
2 considerations underlying the decision, but, as
3 it was described by the Court, it was a decision
4 not to enforce with respect to particular prison
5 administrators and drug companies.

6 And I think a -- a different point
7 here is that --

8 JUSTICE ALITO: Well, hasn't that been
9 FDA policy for all of the years since Chaney?

10 MR. MONGAN: Sure, Your Honor, but
11 that's a --

12 JUSTICE ALITO: Well, that's a big
13 class of people.

14 MR. MONGAN: But that's a flat
15 determination not to enforce, as opposed to a
16 policy guiding future decisions about whether to
17 grant deferred action, which itself is not a
18 flat or final non-enforcement decision. They
19 have argued that deferred action is revocable at
20 any time and could be -- and is not a defense to
21 removal.

22 So we're dealing with a different type
23 of policy here than the one that the agency
24 dealt with in Chaney.

25 JUSTICE BREYER: Well, what is it

1 exactly? I mean, look, I -- I -- I've always
2 thought, well, it means the individualized kind
3 of decision, but, quite rightly, the -- the
4 solicitor general reads me the language, which
5 is programmatic. But agency -- the United
6 States has hundreds, thousands of agencies which
7 do enforce all kinds of things, which make
8 programmatic rules all the time.

9 And so what -- it can't mean that
10 Heckler is interpreting this, committed to
11 agency discretion, to make serious inroads in
12 the principle of judicial review, but
13 everybody's struggling, including me, what's the
14 line? And what's the line generally?

15 It can't be so broad of all programs.
16 It can't be so narrow as an individualized
17 decision. Just what is it?

18 MR. MONGAN: Well, I think we can look
19 to the language of the Chaney decision. It
20 describes a decision not to take enforcement
21 action. So perhaps if there is a broad policy
22 that is a flat categorical decision that we will
23 not take enforcement action, that would be one
24 thing. But the --

25 JUSTICE BREYER: And imagine an SEC

1 rule or imagine an HHS rule and what it says is
2 we are not going to take action to give a
3 certain category of people their benefits. Not
4 reviewable? I mean, nobody would think that.

5 MR. MONGAN: Well --

6 JUSTICE BREYER: So -- so -- so we're
7 struggling still.

8 MR. MONGAN: Yes.

9 JUSTICE BREYER: And I'm saying
10 honestly I am struggling to get the right rule.

11 MR. MONGAN: I -- I understand and
12 there may be ambiguities at the margins here,
13 but I do want to focus it on this case because,
14 here, Acting Secretary Duke identified one
15 ground for terminating this policy. She said
16 that she was -- she pointed to the Attorney
17 General's letter, which concluded that the
18 policy was unconstitutional and beyond statutory
19 authority.

20 And whether or not this might
21 conceivably fall under Chaney, if it does, it
22 still is subject to review.

23 JUSTICE BREYER: So you're saying at
24 the minimum, one, an action to enforce is
25 different from an action not to enforce. Here,

1 we have one to enforce. And you're saying as
2 well that the ground being purely legal, it is
3 not a discretionary ground. He said it was
4 illegal, and, therefore, it is not within
5 discretion. Okay, have I got those two right?

6 MR. MONGAN: That's right, Your Honor.

7 JUSTICE BREYER: Anything else?

8 MR. MONGAN: I think those are what we
9 have focused on in this case and that --

10 JUSTICE GORSUCH: Well, counsel, I --
11 I'm sorry to interrupt there, but I actually had
12 understood your answer on the second one to be
13 different when you were posed that question by
14 Justice Kagan. And I thought you had indicated
15 that whether it was based on policy grounds or
16 on an illegal assessment wouldn't alter the
17 reviewability analysis in your view.

18 So I guess I'm just curious, which is
19 it?

20 MR. MONGAN: So, to be more precise,
21 if we're operating in a world where we assume
22 that Chaney applies, our point is, regardless,
23 this is reviewable because this is within a
24 sub-category where the agency has disclaimed any
25 discretionary choice. It has said we have no

1 authority over the matter. And that can't --

2 JUSTICE GORSUCH: That wasn't my --

3 I'm sorry, that wasn't my question.

4 So -- so if -- if -- assuming we're
5 living in a world in which the agency had
6 alternative grounds and one of which was policy
7 grounds, I had thought you told Justice Kagan
8 that this would be reviewable.

