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

In the Supreme Court of the United States

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

DONALD J. TRUMP, President of the United States, et al.,
Petitioners,
v.
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,
Respondents.

KEVIN K. MCALEENAN,
Acting Secretary of Homeland Security, et al.,
Petitioners,
v.
MARTIN JONATHAN BATALLA VIDAL, et al.,
Respondents.

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

BRIEF FOR THE STATES OF NEW YORK, MASSACHUSETTS, WASHINGTON, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND VIRGINIA, AND THE DISTRICT OF COLUMBIA, RESPONDENTS IN NO. 18-589

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether petitioners' September 2017 decision to terminate Deferred Action for Childhood Arrivals (DACA) is judicially reviewable.

2. Whether petitioners' decision to terminate DACA was lawful.

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Laws

Regulations

Miscellaneous Authorities **Page(s)**

INTRODUCTION

In September 2017, the Acting Secretary of the Department of Homeland Security (DHS) and the Attorney General (who are petitioners here) announced that Deferred Action for Childhood Arrivals (DACA) was unlawful and was being terminated. DACA is a framework for processing requests for deferred action—a form of discretionary forbearance from removal—for certain persons who arrived in the United States as children.

The decision to terminate DACA was a dramatic policy reversal that threatened devastating consequences for hundreds of thousands of people, and serious harm to many thousands of employers and the economies and institutions of every State. Yet petitioners offered just one cursory paragraph to justify their legal conclusion. That paragraph contained a demonstrably incorrect factual assumption and a glaring misstatement of law. Moreover, the proffered administrative record, if taken at face value, reveals that petitioners did not undertake even a basic investigation of whether DACA operated in the way they assumed. At every turn, petitioners failed to meet the basic requirements of rational decisionmaking. And because petitioners asserted that the law gave them no discretion to retain DACA, they cannot now evade judicial review by arguing that the termination was committed to their discretion by law.

As governments themselves, the state respondents here ("States")[1] well understand that a new administration needs latitude to change discretionary policies. But the States also understand that there are consequences to how a new administration makes those changes. Although petitioners could have chosen to terminate DACA as a discretionary policy decision, they chose instead to declare that the law compelled the termination. Petitioners' decision to proceed based on a pronouncement about what the law required takes their action out of the realm of unreviewable enforcement discretion and into the realm of judicial review. "[A]n official cannot claim that the law ties her hands while at the same time denying the courts' power to unbind her. She may escape political accountability or judicial review, but not both." (*NAACP* Pet. App. 73a.)

The States filed suit in the Eastern District of New York to hold petitioners accountable for the insufficiently and incorrectly reasoned determination that DACA was unlawful, and to protect the States' residents, institutions, fiscs, and economies from the harm threatened by the federal government's termination decision. Since 2012, well over 150,000 residents of our States have used DACA to obtain deferred action. Those individuals have come out of the shadows and become productive members of their communities in the only country many have known as home. In deciding to terminate DACA, petitioners

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[1] The state respondent coalition here includes the States of New York, Massachusetts, Washington, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Iowa, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia, and the District of Columbia.

ignored the many ways in which individuals, families, institutions, and States have relied on the policy; and petitioners ignored the reasoning of a prior Secretary and Attorney General who concluded that DACA was lawful. Petitioners' legal determination is reviewable, it is arbitrary and capricious, and it should be vacated.

STATEMENT

A. Factual Background

1. Deferred Action for Childhood Arrivals (DACA)

There are many more undocumented immigrants in the United States than federal immigration authorities have the means to remove. To focus enforcement resources, DHS and its predecessors have a longstanding practice of "giv[ing] some cases lower priority" by "grant[ing] deferred action." 8 C.F.R. § 274a.12(c)(14). A grant of deferred action memorializes the Executive's decision not to proceed against a potentially removable person for a specified period of time. *Reno v. American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 484 (1999). Under federal regulations that have been in place for decades, deferred action recipients may apply for privileges like work authorization. *See* 8 C.F.R. § 274a.12(c)(14) (work authorization). (Joint App'x (J.A.) 797, 799 (memorandum of the U.S. Department of Justice, Office of Legal Counsel (OLC) ("OLC Mem.").)

Deferred action has been "a regular practice" of the Executive Branch for decades, "for humanitarian reasons or simply for its own convenience." *AADC*, 525 U.S. at 483-84. The Supreme Court has approved

the practice, *id.*, and Congress has both recognized the existence of deferred action and confirmed the DHS Secretary's authority to make deferred action recipients eligible for work authorization, *see* 8 U.S.C. § 1154 (deferred action); 8 U.S.C. § 1324a(h)(3) (work authorization).

On various occasions since the 1950s, DHS and its predecessors have found it expedient to make deferred action and similar forms of discretionary relief from removal "available to certain classes of aliens." (J.A. 822 (OLC Mem.).) Past policies of this type include the 1977 Silva Letterholders program, under which 250,000 nationals of certain countries obtained stays of removal. *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 968 n.2 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1279 (2018). Similarly, the Family Fairness Program introduced under the Reagan administration—and expanded under the first Bush administration—"deferred the deportation of 1.5 million family members of noncitizens who were legalized through the Immigration Reform and Control Act." *Id.*

In June 2012, DHS announced that it was creating DACA to provide a channel for processing deferred action requests from persons who arrived in the United States as children and met certain other threshold eligibility criteria. (*Regents* Pet. App. 97a-101a.) DHS explained that DACA was intended to help DHS "ensure that [its] enforcement resources" are expended on the serious criminals that Congress

directed DHS to prioritize for removal,[2] rather than on "low priority cases." (*Regents* Pet. App. 98a.)

To be eligible for DACA, a person must have arrived in the United States under the age of sixteen, continuously resided here between 2007 and 2012, not yet attained the age of thirty, and satisfied certain educational or military service requirements. The person must not have been convicted of a felony, a significant misdemeanor, or multiple misdemeanors, and must not otherwise pose a threat to national security or public safety. (*Regents* Pet. App. 98a.) As DHS explained when announcing the DACA policy, "prosecutorial discretion" is "especially justified" with respect to such people, many of whom "have already contributed to our country in significant ways." (*Regents* Pet. App. 99a.) The memorandum emphasized, however, that no individual could receive deferred action through DACA without first passing a background check, and that all DACA requests "are to be decided on a case by case basis." (*Regents* Pet. App. 99a.) Individuals granted deferred action under DACA receive forbearance from removal for renewable two-year periods revocable at any time. Under pre-existing statutory and regulatory provisions, DACA recipients may apply for work authorization and for permission to travel outside the country ("advance parole"). (*See Regents* Pet. App. 100a-101a.)

From June 2012 until September 2017, about 800,000 individuals relied on DACA to obtain deferred

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[2] *See, e.g.,* DHS Appropriations Act 2010, Pub. L. No. 111-83, 123 Stat. 2142 (2009); H.R. Rep. No. 111-157, at 8 (2009); *see also* DHS Appropriations Act, 2015, Pub. L. No. 114-4, 129 Stat. 39, 43 (2015).

action and employment authorization; in September 2017, there were about 700,000 active recipients, including over 150,000 residents of the States.[3] DACA enabled these recipients to pursue higher education, secure employment, and create and run businesses. (*Batalla Vidal* CA2 J.A. 2129-2213.) It enabled the States to employ DACA recipients with special skills, tax the recipients' income and purchases, and collect tuition from recipients enrolled at public colleges and universities. (*Batalla Vidal* CA2 J.A. 2239-2258, 2266-2298, 3754-3757, 3774-3794, 3956-3965.)

Several legal challenges to DACA were brought before September 2017, and all failed. In each case, the federal government defended the legality of the policy, including through amicus curiae participation. *See, e.g.*, *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015); Br. for United States as Amicus Curiae, *Arizona Dream Act Coal. v. Brewer*, No. 15-15307 (9th Cir. Aug. 28, 2015), ECF No. 62. OLC likewise explained in a published opinion that DACA was legally sound so long as immigration officials "retained discretion to evaluate each application on an individualized basis." (J.A. 827 n.8.)

In 2015, Texas and several other States brought a suit challenging DHS's decision to create a new deferred action policy (Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)) and to make certain changes to DACA. *See Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). The *Texas* district court entered a preliminary

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[3] (*See NAACP* Pet. App. 5a; J.A. 996, 998.) *See also* U.S. Citizenship & Immigration Servs., Approximate Active DACA Recipients (Aug. 31, 2018).

injunction enjoining the implementation of DAPA and the changes to DACA—neither of which had yet gone into effect—based on its conclusion that the plaintiffs were likely to succeed on the procedural claim they brought under the Administrative Procedure Act (APA). A divided panel of the Fifth Circuit affirmed on both procedural and substantive APA grounds. 809 F.3d at 146. Neither court addressed the *Texas* plaintiffs' constitutional claims. This Court summarily affirmed by an equally divided court. 136 S. Ct. 2271.

The federal government maintained DACA after the preliminary injunction against DAPA, and into the new administration, continuing to accept more than 400,000 new and renewal DACA applications.[4] In February 2017, DHS rescinded certain other immigration policies, but expressly left DAPA and DACA intact. (J.A. 857.) In mid-June 2017, DHS rescinded DAPA, which had never gone into effect due to the injunction; DHS again expressly declined to disturb DACA. (J.A. 868.)

2. Defendants' Termination of DACA

In late June 2017, the *Texas* plaintiffs wrote to Attorney General Sessions stating that they would amend the complaint in their still-pending DAPA case to include a challenge to DACA unless the federal government agreed by September 5 to rescind DACA. (J.A. 872-874.) The agency officials tasked with determining the fate of DACA decided in an August

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[4] *See* U.S. Citizenship & Immigration Servs., Number of Form I-821-D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake and Case Status, Fiscal Year 2012-2017 (Sept. 30, 2017).

