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

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, *et al., Petitioners*,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al., Respondents*.

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

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al., Petitioners*,
v.
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al., Respondents*.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, *et al., Petitioners*,
v.
MARTÍN JONATHAN BATALLA VIDAL, *et al., Respondents*.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS THE STATES OF CALIFORNIA, MAINE, MARYLAND, AND MINNESOTA

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QUESTIONS PRESENTED

Whether the district courts in these consolidated cases properly held (i) that petitioners' September 2017 decision to terminate the Deferred Action for Childhood Arrivals policy is subject to judicial review under the Administrative Procedure Act, (ii) that the decision violated or likely violated the Act, and (iii) that petitioners' motions to dismiss certain other claims that remain pending in the California and New York proceedings should be denied.

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INTRODUCTION

The Deferred Action for Childhood Arrivals policy enables certain young people to apply for deferred action, a form of discretionary immigration relief, on an individual basis. Those eligible for consideration under DACA arrived in the United States as children and many of them have never known any other home. All are either enrolled in school, have completed it, or have served honorably in our armed forces. DACA recipients contribute to their States and the Nation as employees, parents, and productive members of our communities. Deferred action affords them a measure of stability and reassurance as they go about their lives and careers here. As a policy, DACA has enjoyed widespread support. As a legal matter, it is grounded in the Executive Branch's broad authority to set priorities and exercise discretion in enforcing the immigration laws, and is consistent with similar class-based discretionary relief policies adopted over the last six decades.

In September 2017, however, petitioners decided to terminate the DACA policy. The decision memorandum, signed by then-Acting Secretary of Homeland Security Duke, offered only one rationale: that DACA was unlawful. It cited a one-page letter from then-Attorney General Sessions asserting that the policy was unconstitutional and beyond the agency's statutory authority.

The respondents in the proceedings now before this Court filed suits challenging the termination decision in district courts in California, New York, and the District of Columbia. All three courts held that the decision was subject to review under the Administrative Procedure Act, in light of the legal rationale proffered for the action. The California and New York district

courts granted preliminary injunctions on the ground that the agency's stated legal premise was incorrect, and the Ninth Circuit has since affirmed the grant of preliminary relief in the California proceeding. The D.C. district court vacated the agency's decision on the ground that the legal premise was, at a minimum, inadequately explained. Those rulings are correct, and the termination decision may be vacated on either ground identified by the courts below.

Petitioners complain that the lower courts "have forced DHS to maintain this entirely discretionary policy for nearly two years." U.S. Br. 16. In fact, no court has held that "DACA *could not* be rescinded as an exercise of Executive Branch discretion." *Regents* Supp. App. 57a; *see NAACP* Pet. App. 108a-109a; *Batalla Vidal* Pet. App. 67a. On the contrary, the courts below have recognized and highlighted the Executive's wide discretion in setting policies regarding immigration enforcement. So far, however, petitioners have chosen to stand by their original decision, which is based not on policy grounds but on the assertion that DACA is unlawful. That decision must stand or fall on the contemporaneous rationale that the agency chose to offer as the public basis for its action. *See, e.g.*, *Camp v. Pitts*, 411 U.S. 138, 142-143 (1973) (per curiam). It cannot be sustained on that basis.

STATEMENT

A. Legal and Factual Background

1. Congress has granted the Executive Branch broad authority with respect to immigration enforcement. It has charged the Secretary of Homeland Security "with the administration and enforcement of" the Immigration and Nationality Act "and all other laws relating to . . . immigration and naturalization,"

8 U.S.C. § 1103(a)(1); directed him to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority," *id.* § 1103(a)(3); and made him responsible for "[e]stablishing national immigration enforcement policies and priorities," 6 U.S.C. § 202(5).

That responsibility carries with it an obligation to exercise "broad discretion" in enforcing the immigration laws. *Arizona v. United States*, 567 U.S. 387, 396 (2012). Such discretion is a "principal feature of the removal system." *Id.* It is inherent in the fact that the federal government cannot realistically remove every undocumented immigrant, *see Regents* Supp. App. 55a-56a—even if doing so were desirable as a policy matter. And it "embraces immediate human concerns" and the "equities of an individual case," such as whether an immigrant has "long ties to the community, or a record of distinguished military service." *Arizona*, 567 U.S. at 396.

The authority to exercise discretion takes several forms. Some are specifically authorized by statute. *See, e.g.*, 8 U.S.C. § 1182(d)(5)(A) (parole); *id.* § 1254a (temporary protected status). Others have been recognized as inherent in the Executive's authority in this area. *See* J.A. 817 n.5 (deferred enforced departure); *Hotel & Rest. Emps. Union v. Smith*, 846 F.2d 1499, 1519 (D.C. Cir. 1988) (en banc) (opinion of Silberman, J.) (extended voluntary departure).

This case involves deferred action, a "regular practice" in which the Executive decides that "no action will thereafter be taken to proceed against an apparently deportable alien." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (quoting 6 Gordon et al., *Immigration Law and Procedure*

§ 72.03[2][h] (1998)). Under longstanding federal regulations, the validity of which is not disputed here, recipients of deferred action may seek work authorization and receive certain other limited benefits. *See* 8 C.F.R. §§ 1.3(a)(4)(vi), 214.14(d)(3), 274a.12(c)(14); 28 C.F.R. § 1100.35(b)(2). Like other forms of discretionary immigration relief, deferred action may be exercised on a purely ad hoc basis, or through policies that provide a framework to guide individualized decisions for applicants in a particular class. For nearly 60 years, the Executive Branch has operated dozens of class-based discretionary relief policies, including several that involved deferred action. *See* J.A. 821-826.

2. Established in 2012, DACA creates a framework guiding deferred action decisions regarding "certain young people who were brought to this country as children," many of whom "know only this country as home." *Regents* Pet. App. 97a-98a. Individuals who obtain deferred action under DACA receive a provisional grant of forbearance from removal for a two-year period, subject to renewal. *Id.* at 98a-101a. They do not gain any lawful immigration status, and immigration officials retain the ability to commence removal proceedings against them at any time. J.A. 819.

Before the Secretary announced DACA, the Office of Legal Counsel at the Department of Justice advised that a policy such as DACA would be legally sound so long as immigration officials "retained discretion to evaluate [its] application on an individualized basis." J.A. 827 n.8. After the Secretary implemented DACA, the federal government successfully defended the policy against various legal challenges. *See Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015); *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).

By September 2017 there were nearly 700,000 active DACA recipients, with an average age of just under 24 years old. *Regents* Pet. App. 13a. More than 400,000 of those individuals lived in the respondent States. J.A. 998. Over 90 percent of DACA recipients are employed, and 45 percent are in school. *Regents* Pet. App. 13a. They have bought homes, embarked on careers, and started families. *See* J.A. 879-980. They are employees at our state and local agencies, and students and staff at our public colleges and universities. *See, e.g.,* J.A. 513, 515, 557, 756-765. They add value to the States and our local communities in many ways—including by contributing to our economies, paying billions of dollars in taxes, and parenting their children. *See, e.g.*, J.A. 510-525, 733-753.

3. In 2014, then-Secretary of Homeland Security Johnson announced the creation of a new program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). DAPA would have applied to adults who, among other things, had been in the United States since 2010, were the parents of citizens or lawful permanent residents, and were not enforcement priorities. *Regents* Pet. App. 107a-110a. It also would have expanded the scope of DACA in several respects. *Id.* at 106a-107a.

Before DAPA could be implemented, Texas and other States challenged its legality, and a district court granted a nationwide preliminary injunction temporarily barring its implementation. *See Texas v. United States*, 86 F. Supp. 3d 591, 677-678 (S.D. Tex. 2015). A divided panel of the Fifth Circuit affirmed that interlocutory order, *see Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), and this Court affirmed the Fifth Circuit's judgment by an equally divided vote, *see United States v. Texas*, 136 S. Ct.

2271 (2016) (per curiam). Before that litigation proceeded to final judgment, the current administration took office and rescinded the DAPA policy. DAPA and the intended expansion of DACA thus never went into effect. But the preliminary injunction entered and affirmed in *Texas* did not affect the original DACA policy.

4. The new administration initially retained DACA and continued to solicit and process applications for deferred action under the policy. *See Regents* Pet. App. 16a. Indeed, the President and other senior officials expressed their commitment to the policy. *See, e.g.*, J.A. 435, 720. In the summer of 2017, however, officials at the Department of Justice began to discuss DACA with the plaintiffs in the *Texas* litigation (which remained pending despite the rescission of DAPA). *Regents* D.Ct. Dkt. 124 at 79-82. On June 29, those plaintiffs publicly informed then-Attorney General Sessions that if the administration did not "phase out the DACA program" by September 5, they would amend their complaint to challenge DACA. J.A. 874.

On September 4, the Attorney General sent a one-page letter advising then-Acting Secretary of Homeland Security Duke that her Department "should rescind" DACA because it was "unconstitutional" and "effectuated . . . without proper statutory authority." J.A. 877. He further asserted that DACA "has the same legal and constitutional defects that the courts recognized as to DAPA." J.A. 878. The Attorney General announced the termination of DACA at a press conference the next day. J.A. 999-1004.

Also on September 5, Acting Secretary Duke issued a memorandum formally rescinding DACA. *Regents* Pet. App. 111a-119a. Her memorandum contained one sentence explaining the reason for the decision:

"Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing [DAPA] litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." *Id.* at 117a. She instructed her Department to stop accepting new DACA applications immediately and to stop accepting all renewal applications after one month. *See id.* at 117a-118a.

B. Procedural Background

These consolidated proceedings arise out of multiple suits challenging the decision to terminate DACA, which respondents filed in district courts in California, New York, and the District of Columbia.