9 And now I thought I understood you to
10 say something slightly different to -- to -- to
11 Justice Breyer. Per -- perhaps I'm missing
12 something.

13 MR. MONGAN: Well, let me try and --
14 and clarify. We believe that a broad policy is
15 not the type of action that's referred to by
16 Chaney, consistent with some of the D.C. Circuit
17 authority that's been cited in the -- in the
18 briefs that General --

19 JUSTICE GORSUCH: Well, I think
20 Justice Breyer -- that just takes us back to the
21 beginning of the discussion with Justice Breyer,
22 which is that can't be so necessarily because
23 every prosecutorial discretion affects a lot of
24 people. You had that discussion with Justice
25 Alito as well. So I -- I -- I guess I -- I'll

1 let you go, but I'm still struggling with this
2 line that you're asking us to draw.

3 MR. MONGAN: Well, it may be a
4 difficult line to draw in the general case, but,
5 in this case, with respect, it is an easy line
6 to draw because we know that this decision was
7 founded on a binding legal determination by the
8 Attorney General that they could not continue
9 this policy.

10 CHIEF JUSTICE ROBERTS: What if it --

11 MR. MONGAN: And that's the --

12 CHIEF JUSTICE ROBERTS: -- what if it
13 were less, as you view, in categorical terms?
14 What if the Attorney General said, I've looked
15 at this, it's -- it's -- it's a close case, but,
16 on balance, I don't think we have the authority?
17 Or if he said, I'm pretty sure we don't have the
18 authority, but a court might come out
19 differently? Does your analysis change, or is
20 it only when he says this is -- as far as I'm
21 concerned, this is definite; it's illegal?

22 MR. MONGAN: No, Your Honor, we would
23 argue that it's a type of action that's
24 presumptively reviewable, and if the agency
25 decides to base a decision on some discretionary

1 choice but with an explanation or rationale
2 that's founded on litigation risk or legal
3 doubt, that that would be a rationale that
4 courts --

5 CHIEF JUSTICE ROBERTS: Is it enough
6 --

7 MR. MONGAN: -- would be equipped to
8 review.

9 CHIEF JUSTICE ROBERTS: -- for him to
10 say, look, I've got a decision from the Fifth
11 Circuit that tells me this is illegal, it's been
12 affirmed by the Supreme Court by an equally
13 divided vote? That's enough for me to say we're
14 not going to do it?

15 MR. MONGAN: It's not enough to
16 sustain the decision, Your Honor. I think that,
17 under these circumstances, given the nature of
18 this program and the interests at stake, we
19 don't think that any genuine statement of legal
20 doubt or litigation risk would be adequate.

21 But that's not what we have here.

22 JUSTICE KAGAN: Well, even if you went
23 through a legitimate balancing exercise, in
24 other words, you talked about the law and what
25 you were worried about, and then you talked

1 about the reliance interests and -- and then you
2 said here's is what we're weighing and here's
3 our judgment, do you think that that would be
4 sufficient?

5 MR. MONGAN: I think, as a general
6 matter, an agency could base a discretionary
7 decision on a -- a reasoned analysis like that.
8 I suspect that if we saw that decision, we would
9 challenge it under the particular circumstances
10 here.

11 But a court might agree that if there
12 were some substantial and detailed consideration
13 of the actual costs of this and the reasoned
14 legal analysis, then maybe that would be, in a
15 court's eyes, sufficient but that's absolutely
16 not what we have here.

17 CHIEF JUSTICE ROBERTS: So --

18 MR. MONGAN: We have a --

19 CHIEF JUSTICE ROBERTS: -- so if this
20 -- if you prevail and the case goes back, is it
21 enough to say, look, we've read the amicus
22 briefs that Justice Breyer pointed out about the
23 reliance interests; we've read, you know, the
24 Fifth Circuit's opinion in -- in the Texas
25 litigation, presumably they would cite that as

1 well, would that be enough?