24, 2017 meeting that DACA "is unlawful and will be ended"; they agreed that "DOJ will send a memorandum to DHS outlining the legal reasons the DACA program is unlawful," after which DHS would end the program. Principals Comm., Summary of Conclusions (filed in *Make the Road N.Y. v. United States DHS*, No. 18-cv-2445 (E.D.N.Y. Aug. 14, 2019), ECF No. 63-1, at 209).

On September 4, Attorney General Sessions sent a four-paragraph letter to the Acting Secretary of DHS, Elaine Duke, advising that DHS "should rescind" DACA because DACA lacked "statutory authority," was "unconstitutional," and had been implemented "after Congress' repeated rejection of proposed legislation that would have accomplished a similar result." (J.A. 877.) The Attorney General's legal analysis consisted of a single paragraph in which he asserted that DACA "has the same legal and constitutional defects that the courts recognized as to DAPA," and would likely meet the same fate in the "potentially imminent litigation" threatened by the *Texas* plaintiffs. (J.A. 878.) The Attorney General advised that "[i]n light of the costs and burdens that will be imposed on DHS" in implementing a rescission, "DHS should consider an orderly and efficient wind-down process." (J.A. 878.) The letter did not describe the basis for any of those conclusions beyond a general citation to the *Texas* opinions, which did not consider DAPA's constitutionality and recognized significant distinctions between DAPA and DACA. *See Texas*, 809 F.3d at 172-74.

On September 5, Attorney General Sessions announced the termination of DACA at a press conference, and Acting Secretary Duke issued a memorandum formally terminating DACA. (J.A. 999-

1004; *Regents* Pet. App. 111a-119a.) The termination memorandum quoted the Attorney General's September 4 letter and then stated that "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings" and the Attorney General's letter, "it is clear" that DACA should be terminated. (*Regents* Pet. App. 117a.) Like the Attorney General's letter, the Acting Secretary's memorandum did not address or acknowledge the reasons that DHS and the U.S. Department of Justice (DOJ) had previously given to the public for concluding that DACA was lawful, the benefits of DACA, or the myriad costs and harms that terminating DACA would inflict on recipients and the public. The only potential costs that the Acting Secretary's memorandum mentioned were the unspecified "administrative complexities" referenced by the Sessions letter. (*Regents* Pet. App. 116a.) Moreover, although Acting Secretary Duke stated that she had been unable to identify any instances of her agency denying a DACA application on discretionary grounds, petitioners now admit that DHS does exercise case-specific discretion in determining whether to grant a DACA request from an applicant who meets the threshold criteria. (*Regents* Pet. App. 112a-113a n.1; J.A. 1010.) (See *infra* at 32-33.)

In the termination memorandum, the Acting Secretary announced that DHS would reject all new DACA applications "filed after the date of this memorandum," and would accept renewal applications only until October 5, and only from individuals whose current deferred action status would expire on or before March 5, 2018. (*Regents* Pet. App. 117a-118a.)

B. Procedural Background

1. This suit in the Eastern District of New York

Sixteen States and the District of Columbia filed this suit in the United States District Court for the Eastern District of New York on September 7, 2017, alleging (among other things) that the termination of DACA was arbitrary and capricious under the APA, and violated equal protection under the Fifth Amendment's Due Process Clause. (*See* J.A. 782, 784.) Petitioners proffered an extremely limited administrative record to the district court, consisting solely of the "materials that [they] unilaterally decide[d] to present to the court, rather than the record upon which the agency made its decision." Order at 2, *In re Nielsen*, No. 17-3345 (2d Cir. Dec. 27, 2017), ECF No. 171. The district court found the record incomplete, but on petitioners' request for a writ of mandamus, the court of appeals stayed petitioners' document-production obligations pending the district court's resolution of "issues of jurisdiction and justiciability." Order, *In re Duke*, No. 17-3345 (2d Cir. Oct. 24, 2017), ECF No. 41.

The district court then rejected petitioners' arguments that judicial review was barred by either the APA, 5 U.S.C. § 701(a)(2), or the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(g). The court determined that the States had standing to challenge the termination of DACA based on their proprietary interests as employers of DACA recipients and as operators of state-run colleges and universities that employed and enrolled DACA recipients. (*Batalla Vidal* Pet. App. 46a-49a.)

In February 2018, the district court entered a preliminary injunction requiring petitioners to continue processing DACA renewal applications based on its determination that petitioners' decision to terminate DACA was likely arbitrary and capricious, and that the other preliminary injunction factors weighed strongly in respondents' favor. (*See Batalla Vidal* Pet. App. 126a.) The district court concluded that the termination would irreparably harm the States as employers and providers of public benefits (*Batalla Vidal* Pet. App. 121a-122a), and that a nationwide injunction was warranted to fully protect the state parties, who employed and admitted persons across the country into their "public hospitals, schools, and universities" (*Batalla Vidal* Pet. App. 128a).

2. Parallel proceedings in other federal courts

Concurrently with this suit, three other plaintiff groups have been litigating challenges to the termination of DACA in other federal courts. In *Regents of the University of California v. U.S. Department of Homeland Security*, a coalition including individuals, state and local governments, and the University of California challenged the termination of DACA in the Northern District of California. That district court reached conclusions similar to those of the district court in *Batalla Vidal*: it identified the same administrative record as deficient, rejected petitioners' threshold arguments that would bar review, determined that the termination likely violated the APA, and issued a preliminary injunction that is coextensive with the New York court's preliminary injunction. (*Regents* Pet. App. 25a-26a, 41a-42a, 66a.) On appeal, the Ninth

Circuit affirmed that preliminary injunction, holding that petitioners violated the APA in terminating DACA based on "an erroneous view of what the law required." (*Regents* Supp. Pet. App. 57a.)

In *NAACP v. Trump*, a plaintiff coalition including NAACP, Microsoft, and Princeton University challenged the termination of DACA in the District of Columbia. Like the district court here, the D.C. district court determined that defendants' September 2017 termination of DACA was "reviewable and unlawful because it was based chiefly on a 'virtually unexplained' conclusion that DACA was unlawful." *NAACP*, 321 F. Supp. 3d 143, 147 (D.D.C. 2018). (*See NAACP* Pet. App. 73a). Rather than immediately vacate the flawed action, the district court stayed the decision to allow DHS ninety days to "better explain its view that DACA is unlawful," or to "issue[] a new decision rescinding DACA." (*NAACP* Pet. App. 74a, 76a). DHS chose to write an explanatory memorandum rather than to issue a new decision, and in June 2018, Secretary Kirstjen Nielsen (Acting Secretary Duke's successor) submitted to the court a short memorandum that "reflect[ed Nielsen's] understanding of the Duke memorandum." (*Regents* Pet. App. 121a.) Noting that like her predecessor she was statutorily "bound by" the Attorney General's earlier conclusion that DACA was unlawful, Secretary Nielsen declared that she "concur[red] with and decline[d] to disturb" Acting Secretary Duke's decision. (*Regents* Pet. App. 122a, 123a, 126a.) The D.C. district court held that the new memorandum failed to cure the defects in the termination decision, because although Secretary Nielsen's memorandum "purports to offer further explanation for DHS's decision to rescind DACA, it fails to elaborate meaningfully on

the agency's primary rationale for its decision: the judgment that the policy was unlawful and unconstitutional." (*NAACP* Pet. App. 81a.) The district court issued final judgment in plaintiffs' favor on the APA claims, but stayed pending appeal the aspects of its decision mandating broader relief than the injunctions in New York and California. *NAACP*, 321 F. Supp. 3d at 147. The court did not reach the constitutional claims.

Another plaintiff group challenged the termination of DACA in district court in Maryland. After the district court declined to enjoin the termination of DACA, the Fourth Circuit reversed, holding that the termination decision was reviewable and vacating it as unlawful under the APA. *Casa de Md. v. U.S. Dep't of Homeland Security*, 924 F.3d 684, 706 (4th Cir. 2019).

On June 28, 2019, this Court granted certiorari in *Regents*, and granted certiorari before judgment in *Batalla Vidal* and *NAACP*, where the Second and D.C. Circuits had heard oral argument on petitioners' appeals, but had not yet ruled. The Court consolidated these three actions here. The federal government's petition for certiorari in *Casa de Maryland* (No. 18-1469), filed well after the other three petitions, is still pending.

SUMMARY OF ARGUMENT

I. Petitioners' September 2017 termination of DACA is judicially reviewable. Petitioners announced to the public that they lacked authority to maintain DACA and were therefore compelled to terminate it. They cannot avail themselves of the APA's exception for decisions committed to agency discretion because

they did not purport to be exercising any discretion when they terminated DACA; instead, they declared that they lacked authority to maintain DACA and were therefore compelled to terminate it. Petitioners cannot use Secretary Nielsen's June 2018 memorandum to retroactively insert other considerations into their 2017 decision.

II. The APA requires vacatur of petitioners' September 2017 termination decision. Petitioners' decisional documents fail every test of reasoned decision-making: they contain mistakes of fact and law, and fail to address important and material considerations. For example, although the purported absence of case-by-case discretion was central to petitioners' conclusion that DACA was invalid, petitioners' proffered administrative record suggests that petitioners did not consider a single piece of data, review a single guidance document, or hear from a single employee about whether DHS was actually exercising discretion in processing DACA applications. Indeed, evidence produced in this and other litigation shows that DHS officials in fact exercise such discretion under DACA and that even a rudimentary investigation by petitioners would have revealed that fact.