1. The States of California, Maine, Maryland, and Minnesota, as well as the other respondents in No. 18-587, filed complaints in the Northern District of California. They alleged, among other things, that the termination decision was arbitrary, capricious, or otherwise not in accordance with law and thus invalid under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See* J.A. 376-579

a. Petitioners proffered an administrative record consisting of 14 documents and "256 publicly available pages, roughly three-quarters of which are taken up by the three published judicial opinions from the *Texas* litigation." *Regents* Supp. App. 21a. The parties disputed the adequacy of that putative administrative record, including in proceedings before this Court. *See In re United States*, 138 S. Ct. 443 (2017) (per curiam). Consistent with this Court's instructions, *see id.* at 445, the district court postponed petitioners' obligation to complete the record and stayed discovery pending review of certain threshold defenses.

Thereafter, the district court rejected petitioners' arguments on reviewability, *Regents* Pet. App. 26a-41a, and granted a limited preliminary injunction, *id.* at 41a-70a. The court held that respondents were likely to succeed on their APA claim because, among other things, the agency's decision was based on the incorrect premise that DACA was unlawful. *Id.* at 41a-62a. The court also concluded that the equities favored provisional relief. *Id.* at 62a-66a. The preliminary injunction partially preserved the status quo for individuals who had already received deferred action under DACA. *Id.* at 66a. It allowed the agency to continue exercising individualized discretion in reviewing renewal applications and to "proceed[] to remove any individual, including any DACA enrollee, who it determines poses a risk to national security or public safety, or otherwise deserves, in its judgment, to be removed." *Id.* In a separate order, the court dismissed some additional claims, while allowing certain due process and equal protection claims to proceed. *Id.* at 71a-90a.

b. The court of appeals affirmed. *Regents* Supp. App. 1a-78a. It first addressed whether petitioners' decision to terminate DACA was unreviewable as a matter "committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2). The court assumed without deciding that the decision fell within the scope of *Heckler v. Chaney*, 470 U.S. 821 (1985), which applied Section 701(a)(2) to create a presumption of non-reviewability for "agency refusals to institute investigative or enforcement proceedings." *Id.* at 838; *see Regents* Supp. App. 34a-35a n.13. The court concluded, however, that "an agency's nonenforcement decision is outside the scope of the *Chaney* presumption—and is therefore presumptively reviewable—if it is based solely on a belief that the agency lacked the lawful authority to do otherwise." *Regents* Supp.

App. 29a; *see id.* at 23a-34a. Here, the termination decision was reviewable because it was based "solely on a belief that DACA was beyond the authority of DHS." *Id.* at 41a. The court also rejected petitioners' argument that 8 U.S.C. § 1252 stripped the district court of jurisdiction to hear this case. *Id.* at 42a-45a.

On the merits, the court of appeals noted that the only preliminary injunction factor in dispute was respondents' likelihood of success on the merits of their APA claim. *Regents* Supp. App. 45a-46a. Because an agency action "based solely on an erroneous legal premise . . . must be set aside," *id.* at 47a, the court examined petitioners' stated ground that DACA was unlawful. In view of the Executive Branch's broad authority over immigration enforcement policy and priorities and its longstanding practice of using class-based discretionary relief policies, the court concluded "that DACA was a permissible exercise of executive discretion." *Id.* at 56a; *see id.* at 47a-57a. It emphasized that it was "not hold[ing] that DACA *could not* be rescinded as an exercise of Executive Branch discretion." *Id.* But petitioners' decision to rescind the program "based on an erroneous view of what the law required" was subject to vacatur. *Id.* The court next held that the district court's decision to make its preliminary injunction effective nationwide was not an abuse of discretion under the circumstances of this case. *See id.* at 58a-60a. It also affirmed the district court's ruling on petitioners' motion to dismiss. *Id.* at 61a-77a.

Judge Owens concurred in the judgment. *Regents* Supp. App. 79a-87a. Although he would have held that petitioners' decision to terminate DACA was insulated from APA review under Section 701(a)(2) and *Chaney*, *id.* at 79a-84a, he would have affirmed

the preliminary injunction on the alternative basis of the equal protection claim advanced by certain respondents, *id.* at 79a, 86a.

2. In No. 18-589, the Eastern District of New York entered a preliminary injunction co-extensive with the one affirmed in the California proceeding. *Batalla Vidal* Pet. App. 62a-129a. The court reasoned that the asserted basis for the termination decision was inadequately explained and rested on a premise that was legally and factually flawed. *See id.* at 67a-69a, 90a-119a.

3. In No. 18-588, the district court for the District of Columbia entered a final judgment vacating the termination decision. *See NAACP* Pet. App. 1a-74a. It reasoned that the decision "was predicated primarily on [a] legal judgment that the program was unlawful." *Id.* at 73a. But that legal judgment could not support the agency's action because it was "virtually unexplained." *Id.* The court temporarily stayed its judgment to afford the agency an opportunity to "provid[e] a fuller explanation for the determination that the program lacks statutory and constitutional authority." *Id.* at 66a.

Two months later, petitioners submitted a supplemental memorandum from then-Secretary of Homeland Security Nielsen. *Regents* Pet. App. 120a-126a. She "decline[d] to disturb" her predecessor's decision and offered her own "understanding of the Duke memorandum." *Id.* at 121a. The district court held that this supplemental memorandum "fail[ed] to elaborate meaningfully on the agency's primary rationale for its decision." *NAACP* Pet. App. 81a. Secretary Nielsen merely "repackage[d] legal arguments previously made" and offered new rationales that could not sup-

port the original decision because they were not identified in Duke's memorandum. *Id.* at 81a-82a; *see id.* at 95a-103a. The court accordingly adhered to its original final judgment, *id.* at 108a-109a, but it partially stayed its order pending appeal, to the extent that full vacatur would provide relief beyond the preliminary injunctions that had been entered in the other cases, *see NAACP v. Trump*, 321 F. Supp. 3d 143, 146 (D.D.C. 2018).

4. This Court granted certiorari in the California case, granted certiorari before judgment in the New York and D.C. cases, and consolidated the proceedings for purposes of briefing and argument.

SUMMARY OF ARGUMENT

The critical feature of this case is that petitioners decided to terminate DACA on the stated ground that the policy was unlawful. That drives the analysis of both the reviewability and merits questions.

As to reviewability, petitioners contend that the courts are powerless to review this decision because it is a type of agency action that has traditionally been treated as presumptively immune from review. The termination decision does not, in fact, fall within such a tradition. But even if it did, it would still be subject to review because the sole rationale that the agency offered for the decision was that it lacked authority to maintain DACA. The Administrative Procedure Act's narrow exception precluding review of actions that are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), cannot apply when the publicly stated basis for the action is that the law left the agency with no discretionary choice to make.

As to the merits, agency action that is based on an invalid legal premise must be vacated. Here, petitioners' assertion that they lack authority to maintain DACA is incorrect. The Executive Branch has broad authority to set policies and priorities and to exercise discretion in enforcing the immigration laws. That includes the authority to grant deferred action and other forms of discretionary relief, as well as the authority to adopt a policy framework that guides individual relief decisions for a class of potential applicants with common characteristics. DACA is part of a long tradition of class-based discretionary relief policies that stretches back six decades. It applies to a carefully defined class of young people who are particularly likely to present compelling cases for discretionary relief; it facilitates the agency's efficient and even-handed consideration of their applications for deferred action, while preserving its discretion to deny relief where appropriate; and, for those who receive deferred action, it provides a measure of stability and reassurance as they go about their lives and careers. The INA does not require petitioners to continue the DACA policy, but it also does not prohibit them from doing so. And the agency's contrary assertion was not only incorrect, it was almost entirely unexplained, which provides an additional ground for vacatur.

Before this Court, petitioners primarily defend the termination decision based on "policy grounds" (U.S. Br. 32) that they advanced in a supplemental memorandum long after the decision was made. Those rationales are not properly considered here (and, in any event, would be insufficient to support the decision). Administrative action must "stand or fall" on the basis of the original rationale offered by the agency at the time of the decision, judged in light of the complete administrative record. *Camp v. Pitts*, 411 U.S.

138, 143 (1973) (per curiam). Courts sometimes afford an agency the opportunity to provide further explanation for its original rationale, as the D.C. district court did here. But agencies may not use that opportunity to introduce new rationales for an old decision. A contrary rule would blur the lines of accountability and create confusion about the actual basis for agency action. That result is not acceptable—especially when an agency has made a decision as consequential as this one.

ARGUMENT

I. THE DECISION TO TERMINATE DACA IS SUBJECT TO JUDICIAL REVIEW

Petitioners first argue (U.S. Br. 17-32) that the courts may not review their decision to terminate DACA. Every court to consider petitioners' reviewability arguments has properly rejected them.

A. The Termination Decision Is Not "Committed to Agency Discretion by Law"

Petitioners principally contend that the termination decision is one "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The threshold inquiry under Section 701(a)(2) is whether the challenged action is of a type that courts have traditionally treated as non-reviewable. There is no such tradition with respect to an agency's termination of a policy framework such as DACA. And even if there were, the termination decision in this case would still be subject to review. As a matter of text and precedent, Section 701(a)(2) applies only to actions that actually involve "[an] agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). But the decision to terminate DACA was grounded solely on an assertion that the policy was unlawful—that is, that the agency

had no discretionary choice to make. *See Regents* Pet. App. 117a. Petitioners cannot resist judicial review on the premise that the law committed that action to their discretion.

1. The Administrative Procedure Act embodies a strong presumption in favor of judicial review. *Lincoln v. Vigil*, 508 U.S. 182, 190 (1995); *see* 5 U.S.C. § 702. That presumption recognizes that "'legal lapses and violations occur.'" *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). When they do, courts play a critical role in providing appropriate remedies and ensuring that "federal agencies are accountable to the public." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

"[T]o honor the presumption of review," and to "give effect to" the substantive requirements of the APA, this Court has "read the exception in § 701(a)(2) quite narrowly." *Weyerhaeuser*, 139 S. Ct. at 370; *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019). It has "generally limited the exception to 'certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion,'" and for which there is "no meaningful standard against which to judge the agency's" discretionary action. *Dep't of Commerce*, 139 S. Ct. at 2568 (citations omitted). Agency actions falling outside such a tradition are reviewable, apart from "those rare instances" where there is simply "'no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *see also Chaney*, 470 U.S. at 830 ("no judicially manageable standards").

