No. 18-587

In the Morris Tyler Moot Court of Appeals at Yale

U.S. 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

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

Facing an imminent threat of litigation, the Secretary of Homeland Security exercised her discretion to wind-down the Deferred Action for Childhood Arrivals (DACA) program. The Fifth Circuit had already enjoined a similar program, Deferred Action for Parents of Americans (DAPA). And the prevailing states were threatening to sue to enjoin DACA under a nearly identical legal theory. Hoping to avoid the chaotic consequences of an immediate shutdown following a second nationwide injunction, the Department concluded that the best option was an orderly, six-month wind-down.

The questions presented are:

1. Whether the Secretary of Homeland Security's discretionary decision to wind-down DACA is judicially reviewable.
2. Whether the Secretary of Homeland Security's decision to wind-down DACA in the face of serious litigation risk is lawful.

LIST OF ALL PARTIES

Petitioners, who were defendants-appellants below, are: U.S. Department of Homeland Security; Kirstjen Nielsen, Secretary of the Department of Homeland Security; William Barr, Attorney General; Donald J. Trump, President of the United States; and the United States of America.

Respondents, who were plaintiffs-appellees below, are: Regents of the University of California; Janet Napolitano, President of the University of California; State of California; State of Maryland; County of Santa Clara; City of San Jose; Service Employees International Union Local 521; Dulce Garcia; Miriam Gonzalez Avila; Saul Jimenez Suarez; Viridiana Chabolla Mendoza; Jirayut Latthivongskorn; and Norma Ramirez.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
INTRODUCTION 1
STATEMENT 2
A. Factual background 2
1. The DACA and DAPA programs. 3
2. The *Texas* litigation. 4
3. DHS reconsiders deferred-action policies. 5
4. The rescission of DACA. 7
B. Proceedings below 9
1. The government seeks mandamus. 9
2. The district court's findings. 10
3. The Ninth Circuit affirms. 11
SUMMARY OF ARGUMENT 11
ARGUMENT 15
I. The Rescission Memorandum is not judicially reviewable. 15
A. The APA bars review of this action because it is "committed to agency discretion by law." 16

TABLE OF CONTENTS—continued

Page

1. *Chaney*'s presumption against review applies to the Rescission Memorandum. 16

2. Courts may not carve reviewable questions out of unreviewable actions. 21

B. The INA bars review of this action. 30

1. Section 1252(g) strips courts of jurisdiction over no-deferred-action decisions. 31

2. The rescission of DACA is a "decision to * * * commence proceedings." 32

II. The rescission of DACA was not arbitrary and capricious. 33

A. DHS provided several rational reasons for rescinding DACA. 33

1. DHS reasonably believed that DACA would be challenged and invalidated. In fact, that is exactly what happened. 34

2. DHS reasonably made the independent assessment that DACA was unlawful. 39

3. DHS reasonably concluded Congress was the appropriate actor to grant benefits to a broad class of immigrants. 39

TABLE OF CONTENTS—continued

Page

B. The gradual wind-down bolsters the reasonableness of DACA's rescission..... 40
III. Respondents' alternative theories for upholding the preliminary injunction should be dismissed. 43
A. The APA notice-and-comment claim should be dismissed. 43
1. The rescission of DACA is not a new, binding substantive rule. 43
2. This Court has rejected the "one-bite" doctrine in a substantially similar context, and should do so here. 44
B. The due process information-sharing claim should have been dismissed. 45
C. The equal protection claim should have been dismissed. 48
1. This claim is foreclosed by *AADC* and *Armstrong*. 48
2. DHS's legitimate justifications in the record should be the stopping point for this claim. 49
3. Even if the Court looks beyond the record, respondents fail to make out a plausible equal protection claim. 50
CONCLUSION 52

TABLE OF AUTHORITIES

Page(s)

CASES

Alvidres-Reyes v. *Reno*, 180 F.3d 199 (5th Cir. 1999) 32
Arizona v. *United States*, 567 U.S. 387 (2012)...15, 17
Ass'n of Irritated Residents v. *E.P.A.*, 494 F.3d 1027 (D.C. Cir. 2007) 25
Batalla Vidal v. *Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018) 48
Botezatu v. *INS*, 195 F.3d 311 (11th Cir. 1999).....32
Bordenkircher v. *Hayes,* 434 U.S. 357 (1978).....27
Bowman Transp., Inc. v. *Ark.-Best Freight Sys., Inc.*, 419 U.S. 281 (1974).....24
Casa de Maryland v. *U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758 (D. Md. 2018) .....*passim*
Chapinski v. *Ziglar*, 278 F.3d 718 (7th Cir. 2002) 32
City of Arlington v. *FCC*, 569 U.S. 290 (2013).....21
City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985).....51
Crane v. *Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013), aff'd *sub nom. Crane* v. *Johnson,* 783 F.3d 244 (5th Cir. 2015).....3
*Crowley Caribbean Tran*sp., Inc. v. Pena, 37 F.3d 671 (D.C. Cir. 1994).....26, 27, 28
Dunlop v. *Bachowski,* 421 U.S. 560 (1975) 16
Encino Motorcars v. *Navarro*, 136 S. Ct. 2117 (2016) 42
Ex parte Fahey, 332 U.S. 258 (1947) 9

TABLE OF AUTHORITIES—continued

Page(s)

FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) 17-18, 40, 41
Fed. Election Comm'n v. *Akins*, 524 U.S. 11 (1998) 29
Fiallo v. *Bell*, 430 U.S. 787 (1977) 49
Hamdan v. Rumsfeld, 548 U.S. 557 (2006) 49
Heckler v. *Chaney*, 470 U.S. 821(1985) .....*passim*
ICC v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) 12, 21, 26, 28, 29
In re United States, 138 S. Ct. 443 (2017) 9
Int'l Union v. *Brock*, 783 F.2d 237 (D.C. Cir. 1986) 27, 29
Int'l Longshoremen's Ass'n v. *Nat'l Mediation Bd.*, 785 F.2d 1098 (D.C. Cir. 1986) 27
Kenney v. *Glickman*, 96 F.3d 1118 (8th Cir. 1996) 27, 28, 29
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 15, 49
Mada-Luna v. *Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987) 43
Massachusetts v. *EPA*, 549 U.S. 497 (2007) 27
Montana Air Chapter No. 29 v. *Fed. Labor Relations Bd.*, 898 F.2d 753 (1990) 27, 29
Morrison v. *Olson*, 487 U.S. 654 (1988) 30
Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. *State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983) 17, 23, 38, 45
Mullins v. *U.S. Dep't of Energy*, 50 F.3d 990 (Fed. Cir. 1995). 25, 38

TABLE OF AUTHORITIES—continued

Page(s)

NAACP v. *Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018) 17, 19, 20, 41

Nat'l Coal. Against the Misuse of Pesticides v. *EPA*, 867 F.3d 636 (D.C. Cir. 1989) 38

Paralyzed Veterans of Am. v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) 44

Planned Parenthood v. *Casey*, 505 U.S. 833, 851 (1992) 42

Perales v. *Casillas*, 903 F.2d 1043 (5th Cir. 1990) 20

Perez v. *Mortgage Bankers Association*, 135 S. Ct. 1199 (2015) 14, 44

Perry v. *Sindermann*, 408 U.S. 593 (1972)...14, 45, 46

Personnel Adm'r of Mass. v. *Feeney*, 442 U.S. 256 (1979) 51

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. *U.S. Dep't of Agr.*, 499 F.3d 1108 (9th Cir. 2007).....38

Regents of the Univ. of Cal. v. *Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018) .....*passim*

Regents of the Univ. of Cal. v. *Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018) 9, 10

Regents of the Univ. of California v. *United States Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304 (N.D. Cal. 2018).....9, 10, 49

Reno v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1990).....*passim*

Romer v. Evans, 517 U.S. 620 (1996) 51

TABLE OF AUTHORITIES—continued

Page(s)

Safe Energy Coal. of Michigan v. *U.S. Nuclear Regulatory Comm'n*, 866 F.2d 1473 (D.C. Cir. 1989) 26-27

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*) 23

SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) (*Chenery II*).....28

Texas v. *United States*, 809 F.3d 134 (5th Cir. 2015) (*Texas I*) .....*passim*

Texas v. *United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).....3, 4

Texas v. *United States*, 201 F. Supp. 3d 810, 815-816 (N.D. Tex. 2016) 41

Texas v. *United States*, 328 F. Supp. 3d 662 (S.D. Tex. 2018) (*Texas II*) .....*passim*

Town of Castle Rock v. *Gonzales*, 545 U.S. 748 (2005) 46

Trump v. *Hawaii*, 138 S. Ct. 2392 (2018)10, 15, 50, 51

United States v. *Armstrong*, 517 U.S. 456 (1996) 14, 27, 48, 49

United States v. *Texas*, 136 S. Ct. 2271 (2016) (per curiam), reh'g den., 137 S. Ct. 285 (2016) (per curiam).....5

Vasquez v. *Aviles*, 639 F. App'x 898 (3d Cir. 2016) 31

Vill. of Arlington Heights v. *Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977).....15, 50

Washington v. *Davis*, 426 U.S. 229 (1976) 50

TABLE OF AUTHORITIES—continued

Page(s)

Washington v. *Trump* 2:17-cv-00141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) 41

Wayte v. *United States*, 470 U.S. 598 (1985).....16

Webster v. *Doe*, 486 U.S. 592, 600 (1988) 21

Young Dong Kim v. *Holder*, 737 F.3d 1181 (7th Cir. 2013) 31-32

CONSTITUTION, STATUTES, AND RULES

U.S. Const. amend. XIV .....*passim*

Administrative Procedure Act, ch. 324, 60 Stat. 237 (5 U.S.C. 551 et seq., 701 et seq.)

5 U.S.C. 553(b)(A) 43, 44

5 U.S.C. 555(e).....27

5 U.S.C. 701(a)(2).....11, 16, 20

5 U.S.C. 706(2)(A) 33

Immigration and Nationality Act, ch. 12, 79 Stat. 911, as amended (8 U.S.C. 1101 et seq.)