Separately, petitioners made a glaring legal error when stating that DACA possessed the same *constitutional* defects that the *Texas* courts had attributed to DAPA; no court has ever found DAPA unconstitutional. Petitioners failed to address significant differences between DACA and DAPA, despite the Fifth Circuit's explicit recognition of those differences in *Texas*. Petitioners likewise failed to explain their major course change on the legality of DACA. Nor did they take steps to ascertain the massive costs

and harms that the termination would inflict on hundreds of thousands of people, many thousands of employers, and the economies and institutions of every State.

Petitioners' defective analysis also yielded a flawed conclusion. Contrary to petitioners' arguments, DACA is lawful. No one disputes that DHS's broad authority to administer the immigration laws and set enforcement priorities includes the discretion to grant deferred action for humanitarian reasons. And DACA recipients' characteristics weigh strongly in favor of deferred action under well-recognized criteria: all DACA recipients arrived in this country as children, have strong roots in their U.S. communities, and have not engaged in serious criminal conduct. Petitioners' claims that DACA was too large and consequential to be implemented without specific congressional approval overlooks that the availability of work authorization—DACA's most significant economic impact—is supported by a express grant of statutory authority. In sum, Congress has not barred DHS from exercising its broad enforcement discretion to grant deferred action to an exceptionally sympathetic, law-abiding, and productive group of individuals who may yet be given the right to stay.

In all events, this Court cannot uphold DACA's termination because the administrative record proffered by petitioners remains incomplete. Crucial questions about petitioners' decisional process remain unanswered, including what steps petitioners took to investigate how DACA operates and what information those steps revealed.

III. Certain respondents in both New York and California (including the States here) pleaded equal

protection claims that were correctly sustained against motions to dismiss, and await further development in the trial courts. The lower courts rightly recognized the sufficiency of respondents' allegations concerning the overwhelming disparate impact of DACA's termination on Latinos from Mexico; irregularities in petitioners' decision-making process; and expressions of animus by the President, who admitted his involvement in the termination.

ARGUMENT

I. The Termination of DACA Is Judicially Reviewable.

Because the APA creates a "strong presumption in favor of judicial review of agency action," this Court has given a narrow reading to 5 U.S.C. § 701(a)(2)'s exception to reviewability for actions committed to agency discretion. *See Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018); *accord Department of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019). The Court has restricted § 701(a)(2)'s exception to circumstances where an action is committed to agency discretion by statute or by a tradition of unreviewability. *Department of Commerce*, 139 S. Ct. at 2568. DHS's announcement that the INA prohibited it from exercising discretion is not within either category.

A. Petitioners Chose to Base the Termination Solely on a Legal Conclusion About Their Authority.

1. Petitioners expressly rested the termination on a conclusion that DACA was unlawful.

According to the September 2017 documents announcing the termination of DACA, petitioners based their action on a legal conclusion that DACA was unlawful. Attorney General Sessions declared in a letter to Acting Secretary Duke that DACA constituted "an open-ended circumvention of immigration laws" that was "unconstitutional" and "without proper statutory authority." (J.A. 877; *see* J.A. 999.) He further opined that DACA was unlikely to survive judicial review because it possessed "the same legal and constitutional defects that the courts recognized as to DAPA." (J.A. 878.) The day after receiving that letter, the Acting Secretary issued a memorandum terminating DACA on the basis of the Attorney General's "legal determination" that DACA was invalid. (*Regents* Pet. App. 111a-112a, 116a.) After describing the *Texas* courts' holdings in striking down DAPA and then quoting the Attorney General's observation that DACA suffered the same legal defects, the Acting Secretary declared that "it is clear that the June 15, 2012 DACA program should be terminated." (*Regents* Pet. App. 116a-117a.)

Petitioners admit that DHS adopted the Attorney General's view that DACA is "not just legally questionable but indeed unlawful." (*E.g.*, Br. 43.) Indeed, the Attorney General's legal determination was "controlling" on DHS as a matter of law. 8 U.S.C.

§ 1103(a)(1). Secretary Nielsen's subsequent memorandum thus conceded that Nielsen and Duke were statutorily "bound by" the Attorney General's determination that DACA was unlawful. (*Regents* Pet. App. 123a.) Any subsequent Secretary will be too, unless the Attorney General's determination is administratively or judicially set aside.

In contending that Acting Secretary Duke was nonetheless exercising discretion, petitioners focus on the Acting Secretary's statement that she "should"—rather than "must"—terminate DACA. (*See* Br. 27-28.) But the word "should" is commonly "used to indicate obligation, duty, or correctness." *Should*, New Oxford American Dictionary (3d ed. 2010). The term therefore simply reflects the Acting Secretary's view that DACA's legal deficiencies obligated her to terminate the policy. The decisional documents lack any textual support for petitioners' assertions that the Acting Secretary harbored "serious doubts" about DACA's lawfulness or viewed DACA's legality as "highly questionable," separate and apart from the Attorney General's binding legal conclusion. (Br. 26-28, 33.) Grafting equivocal language onto the Attorney General's unequivocal conclusion does not change the fact that petitioners chose to base the termination on the conclusion that DHS lacked legal authority to promulgate or maintain DACA. (*See NAACP* Pet. App. 41a-42, 98a.)

The decisional documents likewise contain no support for petitioners' claim (Br.26-27) that they based the termination partly on concerns about litigation risk. The Acting Secretary never expressly identified such concerns, including in her discussion of

the *Texas* litigation.[5] Nor can that concern be read into the Attorney General's statement that DACA would likely meet the same fate as DAPA. (*See* Br. 27.) That statement was not offered as "an independent reason for rescinding DACA," but rather as the Attorney General's view of the "natural consequence of DACA's supposed illegality." (*Regents* Supp. Pet. App. 38a.)

"Nowhere in the administrative record did the Attorney General or the agency consider whether defending the program in court would (or would not) be worth the litigation risk." (*Regents* Pet. App. 56a; *see also Batalla Vidal* Pet. App. 110a-111a.) Petitioners' proffered administrative record contains no data or analysis on the costs and benefits of continuing DACA, no information on the potential consequences should a court strike it down, and no documents relevant to any other consideration that would invoke DHS's policy expertise. The record contains only the *Texas* judicial opinions; the documents establishing, maintaining, and rescinding DACA and DAPA; prior legal memoranda on the justifications for DACA and DAPA; and several letters in which politicians stated their support for DACA or opposition to it.[6] The record lacks any indication that

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[5] The courts have overwhelmingly agreed. *Casa de Md.*, 924 F.3d at 700. (*Regents* Supp. Pet. App. 36a; *Batalla Vidal* Pet. App. 110a.)

[6] A document produced in separate FOIA litigation that was improperly excluded from the administrative record here further confirms that petitioners chose to rest the termination decision exclusively on legal grounds. More than a week before DACA was terminated, an inter-agency "principals" committee agreed that "DOJ will send a memorandum to DHS outlining the legal reasons the DACA program is unlawful," and that DHS would

Acting Secretary Duke independently weighed policy considerations that could be severed from the legal determination she adopted. Thus, even if one could discern petitioners' claimed discretionary considerations in the decisional documents, those considerations would be "too closely bound up" with petitioners' legal determination to affect reviewability. (*NAACP*, Pet App. 41a-42a.) *Accord Casa de Md.*, 924 F.3d at 700.

2. Petitioners cannot retroactively inject new considerations into their termination decision.

Secretary Nielsen's June 2018 supplemental memorandum does not change the reviewability analysis here. Where an agency record suffers "such failure to explain administrative action as to frustrate effective judicial review," a court may "obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (per curiam). But any such explanation is limited to elaboration of "the determinative reason" identified "contemporaneous[ly]" with the agency's original action, as set out in the "administrative record already made and presented to the reviewing court." *Id.*[7]

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then end the program—consistent with the committee's declaration that DACA "is unlawful and will be ended." Principals Committee, Summary of Conclusions, *supra*.

[7] *Accord Department of Commerce*, 139 S. Ct. at 2575-76 ("a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record"); *AT&T Info. Sys., Inc. v. General Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (per curiam) (supplemental explanations

Secretary Nielsen elected to elaborate her "understanding of the Duke memorandum" (*Regents* Pet. App. 121a), rather than accept the D.C. district court's invitation to issue a new decision on a new record (*see NAACP* Pet. App. 94a n.7, 76a, 78a). Therefore, her supplemental memorandum is relevant to this litigation only insofar as it illuminates the conclusion regarding DACA's illegality that petitioners announced in September 2017. Petitioners cannot use Secretary Nielsen's supplemental explanation to retroactively insert other considerations into their 2017 termination decision.

Petitioners' argument to the contrary (*see* Br. 28) would upend nearly eighty years of black-letter administrative law that bars agencies from relying on post hoc rationales. *See, e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 89 (1943). Although petitioners suggest that this prohibition applies only to new reasons offered by appellate counsel (*see* Br. 29), courts have long understood the opposite to be true.[8] As the D.C. Circuit explained more than forty years ago, "[p]ost-hoc rationalizations by the agency on remand are no more permissible than are such arguments when raised by appellate counsel during judicial review."

"should be merely explanatory of the original record and should contain no new rationalizations" (quotation marks omitted)).

[8] Petitioners misplace their reliance (Br. 29) on the statement in *Martin v. Occupational Safety & Health Review Commission* that the Secretary of Labor's interpretation of a statute in an administrative adjudication "*is* agency action, not a *post hoc* rationalization of it." 499 U.S. 144, 157 (1991). Agency adjudications occur during agency proceedings as an "exercise of the agency's delegated lawmaking powers," *id.*, not "*after* agency proceedings have terminated," *id.* (emphasis in original).

Food Mktg. Inst. v. Interstate Commerce Comm'n, 587 F.2d 1285, 1290 (D.C. Cir. 1978).