2 MR. MONGAN: I think that it would
3 have to begin with the deficiencies that Judge
4 Bates identified, which is that the agency has
5 not actually identified with any particularity
6 the legal grounds that it's concerned with.

7 CHIEF JUSTICE ROBERTS: Well, it's
8 not --

9 MR. MONGAN: It does cite the DAPA
10 case.

11 CHIEF JUSTICE ROBERTS: Yeah, I mean,
12 what -- do you need more than that? You've got
13 a court of appeals decision affirmed by an
14 equally divided Supreme Court. Can't he just
15 say that's the basis on which I'm making this
16 decision?

17 MR. MONGAN: Your Honor, no, and I
18 think Judge Bates is exactly right on this. The
19 reasoned explanation requirement is meant to
20 facilitate judicial review and inform the
21 public.

22 And, yes, they point to the DAPA case,
23 but there's four or five theories of illegality
24 floating around there ranging from the notice
25 and comment to the Take Care Clause claim. And

1 we don't know which ground the agency based its
2 decision on.

3 So that is a lack of a reasoned
4 explanation, in addition to the fact that --

5 JUSTICE KAGAN: But what would an
6 adequate explanation look like? I mean, what do
7 you think they would have to do to be in the
8 clear on this?

9 MR. MONGAN: Well, I think that they
10 would at least have to identify the particular
11 grounds that they're relying on to facilitate
12 further judicial review of their underlying
13 legal conclusion and explain why they believe it
14 applies to the DACA policy when they pointed to
15 a case about a different policy.

16 And then have some serious, and more
17 serious than what we see in the Nielsen memo,
18 accounting of the very substantial --

19 JUSTICE BREYER: But suppose they say
20 yeah, we'll do that, we'll do that. And now the
21 authorities are legion on -- that you -- we
22 should decide on the basis of that Duke memo.
23 That was the decision, rested on that. And
24 we've heard that, okay.

25 There's another case where Justice

1 Fortas wrote you shouldn't play ping pong with
2 the agency, okay? So they're saying that's what
3 the -- a lot of their argument was.

4 What's the point? What's the point?
5 I mean, you'll send it back, and they'll say
6 okay, right, DAPA was different; in DAPA, the
7 court said that here the DAPA program makes 4.2
8 million people citizens with a run-around of the
9 normal way to become citizens when you have a
10 child who's a citizen. And here that has
11 nothing to do with this case.

12 They're not -- no run-around. Okay,
13 you point that out, they point -- okay, we're
14 going to come out the same way. It's close
15 enough.

16 So should -- what's the argument
17 against playing -- as there is a sentence for,
18 against you, playing ping pong with the agency?

19 MR. MONGAN: I think that there is a
20 very substantial meaning to a remand in this
21 case, Your Honor. We don't truly know what the
22 agency would do if confronted with a
23 discretionary choice.

24 If they knew that DACA were lawful,
25 there's a new Secretary, and the administration

1 has expressed broad sympathy for this
2 population, and they very well might continue
3 the policy or stop short of wholesale
4 termination.

5 And if we are remanding in light of
6 the lack of a reasoned explanation, my friend
7 has --

8 JUSTICE KAVANAUGH: But it --

9 MR. MONGAN: -- said --

10 JUSTICE KAVANAUGH: -- it was remanded
11 by Judge Bates or -- or given time, and
12 Secretary Nielsen did what you just said and
13 said, even if DACA was legal, you heard Mr.
14 Francisco on that, I would exercise my
15 discretion to rescind, and then explained her
16 consideration of the reliance interests.

17 So why is -- there's already been, in
18 effect, a remand.

19 MR. MONGAN: There -- there is a
20 boilerplate assertion in that memo of
21 independence, I will grant you that. I think if
22 we look at the circumstances --

23 JUSTICE KAVANAUGH: Well, can I just
24 stop you on boilerplate?

25 MR. MONGAN: Yeah.

1 JUSTICE KAVANAUGH: I mean, this is a
2 serious decision. We all agree with that. And
3 -- and it was for the Secretary, presumably.