8 U.S.C. 1103(a)(1).....24

8 U.S.C. 1182(a)(6)(A)(i) 37

8 U.S.C. 1182(a)(9)(b).....37

8 U.S.C. 1252(b)(9).....33

8 U.S.C. 1252(g) 12, 31, 32, 33

Special Immigrant Juvenile (SIJ) Status, 8 U.S.C. 1101(a)(27)(J).....37

William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, 8 U.S.C. 1232.....37

2 U.S.C. 437(g)(a)(8)(A).....29

TABLE OF AUTHORITIES—continued

Page(s)

8 C.F.R. § 274a.12(14) 19-20
Fed. R. Evid. 201 48

MISCELLANEOUS

Development, Relief, and Education for Alien Minors Act (DREAM)
S. 952, 112th Congress (2011) 3, 40
H.R. 6497, 111th Congress (2010) 3, 40
S. 3962, 111th Congress (2010) 3, 40
S. 3827, 111th Congress (2010) 3, 40
H.R. 1751, 111th Congress (2009) 3, 40
S. 2205, 110th Congress (2007) 3, 40
H.R. 1275, 110th Congress (2007) 3, 40
H.R. 5131, 109th Congress (2006) 3, 40
S. 2075, 109th Congress (2005) 3, 40
S. 1545, 108th Congress (2003) 3, 40
S. 1291, 107th Congress (2001) 3, 40

Executive Order No. 13768, Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017). 6

Josh Gerstein & Seung Min Kim, *Supreme Court Impasse on Immigration Threatens "Dreamers," Too*, Politico (June 23, 2016), https://perma.cc/E2KC-UNZL. 5, 34

Letter from Jeff Sessions, U.S. Att'y Gen., to Elaine Duke, Acting Sec'y, Dep't of Homeland Sec. (Sept. 4, 2017) (Sessions Letter) ..... *passim*

TABLE OF AUTHORITIES—continued

Page(s)

Letter from Ken Paxton, Att'y Gen of Texas to Jeffrey Sessions, U.S. Att'y Gen. (June 28, 2015) (Paxton Letter).....6, 7, 23, 34

Lin Manuel Miranda, *My Shot*, *in* Hamilton (2015) 44

Memorandum from Elaine Duke, Acting Sec'y, Dep't of Homeland Sec. to James McCament, Acting Dir., U.S. Citizenship & Immigration Servs. et al. (Sept. 5, 2017) (Rescission Memorandum) .....*passim*

Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec. to David Aguilar, Acting Comm'r, U.S. Customs & Border Patrol et al. (June 15, 2012) (DACA Memorandum) .....*passim*

Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec. to Thomas Winkowski, Acting Dir., U.S. Immigration & Customs Enf't et al. (Nov. 20, 2014) (DAPA Memorandum) 4, 35

Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec. to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Control et al. (Feb. 20, 2017).....6

Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec. to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Control et al. (June 15, 2017).....6, 23

Memorandum from Kirstjen Nielsen, Sec'y, Dep't of Homeland Sec. (June 22, 2018) 36

TABLE OF AUTHORITIES—continued

Page(s)

Order to Complete the Administrative Record (Dkt. No. 79) 9

The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United State and to Defer Removal of Others, 38 Op. O.L.C. 1, 18 n.8 (2014) 9

U.S. Citizenship & Immigration Services, Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012–2018 (Sept. 30, 2018).....42

U.S. Citizenship & Immigration Services, Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012–2017 (Mar. 31, 2017) 36

USCIS, Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017).....47

USCIS, Guidance on Rejected DACA Requests: Frequently Asked Questions (Nov. 30, 2017) 47-48

USCIS, DACA Frequently Asked Questions, https://perma.cc/Y9YZ-BYA4.....46

OPINIONS BELOW

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JURISDICTION

The court of appeals entered judgment on November 8, 2018. This Court granted certiorari and has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

An appendix has been affixed reproducing the relevant constitutional and statutory provisions.

INTRODUCTION

Following a months-long deliberative process, the Department of Homeland Security (DHS) reasonably determined that DACA presented serious litigation risk and should be rescinded. Legal issues had mired the program's implementation from day one. A majority of the states had won an injunction against a similar program, DAPA, on nearly identical questions of law. And now, eleven of those states were threatening to sue to enjoin DACA as well.

Better, DHS concluded, to dictate the terms of an orderly end than rearrange deck chairs on the Titanic. If DACA were invalidated in the courts, more than 800,000 young people were likely to be left in limbo by the chaos of a nationwide injunction.

Respondents disagreed. And in an effort to protect their preferred policy, they have advanced inconsistent positions. While DACA's implementation did not require notice and comment—they say—its

rescission does. And while DACA was fundamentally an exercise of prosecutorial discretion—they claim—its rescission is not.

The government has spent significant sums defending its deferred-action policies against challenge after challenge. This administration determined that those funds could be better used elsewhere. In the exercise of its discretion, DHS reversed its prior nonenforcement action. That is exactly the sort of discretionary decision that courts may not review.

But like the old parable of blind men mistaking an elephant for a tree-trunk or a snake, the courts below latched onto individual aspects of the record and missed its overarching theme: litigation risk. Cherry-picking certain statements for analysis while ignoring others, the Ninth Circuit rejected the discretionary justifications in the record. Seizing on the opportunity to opine on DACA's lawfulness, the court found the rescission reviewable and unlawful.

Politics often predominate, but they need not here. This Court should affirm the agency's action as a fundamental exercise of prosecutorial discretion.

STATEMENT

A. Factual background

Elected on the promise of border security and immigration reform, the President entered office eager to effect the will of the American people. Within days of his inauguration, the President issued an executive order establishing new immigration enforcement priorities. Consistent with standard practice, DHS began rescinding conflicting policies.

At the same time, eleven state attorneys general threatened to sue to enjoin the prior administration's deferred-action programs. These states had already

won injunctive relief against DAPA. Now, they planned to challenge DACA too, and they had put the new administration on notice. Recognizing the similarities between these programs and the potentially chaotic results of a nationwide injunction, DHS opted for an orderly wind-down of DACA.

1. The DACA and DAPA programs.

a. The Obama Administration first launched DACA in June 2012, on the heels of a failed attempt to enact the DREAM Act.[1] Under DACA, undocumented immigrants who met many of the criteria of the DREAM Act had the opportunity to apply for deferred action. See Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec. to David Aguilar, Acting Comm'r, U.S. Customs & Border Patrol et al. (June 15, 2012) (DACA Memorandum). Individuals who came to the United States before age sixteen; met certain age, residency, and education requirements; and lacked serious criminal convictions could apply. *Ibid*. As many as 1.7 million people were eligible. *Texas* v. *United States,* 86 F. Supp. 3d 591, 608 (S.D. Tex. 2015).

Almost immediately, Mississippi and several Immigration and Customs Enforcement (ICE) employees sued to enjoin DACA. *Crane* v. *Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013), aff'd *sub*

[1] In the decade preceding DACA, the DREAM Act was proposed and rejected by Congress eleven times. See S. 952, 112th Congress (2011); H.R. 6497, 111th Congress (2010); S. 3962, 111th Congress (2010); S. 3827, 111th Congress (2010); H.R. 1751, 111th Congress (2009); S. 2205, 110th Congress (2007); H.R. 1275, 110th Congress (2007); H.R. 5131, 109th Congress (2006); S. 2075, 109th Congress (2005); S. 1545, 108th Congress (2003); S. 1291, 107th Congress (2001).

nom. Crane v. *Johnson,* 783 F.3d 244 (5th Cir. 2015). They argued that DACA was inconsistent with the Immigration and Nationality Act (INA); should have gone through notice-and-comment rulemaking under the Administrative Procedure Act (APA); and violated constitutional separation of powers. *Id.* at 730-731. The suit was dismissed on standing grounds, *id.* at 732-746, but Mississippi went on to join the later successful challenge to DAPA.

b. Facing another stalemate on congressional immigration reform, the Obama Administration introduced a second deferred-action program in 2014. See Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec. to Thomas Winkowski, Acting Dir., U.S. Immigration & Customs Enf't et al. (Nov. 20, 2014) (DAPA Memorandum). The DAPA Memorandum instructed the U.S. Citizenship and Immigration Services (USCIS) to establish a process "similar to DACA" for granting deferred action to parents of U.S. citizens and lawful permanent residents. *Ibid.* The DAPA Memorandum also expanded DACA by removing the age cap; extending the renewal and work authorization timeline; and modifying the date-of-entry requirement.

2. The Texas *litigation.*

Immediately thereafter, Texas and twenty-five other states filed suit to enjoin DAPA and expanded-DACA. Before either program went into effect, the district court issued a preliminary injunction. See *Texas* v. *United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), aff'd, 809 F.3d 134 (5th Cir. 2015) (*Texas I*).

The Fifth Circuit affirmed, holding DAPA and expanded-DACA unlawful for two reasons. *First*, the Fifth Circuit concluded that these programs should

have gone through notice and comment. 809 F.3d at 170-178. The Fifth Circuit found that the Memorandum's language that "purport[ed] to confer discretion" was "pretextual" based on "evidence that the DACA application process *itself* did not allow for discretion." *Id.* at 172-174. *Second*, the court concluded that DAPA and expanded-DACA were incompatible with "the INA's intricate system of immigration classifications and employment eligibility." *Id.* at 184.

This Court affirmed by an equally divided vote, see *United States* v. *Texas*, 136 S. Ct. 2271 (2016) (per curiam), and denied a petition for rehearing, 137 S. Ct. 285 (2016) (per curiam).

After the ruling, Texas Attorney General Ken Paxton left open the possibility that the same coalition of states would seek to enjoin DACA. See Josh Gerstein & Seung Min Kim, *Supreme Court Impasse on Immigration Threatens "Dreamers," Too*, Politico (June 23, 2016), https://perma.cc/E2KC-UNZL. Legal commentators across the political spectrum expressed doubt about DACA's future. As the former Chief Counsel of USCIS under President Obama explained, "This decision clearly opens the door to a new lawsuit challenging DACA. If [states] bring the action * * * there is a good chance [the judge] will issue another preliminary injunction." *Ibid.*

Following the 2016 election, the parties agreed to a stay to allow the new administration to reconsider the policies.