Petitioners' contrary rule would subvert the premise of agency accountability that underlies the APA. "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offered genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Department of Commerce*, 139 S. Ct. at 2575-76. If an agency's stated rationales were only a first stab at identifying reasons sufficient to withstand (or evade) judicial review, agencies would possess far less incentive to present careful, reasoned, and genuine accounts of their choices. Especially in cases involving politically sensitive subject-matter, agencies might offer only a partial explanation at first, knowing that they could try again if their initial effort was found inadequate.

B. The APA Permits Review of an Agency's Conclusion that Its Authorizing Statutes Forbid a Particular Action.

Having chosen to base their termination of DACA on a legal conclusion about DHS's authority, petitioners cannot evade judicial review by hiding behind the APA's exception for actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). To honor "the strong presumption that Congress intends judicial review of administrative action,"[9] *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986),

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[9] The presumption in favor of judicial review applies with equal force in the immigration context. *See, e.g.*, *Kucana v. Holder*, 558 U.S. 233, 251 (2010); *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

this Court has "read the exception in § 701(a)(2) quite narrowly," *Weyerhaeuser*, 139 S. Ct. at 370. *Accord Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). Section 701(a)(2) precludes judicial review only when there is no "law to apply" and a court therefore lacks any "meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (quotation marks omitted); *accord Department of Commerce*, 139 S. Ct. 2551, 2568-69. "The few cases" where this Court has applied the exception involve purely discretionary "agency decisions that courts have traditionally regarded as unreviewable, such as the allocation of funds from a lump-sum appropriation, or a decision not to reconsider a final action." *Weyerhaeuser*, 139 S. Ct. at 370 (citations omitted). The termination of DACA is not within this narrow class of unreviewable decisions.

1. An agency's determination about the limits of its authority is not a discretionary non-enforcement decision.

Acting Secretary Duke did not purport to be exercising any discretion when she terminated DACA. Instead, her termination memorandum and the letter from Attorney General Sessions it incorporated set forth petitioners' unequivocal view that DHS lacked discretion to continue administering DACA. (See *supra* at 17-20.) Congress did not give DHS unreviewable discretion to determine the limits of DHS's authority. Nor does § 701(a)(2) exempt from reviewability as "committed to agency discretion" an action that an agency characterizes as compelled by law and lacking any discretionary component.

Petitioners' argument to the contrary depends on an overbroad reading of *Heckler v. Chaney*. *Chaney* held that an agency's decision "to exercise its 'discretion' not to undertake certain enforcement actions" is presumptively unreviewable under § 701(a)(2) because such a decision entails a "complicated balancing of a number of factors which are peculiarly within [an agency's] expertise." 470 U.S. at 823, 831. For such decisions, an agency must assess not only "whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to" act at all. *Id.* Thus, judicial review of discretionary non-enforcement decisions would necessarily intrude on deliberations about priorities and resources long entrusted to agency judgment, and a court would lack any "meaningful standard[s] against which to judge the agency's exercise of discretion." *Id.* at 830.

Here, the Acting Secretary did not use her agency's expertise to weigh discretionary considerations of the type identified in *Chaney*, but instead announced that the law precluded her from exercising enforcement discretion. When an agency reaches a definitive conclusion about the scope of its legal authority, there are plainly "judicially manageable standards" of review, *see id.*, because adjudicating whether an administrative agency has properly interpreted its implementing statute is precisely "the sort of routine dispute" regularly adjudicated by federal courts, *see Weyerhaeuser*, 139 S. Ct. at 370. (*See also NAACP* Pet. App. 39a (identifying "the scope of the agency's lawful enforcement authority" as a

"natural subject for judicial review").) And neither the Court in *Chaney* nor petitioners here identify any historical tradition allowing executive agencies to announce an interpretation of law free from oversight by the branch of government tasked with declaring what the law is. *Cf. Chaney*, 470 U.S. at 831, 833 n.4 (identifying centuries-old precedents illuminating unreviewability of discretionary non-enforcement decisions, and distinguishing agency actions based on an asserted lack of authority).

Petitioners concede that *Chaney* does not preclude judicial review in cases where a "statutory directive" is present that "circumscrib[es]" the agency's discretion. (Br. 19.) On that basis, petitioners acknowledge that the creation of DAPA was properly subject to review by the Fifth Circuit and this Court to evaluate whether "the INA barred DHS from adopting DAPA and expanded DACA." (Br. 24.) But this case presents the fundamentally similar issue of whether the INA barred DHS from adopting and retaining DACA: an issue equally amenable to judicial review. *See FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (the APA "make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action" (quotation marks omitted)). Nothing in the text of § 701(a)(2) nor in any historic tradition of unreviewability restrains courts from policing the bounds of an agency's statutory discretion, whether the agency is asserting authority it lacks, or disclaiming authority it possesses.

Treating an agency's legal conclusion about its authority as unreviewable would hamper agencies in exercising the very discretion that § 701(a)(2) is designed to protect. As the Ninth Circuit observed, "[i]f an agency head is mistaken in her assessment

that the law precludes one course of action, allowing the courts to disabuse her of that incorrect view of the law does not constrain discretion, but rather opens new vistas within which discretion can operate." (*Regents* Supp. Pet. App. 31a.) Judicial review of agency legal interpretations thus keeps agencies publicly accountable. Agencies should not be able to misinterpret what the law requires and face "no consequence" for such a "legal lapse[]."*Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The contrary rule urged by petitioners would allow agencies to "pass[] off" unpopular policy preferences as unreviewable interpretations of law, and thus to "wield power without owning up to the consequences." *See Department of Transp. v. Association of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring). (*See also Regents* Supp. Pet. App. 31a-34a). "[A]n official cannot claim that the law ties her hands while at the same time denying the courts' power to unbind her. She may escape political accountability or judicial review, but not both." (*NAACP* Pet. App. 73a.)

2. Petitioners misconstrue *Brotherhood of Locomotive Engineers*.

Petitioners erroneously suggest that their termination of DACA is immune from review under *Chaney* because the Acting Secretary *could have* ended DACA as an exercise of enforcement discretion. (*E.g.*, Br. 18-19, 22.) But the Court in *Chaney* expressly distinguished between an agency's exercise of "inherent discretion" to decline enforcement, 470 U.S. at 824, and an agency action "based solely on the belief that [the agency] lacks jurisdiction," *id.* at 833 n.4. Contrary to petitioners' arguments (Br. 23-25), the Court did not collapse this distinction when it decided

Interstate Commerce Commission v. Brotherhood of Locomotive Engineers (BLE), 482 U.S. 270 (1987).

Petitioners misplace their reliance (Br. 23-25) on *BLE*'s principle that agency action falling within a "tradition of nonreviewability" does not "become[] reviewable" simply because the agency "gives a 'reviewable' reason" for acting. 482 U.S. at 282-83. An agency must be exercising discretion to come within the tradition of nonreviewability recognized in *Chaney*. Here DHS announced that the law gave DHS no discretion to exercise. This case thus stands outside *BLE*'s observation that an agency does not invite judicial review by offering legal views when it invokes its discretionary power to decline enforcement. It is one thing for an agency to mention legal considerations when expressly exercising its discretion,[10] and quite another for an agency to announce a definitive conclusion that the law *forbids* a certain exercise of discretion. There is no tradition of nonreviewability for actions in which an agency disavows enforcement discretion, rather than exercising it—as evidenced by petitioners' failure to identify any case or historical source to the contrary.

Petitioners' sweeping reading of *BLE* is inconsistent with the Court's own reasoning in that case. *BLE* explained that even as to denials of reconsideration, reviewability turns on the nature of the determination by the agency. An agency considering only a claim that rehearing should be

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[10] The agency in *Chaney*, for instance, expressed doubts about its jurisdiction to take the regulatory action requested while making clear that it would not take that action as a matter of discretion in any event. 470 U.S. at 824-25.

granted because of "material error" possesses complete and traditional discretion. 482 U.S. at 280, 282. By contrast, there is no "tradition of nonreviewability" when a reconsideration request rests on new evidence or changed circumstances. *Id.* at 283-84. In those instances, as here, a reviewing court can apply well-worn "ordinary standards" of review to assess whether the agency's determination contains (among other things) any "errors of fact or law" that render it arbitrary and capricious. *See id.*

Common practice belies petitioners' argument that any agency action connected to non-enforcement is unreviewable no matter what type of determination the agency renders. For example, in *Massachusetts v. EPA*, this Court reviewed and rejected EPA's determination that it lacked regulatory enforcement authority in a particular sphere, holding that non-enforcement decisions are challengeable when agencies are subject to procedural rules for denying a rulemaking petition. 549 U.S. 497, 527-28 (2007). And in *Judulang v. Holder*, this Court applied arbitrary-and-capricious review to assess whether the Board of Immigration Appeals had rationally explained its basis for adopting a specific framework for discretionary immigration relief. 565 U.S. 42, 55 (2011).

In the decades since *BLE* was decided, the federal courts of appeals have continued to distinguish between non-enforcement decisions that apply an agency's vested discretion, and decisions that interpret the bounds of the agency's authority. The Ninth Circuit, for example, differentiates non-enforcement decisions made as "an exercise of discretion," which are unreviewable, from non-enforcement decisions "based solely on [the agency's]

belief that [it] lacks jurisdiction" to act, which are reviewable. *Montana Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. Federal Labor Relations Auth.*, 898 F.2d 753, 756-57 (9th Cir. 1990) (interpreting scope of *Chaney*). The D.C. Circuit similarly holds that broad statements of enforcement policy are generally reviewable because they are "likely to be direct interpretation of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676-77 (D.C. Cir. 1994).