On the few occasions when this Court has recognized a category of traditionally unreviewable actions, it has relied on a clear history to that effect. In

Chaney, for example, the Court cited judicial precedent dating back to the nineteenth century, which established a general tradition of declining to review an agency's decision not to institute a particular enforcement proceeding. *See* 470 U.S. at 831. Elsewhere, the Court pointed to "a similar tradition of non-reviewability," including decades of case law, in holding unreviewable an agency's refusal to reconsider a decision in response to allegations of material error. *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (*BLE*); *see id.* at 280; *cf. Vigil*, 508 U.S. at 192-193 (discussing "tradition[]" of regarding an agency's "allocation of funds from a lump-sum appropriation" as unreviewable).

Petitioners can point to nothing similar here. To the contrary, any identifiable tradition favors review. Since the emergence of class-based discretionary relief policies nearly 60 years ago, courts have repeatedly entertained legal challenges to their adoption or termination. That history includes a Second Circuit decision four decades ago, *see Noel v. Chapman*, 508 F.2d 1023, 1029 (2d Cir. 1975); the Fifth Circuit's decision in the DAPA case, *see Texas v. United States*, 809 F.3d 134, 169 (5th Cir. 2015); and the unbroken chain of decisions reviewing the agency action at issue here, *see, e.g.*, *Regents* Supp. App. 41a-42a.[1]

Petitioners attempt to shoehorn the DACA termination decision into the tradition of non-review recognized in *Chaney*. *See, e.g.*, U.S. Br. 23. *Chaney* involved condemned prisoners in Texas and Oklahoma

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[1] There is also a tradition of courts reviewing agency denials of discretionary relief in individual cases. *See, e.g.*, *Cheng Fan Kwok v. INS*, 392 U.S. 206, 217 (1968); *Foti v. INS*, 375 U.S. 217, 228 n.15 (1963); *Wong Wing Hang v. INS*, 360 F.2d 715, 718 (2d Cir. 1966) (Friendly, J.).

who contended that the use of certain drugs in lethal injection protocols violated the Food, Drug, and Cosmetic Act. 470 U.S. at 823. They "petitioned the FDA . . . to take various investigatory and enforcement actions to prevent these perceived violations," and the agency "refus[ed] to take the requested actions." *Id.* at 823-824. The agency "conclud[ed] that FDA jurisdiction in the area was generally unclear but in any event should not be exercised to interfere with this particular aspect of state criminal justice systems." *Id.* at 824. The prisoners then filed an APA suit "asking that the FDA be required to take the same enforcement actions requested" in their petition. *Id.* at 825. This Court concluded "that an agency's decisions not to take enforcement action should be presumed immune from judicial review under 701(a)(2)" in light of the established "tradition" of committing such decisions to agency discretion. *Id.* at 832. It held that the presumption had not been rebutted in that case. *See id.* at 832-837.

The type of agency action at issue here is fundamentally different from "an agency's refusal to institute proceedings." *Chaney*, 470 U.S. at 832; *see, e.g.*, *Regents* Pet. App. 26a-30a; *Batalla Vidal* Pet. App. 28a-31a. Most critically, whether the FDA action in *Chaney* is described as "programmatic" or "single-shot," U.S. Br. 21, it reflected a definitive decision not to enforce the Food, Drug, and Cosmetic Act with respect to particular conduct by drug manufacturers and prison administrators, *see* 470 U.S. at 824-826. By contrast, a decision to adopt or rescind a class-based deferred action policy does not represent a "[r]efusal[] to take enforcement steps" against anyone. *Id.* at 831. By adopting such a policy, the agency establishes a framework that guides and facilitates future deferred action decisions with respect to a class

of potential recipients; by terminating it, the agency takes away that framework. Neither decision is the type of non-enforcement action addressed by *Chaney*. *See, e.g.*, *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) ("an agency's adoption of a general enforcement policy" falls outside of *Chaney*); *Regents* Supp. App. 34a n.13 (*Chaney* does not support the proposition "that any decision simply related to enforcement should be presumed unreviewable").[2]

Because the agency's decision to terminate DACA does not fall within any tradition of non-review, it is reviewable unless, as petitioners contend, "there is no 'law to apply'" here. U.S. Br. 19. But the only ground Acting Secretary Duke cited in her one-sentence public explanation was a legal one. *See Regents* Pet. App. 117a. Petitioners acknowledge that the Attorney General's pronouncement about DACA's illegality was binding on Duke, *id.* at 123a (citing 8 U.S.C. § 1103(a)(1)); they assert that Duke herself "concluded that DACA is unlawful," U.S. Br. 43; and they offer extensive legal argument about why "[t]hat conclusion was correct," *id.*; *see id.* at 43-50. Having publicly based and defended their decision on that legal ground, petitioners cannot credibly argue that a court has no law to apply in reviewing it.

2. Even if the termination decision could fit within the tradition of non-review recognized in *Chaney* (as

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[2] Petitioners focus (U.S. Br. 18-19) on *Chaney*'s discussion of various concerns related to judicial review of non-enforcement decisions that the Court "list[ed] . . . to facilitate understanding" of courts' "traditional[]" reluctance to review such decisions. 470 U.S. at 832. As the courts below explained, most of those concerns do not apply to the separate type of action at issue here. *See, e.g.*, *Regents* Pet. App. 28a-30a.

the Ninth Circuit assumed without deciding, *Regents* Supp. App. 34a n.13), it would remain subject to review under the circumstances here. In *Chaney*, this Court "emphasize[d]" that the presumption against judicial review of non-enforcement decisions "may be rebutted" in appropriate circumstances. 470 U.S. at 832-833. One possible circumstance, expressly reserved in footnote four, was a decision in which the agency declined to act "based solely on the belief that it lacks jurisdiction." *Id.* at 833 n.4.[3] Such an exception is consistent with the text of the APA and the principles underlying *Chaney*, and it squarely applies to the decision challenged here.

By its terms, Section 701(a)(2) requires an action that involves "the agency's exercise of discretion." *Chaney*, 470 U.S. at 830. If an agency's decision instead rests solely on a publicly stated conclusion that it lacks any legal authority to take a particular action, it cannot resist judicial review on the ground that its decision was "committed to agency discretion by law." To the contrary, such an action presents the kind of "relevant question[] of law" that Congress intended the courts to decide. 5 U.S.C. § 706; *cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., concurring in the judgment) (the "unqualified command" of Section 706 "requires the court to determine legal questions . . . by its own lights, not by those of

[3] The Court noted that, in such a situation, "the statute conferring authority on the agency might indicate" that the decision is non-discretionary. 470 U.S. at 833 n.4. But the Court did not suggest—much less "make clear" (U.S. Br. 24)—that the exception it reserved would be limited to that circumstance.

political appointees or bureaucrats who may even be self-interested litigants in the case at hand").

Chaney's analysis confirms that the exception it suggested in footnote four is a sensible one. A "refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction," 470 U.S. at 833, n.4, does not involve any "complicated balancing" of policy factors that "are peculiarly within [agency] expertise" and that courts are not "equipped . . . to deal with." *Id.* at 831. And it *does* provide "a focus for judicial review." *Id.* at 832. The same is true when an agency refuses to act based solely on the belief that it lacks authority to do so: an "agency's interpretation of . . . the scope of [its] statutory authority" is no different from an interpretation of "its jurisdiction." *City of Arlington v. FCC*, 569 U.S. 290, 296-297 (2013).

Far from encroaching on any executive prerogative, *see* U.S. Br. 18, 22, judicial review of an agency's asserted lack of authority protects the agency's ability to exercise lawful discretion. If an agency is laboring under a mistaken view that it lacks discretion to act in a particular way, judicial review will free the agency to make "a reasoned, discretionary policy choice." *Regents* Supp. App. 31a. At the same time, review advances the APA's core purpose of ensuring that "federal agencies are accountable to the public." *Franklin*, 505 U.S. at 796. When "an agency justifies an action solely with an assertion that the law prohibits any other course, it shifts responsibility for the outcome from the Executive Branch to Congress . . . or the courts." *Regents* Supp. App. 33a. Absent judicial review, an agency professing a lack of legal authority to act will "avoid[] democratic accountability for a choice that was the agency's to make all along." *Id.*

All of these considerations support adopting the exception reserved in footnote four, as the Ninth Circuit did many years ago. *See Mont. Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. FLRA*, 898 F.2d 753, 756 (1990). And that exception squarely applies to the agency decision at issue here. As noted, the sole justification the agency offered for the decision to terminate DACA was a conclusion that continuing the policy would violate the law. *See Regents* Pet. App. 117a; J.A. 877-878.[4]

Petitioners contend that this Court's decision in *BLE* rejected the exception suggested in *Chaney*. U.S. Br. 23-24. That is incorrect. *BLE* considered an action that was both discretionary and traditionally unreviewable: a refusal to re-open a prior proceeding for the purpose of considering a renewed merits argument. *See* 482 U.S. at 280. In a departure from the standard agency practice of denying requests to reopen "without [a] statement of reasons," *id.* at 283 (emphasis omitted), the agency in *BLE* chose to explain its discretionary denial in an order that "respond[ed] in some detail to all of the major contentions" on the merits, *id.* at 276. This Court held that the action was unreviewable, notwithstanding the agency's discussion of the underlying merits. *See id.* at 280. In the process, the Court rejected the notion "that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Id.* at 283. But *BLE* did not present an opportunity to address whether courts could review an

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[4] *See also Regents* Supp. App. 47a (rescission of DACA was "premised on the belief that the DACA program was unlawful"); *Regents* Pet. App. 56a (same); *Batalla Vidal* Pet. App. 67a-68a (same); *Casa de Md. v. DHS*, 924 F.3d 684, 699-700 (4th Cir. 2019), *cert. pending*, No. 18-1469 (same).

agency non-enforcement decision that is predicated solely on the ground that the agency lacks authority to act. The case did not involve any non-enforcement decision and the agency did not deny the request to reopen based on any purported lack of authority. *See id.* at 280-282. There is no indication that this Court intended its observation about "'reviewable' reason[s]" even to comment on the question reserved in *Chaney*, let alone to "resolve[]" it. U.S. Br. 24.