4 And to say in writing even if it's
5 lawful, I nonetheless am going to exercise my
6 discretion, I assume that was a very considered
7 decision. Now we can agree with it or disagree
8 with the -- the merits of it, but it seems --

9 MR. MONGAN: Yes, and I think it's
10 important to look to the penultimate paragraph
11 in that memorandum, where she conducts her
12 collective weighing and she considers those
13 policy rationales along with the legal
14 rationales and say that, together, they outweigh
15 the purported costs of terminating DACA.

16 I also think it's critical to
17 understand the context of this in that --

18 JUSTICE KAVANAUGH: So your point,
19 just so I understand, I think this is your
20 point, is that the legal considerations, while
21 she said that, end up being intertwined in the
22 subsequent paragraphs with the policy
23 considerations?

24 MR. MONGAN: That -- that's absolutely
25 right. And this was, after all, in a context of

1 a memo that they submitted to the district court
2 in ongoing litigation intended to defend and
3 explain the prior decision.

4 And I do want to note here that to the
5 extent that my friend has suggested this is a
6 new decision or a new action and has been
7 presented as such, that's not consistent with
8 what they told the district court.

9 The district court said quite plainly,
10 please notify me if there's a new decision.
11 They submitted this memo and said this is a
12 motion to revise your order with respect to the
13 original Duke decision; we want you to sustain
14 the Duke decision. And the district court took
15 them at their word and treated it accordingly.

16 So I don't think that they can come to
17 this Court and suggest that it is a fresh
18 decision and every rationale is before the
19 Court. Under Camp --

20 JUSTICE KAVANAUGH: In that
21 penultimate paragraph, what is the shortfall in
22 the discussion of reliance interests, in your
23 view?

24 MR. MONGAN: Well, I'm not sure that
25 there are -- there is much of a discussion. She

1 expresses some sympathy and then ultimately says
2 that it is up to Congress to consider and weigh
3 the -- the reliance interests and the costs.

4 It's not a detailed discussion of the
5 dramatic harm to hundreds of thousands of young
6 people, to their families, to their employers,
7 to the states, to the economy that would arise
8 from this decision.

9 JUSTICE KAVANAUGH: Well, she does say
10 that in a sentence. If we remanded and it were
11 detailed more fully, would it still fall short?

12 MR. MONGAN: I think the great value
13 of a remand is that --

14 CHIEF JUSTICE ROBERTS: Please.

15 MR. MONGAN: -- to date, they have not
16 made a decision that actually takes ownership of
17 a discretionary choice to end this policy. And
18 if they had a remand, if that is their intent,
19 they could issue a new decision that actually
20 does that so the public could hold them
21 accountable for the choice they've made.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Five minutes, Mr. -- oh, I'm sorry,
25 General Francisco.

1 REBUTTAL ARGUMENT OF GEN. NOEL J. FRANCISCO
2 ON BEHALF OF THE PETITIONERS

3 GENERAL FRANCISCO: Thank you,
4 Mr. Chief Justice.

5 I think I want to focus on three basic
6 points. First, Justice Kavanaugh, I want to
7 make sure you have all of the relevant portions
8 in the Nielsen Memorandum that I think make this
9 all quite clear. Page 122a, and I'm at the
10 Regents Petitioners' appendix. "In considering
11 how DHS's discretion to establish enforcement
12 policies and priorities should be exercised, the
13 DACA policy properly was and should be rescinded
14 for several separate and independently
15 sufficient reasons." She then gives the first
16 reason, the legality question.

17 Then if you go to page 123a. Second,
18 "regardless of whether the DACA policy is
19 ultimately illegal, it was appropriately
20 rescinded by DHS because there are at a minimum
21 serious doubts about its legality."

22 Further down the page, third,
23 "regardless of whether these concerns about the
24 DACA policy render it illegal or legally
25 questionable, there are sound reasons of

1 enforcement policy to rescind the DACA policy."
2 And then she sets out the enforcement policy.

3 If you move to page 121 -- 125a, where
4 she's discussing reliance, "I do not believe
5 that the asserted reliance interests outweigh
6 the questionable legality of the DACA policy and
7 the other reasons for ending the policy
8 discussed above."