3. DHS reconsiders deferred-action policies.

a. Five days after his inauguration, President Trump issued an Executive Order outlining the administration's immigration-enforcement priorities. See Executive Order No. 13768, Enhancing Public

Safety in the Interior of the United States (Jan. 25, 2017). The order rejected class-based deferred action, stating, "We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement." *Id.* The President "direct[ed] executive departments and agencies * * * to employ all lawful means to enforce the immigration laws." *Ibid.*

DHS Secretary John Kelly then began the months-long, deliberative process of revising DHS's policies. He issued a new priorities memorandum, announcing, "the Department no longer will exempt classes or categories of removable aliens from potential enforcement." See Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec. to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Control et al. (Feb. 20, 2017). This memorandum left DACA and DAPA temporarily in place while DHS continued its review.

b. Four months later, Secretary Kelly exercised his discretion to rescind DAPA based on the "preliminary injunction, the ongoing litigation, the fact that DAPA never took effect, and our new immigration enforcement priorities." See Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec. to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Control et al. (June 15, 2017).

c. Consistent with prior threats, the attorneys general of eleven states wrote U.S. Attorney General Jeff Sessions to announce their intent to challenge DACA. See Letter from Ken Paxton, Att'y Gen of Texas to Jeffrey Sessions, U.S. Att'y Gen. (June 28, 2015) (Paxton Letter). They argued that DACA was unlawful for many of the same reasons as DAPA. Specifically, they argued that "just like DAPA, DACA

unilaterally confers eligibility for work authorization, and lawful presence without any statutory authorization from Congress." *Ibid.* (citation omitted).

d. Attorney General Sessions evaluated the litigation risk posed by this letter in light of his concerns about DACA's lawfulness, the injunction against DAPA, the similarities between the programs, and the President's priorities. Taking all these matters into account, the Attorney General advised the Acting Secretary of DHS, Elaine Duke, to rescind DACA. See Letter from Jeff Sessions, U.S. Att'y Gen., to Elaine Duke, Acting Sec'y, Dep't of Homeland Sec. (Sept. 4, 2017) (Sessions Letter).

The Attorney General explained, "[b]ecause the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA." *Ibid.* This litigation risk was unacceptable, in no small part because it would prevent the program's "orderly and efficient wind-down." *Ibid.* The Attorney General also highlighted the program's inconsistency with the President's priorities. *Ibid.* ("Proper enforcement of our immigration laws is, as President Trump consistently said, critical to the national interest and to the restoration of the rule of law in our country."). Finally, the Attorney General expressed constitutional concerns about the need for Congress to spearhead major immigration reforms. *Ibid.*

4. The rescission of DACA.

Believing imminent litigation was likely to result in the invalidation and immediate termination of DACA, Acting Secretary Duke rescinded the program. See Memorandum from Elaine Duke, Acting

Sec'y, Dep't of Homeland Sec. to James McCament, Acting Dir., U.S. Citizenship & Immigration Servs. et al. (Sept. 5, 2017) (Rescission Memorandum).

She recounted the history relevant to her decision, including the *Texas* litigation, the President's revised priorities, DAPA's rescission, and the threatened new litigation. *Ibid.*

In evaluating litigation risk, Acting Secretary Duke emphasized that "both the district and appellate court decisions relied on factual findings about the implementation of the 2012 DACA memorandum." *Ibid.* These findings led the Fifth Circuit to conclude "that DACA decisions were not truly discretionary." *Ibid.* The Acting Secretary further noted that "USCIS has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria * * * but still had his or her application denied based solely upon discretion." *Id.* at n.1.

Taking to heart the potential reliance interests of current DACA recipients, Acting Secretary Duke determined that an orderly six-month wind-down presented the best path forward. A gradual wind-down would avoid the chaos of an immediate shutdown following a nationwide injunction. During the interim period, DHS would continue to adjudicate all pending initial requests; pending renewal requests; and renewal requests filed within one month by individuals whose benefits would expire before March 5, 2018. *Ibid.* All previous grants of deferred action would remain in effect until expiration. *Ibid.*

Finally, Acting Secretary Duke made clear that DHS would "continue to exercise its discretionary authority" and that the Memorandum placed "no lim-

itations * * * on the otherwise lawful enforcement or litigation prerogatives of DHS." *Ibid.*

B. Proceedings below

The Regents of the University of California; several states; cities and towns in the San Francisco Bay Area; a local employee union; and individual DACA recipients filed suit to prevent the program's wind-down. The cases were consolidated in the Northern District of California. See *Regents of the Univ. of Cal.* v. *Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018); *Regents of the Univ. of Cal.* v. *Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304 (N.D. Cal. 2018).

Plaintiffs raised a variety of claims, several of which were ultimately dismissed. Ignoring DHS's many discretionary rationales, plaintiffs alleged that DACA's rescission was arbitrary and capricious and should have gone through notice and comment. Plaintiffs further raised two novel due process claims and an equal protection claim based entirely on evidence outside the record.

1. The government seeks mandamus.

Despite the ordinary presumption that the administrative record is complete, the district court ordered the agency to supplement the record. Order to Complete the Administrative Record (Dkt. No. 79). The agency petitioned for mandamus relief.

Although mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes," *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947), this Court vacated the district court's order and instructed the court to rule on the government's reviewability arguments on the record provided. *In re United States*, 138 S. Ct. 443, 445 (2017).

2. The district court's findings.

On remand, DHS moved to dismiss. DHS argued that the decision to rescind DACA was unreviewable under the APA and INA, and that several plaintiffs lacked standing. The agency also sought dismissal of plaintiffs' APA, due process, equal protection, and equitable-estoppel claims under Rule 12(b)(6).

The district court dismissed several claims outright. First, the court dismissed plaintiffs' notice-and-comment claim, holding, if "the original promulgation of the discretionary program did not require notice and comment, a return to the status quo ante also does not." *Regents*, 298 F. Supp. 3d at 1310.

Second, the court dismissed plaintiffs' due process claim with respect to deferred action. Because deferred action "is a privilege created by Congress, denial of such relief cannot violate a substantive interest protected by the Due Process clause." *Ibid.*

Third, the court dismissed plaintiffs' novel equitable-estoppel claim. *Id.* at 1313. Finally, the court dismissed two state plaintiffs for lack of standing. *Regents*, 279 F. Supp. 3d at 1036.

The district court provisionally allowed plaintiffs' information-sharing and equal protection claims to proceed. On the latter, however, it expressed serious doubt as to whether the President's campaign statements were admissible, noting that "such admissibility can readily lead to mischief in challenging the policies of a new administration." *Regents*, 298 F. Supp. 3d at 1315. Without the benefit of this Court's decision in *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018), the court deferred to Ninth Circuit precedent. *Ibid.*

However, blinding itself to the government's discretionary justifications, the court found DACA's re-

scission reviewable. The court concluded that plaintiffs would succeed on the merits of their arbitrary-and-capricious claim, entering a nationwide preliminary injunction. DHS appealed, and plaintiffs' cross-petitioned for interlocutory review.

3. The Ninth Circuit affirms.

Likewise ignoring the government's discretionary justifications, the Ninth Circuit affirmed. *Regents of the Univ. of Cal.* v. *Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018). The court concluded that the agency had offered only one rationale: unlawfulness. *Id.* at 499-503. Declining to evaluate DHS's other justifications, the Ninth Circuit found the rescission reviewable as well as arbitrary and capricious. *Id.* at 494-510. The court also affirmed on all 12(b)(6) issues. *Id.* at 512-520.

DHS petitioned for certiorari on all issues which it lost below. Respondents cross-petitioned on the notice-and-comment claim, declining to pursue their deferred-action and equitable-estoppel claims. This Court granted certiorari on all petitioned questions.

SUMMARY OF ARGUMENT

I. The APA and the INA bar review of DACA's rescission.

First, the APA bars review of this action because it is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). While the APA ordinarily favors judicial review, that presumption is reversed for nonenforcement actions. *Heckler* v. *Chaney*, 470 U.S. 821, 830-831 (1985). This remains true for decisions to *rescind* prior nonenforcement actions like DACA. The decision to rescind involves the same discretionary balancing as the decision not to enforce.

The Rescission Memorandum was driven by classic *Chaney* concerns, including the likelihood of success in court, proper allocation of resources, and consistency with the agency's priorities. As in *Chaney*, the Rescission Memorandum did not directly initiate new enforcement action. Thus, it provides no focus for judicial review. And, as in *Chaney*, the Rescission Memorandum did not involve the exercise of coercive power. Finally, the fact that DACA operated on a large-scale does not alter the application of *Chaney*'s presumption against review.

Because DHS offered several unmistakably discretionary reasons for DACA's rescission, this Court need not address whether *Chaney* would still apply if the agency had based its decision solely on DACA's lawfulness. The Ninth Circuit reached this question only because it ignored the administrative record and shut its eyes to the agency's discretionary rationales. Moreover, even if the Ninth Circuit were correct that the only reason provided by the agency was DACA's lawfulness, the Rescission Memorandum would still be unreviewable. Unreviewable decisions do not become otherwise simply because the agency gives a reviewable reason. *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987).

Second, § 1252(g) of the INA independently bars review. That provision strips jurisdiction over "decisions to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. 1252(g). Section 1252(g) was aimed at fixing a particular problem: judicial interference in the Executive's exercise of prosecutorial discretion. No-deferred-action decisions are quintessential exercises of prosecutorial discretion, as this Court affirmed in *Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-490 (1990).

II. Even assuming the rescission is reviewable, it was not arbitrary and capricious. DHS provided several rational reasons for rescinding DACA: (1) DACA presented a major litigation risk; (2) DACA was unlawful; (3) Congress was the preferred actor to enact immigration reform affecting the status of millions of undocumented immigrants; and (4) a gradual wind-down of DACA better served the interests of those impacted than would a chaotic and immediate shutdown following an injunction.

First, the government reasonably believed that DACA presented a serious litigation risk. This belief turned out to be prescient. States did sue to invalidate DACA, and they won. *Texas* v. *United States*, 328 F. Supp. 3d 662, 735 (S.D. Tex. 2018) (*Texas II*).

Even before that suit, DHS reasonably believed that DACA presented clear litigation risks. For one, the agency reasonably believed that DACA presented serious notice-and-comment concerns, given the Fifth Circuit's reliance on facts from DACA' s implementation in *Texas I*. DHS also reasonably believed that DACA presented serious concerns under the INA. Congress had enacted programs for migrants like those eligible for DACA. And the INA's general work authorization and lawful-presence provisions conflicted with DACA just as much as they did with DAPA. Finally, DHS reasonably believed that Congress was the more appropriate actor to grant benefits to a broad class of undocumented immigrants.

Second, the gradual wind-down bolsters the reasonableness of DACA's rescission. DHS rationally believed that, if DACA were invalidated, it would be enjoined—resulting in a chaotic and disorderly shutdown. By opting for a six-month wind-down, the Acting Secretary considered any practical reliance inter-

ests that may have formed, notwithstanding the lack of legal entitlement.

III. Respondents alternative theories for upholding the preliminary injunction should be dismissed.

First, the dismissal of the APA notice-and-comment claim should be affirmed. The Rescission Memorandum is not a new substantive rule. The relevant question is not whether DACA applications are accepted by DHS officials, it is whether those officials retain discretion to grant deferred action. They unquestionably do.