B. New Rationales Advanced by Petitioners After the Termination Decision Do Not Make It Unreviewable

In litigation, petitioners have argued that the termination decision is unreviewable because it was based on an alternative and discretionary "litigation risk" rationale. U.S. Br. 27. Most of the courts to consider this argument have held—correctly—that no such rationale can be found in the decision memorandum. *See Regents* Supp. App. 36a-41a; *Regents* Pet. App. 55a-57a; *Batalla Vidal* Pet. App. 68a. While the "Background" portion of the memorandum mentioned the threatened lawsuit from Texas (among other historical developments), *Regents* Pet. App. 116a, the memorandum did not identify that threat as a basis for the decision or suggest that the agency made any real assessment of the threat, *id.* at 117a.

But even if the Court could plausibly discern a litigation risk rationale from the decision memorandum, that would not alter the reviewability analysis. *See NAACP* Pet. App. 39a-42a. If an agency based a decision on a reasoned assessment of litigation risk, such as by weighing the benefits of an action or policy against the costs of potential litigation, that might "be 'discretionary' in a meaningful sense." *Id.* at 40a. Here, however, any litigation risk rationale is (at

most) barely discernible. And it is entirely derivative of the agency's express conclusion that it lacked authority to continue DACA. A secondary consideration of that sort cannot create a "discretionary" action for purposes of Section 701(a)(2). *See id.* at 41a-42a ("litigation-risk justification was too closely bound up with [the] evaluation of DACA's legality to trigger *Chaney*'s presumption of unreviewability").

Petitioners also argue that the supplemental memorandum submitted by former Secretary Nielsen in the D.C. litigation renders the termination decision unreviewable. U.S. Br. 28-31. As discussed in greater detail below, *infra* pp. 47-49, core principles of administrative law require judicial review to focus on the rationale publicly stated by the agency decisionmaker at the time the challenged decision was made. In rare circumstances, federal courts invite an agency to further explain its stated rationale (as the D.C. district court did here). But that further explanation may be considered by the courts only because it was invited by a judicial tribunal with authority to review the agency's action, and only as a further explication of the agency's original rationale. There is no logical reason—and no basis in precedent—for concluding that a supplemental memorandum intended to facilitate judicial review of an originally reviewable action could render that action unreviewable. If petitioners were to "issue a new decision rescinding DACA," *NAACP* Pet. App. 94a n.7, the reviewability inquiry could properly focus on whatever new rationales the agency might advance at that time. For now, the inquiry must focus on the September 2017 termination decision, which was publicly premised solely on a conclusion about the limits of the agency's authority.

C. Section 1252 Does Not Bar Review

The APA also recognizes that a statute may "preclude judicial review" of agency action. 5 U.S.C. § 701(a)(1). Here, the lower courts correctly rejected petitioners' argument that 8 U.S.C. § 1252(g) "foreclosed district courts from adjudicating" the present dispute. *Regents* Pet. 21; *see* U.S. Br. 21. Section 1252(g) limits federal court jurisdiction with respect to only "three discrete actions" by the Secretary of Homeland Security: "her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (*AADC*). The decision to terminate the DACA policy is not any of those actions. Petitioners also argue that review is foreclosed by 8 U.S.C. § 1252(b)(9). U.S. Br. 21. But that provision applies only to claims "arising from any action taken or proceeding brought to remove an alien," and this case does not involve any such action or proceeding. *See Regents* Supp. App. 45a n.19. The channeling provisions Congress adopted in Section 1252 do not apply here by their terms, and petitioners' suggestion that they implicitly foreclose review (*see* U.S. Br. 21) is untenable. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018) ("[T]his Court's precedents require 'clear and convincing indications' that Congress meant to foreclose review.").

II. THE TERMINATION DECISION IS INVALID UNDER THE APA

On the merits, petitioners now principally defend the decision to terminate DACA on the strength of "a number of reasons" first advanced after the decision was made. U.S. Br. 16; *see id.* at 32-43. But having originally based the decision on the stated ground that DACA was unlawful—and having so far declined to

replace it with any new decision based on a different ground—petitioners must defend their action on the legal rationale they originally offered. *See, e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (*Chenery I*).

The termination decision cannot be sustained on that rationale. Before this Court, petitioners do not question the Executive Branch's "'broad discretion' in the enforcement of the federal immigration laws," U.S. Br. 45; or its authority to designate particular classes of undocumented immigrants as "low-priority targets," *id.* at 46; or its authority to grant deferred action in individual cases, *see id.* at 39-40, 43, 45; or its authority, "pursuant to longstanding regulations," to grant work authorization to those who receive deferred action, *id.* at 44. They do not seriously contest the legality of prior class-based deferred action policies that were "more limited in scope" than DACA. *Id.* at 48. And they suggest no apparent desire to actually remove DACA recipients from the country. *See, e.g.*, *id.* at 55. But they nonetheless argue that DACA's "nature and scope" make it illegal. *Id.* at 46.

That argument is not tenable. When the Executive Branch identifies a class of immigrants who, while undocumented, are very likely to be low priorities for removal and strong candidates for discretionary relief, nothing prevents it from adopting a policy framework under which individuals within that class may seek deferred action. Such a policy does not prevent the Executive from denying deferred action—or even initiating removal proceedings—in any appropriate case. In many other cases, immigration officials will appropriately decide to grant deferred action to deserving individuals. That relief, and the limited benefits that flow from it under existing regulations, are consistent

with longstanding law and practice—as well as fairness and common sense. To be sure, the INA does not require the Executive Branch to adopt or continue a policy such as DACA. But, just as surely, nothing in the law forbids it.

A. The Agency's Stated Premise That DACA Is Unlawful Is Incorrect

An agency's "action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). When the agency's stated rationale rests on a "determination of law," the action "may not stand if the agency has misconceived the law"—even if the action might have been justified on some other ground. *Chenery I*, 318 U.S. at 94. Under that settled principle, the decision to terminate DACA cannot stand because the legal conclusion on which the agency publicly based it is incorrect. *See Regents* Supp. App. 46a-57a. To illuminate the agency's legal error, we first address the practice of deferred action generally and the long history of class-based discretionary relief policies, and then turn to the legality of the policy at issue here.

1. Deferred action is lawful

It is common ground that the practice of granting deferred action in individual cases is lawful. *See* U.S. Br. 39-40, 43. Although deferred action "developed without express statutory authorization," this Court has described it as a "regular practice" that the Executive may employ "for humanitarian reasons or simply for its own convenience." *AADC*, 525 U.S. at 484. And since the emergence of the practice, Congress has adopted statutes that expressly contemplate pre-existing executive authority to grant deferred action. *See,*

e.g., 8 U.S.C. § 1227(d)(2); 49 U.S.C. § 30301 note. All agree that deferred action is available only as a matter of executive discretion, and that individual grants of deferred action do not provide a defense to removal and are "revocable at any time in the agency's discretion." J.A. 854.

By regulation, the Attorney General (and now the Secretary) have exercised statutory authority to confer certain limited benefits on individuals who receive deferred action. Petitioners do not question these "longstanding regulations." U.S. Br. 44. In particular, deferred action recipients may apply to be considered for work authorization if they "establish[] an economic necessity for employment." 8 C.F.R. § 274a.12(c)(14). That regulation was adopted by the INS in 1981 to codify its existing practice. *See* 46 Fed. Reg. 25,080-25,081 (May 5, 1981) (citing 8 U.S.C. § 1103). Congress confirmed the Attorney General's authority to adopt this regulation in the Immigration Reform and Control Act of 1986, which made it unlawful for an employer to hire an "unauthorized alien," defined as one who is not either a lawful permanent resident or "authorized to be so employed by [the INA] *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added). Other federal regulations conferring limited benefits on deferred action recipients are likewise grounded in particular grants of statutory authority.[5]

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[5] Certain regulations provide that the period of time during which an individual enjoys deferred action does not count as a period of "unlawful presence" for purposes of various re-entry bars. 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); *see* 8 U.S.C. § 1182(a)(9)(B)(ii) (an "alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the

2. Class-based deferred action policies are a permissible policy tool

As an alternative to granting discretionary immigration relief on an ad hoc basis, the Secretary may adopt policies that guide and channel deferred action decisions for a class of potentially eligible individuals who share certain circumstances or characteristics. Class-based policies are a salutary method for the Secretary to promote both efficiency and fairness, by identifying categories of individuals who are likely to be low priorities for removal and establishing a framework that facilitates even-handed consideration of their applications for relief.

a. The federal government has operated "more than two dozen" such policies over the past six decades involving various forms of discretionary relief. *See* J.A. 821-822.[6] From 1960 through 1990, for example, the INS adopted various class-based policies for granting "extended voluntary departure," an "extrastatutory" form of immigration relief. *Hotel & Rest. Emps. Union v. Smith*, 846 F.2d 1499, 1519 (D.C. Cir. 1988) (en banc) (opinion of Silberman, J.).[7] Those policies

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Attorney General"). Another regulation defines individuals "currently in deferred action status" to be "'lawfully present'" within the meaning of the statute governing eligibility for certain work-related benefit programs. 8 C.F.R. § 1.3(a)(4)(vi); *see* 8 U.S.C. § 1611(b)(2)-(4) (individuals "lawfully present in the United States as determined by the Attorney General" may participate).

[6] *See generally* Bruno, et al., CRS, *Analysis of June 15, 2012 DHS Memorandum*, at 20-23 (July 13, 2012), https://tinyurl.com/y5muva2y.