Petitioners are mistaken in contending that if review is not precluded here, courts could review a prosecutor's refusal to institute criminal proceedings when the refusal is based on a "'belief . . . that the law will not sustain a conviction.'" (Br. 23-24 (quoting *BLE*, 482 U.S. at 283).) Criminal prosecutors operate within a strong tradition of unreviewable enforcement discretion that has no counterpart for the civil enforcement decisions of administrative agencies. Moreover, unlike a prosecutor's decision to prosecute, the decision to terminate DACA was not a decision to refrain from enforcement. It was simply a decision to end a framework of forbearance.

3. 8 U.S.C. § 1252(g) does not bar review here.

The INA provides that, outside of certain exceptions, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders against

any alien." 8 U.S.C. § 1252(g). As this Court has explained, § 1252(g) "applies only to [the] three discrete actions" listed, not the full universe of "claims arising from deportation proceedings." *AADC*, 525 U.S. at 482; *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (provision does not "sweep in" other types of claims that might "technically" relate to "the three listed actions" but are not one of "those three specific actions themselves"). Section 1252(g) thus does not cover the termination of DACA, which was not a decision to "commence proceedings, adjudicate cases, or execute removal orders."

In addition, § 1252(g) strips courts of jurisdiction only to hear claims brought "by or on behalf of any alien." It thus would not apply to the States' claims, brought to vindicate our States' interests as employers, proprietors of public universities, and regulators.

II. Petitioners' Termination of DACA Was Arbitrary and Capricious.

Petitioners announced that they were terminating DACA because Attorney General Sessions had concluded that DACA possessed all of "the same legal and constitutional defects" the *Texas* courts had found with respect to DAPA. (*Regents* Pet. App. 116a (quotation marks omitted).) Their decision to do that was arbitrary and capricious because the Attorney General's legal opinion contained several facially apparent errors and omissions.[11] The APA requires an agency to "articulate a satisfactory explanation for its

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[11] The States are therefore likely to succeed on their APA claim, and petitioners do not dispute that the other factors, *see Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008), strongly support an injunction.

action" that demonstrates consideration of "relevant factors"—including any "important aspect of the problem"—without any "clear error of judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (quotation marks omitted). Petitioners' approach fails to meet these requirements and falls short of the "reasoned explanation" the APA requires. *See Department of Commerce*, 139 S. Ct. at 2575-76.

A. Petitioners' Asserted Conclusion That DACA Was Illegal Rested on Substantial Errors of Fact and Law.

1. Petitioners erroneously assumed that DACA prevented agency officials from exercising discretion.

In concluding that DACA was unlawful under the *Texas* decisions invalidating DAPA, petitioners made a fundamental factual mistake. Even a rudimentary investigation would have shown that DACA has a feature that takes it squarely outside the *Texas* courts' analysis: in considering DACA requests, DHS officials exercise case-by-case discretion.

On a preliminary record, the Fifth Circuit concluded that DHS's DAPA memorandum "would not genuinely leave the agency and its employees free to exercise discretion." *Texas*, 809 F.3d at 176. From this, the court concluded that DAPA likely violated APA notice-and-comment procedures. The Fifth Circuit identified the lack of case-specific discretion as a reason why DAPA also likely exceeded DHS's authority under the INA, expressly noting that "[w]e do not address whether single, ad hoc grants of

deferred action made on a genuinely case-by-case basis are consistent with the INA." *Id.* at 186 n.202.

Attorney General Sessions's conclusion that DACA possessed the same defects as DAPA assumed that federal officials were *not* free to exercise case-by-case discretion when evaluating DACA requests. Acting Secretary Duke endorsed that assumption in declaring that "DACA decisions were not truly discretionary" (*Regents* Pet. App. 114a), and that she had "not been able to identify" a single instance where an application was "denied based solely on discretion" (*Regents* Pet. App. 112a-113a n.1). Secretary Nielsen issued no corrective or explanation for this assumption in her supplemental memorandum.

Evidence in this case and in a separate challenge to DACA brought by Texas and other States last year shows that petitioners' assumption was false, and that petitioners knew or should have known that. (J.A. 1010.) *See Texas v. United States*, 328 F. Supp. 3d 662, 733-34 ("*Texas II*") (S.D. Tex. 2018). DHS admitted below that it has identified discretionary denials, and petitioners no longer stand behind Acting Secretary Duke's contrary assertion. (J.A. 1010.) Other materials confirm the substantial discretion DHS exercised in evaluating DACA requests, including internal DHS documents, statements from agents who actually process DACA applications, and updated figures showing a discretionary denial rate of 20 percent for initial DACA applications (not including administrative rejections) in the full year before DACA was terminated (J.A. 996). In light of this evidence, the federal district court judge who in 2015 found that DACA (and therefore DAPA) did not leave room for discretion rejected a claim last year that "those processing DACA applications are not free to exercise

discretion." *Texas II*, 328 F. Supp. 3d at 734. As that judge concluded, the evidence now put forth by Texas and other States to support that claim was "not convincing, either in its quantity or its quality." *Id.*

In reaching this conclusion, the judge in *Texas II* specifically rejected the assertions of Kenneth Palinkas, the president of the union representing agents who process DACA requests. Palinkas' declaration was critical to the *Texas* courts' determination that DAPA would be administered in the same way as DACA, and thus would not be discretionary. *See Texas*, 809 F.3d at 172-73 (noting Palinkas's claim that "DACA applications are simply rubberstamped if the applicants meet the necessary criteria" (quotation marks omitted)). But Palinkas admitted in a 2018 deposition in *Texas II* that he has strong personal feelings against DACA, that he is not involved in processing DACA applications, and that he in fact is "not aware of the extent to which discretion is exercised." (Amicus Br. of DACA Recipients and State of New Jersey 23 (quotation marks omitted).) Accordingly, although the district judge in *Texas* had enjoined DAPA based on Palinkas's assertions, the same judge in *Texas II* declined to accept those assertions as a basis for enjoining DACA, noting that Palinkas had never "processed a DACA application," and that "most of what [he] had to say was either opinion or based upon hearsay." *Texas II*, 328 F. Supp. 3d at 733 n.105.

Petitioners apparently failed to conduct any inquiry into how DACA applications are actually processed. Instead, they uncritically accepted the earlier *Texas* decisions' characterization of DACA as nondiscretionary, which rested on the now-debunked Palinkas assertions. Petitioners thus failed to meet

their basic obligation under the APA to "examine the relevant data" before reaching a conclusion. *See State Farm*, 463 U.S. at 43. No government should proceed in such a manner when making a decision that threatens devastating effects on hundreds of thousands of people, and serious harm to many thousands of employers and the economies and institutions of every State. The APA requires the federal government to meet higher standards of reasoned decisionmaking.

The sparse and incomplete record that petitioners have produced to date fails to substantiate petitioners' assumptions and claims. *See State Farm*, 463 U.S. at 52; *see also Department of Commerce*, 139 S. Ct. at 2575 (agency action is invalid where "evidence tells a story that does not match the explanation"). Moreover, petitioners' assertion that DACA decisions were "not truly discretionary" was contradicted by information readily available to petitioners that was unquestionably material to petitioners' legal assessment. Without further production of record documents that might support petitioners' assertions on this score (see *infra* at 51-53 (discussing incomplete record)), the only conclusion a court can draw is that petitioners wrongly assumed that DACA left no room for case-by-case discretion, and that this assumption led petitioners to conclude that DACA possessed serious legal defects it did not in fact have.

2. Petitioners purported to rely on the holding of a case that contained no such holding.

In discussing the *Texas* decisions—the only precedents petitioners cited to justify their declaration that the law compelled them to terminate DACA—petitioners asserted without explanation that DACA

"has the same legal *and constitutional* defects that the courts recognized as to DAPA." (*Regents* Pet. App. 116a (emphasis added, quotation marks omitted); *see* J.A. 877.) But no court has ever found either DAPA or DACA to possess "constitutional defects."

Petitioners make no attempt to explain this error. They instead paraphrase Attorney General Sessions's language (Br. 52) to exclude his incorrect statements that "courts recognized" DAPA to have "constitutional defects" (J.A. 877). But his mistake was glaring and material. Acting Secretary Duke's memorandum adopted the entirety of the reasoning in his letter, and specifically quoted his reference to "constitutional defects." (*Regents* Pet. App. 116a.) And under 8 U.S.C. § 1103(a)(1), she and her successors are bound by the Attorney General's determination unless and until that determination is withdrawn or overruled.

Governments owe it to the public to act with more care when conducting legal analyses that will affect so many so greatly. It was arbitrary and capricious for petitioners to rest the termination of DACA—a decision that will impact the lives and livelihoods of many—on a sloppy and facially erroneous reading of what petitioners claimed was their key legal authority. Agency action "may not stand if the agency has misconceived the law." *Chenery*, 318 U.S. at 94.

B. Petitioners' Evaluation of DACA Omitted Essential Factors.

Even if petitioners had not made the above errors, the termination decision would still be arbitrary and capricious because petitioners did not consider factors that were important and relevant to their analysis. *State Farm*, 463 U.S. at 42-43.

1. Petitioners failed to address significant differences between DACA and DAPA.

Petitioners' conclusion that DACA was unlawful rested on the premise that DACA possessed the same infirmities that the Fifth Circuit attributed to DAPA. Yet the Fifth Circuit itself cautioned that "DACA and DAPA are not identical," 809 F.3d at 174, and that "any extrapolation" from one to the other "must be done carefully," *id.* at 173. Despite that admonition, petitioners never addressed key differences between DAPA and DACA.