This Court has rejected a "one-bite" doctrine in a substantially similar context and should do so here. See *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015). As in *Perez*, nothing in the Rescission Memorandum binds future administrations to that policy.

Second, the due process information-sharing claim should be dismissed. Respondents have no enforceable due process rights. There were never any "mutually explicit understandings" guaranteeing information-sharing protections. *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972). DHS's public notices explicitly state the opposite. Even if respondents had an enforceable due process right, they have failed to plausibly allege that the Department's information-sharing policy has changed. In fact, it has not.

Third, the equal protection claim should be dismissed. To start, the claim is foreclosed. Selective-prosecution claims are barred in the immigration arena. See *AADC*, 525 U.S. 471. And regardless, respondents fail to meet the heightened pleading standard for such claims. See *United States* v. *Armstrong*, 517 U.S. 456 (1996).

Moreover, this Court's review of respondents' equal protection claim should start and end with the Department's legitimate justifications. Courts defer to any "facially legitimate and bona fide reason" for agency action and "do not look behind the exercise of that discretion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972). *Mandel*'s presumption against extra-record inspection is sensible, and there is good reason to avoid second-guessing based on campaign statements. This Court reaffirmed as much last term in *Trump* v. *Hawaii*, 138 S. Ct. 2393, 2418 (2018).

Finally, even if the Court looks beyond the face of the record, respondents fail to make out a plausible equal protection claim. There is no evidence of discriminatory purpose. To the contrary, the President has repeatedly expressed support for DACA recipients. If anything, looking beyond the administrative record, this Court will only find confirmation that DHS's justifications were legitimate.

ARGUMENT

I. The Rescission Memorandum is not judicially reviewable.

The unbroken refrain of this Court's decisions is the Executive's "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona* v. *United States*, 567 U.S. 387, 394 (2012). Nowhere is that power greater than in the Executive's exercise of prosecutorial discretion through deferred action. Consistent with this refrain, the APA and INA bar review of this action.

A. The APA bars review of this action because it is "committed to agency discretion by law."

At heart, DACA's rescission is a choice about how often and to whom to grant deferred action. In other words, it is an action "committed to agency discretion by law" and thus unreviewable. 5 U.S.C. 701(a)(2).

1. Chaney*'s presumption against review applies to the Rescission Memorandum.*

While the APA ordinarily favors judicial review, that presumption is reversed for agency nonenforcement actions. *Heckler* v. *Chaney*, 470 U.S. 821, 830-831 (1985). That is because "an agency's decision not to prosecute or enforce * * * is a decision generally committed to an agency's *absolute discretion*." *Id.* at 831 (emphasis added).

Nonenforcement decisions are inherently "ill-suited to judicial review." *Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-490 (1990) (*AADC*). Such decisions call for a "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Chaney*, 470 U.S. at 831. These factors include "whether a violation has occurred, * * * whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, [and] whether the particular enforcement action requested best fits the agency's overall policies." *Ibid.* Thus, in the absence of detailed statutory factors guiding review, courts should not—and do not—evaluate agencies' decisions not to enforce. *Id.* at 834-835; *Dunlop* v. *Bachowski,* 421 U.S. 560, 565-566 (1975).

Nowhere is the need for this discretion greater than in the immigration setting. As this Court has

repeatedly recognized, *Chaney*'s "concerns are greatly magnified in the deportation context." *AADC*, 525 U.S. at 490. As with any prosecution, removal decisions are frequently based on factors "not readily susceptible to the kind of analysis the courts are competent to undertake." *Ibid.* Decisions to grant or not grant deferred action frequently involve an intricate weighing of enforcement priorities, resources, and concerns about the deterrent effect of leniency. It should thus come as no surprise that the "broad discretion exercised by immigration officials" is a "principal feature of the removal system." *Arizona*, 567 U.S. at 396.

This presumption against review applies to the Rescission Memorandum for four reasons.

First, *Chaney*'s presumption operates just as strongly for decisions to *rescind* nonenforcement policies as it does for decisions to *implement* them. These decisions involve exactly the same balancing and resource allocation. See *NAACP* v. *Trump*, 298 F. Supp. 3d 209, 231 (D.D.C. 2018) ("[T]his Court has little difficulty concluding that *Chaney* extends to the *revocation* of nonenforcement decisions.").

This symmetry makes good sense, both in the abstract and as applied to the Rescission Memorandum. In general, the APA does not treat the decision to rescind differently from the decision to implement. The rescission of a substantive rule, for example, is subject to the same arbitrary-and-capricious standard as its promulgation. See *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins.*, 463 U.S. 29, 41 (1983); see also *FCC* v. *Fox Television Studios, Inc.*, 556 U.S. 502, 515 (2009) (holding the same for policies made via adjudication).

More important, the Rescission Memorandum itself relies on the same discretionary balancing and resource allocation as any other nonenforcement action. Indeed, the agency expressly rested its decision on several of the rationales articulated in *Chaney*, including the likelihood of success in court, proper allocation of resources, and consistency with the agency's overall policies. 470 U.S. at 831.

From start to finish, the Memorandum emphasized litigation risk. Beginning with an overview of *Texas I*, the Acting Secretary highlighted how the Fifth Circuit's reasoning left DACA vulnerable to attack. See Rescission Memorandum (noting the court's reliance on "factual findings about the implementation of the 2012 DACA memorandum"). Accordingly, the Acting Secretary agreed with the Attorney General that "it is likely that potentially imminent litigation would yield similar results with respect to DACA." *Ibid.*

The Acting Secretary balanced the likelihood of a loss in court against several factors. For one, DACA was inconsistent with the President's priorities. See Sessions Letter. DACA also raised serious separation-of-powers concerns about whether the Executive should implement comprehensive immigration reform. *Ibid.* Finally, DHS considered the risk of an immediate injunction, which would have provoked chaos and a sudden loss of benefits.

With the defeat of DAPA barely behind it, DHS made a decision about the best use of resources. Instead of expending significant public funds to defend a policy whose near-mirror image had already been enjoined, DHS chose to wind DACA down.

These are quintessential *Chaney* concerns. Courts are inherently ill-equipped to evaluate factors like likelihood of success, use of resources, and consistency with the agency's priorities. *Chaney*, 470 U.S. at 831. Under *Chaney*, "a court's preliminary disapproval of an agency's nonenforcement policy [may] lead the agency to rescind that policy for bona fide discretionary reasons." *NAACP*, 298 F. Supp. at 233. That is exactly what happened here.

Second, the Rescission Memorandum provides no "focus for judicial review." *Chaney*, 470 U.S. at 832. Because the Rescission Memorandum does not require the agency to remove any undocumented immigrants, there are no agency proceedings to provide judicial focus. Instead, the only action to review is the rescission itself—which, as explained, was based on discretionary factors outside judicial competence. See *NAACP*, 298 F. Supp. 3d at 230.

Third, the Rescission Memorandum does not involve an exercise of "coercive power." *Chaney*, 470 U.S. at 832. The Memorandum does not revoke any existing grant of deferred action. At most, it removes one mechanism by which undocumented immigrants could have sought future deferred action. Even then, the Memorandum does not restrict DHS's discretion to grant deferred action on a case-by-case basis. See Recession Memorandum (explaining that DHS "[w]ill continue to exercise its discretionary authority").

Moreover, the Rescission Memorandum does not deny work authorization or other benefits to any alien. While deferred action may be associated with certain benefits, DACA is not their source. Instead, these benefits stem from longstanding regulations. See 8 C.F.R. § 274a.12(14) (permitting aliens who have "been granted deferred action" to apply for em-

ployment authorization). And in any case, the withholding of work authorization and other discretionary benefits is separately unreviewable under § 701(a)(2) because "[t]here are no statutory standards * * * to apply." *Perales* v. *Casillas*, 903 F.2d 1043, 1058 (5th Cir. 1990); see also *NAACP*, 298 F. Supp. 3d at 230 & n.14.

Finally, *Chaney*'s presumption applies regardless of DACA's scope. Courts have treated large-scale refusals to grant discretionary relief as unreviewable. In *Perales*, for example, the Fifth Circuit held that § 701(a)(2) precluded review of the government's refusal to grant work authorization and voluntary departures to a large class. 903 F.2d 1043.

What is more, *no one* disputed that *Chaney*'s presumption applied. The sole issue in the case was whether any statutes or regulations displaced that presumption. *Id.* at 1050-1051. Indeed, the *Perales* court found judicial review more, not less, troubling in the large-scale context. "While statutory or regulatory standards are necessary for direct review of particular administrative adjudicatory decisions, they are *even more necessary* as a basis for an inquiry into general administrative decision-making practices." *Id.* at 1051 (emphasis added). Just so here.

* * *

In sum, *Chaney* easily forecloses review of respondents' APA claims. "In deciding to rescind an immigration policy of nonenforcement, DHS * * * act[ed] with broad discretion that courts cannot review absent clear congressional authorization." *Regents of the Univ. of Cal.* v. *Dep't of Homeland Sec.*, 908 F.3d 476, 521 (2018) (Owens, J., concurring in the judgment). Of course, no such authorization ex-

ists. "[T]he broad, discretion-granting language of the [INA] reinforces that DHS's enforcement decision is not subject to APA review." *Ibid*. It "exudes deference" to the Executive. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988). Without statutory standards to shape review, this Court has no business engaging in an unmoored evaluation of DHS's discretionary rescission.

2. Courts may not carve reviewable questions out of unreviewable actions.

Respondents contend that *Chaney*'s presumption does not apply to nonenforcement actions based on an agency's determination of lawfulness. That is both irrelevant and wrong.

In *Chaney*, this Court left open the question of whether "a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction" is reviewable. *Chaney*, 470 U.S. at 833 n.4. Respondents contend that an agency's determination of lawfulness is equivalent to its determination of jurisdiction, see *City of Arlington* v. *FCC*, 569 U.S. 290, 297-301 (2013), and *Chaney*'s presumption applies to neither. Because DHS based its decision on litigation risk rather than lawfulness alone, there is no reason for the Court to decide this unpresented question.

But even if this question were squarely presented, respondents' answer is effectively foreclosed by this Court's doctrine. Unreviewable actions do not become otherwise simply because the agency gives a reviewable rationale. See *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (*BLE*). That rule makes good sense. Courts ought not enter the business of parsing the Executive's discretionary actions in search of reviewable questions.

a. Respondents are shadowboxing an imaginary opponent. Contrary to the Ninth Circuit's conclusion, DHS did not rescind DACA "based solely on a belief that the program was unlawful." *Regents*, 908 F.3d at 499. Instead, DHS gave a number of discretionary reasons rooted in the program's litigation risk.