[7] Petitioners previously agreed with Judge Silberman that extended voluntary departure was extrastatutory, but now suggest

applied to immigrants from particular countries. H.R. Rep. No. 100-627 at 6 (1988) (EVD Report). They ultimately allowed hundreds of thousands of "otherwise deportable aliens to remain temporarily in the United States" for humanitarian reasons. *Id.*

Other discretionary relief policies defined the eligible class more broadly. A prominent example is the "Family Fairness" policy, established in 1987 and expanded in 1990, which made extended voluntary departure available to qualifying spouses and children of immigrants who had been granted legal status under the Immigration Reform and Control Act.[8] At the time it was expanded, the Commissioner of the INS testified that up to 1.5 million individuals could be eligible for relief.[9]

For over two decades, the Executive has also employed class-based policies to guide the exercise of deferred action in individual cases. *See generally* J.A. 822-826. Class-based deferred action policies have addressed, for example, certain victims of spousal abuse, *id.* at 822-823; victims of human trafficking and certain other crimes who were applying for "T" or "U" visas, *id.* at 823-825; certain foreign students affected

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that it may have "'derived from the voluntary departure statute.'" U.S. Br. 48; *see id.* at 48-49 & n.10. Either way, like deferred action, it "developed without express statutory authorization." *AADC*, 525 U.S. at 484.

[8] *See* Memorandum from Gene McNary, Commissioner, INS to Reg'l Comm'rs, *Re: Family Fairness* (Feb. 2, 1990) (Family Fairness Memo).

[9] *Immigration Act of 1989: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. Pt. 2, at 49, 56 (1990) (testimony); *see also* 55 Fed. Reg. 6058 (Feb. 21, 1990) ("approximately one million").

by Hurricane Katrina, *id.* at 825; and certain widows and widowers of U.S. citizens, *id.* at 825-826. Like DACA, these policies required immigration officials to make individualized assessments of whether deferred action was appropriate, and did "not 'provide any assurance that all such requests [would] be granted.'" *Id.* at 825; *see id.* at 822-826.

Congress has long been aware of these and other class-based discretionary relief policies, and has encouraged their use. In 1983, for example, a "sense of the Congress" resolution encouraged the creation of a class-based relief policy that would have applied to El Salvadoran immigrants. *See* Dep't of State Authorization Act, Pub. L. No. 98-164, § 1012, 97 Stat. 1017, 1062 (1983). In 1990, Congress adopted a statute addressing individuals covered by the Family Fairness policy; it delayed the effective date by one year and emphasized that the delay "shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date." Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, tit. III, § 301(g), 104 Stat. 4978, 5030. Since the emergence of class-based deferred action policies in the 1990s, Congress has never disapproved of the practice; instead, it has adopted multiple statutes that pre-suppose executive authority to grant deferred action. *See, e.g.*, 8 U.S.C. § 1227(d)(2); *id.* § 1154(a)(1)(D)(i)(II), (IV); 49 U.S.C. § 30301 note.

b. Petitioners seek to distinguish prior class-based policies from the DACA policy at issue here (U.S. Br. 46-50), but those distinctions do not survive scrutiny. For example, not all of the prior policies may "fairly be described as 'interstitial' in nature," *id.* at 48, providing only "temporary relief while the aliens sought or

awaited permanent status afforded by Congress," *id.* at 47. Several class-based policies were adopted at a time when the eligible population had no existing mechanism for obtaining legal status (outside of generally available channels such as asylum). The deferred action policy for certain widows and widowers of U.S. citizens, for example, was established when "no [other] avenue of immigration relief exist[ed]."[10] It is true that Congress eventually created a pathway for those individuals to obtain lawful status. *See* Dep't of Homeland Sec. Appropriations Act, 2010, Pub. Law 111-83, § 568(c), 123. Stat. 2142, 2186-2187. But that simply highlights that the policy was "interstitial" only in hindsight—as petitioners themselves seem to hope will soon be true of DACA. *See* U.S. Br. 32 (discussing petitioners' pursuit of "a legislative solution").

Nor were all prior policies more time-limited than DACA. *See* U.S. Br. 48. For example, the federal government granted certain Czechoslovakians extended voluntary departure in one-year increments from 1968 through 1977. *See* EVD Report at 6; *see also id.* (listing other policies with similar durations). And three successive presidential administrations have granted deferred enforced departure to certain Liberians since 2007. *See, e.g.*, 84 No. 36 Interpreter Releases 2125 (Sept. 17, 2007); 96 No. 14 Interpreter Releases 14 (April 1, 2019).

Finally, while many prior policies defined the eligible population quite narrowly, *see* U.S. Br. 49, others were much broader. As the Executive told Congress, for example, fully 40 percent of the undocumented

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[10] Memorandum from Donald Neufeld, Acting Assoc. Dir., Office of Domestic Operations, USCIS to Field Leadership, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children* (June 15, 2009).

population at the time were eligible for relief under the expanded Family Fairness policy. *See* J.A. 851-852; *supra* p. 28. Substantially fewer people ultimately applied because Congress authorized statutory relief shortly thereafter. *See* IMMACT, tit. III, § 301(g). At the time the policy was expanded, however, its scale not only "match[ed] that of DACA," U.S. Br. 49, but far exceeded it.

3. DACA is a permissible class-based deferred action policy

DACA tracks the established practice of using class-based frameworks to identify and process the cases of individuals who are likely to be compelling candidates for relief or forbearance. It applies only to young people who came or were brought to this country as children; have continuously resided here since 2007; are current students, have completed high school, or are honorably discharged veterans; have not been convicted of any serious crimes; and do not otherwise threaten national security or public safety. *See Regents* Pet. App. 98a. Eligible individuals who pass a background check and pay a fee may apply for deferred action on an individual basis. *Id.* at 11a, 99a. Successful applicants receive a grant of deferred action for a two-year period. *Id.* at 100a. That grant is revocable and provides no defense to removal, *see* J.A. 819, but it does afford recipients a measure of stability and the opportunity to seek authorization to work legally in the country they know as home.

Like past class-based policies, DACA is grounded in important part in "immediate human concerns." *Arizona v. United States*, 567 U.S. 387, 396 (2012). Those who meet the minimum criteria have, by definition, "long ties to the community." *Id.* Many of them also have "a record of distinguished military service,"

"children born in the United States," or other qualities that make them particularly suitable for discretionary relief. *Id.* They are not among the populations that Congress has prioritized for removal. And many of the DACA criteria are consonant with considerations that Congress itself has relied on in setting immigration policy.[11] Indeed, nearly everyone seems to agree with the agency's initial assessment that individuals who satisfy the DACA criteria are likely to present "low priority cases" for removal. *Regents* Pet. App. 98a; *see id.* at 64a-65a (statement by President Trump: "Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really!"); *id.* at 125a (Secretary Nielsen's recognition of "the sympathetic circumstances of DACA recipients as a class").

Also like other class-based deferred action policies, DACA requires individual applications to be evaluated on a case-by-case basis as a matter of "[p]rosecutorial discretion." *Regents* Pet. App. 99a; *see* J.A. 827 & n.8. Immigration officials are free to consider all the information available to them and to deny (or revoke) deferred action based on any relevant factor. Since the policy's inception, USCIS has denied more than 81,000 initial applications for deferred action.[12] Petitioners

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[11] Congress has, for example, adopted laws prioritizing the removal of criminals rather than law-abiding individuals, *see* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. F, tit. II, 129 Stat. 2242, 2497; *see also* J.A. 813, and provisions reflecting a special concern for undocumented immigrants who come to this country as children, *see* 8 U.S.C. §§ 1101(a)(27)(J), 1158(a)(2)(E), 1182(a)(9)(B)(iii)(I), have been physically present in the United States for lengthy periods, *see id.* § 1229b(b)(1), or have served honorably in the armed forces, *see id.* § 1439.

[12] USCIS, *Number of Form I-821D, Consideration of Deferred*

do not publish data on the basis for those denials, but they have acknowledged in this litigation that some number of the denials involved applicants "who met the threshold criteria for consideration [under] DACA," J.A. 1010, and therefore must have been rejected based on consideration of other factors in their individual cases.[13]

No doubt, a large percentage of those who meet the stated criteria and submit applications do receive grants of deferred action. *See* U.S. Br. 39 n.7 (91% approval rate since 2012); *Regents* Supp. App. 51a (17.8% of applications acted on in 2016 denied). That is what one would expect of a policy that is calibrated to identify, as potential candidates for discretionary relief, "productive young people" who "have already contributed to our country in significant ways." *Regents* Pet. App. 99a; *see also Texas*, 809 F.3d at 174 ("DACA applicants are less likely to have backgrounds that would warrant a discretionary denial."). In addition, the nature of the DACA policy encourages self-selection among the population of people who satisfy the threshold criteria, many of whom have never applied

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Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake and Case Status, Fiscal Year 2012-2019 (Apr. 30 2019), https://tinyurl.com/y59zwrtd.

[13] The lower courts in the DAPA litigation expressed doubts as to whether "DACA allowed for discretion," based on their review of information in the preliminary injunction record. *E.g.*, *Texas*, 809 F.3d at 175-176. In light of the more robust factual record developed in recent litigation, however, the same district court concluded that the evidence proffered by plaintiffs to show that "individual decision-makers are not exercising . . . discretion" was "not convincing, either in its quantity or quality." *Texas v. United States*, 328 F. Supp. 3d 662, 734 (S.D. Tex. 2018); *see generally* DACA Recipients & New Jersey Amicus Br. 9-24.

for relief. *See Texas*, 809 F.3d at 210 (King, J., dissenting). Applicants must pay a substantial fee (currently $495), submit to a federal background check, and provide sensitive personal information and biometric data to federal authorities. *See Regents* Pet. App. 9a-11a; J.A. 713. It is no wonder that the substantial majority of individuals who are willing to take those steps present compelling cases for deferred action.