For example, the Fifth Circuit emphasized that approximately 4.3 million people—nearly 40 percent of the undocumented population—would have been eligible for DAPA and reserved the question whether grants of deferred action to a smaller population "are consistent with the INA." *Texas*, 809 F.3d at 147-48, 186 n.202. DACA eligibility extends to only about 1.4 million persons, about 10 percent of the current undocumented population. Br. for United States at 59, *Texas I*, 136 S. Ct. 2271 (No. 15-674). DACA's size (unlike DAPA's) is thus comparable to historic exercises of discretionary relief like the Family Fairness Program, which the Fifth Circuit did not criticize. Even in absolute terms, fewer individuals are eligible for DACA than the approximately 1.5 million persons who were eligible for the Family Fairness Program, although that program was implemented when the undocumented population was much smaller.[12] (J.A. 821-822, 850 n.15.) Petitioners gave no

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[12] Petitioners fail in their attempts to distinguish DACA from the Family Fairness Program and other historical policies

reasons why a deferred-action framework of DACA's more limited scope is governed by the Fifth Circuit's decision or reasoning about DAPA.

The Fifth Circuit's decision also turned on the ability of those eligible for DAPA to "derive a lawful immigration status from their children's immigration status" under the INA. *Texas*, 809 F.3d at 179. According to the Fifth Circuit, DAPA circumvented "Congress's careful plan" by offering relief—on terms different from what Congress prescribed—to a class of persons already within the ambit of certain "specific and intricate provisions" of the INA. *Id.* at 186; *see also id.* at 179-80. Because the INA contains no comparable provisions concerning the class of persons who would qualify for DACA, that critical aspect of the court's reasoning does not translate. Petitioners argue that the INA's pathway to legal status for DAPA-eligible individuals was "not critical to the Fifth Circuit's analysis" (Br. 35-36), but the Fifth Circuit's discussion shows otherwise. The absence of analogous prescriptions concerning DACA-eligible individuals is thus a "critical difference" that petitioners should have addressed in their decisional documents. *See State Farm*, 463 U.S. at 54.

Petitioners likewise failed to account for the federal government's prior statements to this Court that DACA was grounded in the important principle that "people who came to this country as children are not similarly situated to adults," and have "particularly strong ties to this country" because many "have

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extending discretionary relief to large numbers of noncitizens (Br. 47-50) for the reasons stated by the other respondents. (*See*, *e.g.*, Br. for DACA Recipient Resps. 44-47; Br. for States of California et al. 27-28 & n.10.)

never known another home." *Texas* U.S. Br. 45-46. This Court has recognized "long ties to the community" as an important equitable consideration in enforcement of the immigration laws. *See Arizona v. United States*, 567 U.S. 387, 396 (2012). And the INA itself distinguishes between children and adults, excluding time accrued as a minor from the "unlawful presence" calculation. *See* 8 U.S.C. § 1182(a)(9)(B)(iii)(I).

Petitioners' remarkable assertion to this Court that "the sympathetic circumstances of the aliens involved" are simply immaterial to DACA's validity (Br. 45) ignores that "humanitarian reasons" and "sympathetic factors" are well-recognized bases for extending deferred action, *AADC*, 525 U.S. at 484 & n.8. As this Court explained in *Arizona*, "[d]iscretion in the enforcement of immigration law embraces immediate human concerns." 567 U.S. at 396. Petitioners cannot now disclaim that element of their discretion simply because they would rather not exercise it.

Secretary Nielsen's June 2018 supplemental memorandum does nothing to change the analysis. While Secretary Nielsen stated her belief that any differences between DACA and DAPA are insufficient "to convince [her] that the DACA policy is lawful" (*Regents* Pet. App. 122a), she did not explain why she viewed those differences as immaterial. This was an especially conspicuous failure because three district courts, whose reasoning was available to Secretary Nielsen when she issued the new memorandum, had found those distinctions material. (*See Batalla Vidal* Pet. App. 98a-104a; *Regents* Pet. App. 50a-54a; *NAACP* Pet. App. 51a-52a.) Secretary Nielsen also continued to rely on Attorney General Sessions's pronouncement that DACA is illegal because it purportedly shares

with DAPA some general "incompatibility" with the "INA's comprehensive scheme." (*Regents* Pet. App. 122a.) Yet, despite three district courts having explained why that was not so, Secretary Nielsen neither identified the INA provisions with which DACA purportedly conflicts, nor provided any "clue as to how an agency official, a court, or anyone else would go about determining whether a particular nonenforcement policy meets [her] test for 'compatibility' with the overall statutory scheme." (*NAACP* Pet. App. 105a.) In sum, "the Nielsen Memo offers nothing even remotely approaching a considered legal assessment" (*NAACP* Pet. App. 105a), and thus failed to address any of the critical omissions of reasoning in the termination decision that render it arbitrary and capricious.

Petitioners initially offered a cursory legal analysis that failed to identify how the few legal authorities they believed relevant—the *Texas* decisions and the INA—compelled the conclusion that they reached. Inexplicably, after three courts had identified these failures of reasoning, Secretary Nielsen elected to ignore and elide those defects, rather than to confront and correct them by providing the analysis that had been missing. Thus, even after a second chance, petitioners have yet to produce the reasoned explanation required by the APA, and it is not for a court to "supply a reasoned basis for the agency action that the agency itself has not given." *See State Farm*, 463 U.S. at 43.

2. Petitioners failed to explain their change in position or to consider the significant interests affected.

Petitioners also violated the APA by changing course on DACA for non-discretionary reasons without

fulfilling their obligations to "supply a reasoned analysis for the change," *State Farm*, 463 U.S. at 42; to show "good reasons for the new policy," *Fox Television*, 556 U.S. at 515; or to consider the "serious reliance interests" DACA engendered, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quotation marks omitted).

For the first seven-and-a-half months of the current presidential administration, petitioners gave no indication they considered DACA illegal under the reasoning of the *Texas* decisions. To the contrary, they continued to accept and process requests for DACA relief, and the President explained in April 2017 that his policy was not to deport DACA recipients, whom he advised to "rest easy." (J.A. 435.) Former DHS Secretary John Kelly likewise publicly affirmed in March 2017 that the federal government had made a "commitment" to DACA recipients (J.A. 435), and Secretary Kelly kept DACA in place even as the agency announced other restructurings of its enforcement policies in February and June 2017 (J.A. 857, 868).

Yet on September 5, 2017, petitioners reversed course and declared that DACA was beyond DHS's authority under the INA and the Constitution. Petitioners claim that they evinced an awareness that they were changing their position and provided purportedly "good reasons" for the change by referring to the *Texas* litigation and the Attorney General's view that DACA had the same defects as DAPA. (Br. 51-52.) But the errors and omissions in the Attorney General's analysis show that petitioners' new position was not "the product of reasoned decisionmaking." *See State Farm*, 463 U.S. at 52. Even now, petitioners continue to mischaracterize the *Texas* decisions. In belatedly

acknowledging that the federal government previously considered DACA legal, petitioners claim that the OLC memorandum reflecting the government's prior view was "flatly rejected by the Fifth Circuit." (Br. 52.) But neither Acting Secretary Duke nor Secretary Nielsen ever addressed the OLC memorandum, nor did Attorney General Sessions distinguish the memorandum in his legal analysis. And the Fifth Circuit did not in fact reject the OLC memorandum. Rather, it concluded that DAPA's particular characteristics differentiated DAPA from the other types of deferred action and similar discretionary relief described in the memorandum. *Texas*, 809 F.3d at 184 n.197.

Petitioners also acted arbitrarily and capriciously in failing to account for the interests of those who have relied on DACA. *See Encino Motorcars*, 136 S. Ct. at 2126. To be sure, petitioners remained (and remain) free to terminate DACA or to rescind the relief afforded to any particular DACA recipient as a matter of discretion. But even in areas where an agency has broad discretion, an agency must still demonstrate that it understands how affected parties will be impacted by a major course change. For example, the automobile dealerships in *Encino Motorcars* could claim no right to the continued existence of a Department of Labor regulation allowing them to avoid paying overtime to service advisors. *See id.* Yet even though the agency was free to change policy, it improperly ignored the impacts of its change in enforcement policy on the dealerships who had "structured their compensation plans against [the] background understanding" in place. *Id.* The agency there failed to perform the necessary diligence given the "serious reliance interests at stake." *Id.* at 2127.

Interests weightier than an ability to avoid paying overtime wages are at issue here. Yet petitioners nowhere attempted to ascertain the likely costs and harms of their change in course. The APA's requirements of reasoned decisionmaking demand more.

Since 2012, DACA has provided a means for about 800,000 recipients to support themselves and their families, and to contribute to their communities by starting businesses and performing essential jobs; without DACA, recipients will lose that ability. Private and public employers have invested time and resources in hiring and training DACA recipients that the program permitted to work and to be hired; losing those employees will disrupt businesses and harm state and other government agencies. Many recipients have enrolled in multi-year degree programs that they that now may not be able to complete, to the detriment of the enrollees—some of whom already made nonrefundable tuition payments—and of the colleges and universities that admitted them. Petitioners do not dispute that terminating DACA will produce these harms. Nor can they dispute that their proffered administrative record reveals no attempt to assess the scope and magnitude of the costs and harms that would result from a termination of DACA.

Petitioners claim that they nonetheless accounted for the serious reliance interests at stake by ordering a wind-down of DACA over time. (Br. 42.) But they described that choice as necessary to accommodate unspecified "administrative complexities" that the termination would present for DHS. (*Regents* Pet. App. 116a.) Nothing in the record suggests that Acting Secretary Duke or Attorney General Sessions ever considered the massive economic, social, and personal

consequences of terminating DACA for those relying on it.

