



PROGRAM MATERIALS

Program #30219

October 15, 2020

Supreme Court Upholds DACA, Stating DHS's Decision to Rescind Was Arbitrary and Capricious

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DEFERRED ACTION FOR CHILDHOOD ARRIVALS (“DACA”): ITS PAST, PRESENT AND FUTURE



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OCTOBER 15, 2020

SPEAKER BIOS



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- Has a unique focus on the needs of international students, scholars, and research scientists.
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- Focuses on assisting professionals in the technology, business, investment, athletic and entertainment fields,
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AGENDA



- DACA: Overview and Requirements
- DACA's History
- Supreme Court Case
- DACA Today
- DACA's Future
- Alternatives to DACA

WHY DACA?

DREAM Act

- What it proposed
- Number of people affected
 - Estimated 13 Million Children
- Why
 - Considered Americans
 - No other home
 - Not their fault
 - Come out of the shadows
 - Public safety – drivers licenses/work authorization
 - No other options – no other line for them

*Obama Administration / Controversy

- November 2012 memo
- Political Response
- 91% of DACA are employed
- Average hourly wage of over \$17/hr
- 72% pursuing bachelor's degree or higher
- 80% driver's licenses
- Doctors, lawyers, childcare workers, first responders, professionals
 - (<https://www.adl.org/education/resources/tools-and-strategies/table-talk/what-is-daca-and-who-are-the-dreamers>)
- What DACA is and what it is not

REQUIREMENTS, BENEFITS, APPLICATION PROCESS



DACA



Deferred Action for Childhood Arrivals

DACA REQUIREMENTS



- Under age 31 as of June 15, 2012
- Arrived to US before 16th birthday
- Continuously resided in US since June 15, 2007 until present
- Physically present and in US and no lawful status on June 15, 2012
- Graduated or obtained certificate of complete from high school or obtained GED, a current student, or honorably discharged veterans
- Not convicted of serious crimes
 - 3 or more misdemeanors
 - CIMT - no DUI
- Not a threat to national security or public safety

BENEFITS OF DACA



- 2 year deferred action*
- Work authorization*
- Advance parole*
- Medicare/social security benefits
- Social security number
- Driver's license
- Credit history



DACA APPLICATION PROCESS



File I-821, I-765, I-131

- Obtain deferred action I-797, EAD/AP card
- Social security number through SSA
- Driver's license
- Renew every 2 years 180 days prior to expiration date*

Application for Temporary Protected Status Department of Homeland Security U.S. Citizenship and Immigration Services		
For USCIS Use Only		
	Action Block	Case II
		A-Num
Application For Employment Authorization Department of Homeland Security U.S. Citizenship and Immigration Services		
Extension	Fee Stamp	
Extension		
Number	A-	

HISTORY OF DACA



OBAMA ADMINISTRATION
TRUMP ADMINISTRATION

HISTORY OF DACA

Obama Administration

- Created via executive order on June 15, 2012
- November 2014 – DACA/DAPA expansion
- Number of DACA recipients - March 2020 - 643,000

Trump Administration

- June 2017 – rescind DAPA
- September 2017 – Elaine Duke rescission of DACA
- 3 US district courts issued nationwide injunctions between Jan 2018 and June 2020, allowed only renewals
- June 2018 – Kirstjen Nielsen memo on rescission of DACA

SCOTUS DECISION

DHS v. Regents of Univ. of CA, June 2020

- 3 combined cases
- Large/small impact of decision
- Arbitrary and capricious based on Elaine Duke's reasoning, but DHS has authority to rescind
- DACA program to be reinstated

(Slip Opinion)

OCTOBER TERM, 2019

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DEPARTMENT OF HOMELAND SECURITY ET AL. v.
REGENTS OF THE UNIVERSITY OF
CALIFORNIA ET AL.

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

No. 18–587. Argued November 12, 2019—Decided June 18, 2020*

In 2012, the Department of Homeland Security (DHS) issued a memorandum announcing an immigration relief program known as Deferred Action for Childhood Arrivals (DACA), which allows certain unauthorized aliens who arrived in the United States as children to apply for a two-year forbearance of removal. Those granted such relief become

DACA TODAY



USCIS MEMOS
POLITICS OF DACA'S FUTURE
DACA ALTERNATIVES

DACA TODAY



Trump Administration Termination of DACA/Lawsuits after SCOTUS Decision

- Chad Wolf memo - July 28
 - *“In accordance with the Supreme Court decision, I am determined to give careful consideration to whether the DACA policy should be maintained, rescinded, or modified.”*
- USCIS memo - Aug. 24
 - Reject all new DACA applications, no initial applications granted, only renewals
 - From 2 years to 1 year for deferred action and EAD
 - Restrict advance parole except for “exceptional circumstances”
- Initial DACA applications are being denied

DACA'S FUTURE: WHAT HAPPENS NEXT?