The Ninth Circuit shut its eyes to the agency's discretionary rationales. Slicing and dicing the administrative record, the court collapsed the agency's several concerns into one: unlawfulness. Having set up this strawman, the Ninth Circuit went on to hold DACA's rescission reviewable without even cursory analysis of the agency's other justifications.

All the while complaining about the record's "scant" scope, *id.* at 492-493, the Ninth Circuit proceeded to throw large chunks of it out the window. Just one page after purporting to take the Attorney General "literally at his word," *id.* at 500, the court disbelieved his conclusion that "it is likely that potentially imminent litigation would yield similar results," *id.* at 501. Instead of taking that statement at face value, the Court dismissed it as insufficiently "independent." *Id.* at 501.

Ignoring the agency's overarching narrative of litigation risk, the Ninth Circuit zeroed-in on a single sentence in a single memo, declaring it to be the agency's entire rationale. See *id.* at 500 (alleging that the Rescission Memorandum "contains exactly one sentence of analysis"). This, despite the Memorandum's several-pages-long discussion of the growing litigation concerns associated with DACA.

Having stripped out any statement that did not fit its neat and tidy narrative, the Ninth Circuit rejected the agency's litigation concerns because they

required "extra analytical steps (someone might sue to enjoin DACA, and they might win) that are entirely absent from the list of factors that the Acting Secretary stated she was 'taking into consideration'" in the record. *Id.* at 500.

But those steps *are* in the record. Just not the record the Ninth Circuit reconstructed. And while the Acting Secretary may not have fully articulated them in the sentence on which the court focused, she did take them into consideration. Someone *did* threaten to sue to enjoin DACA. See Paxton Letter. And the agency *did* conclude those challengers might win. See Rescission Memorandum; Sessions Letter.

The Ninth Circuit discounted the discussion of these factors because they appeared in the background section of the Memorandum. That is exactly what *Chenery I* says a court must *not* do. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-95 (1943) (*Chenery I*). "It is well established that the agency action must be upheld * * * on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50. Just as a court may not supply post-hoc reasons to support an agency's judgment, neither may it erase reasons the agency offered.

The Ninth Circuit likewise erred in determining that the rescission was not discretionary because the Acting Secretary did not say the magic words. See *id.* at 501 (comparing Secretary Kelly's statement "in the exercise of my discretion" with Acting Secretary Duke's statement "in the exercise of my authority"). The word "discretion" is not a talisman. An agency's failure to invoke "discretion" does not make its action

nondiscretionary, any more than an agency's assertion of "discretion" makes it so.[2]

In the final analysis, an agency's reasons need not be articulated with perfect clarity "if the agency's path may reasonably be discerned." *Bowman Transp.* v. *Ark.-Best Freight Sys.*, 419 U.S. 281, 286 (1974). The court's role is not to engage in a pseudo-psychological evaluation of the Acting Secretary's mind and attempt to discern the reason that most drove her decision-making. Instead, the court's role is to consider all of the asserted rationales that may be reasonably discerned from the record. Blinded by what it took to be an opportunity to opine on DACA's lawfulness, the Ninth Circuit ignored this time-worn rule and substituted its own justifications for those of the agency.

Perhaps recognizing the weakness of its position on the actual record, the Ninth Circuit supplemented its argument by contending that litigation risk is inseparable from lawfulness. See *Regents*, 908 F.3d at 500 n.14. Not so.

Litigation risk encompasses the agency's careful balancing of the likelihood that the program would

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[2] Respondents contend that the Acting Secretary could not have made a discretionary decision, because 8 U.S.C. 1103(a)(1) grants the Attorney General "controlling" authority over questions of law. There is a reason this was not addressed by the Ninth Circuit. It makes no sense. That provision simply allocates authority. It does not prevent the Secretary or Attorney General from offering discretionary reasons. And in any case, the Attorney General did not command DHS rescind DACA but simply "advise[d]" it to do so. Sessions Letter. Finally, § 1103(a)(1) only concerns the Attorney General's authority over the INA. To the extent his assessment was driven by APA and constitutional concerns, those are not covered.

be enjoined against the costs and benefits of retaining it. In contrast, lawfulness is an independent legal determination. Of course, litigation risk depends in part on the likelihood that a court would hold the program unlawful. But that is true of settlement decisions too, which courts have long considered discretionary.

Settlement decisions are covered by *Chaney*'s presumption against judicial review. See, *e.g.*, *Ass'n of Irritated Residents* v. *EPA*, 494 F.3d 1027, 1031 (D.C. Cir. 2007). That is because "what is at issue is a judgment call, made by Agency officials, regarding how they wanted to invest Agency resources, * * * what chances there were of doing better in court than in the settlement, and what the public interest required." *Mullins* v. *U.S. Dep't of Energy*, 50 F.3d 990, 993 (Fed. Cir. 1995).

Settlement is emphatically not the same as a determination of lawfulness. An agency may maintain that a company violated the law, but nevertheless accept a settlement due to litigation risk. So too here. DHS could reasonably conclude that ending DACA was the best choice given its litigation risk, whether or not the program was in fact unlawful.

Ultimately, the posture here is exactly like *Chaney*. "We do not have in this case a refusal by the agency to [maintain DACA] based solely on the belief that it lacks jurisdiction." *Chaney*, 470 U.S. at 833. Thus, the Court "need not * * * address the thorny question of [DHS's] jurisdiction." *Id.* at 828. *Chaney* left open whether the presumption of nonreviewability applies to nonenforcement actions based solely on a lack of jurisdiction. In urging the Court to answer this question, respondents effectively demand an advisory opinion. But this Court is not the legal acade-

my. It sits to resolve cases and controversies, not answer theoretical questions that have no bearing on litigants' rights. The Court should decline to answer this question today.

b. If the Court were to reach this question, it need look no further than a case decided just two years after *Chaney*. In *BLE*, this Court emphatically rejected "the principle that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." 482 U.S. at 283.

BLE forecloses the result demanded by respondents. If an agency action is of a type that falls outside this Court's justiciable controversies, it is unreviewable. Full stop. The agency's given rationale does not alter the Court's power to review:

> To demonstrate the falsity of that proposition it is enough to observe that a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction. That is surely an eminently "reviewable" proposition, in the sense that courts are well qualified to consider the point; yet it is entirely clear that the refusal to prosecute cannot be the subject of judicial review.

Id. at 283. Just so here. If DHS's rescission of DACA is otherwise unreviewable (and it is), then the agency's reliance on concerns about the program's legality cannot change that. *BLE* "squarely rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions." *Crowley Caribbean Trans*p. v. *Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994); see also *Safe Energy Coal. of Mich.* v. *U.S.*

Nuclear Regulatory Comm'n, 866 F.2d 1473, 1476 (D.C. Cir. 1989).

c. This rule makes good sense. Courts ought not enter the business of second-guessing the Executive's exercises of prosecutorial discretion. "[T]he decision whether or not to prosecute * * * generally rests entirely in [the prosecutor's] discretion." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Bordenkircher* v. *Hayes,* 434 U.S. 357, 364 (1978)).

Indeed, agencies are generally under no obligation to give *any* reason at all for their nonenforcement decisions. Cf. *Massachusetts* v. *EPA*, 549 U.S. 497, 527 (2007) (explaining that refusals to enforce differ from refusals to pursue notice-and-comment rulemaking, since the latter require public explanation under 5 U.S.C. 555(e)). It would be bizarre to hold that while an agency need not explain itself at all, it could open itself up to judicial reversal if it does. Agencies ought not be dissuaded from reason-giving by the threat that fundamentally executive functions might be invaded by the courts.

d. While respondents encourage deference to a few scattered circuit court decisions, those cases should not control this Court's analysis. See *Kenney* v. *Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley*, 37 F.3d 671; *Montana Air Chapter No. 29* v. *Fed. Labor Relations Bd.*, 898 F.2d 753 (1990).

First, those decisions are relics of a pre-*BLE* era. Key cases on which respondents rely preceded this Court's clarifying intervention in *BLE*. See *Int'l Union* v. *Brock*, 783 F.2d 237 (D.C. Cir. 1986) (decided prior to *BLE*); *Int'l Longshoremen's Ass'n* v. *Nat'l Mediation Bd.*, 785 F.2d 1098 (D.C. Cir. 1986) (same); see also *Montana Air*, 898 F.2d at 756 (rely-

ing largely on the prior two cases). Indeed, the D.C. Circuit has recognized the inconsistency of *International Union* with *BLE* and overruled it in the context of individual nonenforcement decisions. See *Crowley*, 37 F.3d at 675-677; see also *Kenney*, 96 F.3d at 1122-1123 (adopting the same logic but failing to consider, or even cite, *BLE*).

Latching onto *Crowley*, respondents attempt to distinguish *BLE* on the grounds that it applies only to individual nonenforcement decisions. However, that distinction is unpersuasive. As an initial matter, this argument relies on the same heads-I-win-tails-you-lose logic that respondents have peddled throughout litigation. Respondents analogize DACA to individual exercises of deferred action when convenient, but programmatic exercises when not.

Inconsistency aside, respondents' legal distinction makes no sense. Their argument would treat nonenforcement decisions announced via general policies as inferior to those announced via individual adjudications. But that is exactly the sort of form-over-substance distinction long rejected by this Court. Since 1947, this Court has affirmed that "an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947) (*Chenery II*).

Finally, the D.C. Circuit's reasons for distinguishing general from individual nonenforcement policies do not pertain here. The D.C. Circuit argued that *Chaney*'s presumption should not apply to legal determinations made in general nonenforcement policies, because they are: (1) less likely to involve "mingled assessments of fact, policy, and law"; (2)

more likely to represent a conscious and express abdication of statutory responsibilities; and (3) more likely to contain non-ad-hoc rationales. *Crowley*, 37 F.3d at 677 (citing *Chaney*, 470 U.S. at 833 n.4). But here, DACA's rescission involved substantial factual analysis. And the decision to *more* faithfully enforce immigration laws is the polar opposite of an abdication of statutory responsibilities.