4. The agency's assertion that DACA is illegal rests on a mistaken legal premise

The question of DACA's legality is at issue in this case because petitioners based their decision to terminate the policy on the stated premise that it was unlawful. As discussed above, judicial review of the agency's legal conclusion must focus on the specific "grounds invoked by the agency" in its decision memorandum. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*). Here, the asserted grounds are that DACA was "unconstitutional" and beyond the agency's "proper statutory authority." *Regents* Pet. App. 116a.

a. The constitutional objection can be addressed briefly. To this day, petitioners have not identified any constitutional flaw in the DACA policy—including in their merits brief in this case. As noted, a "principal feature of the removal system is the broad discretion exercised by" executive officials, who "must decide whether it makes sense to pursue removal at all" in a particular case. *Arizona*, 567 U.S. at 396. A policy that guides the exercise of that discretion in certain cases, subject to all the procedures and requirements imposed by Congress, does not violate the Constitution.

b. The only considerations invoked by Acting Secretary Duke and Attorney General Sessions for the assertion that DACA is beyond the agency's statutory authority were the rulings in the DAPA case. *See Regents* Pet. App. 117a; J.A. 877; U.S. Br. 33-36. But the reasons offered by the Fifth Circuit majority for affirming the preliminary injunction in that case are either inapplicable to DACA, incorrect, or both.

The Fifth Circuit relied on language in the DAPA memorandum deeming DAPA recipients to be "'*lawfully present* in the United States.'" *Texas*, 809 F.3d at 148; *see Regents* Pet. App. 104a. The DACA memorandum contains no similar language. *See Regents* Pet. App. 97a-101a. Although established regulations direct that, for certain limited purposes, periods of deferred action do not constitute "unlawful presence," *see supra* n.5, that is true of *any* grant of deferred action—whether under DACA, under a "previous-deferred action program[]," *Texas*, 809 F.3d at 184, or on an "ad hoc" basis, *id.* at 186 n.202. And neither those regulations nor the grant of deferred action itself interferes with the Secretary's ability to initiate removal proceedings with respect to any deferred action recipient.

The Fifth Circuit also focused on INA provisions "allowing defined classes of aliens to be lawfully present" and making certain specific "classes of aliens eligible for deferred action." *Texas*, 809 F.3d at 179. Those provisions do not foreclose the ability of the Executive to grant deferred action, which does not confer any lawful immigration status and has always been understood as an exercise of the Secretary's general authority that "developed without express statutory authorization." *AADC*, 525 U.S. at 484. Congress has indicated its understanding and approval of the

deferred-action mechanism when it has adopted provisions instructing the Secretary to consider granting that relief to specific classes of individuals. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV). But nothing about those provisions suggests that they were intended to prohibit the Executive from granting deferred action to other individuals in other situations.

Another consideration the Fifth Circuit invoked was the fact that Congress has "repeatedly declined to enact" specific statutory relief for the DACA population. *Texas*, 809 F.3d at 185; *see* U.S. Br. 34, 44. Of course, "unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969). They are particularly unilluminating here: The legislative proposal cited by the Fifth Circuit would have created a path to lawful immigration status, not a statutory deferred action policy. *See* DREAM Act of 2010, H.R. 5281, 111th Cong. (2010). And Congress has also declined to enact bills that would have curtailed class-based deferred action policies or otherwise limited the practice of deferred action. *See, e.g.*, J.A. 828 n.9; H.R. 29, 114th Cong. (2015).

In addition, the Fifth Circuit was troubled by the size and breadth of the DAPA policy. *See, e.g.*, *Texas*, 809 F.3d at 181 ("4.3 million otherwise removable aliens eligible"). Whatever force that concern might have had in the context of the DAPA case, it does not undermine the legality of a policy such as DACA—which applies to a far smaller category of immigrants that is carefully defined to include only those who are particularly likely to be deserving of discretionary relief.

Finally, the Fifth Circuit relied on an alternative holding that DAPA likely required a notice-and-comment rulemaking process. *See Texas*, 809 F.3d at 170-178. But petitioners do not suggest that they agree with that holding; nor have they made any similar argument here regarding DACA.[14]

c. Before this Court, petitioners unveil a theory of why they lack authority to continue DACA that is somewhat more elaborate than the cursory assertions they have advanced to date. They now argue that "the nature and scope of DACA" make it unlawful. U.S. Br. 46. That argument is unpersuasive.

Petitioners do not question their authority to designate classes of undocumented immigrants as "low-priority targets," U.S. Br. 45, and they seem to agree that the immigrants eligible for DACA are among the lowest priority in the Nation. *See Regents* Pet. App. 64a-65a. To be sure, for purposes of this litigation, petitioners have taken to characterizing DACA recipients as complicit in "ongoing violations of federal law on a massive scale." *E.g.*, U.S. Br. 33. But the fact remains that most of them "were brought to this country as children," *Regents* Pet. App. 97a, lacked any "intent to violate the law," *id.* at 98a, "know only this country as home," *id.*, and have become "productive" members of our society, *id.* at 99a. And petitioners appear to embrace the idea that these individuals could properly seek and obtain deferred action on an "individualized" and "case-by-case basis." *Id.* at 124a; U.S. Br. 39-40.

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[14] In any event, that holding rested in substantial part on a factual premise that even the district court in the DAPA proceedings has since disavowed. *See supra* n.13.

Petitioners object to DACA's use of "stated eligibility criteria," which they view as creating an "implicit presumption" that those who satisfy the criteria will obtain relief. U.S. Br. 39-40. But every policy that seeks to "strategically deploy [agency] resources" (*id.* at 45) by identifying people who are likely to be low priorities for removal must state criteria of one form or another. Defined criteria are particularly important for policies guiding the exercise of discretionary relief, because they help "to avoid arbitrary enforcement decisions by individual officers" and to facilitate a degree of consistency across the agency. J.A. 837. At the same time, DACA clearly directs that immigration officials retain discretion to deny deferred action in appropriate cases based on any relevant factors. *See Regents* Pet. App. 99a-101a. Experience has demonstrated that many applications are in fact denied, *supra* pp. 32-33, and petitioners have not identified anything in the DACA policy supporting their assertion that it "inhibit[s] assessments of whether deferred action is appropriate in a particular case," *Regents* Pet. App. 124a. Petitioners may prefer a purely ad hoc approach to deferred action as a matter of policy, *see id.*, but nothing in the INA prohibits the Secretary from adopting a more robust and transparent framework to guide deferred action decisions for especially deserving populations.

Petitioners also focus on the fact that those who receive deferred action under DACA are eligible to seek work authorization. U.S. Br. 44-46. This is not any "unheralded" executive authority. *Id.* at 45. As noted, the possibility of work authorization flows from a separate and "longstanding" regulation, *id.* at 44, which petitioners do not challenge. 8 C.F.R. § 274a.12(c)(14). As a result of that regulation, each of the class-based deferred action policies described

above enabled those who received relief to pursue work authorization. So did many other class-based discretionary relief policies, including the Family Fairness policy that applied to up to 40 percent of the undocumented population. *See* Family Fairness Memo; J.A. 822. All the while, Congress has never modified its statute recognizing the Attorney General's (and now the Secretary's) ability to "authoriz[e]" those who receive discretionary relief "to be so employed." 8 U.S.C. § 1324a(h)(3); *see NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) ("[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.").[15]

Moreover, it is consistent with "common sense" (U.S. Br. 45) that Congress has allowed the Secretary to use his authority in this way. When the Executive has made a considered decision to temporarily forbear from removing particular individuals from the United States, it is sensible to allow them the opportunity to support themselves and their families through lawful employment during that period of forbearance. The only practical alternative would be for deferred action recipients to work illegally—exposing themselves to exploitation and affecting the labor market. No plausible interpretation of the INA demands that result.

Petitioners' final objection to DACA relates to the policy's size and "scope." U.S. Br. 46-50; *see id.* at 46-49. No doubt, the scope of such a policy is relevant to its legality. It could present substantial legal concerns

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[15] This case is thus quite unlike *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), where the agency's longstanding position was that it *lacked* authority to regulate tobacco products and Congress "ratif[ied]" that position "and precluded the FDA from regulating." *Id.* at 158, 161; *see* U.S. Br. 45.

if a class-based deferred action policy encompassed people whom Congress designated as priorities for removal, *see* J.A. 807, or was so large that it would likely "impede removals that would otherwise occur in its absence," *id.* at 851. Here, however, DACA uses carefully selected criteria to define a population of young people that all seem to agree are among the very lowest priorities for immigration enforcement. Petitioners' complaint about the total number of people who satisfy those criteria merely states an aspect of the problem facing the agency; it is not an argument one way or the other about the legality of any particular policy response to that problem.

We can all regret that so many deserving young people are caught in a legal limbo that is not of their own making. No one is happy that the political branches of our federal government have not agreed to a sensible solution. While we await such a solution, the Secretary remains responsible for establishing "national immigration enforcement policies and priorities" to deal with the situation as it presently stands. 6 U.S.C. § 202(5); *see* 8 U.S.C. § 1103(a)(1), (3). Petitioners have not established that the law forbids them from maintaining, as part of that effort, a policy framework that guides discretionary deferred action decisions about this carefully defined and highly deserving group of immigrants.

d. Petitioners finally argue that even if the legal conclusion on which the termination decision rests is "[in]correct," the decision may stand if that conclusion was nonetheless "reasonable." U.S. Br. 43; *see id.* at 50-51. That argument is foreclosed by *Chenery*, which applies with full force here. Regardless of whether an agency action might be justified on some other basis, if it "is based upon a determination of law," then it

"may not stand if the agency has misconceived the law." *Chenery I*, 318 U.S. at 94; *see, e.g.*, *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998); *cf. Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) ("'[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis.'"). The question here is not whether an agency's statutory interpretation or other legal analysis could be viewed as "reasonable," but whether the agency acted on a mistaken view of the limits of its lawful discretion.

B. The Agency's Explanation for Its Decision Does Not Satisfy the APA's Requirements for Reasoned Decisionmaking

As the D.C. district court explained, the termination decision must be vacated for the additional reason that the agency "fail[ed] to give an adequate explanation" for its action. *NAACP* Pet. App. 54a; *see id.* at 49a-55a; *see also Casa de Md.*, 924 F.3d at 703-705.