- Memos are temporary
- *Santa Fe Dreamers Project* lawsuit and other legal challenges

DACA ALTERNATIVES



Alternatives/recommendations

- Family Based
 - Immediate relative
 - VAWA
- Employment Based
- Other alternatives
 - SIJS
 - PIP
 - U-Visa
 - Cancellation of removal
- AOS/Consular Process?

FAQS



- Should I file for DACA now?
- If my DACA has expired, can I file?
- What happens if my DACA renewal was pending before these memos?
- Is my 2-year DACA still valid?
- What if I was arrested since my initial grant of DACA, what will happen for my renewal?
- What is the filing fee for DACA and my EAD?
- My DACA has expired, will USCIS refer me to ICE?
- What are “exceptional circumstances” to get advance parole?

SUMMARY AND QUESTIONS



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Homeland Security

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Memorandum on Rescission Of Deferred Action For Childhood Arrivals (DACA)

Release Date: September 5, 2017

MEMORANDUM FOR:

James W. McCament
Acting Director
U.S. Citizenship and Immigration Services

Thomas D. Homan
Acting Director
U.S. Immigration and Customs Enforcement

Kevin K. McAleenan
Acting Commissioner
U.S. Customs and Border Protection

Joseph B. Maher
Acting General Counsel

Ambassador James D. Nealon
Assistant Secretary, International Engagement

Julie M. Kirchner
Citizenship and Immigration Services Ombudsman

FROM:

Elaine C. Duke
Acting Secretary

SUBJECT:

Rescission of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children”

This memorandum rescinds the June 15, 2012 memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” which established the program known as Deferred Action for Childhood Arrivals (“DACA”). For the reasons and in the manner outlined below, Department of Homeland Security personnel shall take all appropriate actions to execute a wind-down of the program, consistent with the parameters established in this memorandum.

Background

The Department of Homeland Security established DACA through the issuance of a memorandum on June 15, 2012. The program purported to use deferred action—an act of prosecutorial discretion meant to be applied only on an individualized case-by-case basis—to confer certain benefits to illegal aliens that Congress had not otherwise acted to provide by law.^[1]^(# ftn1) Specifically, DACA provided certain illegal aliens who entered the United States before the age of sixteen a period of deferred action and eligibility to request employment authorization.

On November 20, 2014, the Department issued a new memorandum, expanding the parameters of DACA and creating a new policy called Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”). Among other things—such as the expansion of the coverage criteria under the 2012 DACA policy to encompass aliens with a wider range of ages and arrival dates, and lengthening the period of deferred action and work authorization from two years to three—the November 20, 2014 memorandum directed USCIS “to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis,” to certain aliens who have “a son or daughter who is a U.S. citizen or lawful permanent resident.”

Prior to the implementation of DAPA, twenty-six states—led by Texas—challenged the policies announced in the November 20, 2014 memorandum in the U.S. District Court for the Southern District of Texas. In an order issued on February 16, 2015, the district court preliminarily enjoined the policies nationwide.^[2]^(# ft2) The district court held that the plaintiff states were likely to succeed on their claim that the DAPA program did not comply with relevant authorities.

The United States Court of Appeals for the Fifth Circuit affirmed, holding that Texas and the other states had demonstrated a substantial likelihood of success on the merits and satisfied the other requirements for a preliminary injunction.^[3]^(# ft3) The Fifth Circuit concluded that the Department’s DAPA policy conflicted with the discretion authorized by Congress. In considering the DAPA program, the court noted that the Immigration and Nationality Act “flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization.” According to the court, “DAPA is foreclosed by Congress’s careful plan; the program is ‘manifestly contrary to the statute’ and therefore was properly enjoined.”

Although the original DACA policy was not challenged in the lawsuit, both the district and appellate court decisions relied on factual findings about the implementation of the 2012 DACA memorandum. The Fifth Circuit agreed with the lower court that DACA decisions were not truly discretionary,^[4]^(# ft4) and that DAPA and expanded DACA would be substantially similar in execution. Both the district court and the Fifth Circuit concluded that implementation of the program did not comply with the Administrative Procedure Act because the Department did not implement it through notice-and-comment rulemaking.