Ultimately, what these circuit courts were concerned about simply is not at issue here. There is no concern that DHS evaded its statutory obligations. Just as in *BLE*, even if DHS incorrectly interpreted DACA's legality, it would not be required to take any action. Nor is there any concern that DHS has advanced an unreviewable legal interpretation that affects the future liability of private parties. See *Int'l Union*, 783 F.2d at 242-243 (nonenforcement action defining reporting requirements); *Montana Air*, 898 F.2d at 757-758 (nonenforcement action defining unfair labor practices); *Kenney*, 96 F.3d at 1122-1123 (nonenforcement action defining acceptable contamination levels and cleaning procedures for poultry processors).

Finally, this Court's decision in *Federal Election Commission* v. *Akins* is not to the contrary. 524 U.S. 11 (1998). There, the Court only reached the merits of the Commission's legal interpretation *after* applying *Chaney*'s presumption. Recognizing that nonenforcement actions are "generally not subject to judicial review," the Court found this presumption overcome by "a statute that explicitly indicate[d] the contrary." *Id.* at 26. Because the statute authorized suit by "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by [the] party," this

was the rare nonenforcement action that was reviewable. 2 U.S.C. 437(g)(a)(8)(A).

e. Any last-ditch appeal respondents might make to democratic accountability likewise fails. Democratic accountability is supported, not undermined, by *BLE*'s rule. "Under our system of government, the primary check against prosecutorial abuse is a political one," not a judicial one. *Morrison* v. *Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting). The Executive always pays the price when prosecutors refuse to bring cases, no matter the rationale.

Respondents underestimate the capacity of the people to hold elected actors accountable. When President Nixon refused to hand over the Watergate tapes, the public held him responsible. It did not matter whether he did so because he was concerned about personal legal exposure or protecting executive privilege. Likewise, when U.S. Attorneys declined to prosecute banks following the 2008 Recession, the public did not assess whether they did so because there was insufficient evidence of criminal behavior or because the banks were too big to jail. "[W]hen crimes are not investigated and prosecuted * * * the President pays the cost in political damage to his administration." *Id.* at 728-29.

More important, involving courts in the business of assessing prosecutorial decisions would risk creating the perception of a politicized judiciary. When courts prevent the President from acting in areas assigned to his "absolute discretion," *Chaney*, 470 U.S. at 831, responsibility over those areas is eroded. And the public knows it. Instead of holding the Executive accountable for discretionary decisions, the public will put their praise or blame elsewhere. Naturally, it will come to rest on the judges who have just inval-

idated policies understood to be within the Executive's core prerogatives. This is far more corrosive of democratic accountability than declining review.

B. The INA bars review of this action.

Section 1252(g) of the INA provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. 1252(g). This provision "was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *AADC*, 525 U.S. at 485 n.9. It bars review here.

1. Section 1252(g) strips courts of jurisdiction over no-deferred-action decisions.

"[P]rotecting the Executive's discretion from the courts * * * can fairly be said to be the theme" of the INA. *AADC*, 525 U.S. at 486. Indeed, § 1252(g) was "clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations." *Id.* at 485. The Rescission Memorandum is such a determination.

When Congress enacted § 1252(g), case-by-case exercises of deferred action were common. *Id.* at 484. "Since no generous act goes unpunished, however, the [government's] exercise of this discretion opened the door to litigation in instances where the [government] chose *not* to exercise it." *Id.* at 484. Congress intervened to prevent such suits.

Circuit courts have uniformly interpreted § 1252(g) as barring review of DACA denials. That is because "a denial of DACA relief * * * involves the exercise of prosecutorial discretion not to grant a deferred action." *Vasquez* v. *Aviles*, 639 F. App'x 898,

901 (3d Cir. 2016); see also *Young Dong Kim* v. *Holder*, 737 F.3d 1181, 1185 (7th Cir. 2013) (holding that § 1252(g) barred review of the Board of Immigration Appeals' alleged failure to comply with ICE guidance on prosecutorial discretion); *Botezatu* v. *INS*, 195 F.3d 311, 312-314 (11th Cir. 1999) (holding that § 1252(g) barred review of humanitarian parole denials).

In short, the purpose of § 1252(g) is clear: "to protect from judicial intervention the Attorney General's long-established discretion to decide whether and when to prosecute or adjudicate removal proceedings or to execute removal orders." *Alvidres-Reyes* v. *Reno*, 180 F.3d 199, 201 (5th Cir. 1999).

DHS has absolute discretion to decide whether to grant deferred action. Under § 1252(g), courts generally may not force the agency's hand in processing deferred action or other status adjustment applications. *See, e.g.*, *Chapinski* v. *Ziglar*, 278 F.3d 718, 721 (7th Cir. 2002). Moreover, courts may not demand that the Attorney General adjudicate discretionary denials of relief under particular standards. Cf. *Alvidres-Reyes*, 180 F.3d at 201 (declining plaintiffs' invitation to "substitute a court order for the Attorney General's decision" and "require her by judicial fiat" to review applications "under the former rather than the current legal standards").

*2. The rescission of DACA is a "decision to * * * commence proceedings."*

The plain text of the statute likewise confirms this Court's long-standing interpretation and its application to this case. The Rescission Memorandum is a "decision to * * * commence proceedings." Re-

scinding DACA is the necessary first-step in pursuing removal orders against DACA recipients.

Respondents' arguments to the contrary require them to reject the analogy to individual deferred action they have embraced elsewhere. But respondents cannot have their cake and eat it too. If DACA is analogous to an individual act of deferred action in determining its legality, it is so here. In contrast, if DACA is not analogous to an individual act of prosecutorial discretion, that simply underscores the agency's lawfulness concerns.

In either case, judicial review is inconsistent with the statute. Section 1252(g) "is specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings." *Id.* at 487. The Ninth Circuit's preliminary injunction results in exactly this sort of fragmentation and delay. As a result of the injunction, undocumented individuals who otherwise would have become eligible for deportation have been permitted to renew their grants of deferred action. That is precisely the sort of interference in the Executive's prosecutorial discretion that § 1252(g) was meant to prevent.

Finally, any challenge must take the form of an appeal from a "final order" of removal. See 8 U.S.C. 1252(b)(9). Because respondents lack such orders, their challenge is nonjusticiable.

II. The rescission of DACA was not arbitrary and capricious.

This is not a case about whether DACA is lawful. Nor is this a case about whether DACA is wise policy, nor whether Congress should act to protect those who entered this country illegally as children. This is

a case about whether DHS "made a reasoned decision to rescind DACA based on the Administrative Record." *Casa de Maryland* v. *Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 767-768 (D. Md. 2018). And that, it certainly did.

A. DHS provided several rational reasons for rescinding DACA.

DHS exercised its discretion to rescind DACA after reasonably determining: (1) DACA presented a major litigation risk; (2) DACA was unlawful; (3) Congress was the preferred actor to enact major immigration reform affecting the lawful status of millions of undocumented immigrants; and (4) a gradual wind-down of DACA better served the interests of those impacted than would a chaotic and immediate shutdown following an injunction.

1. DHS reasonably believed that DACA would be challenged and invalidated. In fact, that is exactly what happened.

From the courthouse steps, just moments after this Court affirmed the injunction of DAPA, the same state attorneys general who had just prevailed suggested they were prepared to challenge DACA. See Josh Gerstein & Seung Min Kim, *Supreme Court Impasse on Immigration Threatens "Dreamers," Too*, Politico (June 23, 2016), https://perma.cc/E2KC-UNZL. One year later, eleven state attorneys general doubled down on that threat, publicly committing to challenge DACA if it were not rescinded. See Paxton Letter.

Staring down the barrel of an impending lawsuit after a decisive defeat on nearly identical questions of law, the government reasonably believed that con-

tinued administration of DACA presented an unjustified litigation risk.

In fact, we now know that the agency's evaluation was prescient. Not only did the state attorneys general carry out their threat, they won. *Texas* v. *United States*, 328 F. Supp. 3d 662, 735 (S.D. Tex. 2018) (*Texas II*) (holding "the Plaintiff States have made a clear showing they are likely to succeed on the merits" of their APA claims).

a. DACA presented serious concerns under the APA's notice-and-comment rule.

In entering an injunction against the implementation of DAPA and expanded-DACA, the Fifth Circuit held that these programs amounted to legislative rules, requiring notice and comment. *Texas* v. *U.S.*, 809 F.3d 134 (5th Cir. 2015) (*Texas I*). In the court's view, both policies imposed "rights and obligations" and failed to leave line-agents genuinely free to exercise discretion. *Id*. at 171-176.

Pointing to the lack of evidence that even a single DACA request had been denied for discretionary reasons, the Fifth Circuit found the DACA Memorandum's guarantees of discretion "pretextual." *Id*. at 172-173. Relying on the fact that DAPA's enactment would be similar—indeed, explicitly so, see DAPA Memorandum at 4 (directing USCIS to "establish a process, similar to DACA")—the Fifth Circuit grounded its notice-and-comment holding on the facts of DHS's enforcement of DACA. In so doing, the court all but ensured a similar result were the original program challenged under the APA.

The Acting Secretary thus made a reasonable determination that there was no meaningful difference

between DAPA, expanded-DACA, and the original DACA program on this front.

While the Ninth Circuit suggested that DACA's denial rate has increased since 2015, see *Regents*, 908 F. 3d at 507-508, it fundamentally misapprehended USCIS's data. Included in USCIS's figure for DACA applications "denied" are those which are "terminated" or "withdrawn." Withdrawals occur when applicants obtain alternative immigration status or resubmit their applications to better comport with DACA's criteria. See U.S. Citizenship & Immigration Services, Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012–2017, at 1 (Mar. 31, 2017). Thus, the number of denials is not a good proxy for discretion.

Fortunately, a proxy is not necessary because USCIS has repeatedly confirmed that it cannot find a *single* instance of discretion. As Acting Secretary Duke noted, USCIS "has not been able to identify specific denial cases where an applicant appeared to satisfy the [Memorandum's criteria], but still had his or her application denied based solely upon discretion." Rescission Memorandum; *Texas II*, 328 F. Supp. 3d at 732.

In any case, DACA "tilts the scales significantly and has the practical effect of inhibiting assessments of whether deferred action is appropriate in a particular case." Memorandum from Kirstjen Nielsen, Sec'y, Dep't of Homeland Sec. 3 (June 22, 2018). And the OLC had "advised that it was critical" that deferred action be granted "on a case-by-case basis," not "automatically" under programmatic criteria. 38 Op. O.L.C. 1, 18 n.8 (2014). Seeing the Fifth Circuit's

calls for more than "mere pretext" in the test of line-agent discretion, DHS reasonably concluded that continued administration of DACA presented a renewed risk of litigation.

b. DACA presented serious conflict with Congress's statutory scheme in the INA. In *Texas I,* the Fifth Circuit held that DAPA and expanded-DACA were inconsistent with the INA. DHS reasonably believed that this same logic would apply to DACA.