Petitioners fare no better in their attempt to rely (*see* Br. 42, 51-52) on Acting Secretary Nielsen's assurance that she was "keenly aware that DACA recipients have availed themselves of the policy in continuing their presence in this country and pursuing their lives" (*Regents* Pet. App. 125a). Even if this assurance could be imputed to the decisionmakers who actually terminated DACA—Acting Secretary Duke and Attorney General Sessions—the administrative record proffered by petitioners does not show what information Secretary Nielsen considered to inform herself of the type or magnitude of the interests at stake. Moreover, her cursory discussion refers only to unspecified "reliance interests" of DACA recipients; it makes no attempt to account for the effects of the termination on the States and the other organizations, entities, and persons who employ and depend upon DACA recipients. Petitioners' failure to recognize that these interests even exist is by itself grounds for vacating the termination decision.

C. Petitioners' Defective Legal Analysis Led to a Flawed Legal Conclusion.

The legal and factual errors in petitioners' legal analysis (see *supra* at 31-35) led them to erroneously conclude that DACA exceeded the enforcement discretion conferred on immigration officials by the INA.[13]

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[13] Petitioners' conclusion that DACA is unlawful is a conclusion no court has ever reached. And because petitioners' analysis was arbitrary and capricious, this Court need not address petitioners' flawed conclusion. In any event, it would be

"A principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396. The Constitution and the INA charge these officials with determining whether, when, and how to take enforcement action against removable individuals. Crucial practical and policy considerations make broad latitude essential to that complex task. As this Court has noted, "[t]he equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service." *Id.* (*See also Regents* Pet. App. 98a (enumerating veteran status as eligibility criteria for DACA).) In addition, "[s]ome discretionary decisions involve policy choices that bear on this Nation's international relations," *Arizona*, 567 U.S. at 396, a field where circumstances often change, sometimes rapidly, and this Court has a "customary policy of deference to the President," *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 348 (2005) (citing this policy in declining to impose restrictions on removal process that were not expressly required by Congress).

In insisting that DACA required specific legislative authorization (Br. 43-46), petitioners upend the fundamental premise of immigration law that "flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (quotation marks omitted). The relevant inquiry here

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inappropriate here to uphold petitioners' legal conclusion based on legal reasons not asserted by any agency decisionmaker in this case, especially given petitioners' failure to produce the complete record for review. (See *infra* at 51-53.)

is not whether Congress specifically authorized DHS to make discretionary grants of deferred action to individuals meeting DACA's eligibility criteria, but whether Congress's broad grant of enforcement discretion to DHS precludes that authority. The answer to that question is *no*.

Congress has tasked the DHS Secretary with "the administration and enforcement" of the INA and "all other laws relating to the immigration and naturalization of aliens," 8 U.S.C. § 1103(a)(1), and has directed the Secretary to "issue such instructions" and "perform such other acts as he deems necessary for carrying out his authority," *id.* § 1103(a)(3). Congress has also charged the DHS Secretary with responsibility for "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). And by appropriating funds sufficient to remove only a small portion of the country's total undocumented population, Congress has made it necessary for DHS to exercise substantial discretion in setting those priorities. (*See Batalla Vidal* Pet. App. 72a (DHS "has the resources to remove fewer than 400,000" of approximately 11.3 million undocumented immigrants).) Petitioners thus acknowledge that the "vast disparity" (Br. 46) between the size of the undocumented population and DHS's limited resources means that the agency cannot indiscriminately pursue removal of all undocumented immigrants; it must instead "establish enforcement priorities, and strategically deploy its resources to enforce the law" (Br. 45).

One well-recognized way in which DHS and its predecessor agencies have long carried out that mission is by affording certain removable individuals discretionary relief such as deferred action, originally known as "nonpriority." *AADC*, 525 U.S. at 484

(quotation marks omitted); *see also*, *e.g.*, *Lennon v. INS*, 527 F.2d 187, 189 n.3 (1975). "This commendable exercise in administrative discretion, developed without express statutory authorization," *AADC*, 525 U.S. at 484 (quotation marks omitted), does not confer lawful immigration status or provide a defense to removal. Instead, DHS refrains from removal for a stated period, revocable at any time, "for humanitarian reasons or simply for its own convenience." *Id.; see also* 8 C.F.R. § 274a.12(c)(14) (describing deferred action as "an act of administrative convenience to the government which gives some cases lower priority"). Relevant criteria include a low probability that an individual will ultimately be removed, "the presence of sympathetic factors that could adversely affect future cases or generate bad publicity" for the government, and the absence of any violations of law constituting a high enforcement priority. *AADC,* 525 U.S. at 484 n.8.

Petitioners do not dispute that their broad authority to administer the immigration laws and set enforcement priorities includes the authority to grant deferred action and to notify DACA recipients of that decision. (Br. 4-5). As petitioners rightly note, "Congress and this Court have recognized the practice's use in certain contexts." (Br. 43; *see* Br. 45.) Petitioners also do not dispute the validity of their own regulations permitting deferred-action recipients to receive certain privileges during a period of deferred action, including work authorization in cases of economic necessity. (Br. 5 (citing 8 C.F.R. § 274a.12(c)(14)).) Indeed, those regulations are longstanding, applicable not just to DACA recipients but to all recipients of deferred action, and supported by separate legislative authority. The practice of

granting work authorization to economically needy immigrants during periods of discretionary relief from removal dates back to at least the 1970s,[14] was first codified in regulations in 1981,[15] and was confirmed by Congress in 1986.[16] *See* 8 U.S.C. § 1324a(h)(3) (recognizing employers' ability to hire immigrants who are "authorized to be so employed by [the INA] *or by the [DHS Secretary]*" (emphasis added)).

Petitioners nevertheless argue that DACA exceeded the broad discretion to grant deferred action and work authorization that petitioners admittedly possess. But each of their arguments is mistaken. Petitioners suggest that DACA is invalid because it is a "categorical deferred-action policy" (Br. 40, 43), by which they mean it has "stated eligibility criteria" (Br. 40) and "creates an implicit presumption that requestors who meet its eligibility criteria will be

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[14] *See* Sam Bernsen, INS Gen. Counsel, *Leave to Labor*, 52 No. 35 Interpreter Releases 291, 294 (Sep. 1975).

[15] *See* Employment Authorization, 46 Fed. Reg. 25,079, 25,080 (May 5, 1981).

[16] Likewise, regulations dating back to 1979 have allowed deferred-action recipients to participate in Social Security. 44 Fed. Reg. 10,369, 10,371 (Feb. 20, 1979). And the INA now reflects Congress's plain intent to vest the Secretary of DHS with discretion to grant Social Security benefits to those who have been granted deferred action. 8 U.S.C. § 1611(b)(2) (bar on granting Social Security benefits "shall not apply . . . to an alien who is lawfully present in the United States *as determined by the [Secretary]*" (emphasis added)); *see also* 8 C.F.R. § 1.3(a)(4)(vi) (for "purposes of 8 U.S.C. § 1161(b)(2)," defining "lawfully present" to include specified "classes of aliens permitted to remain in the United States because DHS has decided for humanitarian or other public policy reasons not to initiate removal proceedings or enforce departure," including "[a]liens currently in deferred action status").

granted deferred action" (Br. 39). But the memorandum announcing DACA allows DHS agents to exercise case-by-case discretion to deny deferred action to those who meet DACA's threshold criteria (*Regents* Pet. App. 99a), and those agents were indisputably exercising that discretion (see *supra* at 32-33). There is nothing unusual or unlawful about creating an efficient framework for the exercise of individualized enforcement discretion by establishing criteria that identify candidates who are likely to benefit from that discretion. (*See* J.A. 821-826 (OLC Mem.).) Properly understood, DACA does not violate the legal principle petitioners invoke.

One of the core functions of deferred action is to serve DHS's "own convenience." *AADC*, 525 U.S. at 484. Deferred-action frameworks like DACA serve that end in part "by encouraging lower priority individuals to identify themselves to the agency," which can help "the agency to better focus its scarce resources on higher enforcement priorities." (J.A. 837-838 (OLC Mem.).) Implementing deferred action only in an ad hoc way would leave the agency less able to direct resources toward its highest enforcement priorities. As the New York district court observed, there is "no principled reason why the Executive Branch may grant deferred action to particular immigrants but may not create a program by which individual immigrants who meet certain prescribed criteria are eligible to request deferred action." (*Batalla Vidal* Pet. App. 95a.)

Petitioners are simply wrong that DACA "affirmatively sanction[s] the ongoing violation of federal law." (Br. 43). Like all forms of deferred action, DACA neither provides recipients with lawful immigration status nor furnishes a defense to removal, and

a grant of deferred action under DACA can be revoked at any time. DACA relief simply communicates a decision that DHS has elected not to use its limited resources to remove the recipient for a stated time, unless the agency sooner changes its mind. In this respect, DACA is no different from the type of deferred action that petitioners acknowledge to be legitimate. (*See* Br. 46-50.) Nor does the grant of work authorization to DACA recipients transform this policy into a violation of law or distinguish it from other deferred action policies, as petitioners contend. (Br. 44-45). Work authorization is available to *all* recipients of deferred action under independent statutory and regulatory provisions that were put in place years before this Court endorsed deferred action in *AADC*.