One of the "basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Agency explanations must be "based on consideration of the relevant factors," and may not "fail[] to consider an important aspect of the problem." *State Farm*, 463 U.S. at 42, 43. When an agency departs from its prior position, it must (among other things) supply a "reasoned explanation for the change," *Encino Motorcars*, 136 S. Ct. at 2125, and "display awareness that it *is* changing positions," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

To explain the illegality rationale here, the decision memorandum invokes just two considerations: the rulings in the DAPA litigation and the Attorney

General's letter. *Regents* Pet. App. 117a. That letter also invokes the rulings in the DAPA litigation. J.A. 877. Neither document explains why those rulings were fatal to the separate DACA policy. Neither says anything about why the Fifth Circuit's interlocutory decision would control the analysis of DACA's legality, or acknowledges any of the differences between the two policies. *See supra* pp. 35-36. Neither addresses the fact that this Court's order affirming the Fifth Circuit was not accompanied by any explanation, is not precedential, and affirmed only a grant of preliminary equitable relief. Under those circumstances, the Court's order could not have resolved the validity of DAPA—let alone of DACA.[16] And while both documents assert that DACA "was effectuated . . . without proper statutory authority," *Regents* Pet. App. 116a; J.A. 877, neither one discusses the Secretary's broad statutory authority to establish immigration enforcement policies and priorities or the long history of class-based deferred action policies.

Indeed, the letter and the decision memorandum raise more questions about petitioners' rationale than they answer. The letter asserts that "the DACA policy has the same . . . constitutional defects that the courts recognized as to DAPA," J.A. 878, when in fact no court ever recognized any "constitutional defect[]" in DAPA, *see Regents* Supp. App. 48a-49a. The decision memorandum asserts that the agency was unable to identify specific discretionary denials of deferred action involving applicants who "appeared to satisfy

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[16] *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (a preliminary injunction is "often dependent as much on the equities of a given case as the substance of the legal issues it presents," and its purpose is "not to conclusively determine the rights of the parties").

the" DACA eligibility criteria, *Regents* Pet. App. 112a-113a n.1, an assertion that petitioners have since admitted is incorrect, *see* J.A. 1010.

The agency also failed to demonstrate any "awareness that it [was] changing position[s]." *Fox Television*, 556 U.S. at 515. Petitioners created DACA after receiving advice from the Office of Legal Counsel that it would be lawful, J.A. 827 n.8; they successfully defended the policy in court, *supra* p. 4; and they continued the policy long after this Court's summary affirmance in the DAPA case—soliciting, accepting, and processing hundreds of thousands of applications for deferred action under DACA during the last seven months of the Obama Administration and the first seven months of the Trump Administration.[17] The decision memorandum does not acknowledge any of that history. *See Fox Television*, 556 U.S. at 515.

After finding the explanation in the decision memorandum inadequate, the D.C. district court stayed its vacatur order to allow the agency an opportunity to "provid[e] a fuller explanation for the determination that [DACA] lacks statutory and constitutional authority." *NAACP* Pet. App. 66a; *see infra* pp. 49-50. But when Secretary Nielsen responded in a supplemental memorandum, she barely expanded on the explanation offered by her predecessor. Once again, the agency's explanation of why "the DACA policy was contrary to law" relied exclusively on the Attorney General's letter and the Fifth Circuit's decision. *Regents* Pet. App. 122a; *see id.* at 122a-123a. The supplemental memorandum at least acknowledged the

[17] *See* USCIS, *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake Biometrics and Case Status, Fiscal Year 2012-2017* (June 30, 2017), https://tinyurl.com/y868mj7y.

existence of "arguable distinctions between the DAPA and DACA policies," *id.* at 122a, but it did not discuss those distinctions or explain why the agency believed the Fifth Circuit's decision was fatal to DACA. *See NAACP* Pet. App. 105a ("[T]he Nielsen Memo offers nothing even remotely approaching a considered legal assessment.").

Petitioners' argument that the "APA demands nothing more" than the unelaborated assertions of illegality that the agency offered here (U.S. Br. 52) misunderstands both the nature and purpose of the requirement for a reasoned explanation. *See Dep't of Commerce*, 139 S. Ct. at 2575. That requirement "is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Id.* at 2575-2576. A reasoned explanation facilitates effective judicial review and ensures "political accountability," which is "the very premise of administrative discretion in all its forms." *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000) (O'Scannlain, J.); *see Regents* Supp. App. 31a-34a.

While an agency need not prepare "the equivalent of a bench memo" to explain its changed legal position, *Regents* C.A. Dkt. 31 at 31, that does not excuse it from offering enough of an explanation to allow a jurist or a concerned citizen to understand the true basis for the agency's conclusion that one of its own policies was unlawful. Here, even a discerning reader is left uncertain about, for example, whether the Executive Branch believes that DACA violates the Constitution (and, if so, why), and on what basis it believes the policy exceeds the Executive's broad statutory authority to decide how to enforce the immigration laws. Especially when making a decision that directly affects the

lives of hundreds of thousands of people, an agency owes the public and the courts a more substantial and reasoned explanation.

C. Alternative Rationales Advanced by Petitioners During this Litigation Cannot Save the Termination Decision

The bulk of petitioners' merits arguments before this Court address rationales that the Acting Secretary did not express in her September 2017 decision memorandum. *See* U.S. Br. 32-43. Those additional rationales were either advanced by counsel during the course of this litigation or presented in Secretary Nielsen's June 2018 supplemental memorandum, which "decline[d] to disturb" the challenged decision. *Regents* Pet. App. 121a. They are not properly considered here. Petitioners chose to justify this important decision on the ground that DACA is unlawful. Unless and until they choose to supersede that original action with some new one, their decision must "stand or fall" on that ground. *Camp*, 411 U.S. at 143.

1. "Litigation Risk"

A court conducting review under the APA "may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Petitioners have argued in these proceedings that the termination decision may be justified on an alternative "litigation risk" rationale. U.S. Br. 27. The great majority of the courts to consider the issue have correctly held that this rationale is *post hoc*. *See Regents* Supp. App. 35a; *Regents* Pet. App. 55a-57a; *Batalla Vidal* Pet. App. 109a-112a; *Casa de Md.*, 924 F.3d at 700 & n.12. As discussed above, *supra* p. 21, the decision memorandum never even mentioned litigation risk as an alternative ground for the decision.

Petitioners argue that such a rationale can be inferred. *See* U.S. Br. 26-28. A corollary of the principle that courts must review agency action on the contemporaneous basis identified by the decisionmaker, however, is that the "basis must be set forth with such clarity as to be understandable." *Chenery II*, 332 U.S. at 196. A reviewing court may not "chisel that which must be precise from what the agency has left vague and indecisive." *Id.* at 197. Neither the "discussion of the prior litigation" over DAPA in the decision memorandum's "Background" section, U.S. Br. 28, nor the Acting Secretary's "statement that she 'should'—not must—rescind DACA," *id.*, is sufficient to suggest to a discerning reader that the decision was based on an assessment of litigation risk.

And even if a separate litigation risk rationale could reasonably be discerned from the decision memorandum, *see NAACP* Pet. App. 56a, it could not support the decision, *see id.* at 56a-59a. While the memorandum briefly describes the DAPA litigation and notes that Texas had threatened to challenge DACA, there is no indication that the agency conducted any reasoned assessment of that threat. Any such assessment would have had to consider the availability of possible defenses, both procedural and on the merits. It would have evaluated policy adjustments the agency might make to forestall any legal attack. And it would have balanced any perceived risk of a possible adverse court decision against the costs—to DACA recipients, the States, the federal government, and the overall economy—that were certain to be inflicted by abruptly ending the policy. Nothing in the decision memorandum or the proffered administrative record

suggests that the agency gave any thought to those considerations.[18]

Nor can the decision to rescind DACA be justified by concerns about an immediate "court-ordered shutdown" on terms "beyond the agency's control" (U.S. Br. 35)—even if those concerns had been expressed in the decision memorandum. District courts have "broad discretion" to "fashion[] equitable relief." *E.g.*, *Crawford v. Silette*, 608 F.3d 275, 278 (5th Cir. 2010). The equities surrounding a challenge to a policy that has been in place for years, and one on which hundreds of thousands of young people have structured their lives, would weigh heavily against any abrupt court-ordered shutdown. Indeed, after the threatened litigation eventually materialized in May 2018, the district court in Texas, while inclined to agree with the plaintiffs on the merits, refused to enter any provisional order shutting down the policy. *Texas v. United States*, 328 F. Supp. 3d 662, 740 (S.D. Tex. 2018).

2. Former Secretary Nielsen's Policy Rationales

Most of petitioners' merits arguments focus on rationales unveiled in Secretary Nielsen's supplemental memorandum, which was submitted to the district court in the D.C. proceeding. *See* U.S Br. 35, 37-43. Those new rationales are not properly considered here.

Judicial review of agency action is ordinarily limited to the contemporaneous rationale of the formal

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[18] When the D.C. district court invited the agency to further explain any concern about litigation risk, Secretary Nielsen invoked the "burdens[]" of litigation and her "serious doubts" about DACA's legality (based principally on the "determination and ruling" in the Attorney General's summary letter), but again offered no reasoned assessment of the threat. *Regents* Pet. App. 123a.

agency decisionmaker and the complete administrative record before the agency at the time of the decision. *See Dep't of Commerce*, 139 S. Ct. at 2573; *Camp*, 411 U.S. at 143. If the decision cannot be sustained on that basis, the proper course is normally to vacate the decision and remand to the agency for further consideration. *See Camp*, 411 U.S. at 143; *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *see generally* 5 U.S.C. § 706(2)(A). Vacatur allows the agency to "deal with the problem afresh," *Chenery II*, 332 U.S. at 201, and it serves an important "'think-it-over' function," Friendly, *Chenery Revisited*, 1969 Duke L.J. 199, 209 (1969). Courts allow the agency to take a fresh look at the problem—even if there is "scant doubt" about what it will do in the new proceeding, *id.*—out of respect for the proper division of authority between the judicial and executive branches. And remand benefits the public by requiring the agency to state formally and forthrightly the grounds for any further action.