The Fifth Circuit determined, in part, that Congress had occupied the field with an "intricate process for illegal aliens to derive a lawful immigration classification from their children." *Texas I*, 809 F.3d at 179. Spotlighting this logic, respondents argue that DACA does not replace a specific statutory scheme in the same manner as DAPA. In light of the numerous congressionally enacted immigration programs for undocumented minors, respondents' premise is dubious at best. See, *e.g.*, Special Immigrant Juvenile (SIJ) Status, 8 U.S.C.1101(a)(27)(J); William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, 8 U.S.C.1232 (expanding the scope of protections for juvenile migrants).

Regardless, the Fifth Circuit did not hang its hat on this rationale. To the contrary, the Fifth Circuit explicitly relied on DAPA's incompatibility with the INA's *general* lawful presence and work authorization provisions. And certainly, those provisions present the same conflict with DACA.

"The INA * * * specifies classes of aliens eligible and ineligible for work authorization, including those eligible for work authorization and deferred action—with *no mention of the class* of persons whom DAPA

would make eligible for work authorization." *Texas I*, 809 F.3d at 180-181 (emphasis added). So too here.

And DACA makes recipients eligible for advance parole, permitting freer travel outside the United States than beneficiaries would otherwise be entitled to under Congress's statutory scheme. See 8 U.S.C. 1182(a)(6)(A)(i); *id.* § 1182 (a)(9)(b); see also *Texas* II, 328 F. Supp. 3d at 718.

Finally, DAPA and DACA cover well over one million people apiece. The Acting Secretary reasonably concluded that any difference in the population sizes of the programs—when both already shielded an enormous number of individuals from removal—was legally insignificant. Not only was this a reasonable conclusion at the time of DACA's rescission, the relevant district court later agreed it was correct. *Id.* at 725.

c. Respondents' rule would make it impossible for agencies to rely on litigation-risk assessments.

Agencies regularly rely on litigation-risk assessments, and courts have consistently upheld such decisions under arbitrary-and-capricious review. See, *e.g.*, *Nat'l Coal. Against the Misuse of Pesticides* v. *EPA*, 867 F.3d 636, 642-645 (D.C. Cir. 1989) (upholding an agency's decision to settle a lawsuit based on litigation risk); *Mullins* v. *U.S. Dep't of Energy*, 50 F.3d 990, 993 (Fed. Cir. 1995) (same).

Respondents effectively ask this Court to decide whether DHS got the litigation risk assessment right. But the question is not whether DHS gave the best answer; it is whether DHS gave a reasonable one. Arbitrary-and-capricious review is highly deferential. Indeed, all that the law requires is that there be a "rational correlation between the facts reviewed

and the decision made." *State Farm*, 463 U.S. at 42-44; see also *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am.* v. *Dep't of Agr.*, 499 F.3d 1108, 1115 (9th Cir. 2007) (noting that the standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision").

Agency justifications based on litigation risk should be presumed reasonable when they are based on federal courts' rulings on substantially similar questions of fact and law. Other courts have suggested as much. See *Casa de Maryland*, 284 F. Supp. 3d at 772 (holding it "cannot" be arbitrary and capricious for DHS to believe DACA would be invalidated given prior injunctions against DAPA).

DHS did not pull its litigation-risk rationale out of thin air. With the "defeat of DAPA directly in the rear-view mirror," the agency could hardly ignore the brick wall of litigation risk on the horizon. *Id.* at 765.

2. DHS reasonably made the independent assessment that DACA was unlawful.

Apart from the reasonable belief that DACA posed a serious litigation risk, DHS rescinded DACA based on an independent assessment of the program's lawfulness. Given the affirmance of *Texas I* by an equally divided Court and the Attorney General's considered legal advice, DHS rationally concluded that DACA was likely unlawful. See Sessions Letter (noting that DACA has "the same legal * * * defects that the courts recognized as to DAPA").

Regardless of how the Court might analyze DACA's lawfulness in the first instance, this "carefully crafted" justification, amply "supported by the Administrative Record," easily clears arbitrary-and-

capricious review. See *Casa de Maryland*, 284 F. Supp. 3d at 772. "[H]ow could trying to avoid unlawful action possibly be arbitrary and capricious? Quite simply, it cannot. Regardless of whether DACA is, in fact, lawful or unlawful, the belief that it was unlawful and subject to serious legal challenge is completely rational." *Ibid.*

3. DHS reasonably concluded Congress was the appropriate actor to grant benefits to a broad class of immigrants.

Attorney General Sessions expressed constitutional concerns about the appropriate balance of power between Congress and the executive branch. See Sessions Letter. The Administration believed that Congress was the more appropriate body to enact broad protections for a large class of undocumented immigrants.

This is made all the more significant because Congress has considered bills that would have protected DACA-eligible individuals but has never passed them. In fact, Congress has rejected such proposals *eleven* times. See p. 3, n.1, *supra*. "[U]nlike the DAPA situation, Congress has directly addressed DACA or a DACA-like population, so one need not guess its position." *Texas II*, 328 F. Supp. 3d at 721. Both houses of Congress, while controlled by both political parties, have, "time after time, considered and rejected bills that would afford lawful immigration status to the same or a similar group of individuals contemplated by DACA." *Ibid.*

Put simply: the Administration reasonably determined that if Congress had wanted to grant lawful presence or other benefits to such a wide swath of undocumented immigrants, it would have done so.

Finally, DHS "need not demonstrate * * * that the reasons for the new policy are better than the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *Fox Television*, 556 U.S. at 515. A new administration's beliefs regarding such fundamental values as institutional competence surely clear the mark.

B. The gradual wind-down bolsters the reasonableness of DACA's rescission.

DHS rationally believed that, if DACA were invalidated, it would be enjoined—resulting in a chaotic and disorderly shutdown. Courts in the Fifth Circuit, having previously enjoined DAPA, left little reason to believe they would not do the same again.[3] Courts across the country, moreover, had begun to issue nationwide injunctions against executive-branch programs already in force. See, *e.g.*, *Washington* v. *Trump* 2:17-cv-00141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (enjoining the "travel ban" executive order); *Texas* v. *United States*, 201 F. Supp. 3d 810, 815-816 (N.D. Tex. 2016) (enjoining a Department of Education policy allowing students to use bathrooms matching their gender identity). Given this trend, and the litigation risk in the Fifth Circuit in particular, the Rescission Memorandum was intended to produce a smooth and orderly wind-down.

While respondents have no legally cognizable reliance interests in deferred-action benefits under DACA, see pp. 45-46, *infra*, the Department went

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[3] While true that the district court did not enjoin DACA, an "agency's predictive judgment * * * merits deference." *Fox Television*, 556 U.S. at 521. The agency is not required to have 20/20 vision of events yet to come.

above and beyond by balancing the government's interests in terminating the program against the interests of those who would be adversely impacted. DHS dictated the terms of an orderly, six-month wind-down rather than awaiting a chaotic conclusion via a court-ordered injunction. See *Casa de Maryland*, 284 F. Supp. 3d at 773; *NAACP*, 298 F. Supp. 3d at 219.

DHS considered the practical reliance interests that may have formed, notwithstanding the lack of legal entitlement. See, *e.g.*, *Encino Motorcars* v. *Navarro*, 136 S. Ct. 2117, 2126 (2016) (noting "serious reliance interests * * * must be taken into account"). Far from pulling the rug out from under Dreamers who had been granted deferred-action status, the Acting Secretary continued to accept renewal applications. As a result, the vast majority—86%—of DACA recipients were not scheduled to lose their status or work authorizations until late 2019 or early 2020. See U.S. Citizenship & Immigration Services, Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012–2018, at 1 (Sept. 30, 2018) (showing that the agency approved 710,241 two-year renewals in 2017 and 2018, 86% of the 823,283 DACA recipients).

Had DACA been enjoined, there is ample reason to believe that benefits would have been terminated immediately. Such a chaotic end would have left more than 800,000 young people in limbo. During the appeal, these individuals would have lacked meaningful certainty about their futures when making among the most "intimate and personal choices a person may make in a lifetime"—choices about occupation, education, marriage, parenting, and other

fundamental life commitments. *Planned Parenthood* v. *Casey*, 505 U.S. 833, 851 (1992).

Instead, the Acting Secretary "opted for a six-month wind-down period instead of the chaotic possibility of an immediate termination, which would come at a time known only to the judge resolving a future challenge to the DACA program." *Casa de Maryland*, 284 F. Supp. 3d at 773. This decision "took control of a pell-mell situation and provided Congress—the branch of government charged with determining immigration policy—an opportunity to remedy it." *Ibid*.

III. Respondents' alternative theories for upholding the preliminary injunction should be dismissed.

A. The APA notice-and-comment claim should be dismissed.

1. The rescission of DACA is not a new, binding substantive rule.

While the APA requires notice and comment for binding substantive rules, such procedures do not apply to "general statements of policy." 5 U.S.C. 553(b)(A). "The critical factor" in determining whether an agency directive is a general statement of policy is "the extent to which the challenged [directive] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the policy in an individualized case." *Mada-Luna* v. *Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987).

Respondents claim that the Rescission Memorandum makes rejections of DACA applications mandatory and thus constitutes a new substantive rule. This shoots at the wrong target. The relevant question is not whether DACA applications are ac-

cepted by DHS officials, it is whether these officials retain discretion to grant deferred action. They unquestionably do.

Nothing in the text of the Rescission Memorandum forbids the agency from granting requests for deferred action. To the contrary, the Memorandum acknowledges the background principle of deferred action as "an act of prosecutorial discretion meant to be applied on an individualized case-by-case basis." Rescission Memorandum. And nothing in the Memorandum prevents future DHS Secretaries from implementing a program like DACA.

2. This Court has rejected the "one-bite" doctrine in a substantially similar context, and should do so here.

In *Perez* v. *Mortgage Bankers Association*, this Court rejected the proposition that when an agency reverses a prior interpretive rule, that change constitutes a binding legislative rule requiring notice and comment. 135 S. Ct. 1199 (2015) (overruling *Paralyzed Veterans of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997)). The "one-bite" doctrine was held to "improperly impose on agencies an obligation beyond the 'maximum procedural requirements' specified by the APA." *Id.* at 1206.