9 And, finally, when you get to the
10 conclusion on page 126a, "for these reasons, in
11 setting DHS enforcement policies and priorities,
12 I concur with and decline to disturb Acting
13 Secretary Duke's decisions to rescind the DACA
14 policies."

15 So, frankly, I don't understand --

16 JUSTICE GINSBURG: From all of that,
17 we don't know how she would respond if there
18 were a clear recognition that there was nothing
19 illegal about DACA.

20 Her whole memo is infected by the idea
21 that this is, one, illegal. It leaves
22 substantial doubt about its illegality.

23 If we take that out, then the
24 independent ground that you're asserting, then
25 she would be saying we stand up and say this is

1 the policy of our administration. We don't like
2 DACA and we're taking responsibility for that,
3 instead of trying to put the blame on the law.

4 GENERAL FRANCISCO: Respectfully, Your
5 Honor, I very much disagree. She sets forth
6 explicitly on page 121A several separate and
7 independently-sufficient reasons.

8 We own this. We both own the policy
9 rationale set forth in Secretary Nielsen's
10 memorandum. Also, because we think this is not
11 subject to judicial review at all, we own the
12 legal judgment set forth in Secretary Nielsen's
13 memoranda.

14 So simply stated, the fact that we've
15 got alternative and legal policy grounds for
16 making this decision make two things clear.

17 First, it is four square within Chaney
18 under the reviewability issue because Chaney,
19 likewise, was -- rested on alternative legal
20 grounds. The FDA believed it lacked
21 jurisdiction and policy grounds.

22 And, secondly, it shows how this was
23 plainly and eminently reasonable rescission,
24 even if you disagree with us on the legal issue
25 because we have set forth separate and

1 independent policy issues for the decision.

2 So that was basically my first point.

3 JUSTICE KAGAN: But even what you just
4 read, General, in that key paragraph where the
5 Secretary weighs the -- the -- the -- the
6 reliance interests against the reasons in her
7 memo, everything's wrapped up.

8 And we really don't know how she would
9 have conducted that balance, how she would have
10 weighed those two, if the legal had been taken
11 away from it.

12 GENERAL FRANCISCO: I -- I simply
13 disagree with that. When she specifically says
14 that she is setting forth separate, separate and
15 independent grounds justifying the rescission, I
16 don't think that there's any fair way to read
17 that but by saying that she would have rescinded
18 it based on any of the independent grounds,
19 which brings me --

20 JUSTICE BREYER: Look at the
21 independent grounds. Number 1 -- Number 1, "we
22 should not adopt a policy of non-enforcement of
23 those laws for broad classes and categories."
24 Okay. And Congress she thinks agrees with us.

25 Well, I don't know. Maybe they do;

1 maybe they don't. But aside from that, that --
2 that's a conclusion.

3 Look at the second one: "We should do
4 it on a truly individualized case-by-case
5 basis." That's a conclusion. That isn't a
6 reason.

7 And the third one is a reason. The
8 third one: "It is important to project the
9 message that leaves no doubt regarding the
10 clear," et cetera, "enforcement of immigration
11 against all --" that's an independent reason.

12 GENERAL FRANCISCO: With respect, may
13 I finish? May I finish?

14 CHIEF JUSTICE ROBERTS: Yes.

15 GENERAL FRANCISCO: I'm going to try
16 to squeeze in two points in a single sentence.

17 JUSTICE BREYER: That's all right.
18 Good luck. I'm sorry.

19 GENERAL FRANCISCO: The first -- the
20 -- the first point is that I very much disagree.
21 All of those articulate the basic same policy
22 rationale that this is a law enforcement agency.
23 They are against general policies that actively
24 facilitate violations of the law.

25 And the last point I will make is,

1 well, we don't think you need to address the
2 legality question if you agree with us on any of
3 our other arguments.

4 If you disagree with us on any of our
5 other arguments, you absolutely must address the
6 ultimate legality question because we simply
7 cannot be forced to maintain a policy that this
8 Court concludes that is illegal.

9 So if you decide to get there, then we
10 do think that DACA is illegal and was
11 justifiably -- was justifiably rescinded on that
12 basis as well.

13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 11:30 a.m., the case
17 was submitted.)

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