In rare circumstances, some courts defer vacatur and instead invite the agency to provide further explanation for a rationale that would not otherwise satisfy the APA's requirements for reasoned decisionmaking. At its most formal this practice is known as "remand without vacatur," and it is not without controversy.[19] But it has been recognized by the D.C. Circuit, *see, e.g.*, *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019), and finds some support in this Court's jurisprudence, *see Camp*, 411 U.S. at 143; *Overton Park*, 401 U.S. at 420. It affords the agency

[19] *See, e.g.*, *Checkosky v. SEC*, 23 F.3d 452, 490-493 (D.C. Cir. 1994) (opinion of Randolph, J.) (remand without vacatur is "flatly prohibit[ed]" by section 706(2)(A)'s command that reviewing courts "'shall . . . hold unlawful and set aside' the agency action").

an opportunity to submit "an amplified articulation" of the rationale it originally advanced. *Local 814, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976). What it does not afford is an opportunity to defend an old decision on new rationales. Whether the "additional explanation" is obtained through a formal remand, *id.*, or through a less formal procedure, it "should be merely explanatory of the original record and should contain no new rationalizations." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) (addressing agency affidavits).

This Court's decision in *Camp* underscores that limitation. The Court acknowledged the possibility of seeking "additional explanation" of the agency's "curt" stated rationale, which rested on a "finding that a new bank was an uneconomic venture." 411 U.S. at 143. But it added that "[i]f *that finding* is not sustainable on the administrative record [originally] made, then the Comptroller's decision must be vacated." *Id.* (emphasis added).

Here, the D.C. district court stayed its judgment vacating the termination decision for 90 days to give petitioners "an opportunity to better explain" their stated rationale "that DACA is unlawful." *NAACP* Pet. App. 74a; *see id.* at 66a. Petitioners could have responded to the court's invitation by providing a reasoned explanation for that original rationale. Or they could have advanced new rationales for terminating DACA—by "issu[ing] a new decision" presenting any such rationales, which then would have been the basis for any future judicial review. *Id.* at 94a n.7; *cf. Int'l Refugee Assistance Project*, 137 S. Ct. at 2083. But petitioners did neither.

Instead, Secretary Nielsen submitted a short supplemental memorandum that purported to give "further explanation" for her predecessor's rationale, *Regents* Pet. App. 121a, but in fact "provide[d] almost no meaningful elaboration on the Duke Memo's assertion that DACA is unlawful," *NAACP* Pet. App. 104a. At the same time, she emphasized that she was not making any new decision: she "decline[d] to disturb the Duke memorandum's rescission of the DACA policy," and wrote only to explain her "understanding of the Duke memorandum and why [Duke's] decision to rescind the DACA policy was, and remains, sound." *Regents* Pet. App. 121a. As a direct consequence of the agency's choice to stand by its original decision, that decision must "stand or fall" based on the rationale identified in Duke's original decision memorandum and the agency's explanation of that rationale. *Camp*, 411 U.S. at 143. Secretary Nielsen's new policy rationales cannot be advanced to sustain the earlier decision.

In any event, those new rationales would not satisfy the requirements of the APA. Most of the "reasons of enforcement policy" identified by Secretary Nielsen (*Regents* Pet. App. 123a) are in fact premised on the validity of the legal ground offered by her predecessor. Nielsen describes her "serious doubts about [DACA's] legality," *id.*; asserts that grants of deferred action under the DACA policy are not "truly individualized" or "case-by-case," *id.* at 124a; and contends that a policy such as DACA "should be enacted legislatively," *id.* Those rationales "simply recapitulate" the agency's unsupported and incorrect conclusion that DACA is unlawful. *NAACP* Pet. App. 106a. At the very least, they depend heavily on the premise that DACA is unlawful, and there is reason to doubt that Secretary Nielsen would have advanced them if she knew that premise was incorrect.

Secretary Nielsen's final rationale is that the agency terminated DACA to "project a message" of "clear" and "consistent" enforcement of the immigration laws in response to an influx of "minor aliens" who "have illegally crossed or been smuggled across our border in recent years." *Regents* Pet. App. 124a. Petitioners acknowledge that this argument "was not reflected in the Duke Memorandum." U.S. Br. 31. This type of policy rationale could be reviewed under the arbitrary and capricious standard, in light of the "full administrative record," if offered as a contemporaneous ground for agency action. *Overton Park*, 401 U.S. at 420; *see Dep't of Commerce*, 139 S. Ct. at 2573; *Camp*, 411 U.S. at 143. Here, however, the problem is not just that the agency decisionmaker did not advance this policy rationale, but also that there is no support for Nielsen's policy views in the proffered record of materials underlying Duke's decision. Petitioners acknowledge as much by citing only materials from outside that record to bolster this rationale. *See* U.S. Br. 40-41.

That deficiency highlights why it is not appropriate to review agency action based on new, after-the-fact rationales. This Court limits review to the originally stated rationale not for the sake of formalism, but so that courts and the public can evaluate the justifications for agency action offered by the accountable agency decisionmaker in light of the information before the agency at the time of the decision. A rule allowing agencies to introduce a new rationale long after the decision was made would blur the lines of accountability, by creating confusion about who made the decision and why they did so; it would reduce the agency's incentives for offering a sustainable rationale in the first instance; and it would deprive the courts and the public of the record materials necessary to

evaluate whether the new rationale is a genuine one that resulted from reasoned decisionmaking. *Cf. Dep't of Commerce*, 139 S. Ct. at 2575-2576.

The D.C. district court recognized that nothing prevented former Secretary Nielsen from "issu[ing] a new decision rescinding DACA." *NAACP* Pet. App. 94a n.7. Nothing prohibits her successor from doing the same. Indeed, given petitioners' stated concerns that continued judicial review of the Acting Secretary's decision has "undermined [the] political process" by frustrating their "attempt[s] to negotiate a legislative solution," U.S. Br. 32, the most perplexing aspect of this case may be that they have not done so. If the agency issues a new decision, any further judicial review would properly focus on whatever rationales are publicly proffered to support it. Until then, however, petitioners must defend their decision to terminate DACA on the legal rationale they offered to the public and the courts in the decision memorandum signed by Acting Secretary Duke.

III. THE JUDGMENTS OF THE COURTS BELOW SHOULD BE AFFIRMED

Because the contemporaneous rationale that the agency offered for the termination decision rests on an incorrect and inadequately explained premise, the decision is subject to vacatur. *See* 5 U.S.C. § 706(2)(A). It follows that the final judgment of the D.C. district court should be affirmed. It follows *a fortiori* that the respondents in the California and New York actions are likely to succeed on the merits. And the equitable considerations here tilt overwhelmingly in favor of affirming the provisional relief granted in those proceedings: petitioners have not identified any tangible harm caused by DACA; and they do not dispute the profound harm that their decision would cause to

individuals, families, communities, employers, universities, and States as a result of nearly 700,000 DACA recipients losing their deferred action. *See, e.g.*, *Regents* Pet. App. 62a-63a.

Although the D.C. case arrives at this Court following a final judgment, the California and New York cases remain in an interlocutory posture, following the district courts' partial denials of petitioners' motions to dismiss. In the California case, for example, the lower courts ruled that respondents stated a due process claim regarding changes to the federal policy governing the sensitive personal information provided by DACA recipients. *Regents* Supp. App. 68a-73a; *Regents* Pet. 79a-81a. Petitioners mentioned those rulings in their petition, *see Regents* Pet. 31, but have forfeited any challenge to them by omitting the issue from their merits brief. *See, e.g.*, *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 140 n.2 (2014).[20]

As to the pending APA claims, the respondents in California and New York (unlike those in D.C.) have challenged the adequacy of the 14-document administrative record proffered by petitioners—and every court to consider that question has held that the proffered record is incomplete.[21] If this Court holds that

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[20] Although the state respondents in the California proceeding did not allege an equal protection claim based on discriminatory animus (*see* U.S. Br. 52-57), the court of appeals correctly denied the motion to dismiss as to that claim (*see Regents* Supp. App. 73a-77a).

[21] *See In re United States*, 875 F.3d 1200, 1205 (9th Cir. 2017), *judgment vacated*, 138 S. Ct. 443 (2017); *In re Nielsen*, No. 17-3345, Dkt. 171 at 2-3 (2d. Cir. Dec. 27, 2017); *Regents* D.Ct. Dkt. 79 at 8; *Batalla Vidal* D.Ct. Dkt. 89 at 3.

the APA claim is reviewable and then affirms the judgment in the D.C. case, that would substantially resolve the remaining proceedings. But if the claim is reviewable and the D.C. judgment is not affirmed in its entirety, then the California and New York cases should be remanded for completion of the administrative record.

Obtaining the complete record is not a matter of mere academic significance. Petitioners promoted and continued DACA well into the present federal administration and long after the rulings in the DAPA case; they terminated the policy after private deliberations with the state plaintiffs in the DAPA litigation (which are not reflected in the proffered administrative record); and they chose to offer a legal conclusion as the sole basis for the decision, but have separately advanced numerous policy rationales (which also are not reflected or supported in the proffered record), *see, e.g.*, J.A. 999-1004; *Regents* Pet. App. 123a-125a. That sequence of events raises legitimate questions about whether the rationale offered by the agency here is a "contrived excuse." *See Regents* Supp. App. 75a. While agencies normally enjoy a presumption of regularity, U.S. Br. 30, the courts are always entitled to obtain the complete administrative record before finally resolving the legality of agency action—to ensure, among other things, that the rationale offered by the agency is a genuine one. *Cf. Dep't of Commerce*, 139 S. Ct. at 2575 (court order requiring completion of administrative record led to documents establishing that "the sole stated reason" for the agency decision "seems to have been contrived").

CONCLUSION

The judgments below should be affirmed.

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