Perez emphasized that "[n]ot all 'rules' must be issued through the notice-and-comment process * * * . [U]nless another statute states otherwise, the notice-and-comment requirement 'does not apply' to 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.'" *Id.* at 1203-1204 (quoting 5 U.S.C. 553(b)(A)). The "one-bite" doctrine is thus "contrary to the clear text of the APA's rulemaking provisions." *Id.* at 1206.

This follows logically, as nothing in a changed interpretive rule need bind an agency to that particular interpretation in the future. Similarly, nothing in a changed statement of policy binds DHS to that policy moving forward. An agency issuing a general policy statement need not worry that it is "throwing away [its] shot." Lin Manuel Miranda, *My Shot*, *in* Hamilton (2015).

A new administration may decide to implement a deferred-action program like DACA, determining that a diminished risk of litigation or a new congressional mandate justifies its use. See, *e.g.*, *State Farm*, 463 U.S. at 59 (Rehnquist, C.J., concurring in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").

* * *

Yet again, it is clear that respondents are trying to have their cake and eat it too. Absent any cognizable "one-bite" doctrine, respondents' notice-and-comment claim is patently incompatible with its claim that DHS's lawfulness rationale was arbitrary and capricious. If DACA was lawful from its inception, then no heightened rulemaking procedures apply to its rescission. In contrast, if DACA's rescission should have gone through notice and comment, then the agency's lawfulness concerns *cannot* be arbitrary and capricious.

B. The due process information-sharing claim should have been dismissed.

Respondents' due process claim should have been dismissed. ***First*****,** respondents have no enforceable due process rights related to information sharing. In

dismissing respondents' due process deferred-action claim, the Ninth Circuit highlighted the lack of any "mutually explicit understandings" supporting an entitlement. *Regents*, 908 F.3d at 514 (quoting *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972)). The same logic applies with equal force here.

A threshold requirement for any due process claim is a liberty or property interest protected by the Constitution. For government benefits to constitute protected interests, one must have more than "an abstract need or desire for [the benefit]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972). This Court has made clear that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 756 (2005). Where benefits are discretionary, there must be "rules or mutually explicit understandings" to support an entitlement claim. *Perry*, 408 U.S. at 601.

Not only were there *not* mutually explicit understandings of information-sharing protections, DHS's public notices explicitly state the opposite. The DACA Memorandum underscored that it "confer[ed] no substantive right." DACA Memorandum at 3. And Frequently Asked Questions (FAQs) published by DHS on information-sharing, specifically, stated: "This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit." USCIS, DACA Frequently Asked Questions at Q19, https://perma.cc/Y9YZ-BYA4. Respondents cannot unilaterally claim due process protections.

Second, even if respondents had an enforceable due process right, they have failed to plausibly allege that the agency's information-sharing policy has changed. In fact, it has not.

When DACA was first enacted, the agency published FAQs explaining its policy. While information provided in a request for deferred action is "protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings," the "information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal." *Ibid*. Those included "national security purposes" and the "investigation or prosecution of a criminal offense." *Ibid*. The same policy is in effect today.

Respondents' allegations of change rest exclusively on two words published after DACA's rescission. DHS noted in FAQs that "information will not be *proactively provided* to ICE and CBP for the purpose of immigration enforcement proceedings." USCIS, Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals (DACA) at Q7 (Sept. 5, 2017) (emphasis added). But respondents fail to allege any meaningful difference between information "protected from disclosure" and information not "proactively provided." More important, respondents fail to provide any evidence that the agency intends to use DACA-collected information for immigration enforcement. Put simply, it does not.

This is yet another example of respondents cherry-picking a single phrase out of the record and reading it for more than it is worth. In zeroing-in on these two specific words, respondents ignore the agency's clarification, published soon thereafter. Revised FAQs were published explicitly to assuage any

such concerns: "This information-sharing policy *has not changed in any way since it was first announced*, including as a result of the Sept. 5, 2017 memo starting a wind-down of the DACA policy." USCIS, Guidance on Rejected DACA Requests: Frequently Asked Questions (Nov. 30, 2017) (emphasis added).[4] Where district courts have relied on this clarification in parallel litigation, they have dismissed identical due process claims. See *Batalla Vidal* v. *Nielsen*, 291 F. Supp. 3d 260, 279-281 (E.D.N.Y. 2018).

C. The equal protection claim should have been dismissed.

1. This claim is foreclosed by AADC *and* Armstrong.

a. "[A]n alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *AADC*, 525 U.S. at 488. Attempting to distinguish the claim here from one of "selective enforcement," the Ninth Circuit misses the mark. The Department's decision to rescind DACA was grounded in the same "prosecutorial discretion" as the agency's actions in *AADC*. Indeed, *AADC*'s core concerns are implicated here. Allowing respondents' equal protection claim to proceed would inhibit "prosecutorial discretion" and allow "continuing violation[s]" of law. *Id*. at 489.

b. And even if *AADC* did not foreclose the claim outright, respondents' claims would still be subject to the heightened pleading standard applied to selective-prosecution claims. See *Armstrong*, 517 U.S.

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[4] Even though these FAQs were not attached to the initial complaint, courts may take judicial notice of "matters of public record." Fed. R. Evid. 201.

456. Respondents contend that *Armstrong* does not control because this is not a selective-prosecution claim, but DACA's deferred-action grants are fundamentally exercises of prosecutorial discretion.

To clear *Armstrong*'s initial pleading hurdle, respondents "must show that similarly situated individuals of a different race" were *not* denied deferred-action status. *Id.*at 465. Respondents cannot—and do not even try—to do so.

2. DHS's legitimate justifications in the record should be the stopping point for this claim.

It is black-letter law that courts defer to any "facially legitimate and bona fide reason" for agency action and "do not look behind the exercise of that discretion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972). This is especially so in the immigration arena, given the "fundamental sovereign attribute exercised" in the admission and exclusion of foreign nationals. *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977).

Mandel's default presumption that the Court will confine itself to the legitimate justifications in the record is sensible. There is good reason not to place the judiciary in the position of second-guessing agency action based on comments made in a 24/7 media environment. See, *e.g.*, *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 623-624 n.52 (2006) (noting that courts have never, "in evaluating the legality of executive action, deferred to comments made by such officials to the media"). And there is even more reason for courts to avoid getting into the business of scrutinizing statements made during rough-and-tumble election campaigns. Making such statements the focus of judicial inspection could "readily lead to mischief in

challenging the policies of a new administration." *Regents*, 298 F. Supp. 3d at 1315 (cautioning courts to "proceed with caution and give wide berth to the democratic process").

This Court reaffirmed as much just last term. See *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2418 (2018). Even operating under the *assumption* that it could consider extrinsic evidence for the limited purpose of applying rational-basis review, the Court emphasized that it would "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Ibid*.

At bottom: the Court in *Hawaii* maintained the time-honored deference central to *Mandel*, upholding the action on the basis of legitimate justifications in the record. While respondents make much of *Hawaii*'s glances beyond the record, the Court only *assumed* it could consider such statements and never actually reached the question. Even then, it did so only because the case was unconventional. See *id.* at 2420; see also *Int'l Refugee Assistance Project* v. *Trump*, 883 F.3d 233, 264 (4th Cir. 2018) (calling the case an "extraordinary" one).

3. Even if the Court looks beyond the record, respondents fail to make out a plausible equal protection claim.

It is axiomatic that disparate-impact evidence does not establish an equal protection claim except in those exceedingly "rare" cases where a "*clear pattern*, *unexplainable* on grounds other than race, emerges from the effect of the state action." *Vill. of Arlington Heights* v. *Metro. Housing Dev. Corp.*, 429 U.S. 252,

266 (1977) (emphasis added). Put simply, this is not such a case.

In the absence of a clear pattern, an equal protection violation can only be plausibly alleged by evidence of invidious "discriminatory purpose." *Washington* v. *Davis*, 426 U.S. 229, 239 (1976); see also *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256 (1979). Here, again, respondents fall far short.

a. There is no pattern of discrimination, clear or otherwise. In *Hawaii,* this Court stressed that the fact that "five of the seven nations" included in the Proclamation were majority-Muslim did not support even an "inference of religious hostility." 138 S. Ct. at 2421. So too here. The fact that the majority of DACA recipients are Latino does not support an inference of racial discrimination.

b. Respondents are far from demonstrating evidence of discriminatory purpose. Even the extra-record evidence fully supports DHS's justifications that DACA was rescinded on the basis of (1) litigation risk; (2) an independent evaluation of unlawfulness; (3) the administration's belief that Congress is the appropriate actor to enact such a program; and (4) the desire to have an orderly wind-down. While respondents continuously throw around statements made by the President as if they were a smoking gun, his comments fully support DHS's justifications.

The President has repeatedly expressed his support for DACA beneficiaries. He referred to Dreamers as "incredible kids" and "terrific people," pledging to "show great heart" toward them. *Casa de Maryland*, 284 F. Supp. 3d at 775 (citations omitted). He has called the "DACA situation" a "very difficult thing for me. Because, you know, I *love* these kids."

Ibid. Linking up with DHS's first and second justifications, the President has said that "the existing law is very rough. It's very, very rough." *Ibid.* And supporting DHS's third and fourth justifications, the President has repeatedly "urged Congress to pass Dreamer-protected legislation during DACA's wind down period." *Ibid.*

Hardly verbal hand grenades. And far from evidence of a "bare desire to harm," *Romer* v. *Evans*, 517 U.S. 620, 634 (1996), or "irrational prejudice," *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

If anything, by looking beyond the administrative record, the Court will find only additional evidence that DHS's justifications were legitimate. Seeing the "rough" existing law as jeopardizing DACA's protections for a population the President "loves," the government made the "difficult" decision to wind-down the program while urging congressional action. From its earliest days, the administration has sought to put the ball back in Congress's court—where the power to grant protections for broad classes of immigrants properly resides.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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APPENDIX

Constitutional Provisions

The Fourteenth Amendment of the U.S. Constitution provides, in relevant part:

> No state shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

Statutory Provisions

The Administrative Procedure Act

Section 701(a) of the Administrative Procedure Act provides:

> This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

5 U.S.C. 701(a).

Section 706 of the Administrative Procedure Act provides, in relevant part:

> The reviewing court shall * * * hold unlawful and set aside agency action, findings, or conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

5 U.S.C. 706(2)(A).

The Immigration and Nationality Act

Section 1252(b)(9) of the Immigration and Nationality Act provides, in relevant part:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. 1252(b)(9).

Section 1252(g) of the Immigration and Nationality Act provides:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory) * * * no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. 1252(g).