Petitioners fare no better in suggesting that DACA is somehow flawed because an estimated 1.7 million individuals were eligible to request deferred action under DACA. (Br. 43-44.) First, that number is a questionable figure that exceeds petitioners' prior estimate. (See *supra* at 36.) Second, that number, even if correct, would represent just a small portion (approximately 15 percent) of the estimated 11.3 million undocumented immigrants in the country (*Batalla Vidal* Pet. App. 72a). And the estimated number of persons who in fact received deferred action pursuant to DACA (800,000) is an even smaller fraction: approximately 7 percent. DACA's eligibility criteria have thus effectively identified a narrow segment of the overall removable population: a group of individuals who were highly unlikely to be removed both because of DHS's limited resources and because of those individuals' particular characteristics. Even now, petitioners do not deny that DACA recipients—all of whom arrived in this country as children, have

strong roots in their U.S. communities, and have not engaged in serious criminal conduct (*Regents* Pet. App. 97a-98a)—are "low-priority targets" for removal (Br. 46). DACA recipients' characteristics weigh strongly in favor of deferred action for "humanitarian reasons" under the criteria recognized by this Court in *AADC*, including a low likelihood of removal, the "presence of sympathetic factors," and the absence of any violation "given high enforcement priority." *See* 525 U.S. at 484 n.8.

Petitioners are further mistaken in contending that DACA was too consequential from an economic and political standpoint to be left to DHS without a more specific grant of statutory authority. (Br. 44-45.) DACA's most significant economic impact—the availability of work authorization—*was* based on a specific statutory grant of authority: 8 U.S.C. § 1324a(h)(3). Moreover, it would be impossible for DHS to carry out its statutory charge to establish "national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), without making decisions with significant economic and political consequences.

At bottom, petitioners' claim that DACA required additional legislation ignores that Congress has already given DHS broad discretion to set enforcement priorities and forgo enforcement based on "humanitarian reasons," *AADC*, 525 U.S. at 484, and "immediate human concerns," *Arizona*, 567 U.S. at 396. "Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime." *Id.* Congress has sensibly and humanely authorized DHS to permit individuals to work legally during the period when the agency has chosen to forbear from removing them. To be sure, Congress has

not at this point created a pathway for recipients of deferred action under DACA to obtain lawful immigration status, but that step remains overwhelmingly popular with the public and still may become a reality. In the meantime, nothing in the congressional scheme forecloses DHS from exercising its enforcement discretion to grant deferred action to an exceptionally sympathetic, law-abiding, and productive group of individuals who have not known another home, are unlikely to be removed, and are widely viewed as promising candidates to be given the right to stay.

D. This Court Cannot Uphold Petitioners' Justifications for the Termination Without a Full Administrative Record.

Even if this Court disagrees that petitioners' actions were arbitrary and capricious on the current record, it must reject petitioners' request to uphold their termination of DACA as "plainly valid." (*See* Br. 32.) Claims that challenge an agency's reasons for acting cannot be resolved against an APA plaintiff on the merits until the agency has presented the complete administrative record undergirding its decision. The contrary course that petitioners urge would permit and incentivize agencies to withhold evidence unfavorable to the agency's position. *See Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). APA plaintiffs are thus entitled to a complete administrative record, and a court may properly direct completion when the record presented is demonstrably incomplete. *See Department of Commerce*, 139 S. Ct. at 2574.

Here, the dismissal of respondents' APA claims that petitioners request cannot be granted at the

current stage of the proceedings because petitioners have yet to produce a complete administrative record. In December 2017, after the Ninth Circuit affirmed the district court's determination in *Regents* that the administrative record produced by petitioners was facially deficient, this Court directed the district court to address petitioners' "threshold arguments" about jurisdiction and reviewability before considering whether "amendments to the record are necessary and appropriate." *In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam). Shortly afterwards, the Second Circuit denied petitioners' mandamus application, which had sought to preclude completion of the administrative record in *Batalla Vidal*, a case where the district court had already rejected petitioners' jurisdiction and reviewability arguments. Order at 4, *In re Nielsen*, No. 17-3345 (2d Cir. Dec. 27, 2017), ECF No. 171. The Second Circuit noted that specific materials "appear to be missing" from petitioners' proffered record and that the district court in California had already identified 48 non-privileged documents that were before the agency decisionmakers but not within the record presented. [17] *Id.* at 2-3.

Nearly two years later, petitioners still have not completed the administrative record in any of the cases under review.[18] As the New York district court

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[17] Since that ruling, petitioners have produced in FOIA litigation other documents that should have been part of the administrative record here, including the August 24, 2017 document describing the conclusions of the Principals Committee. *See* Principals Comm., Summary of Conclusions.

[18] In *Batalla Vidal* and *Regents*, petitioners obtained a stay of that obligation pending their various interlocutory appeals.

recognized, because the States' APA claims turn on asserted defects in the rationality and reasonableness of petitioners' decisional process, and because the record here remains incomplete, it is not possible to render judgment in petitioners' favor at this moment in the proceedings. (*Batalla Vidal*, Pet. App. 138a.) Nor could this Court reverse the determination that the record is incomplete when petitioners have not challenged those rulings in their opening brief and when those rulings are, in any event, plainly correct.

III. The States Have Sufficiently Stated an Equal Protection Claim.

The Court should decline to disturb the *Regents* and *Batalla Vidal* rulings denying petitioners' motion to dismiss the equal protection claims in those cases.[19] The respondents in the New York and California cases who raised an equal protection claim adequately alleged that the termination of DACA was motivated by discriminatory animus against Latinos from Mexico, and resulted in a discriminatory effect on that group. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). To sufficiently plead animus, a plaintiff need only raise a plausible inference that "an invidious discriminatory

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(*See Batalla Vidal* Pet. App. 138a n.4.) *See also* Order, *Regents v. United States Dep't of Homeland Security*, No. 17-05211 (N.D. Cal. Sep. 14, 2018). The respondents in *NAACP* moved for summary judgment on the partial record, which the district court granted. (*NAACP* Pet. App. 18a, 76a.)

[19] The New York and California district courts' injunctions and the D.C. district court's judgment relied only on APA claims, and none of the respondents relies on an equal protection claim as an alternative ground for affirming those dispositions.

purpose" could have been "a motivating factor" in a governmental decision. *See id.* at 265-66. Respondents satisfied that standard here.

First, respondents alleged that the impact of terminating DACA falls overwhelmingly on Latinos from Mexico. Seventy-eight percent of DACA recipients are Latinos from Mexico. (*Regents* Supp. Pet. App. 74a; J.A. 708.) Of the approximately 1,400 DACA recipients who would lose deferred action each day without the relief granted by the courts below (*Batalla Vidal* Pet. App. 120a), approximately 1,100 are Latinos from Mexico.

Second, respondents alleged that petitioners failed to act with the care and consideration that governments typically give a decision of this magnitude (J.A. 718-721, 727-734), a fact which can support an inference of discriminatory intent, *see Arlington Heights*, 429 U.S. at 267. The current administration reaffirmed its commitment to DACA recipients on several occasions, including as late as June 2017. (J.A. 718-721.) Yet just three months later, petitioners announced that the law compelled them to terminate DACA in decisional documents that contained mistakes of fact and law, and failed to address important considerations. For example, although the purported absence of case-by-case discretion was central to petitioners' conclusion, petitioners' proffered administrative record suggests that petitioners did not consider a single piece of data, review a single guidance document, or hear from a single employee about whether DHS was actually exercising discretion in processing DACA applications.

Third, respondents alleged that although President Trump may have made a few positive statements about DACA (*cf.* Br. 55), the President has also made repeated statements demonstrating prejudice against Latinos from Mexico (*see Batalla Vidal* Pet. App. 152a; *see also Regents*, Supp. Pet. App. 74a-77a). Those invidious statements are enough at the pleading stage to state an equal protection claim. For example, during his presidential campaign, then-candidate Trump denigrated Mexican immigrants as rapists and criminals. (J.A. 721-722.) After his inauguration, President Trump characterized Latino immigrants as "animals." (J.A. 676-677.) The President continued these statements even into the period between the September 2017 termination of DACA and Secretary Nielsen's purportedly curative new memorandum, comparing immigrants from Mexico to vermin who "infest our Country."[20] Subsequently, in a speech in May 2018, he declared that such immigrants "aren't people. These are animals."[21]

To be sure, at trial respondents will need to prove that this demonstrated animus was connected to the termination of DACA. But at the pleading stage, respondents' allegations are sufficient to raise a plausible inference that the President's discriminatory animus was a motivating factor in the termination of DACA.

Petitioners argue that the President's statements are immaterial and that the question here is whether

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[20] *See* David A. Graham, *Trump Says Democrats Want Immigrants to Infest the U.S.*, The Atlantic (Jun. 19, 2018).

[21] *See* Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. Times (May 16, 2018).

Acting Secretary Duke (or Secretary Nielsen) harbored animus. (Br. 55.) But the President has broad power to direct his subordinates, and declared his direct involvement in the termination decision. (J.A. 729.) A high-level government official cannot launder his animus through subordinate officers. This Court has recognized that animus can be an unlawful "motivating factor" when an otherwise unbiased decisionmaker is spurred by the animus of others in the same organization—even others to whom the decisionmaker does not report. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011). And plainly, the inclinations and directives of the President can motivate an agency head who serves at the President's pleasure.

In an attempt to obtain a more favorable standard of review, petitioners miscast respondents' equal protection claims as a selective-enforcement challenge. But the States are not individual plaintiffs claiming discrimination within individual enforcement proceedings. *See, e.g.*, *AADC*, 525 U.S. at 488. (*See also Regents* Supp. Pet. App. 75a-76a.) Instead, they are suing to vindicate their proprietary interests in DACA's effects on state economies and workforces, and interests in public health, public safety, and public education. In addition, the equal protection claims here will not disrupt individualized removal actions. DACA is a class-wide framework allowing individuals to apply for deferred action; it is not a defense to prosecution or removal, and continuing DACA would not bar DHS from exercising discretion to enforce in any given case.

CONCLUSION

The decisions below should be affirmed.

Respectfully submitted,

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