The Supreme Court affirmed the Fifth Circuit’s ruling by equally divided vote (4-4).^[5]^(# ft5) The evenly divided ruling resulted in the Fifth Circuit order being affirmed. The preliminary injunction therefore remains in place today. In October 2016, the Supreme Court denied a request from DHS to rehear the case upon the appointment of a new Justice. After the 2016 election, both parties agreed to a stay in litigation to allow the new administration to review these issues.

On January 25, 2017, President Trump issued Executive Order No. 13,768, “Enhancing Public Safety in the Interior of the United States.” In that Order, the President directed federal agencies to “[e]nsure the faithful execution of the immigration laws . . . against all removable aliens,” and established new immigration enforcement priorities. On February 20, 2017, then Secretary of Homeland Security John F. Kelly issued an implementing memorandum, stating “the Department no longer will exempt classes or categories of removable aliens from potential enforcement,” except as provided in the Department’s June 15, 2012 memorandum

establishing DACA,[6](#_ftn6) and the November 20, 2014 memorandum establishing DAPA and expanding DACA.[7](#_ftn7).

On June 15, 2017, after consulting with the Attorney General, and considering the likelihood of success on the merits of the ongoing litigation, then Secretary John F. Kelly issued a memorandum rescinding DAPA and the expansion of DACA—but temporarily left in place the June 15, 2012 memorandum that initially created the DACA program.

Then, on June 29, 2017, Texas, along with several other states, sent a letter to Attorney General Sessions asserting that the original 2012 DACA memorandum is unlawful for the same reasons stated in the Fifth Circuit and district court opinions regarding DAPA and expanded DACA. The letter notes that if DHS does not rescind the DACA memo by September 5, 2017, the States will seek to amend the DAPA lawsuit to include a challenge to DACA.

The Attorney General sent a letter to the Department on September 4, 2017, articulating his legal determination that DACA “was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress’ repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch.” The letter further stated that because DACA “has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA.” Nevertheless, in light of the administrative complexities associated with ending the program, he recommended that the Department wind it down in an efficient and orderly fashion, and his office has reviewed the terms on which our Department will do so.

Rescission of the June 15, 2012 DACA Memorandum

Taking into consideration the Supreme Court’s and the Fifth Circuit’s rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated. In the exercise of my authority in establishing national immigration policies and priorities, except for the purposes explicitly identified below, I hereby rescind the June 15, 2012 memorandum.

Recognizing the complexities associated with winding down the program, the Department will provide a limited window in which it will adjudicate certain requests for DACA and associated applications meeting certain parameters specified below. Accordingly, effective immediately, the Department:

- Will adjudicate—on an individual, case-by-case basis—properly filed pending DACA initial requests and associated applications for Employment Authorization Documents

that have been accepted by the Department as of the date of this memorandum.

- Will reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum.
- Will adjudicate—on an individual, case by case basis—properly filed pending DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries that have been accepted by the Department as of the date of this memorandum, and from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017.
- Will reject all DACA renewal requests and associated applications for Employment Authorization Documents filed outside of the parameters specified above.
- Will not terminate the grants of previously issued deferred action or revoke Employment Authorization Documents solely based on the directives in this memorandum for the remaining duration of their validity periods.
- Will not approve any new Form I-131 applications for advance parole under standards associated with the DACA program, although it will generally honor the stated validity period for previously approved applications for advance parole. Notwithstanding the continued validity of advance parole approvals previously granted, CBP will—of course—retain the authority it has always had and exercised in determining the admissibility of any person presenting at the border and the eligibility of such persons for parole. Further, USCIS will—of course—retain the authority to revoke or terminate an advance parole document at any time.
- Will administratively close all pending Form I-131 applications for advance parole filed under standards associated with the DACA program, and will refund all associated fees.
- Will continue to exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate.

This document is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.

[1].(# ftntref1). Significantly, while the DACA denial notice indicates the decision to deny is made in the unreviewable discretion of USCIS, USCIS has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria as

outlined in the June 15, 2012 memorandum, but still had his or her application denied based solely upon discretion.

[2].([# ftnref2](#)) *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

[3].([# ftnref3](#)) *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

[4].([# ftnref4](#)) *Id.*

[5].([# ftnref5](#)) *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

[6].([# ftnref6](#)) Memorandum from Janet Napolitano, Secretary, DHS to David Aguilar, Acting Comm'r, CBP, et al., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (June 15, 2012).

[7].([# ftnref7](#)) Memorandum from Jeh Johnson, Secretary, DHS, to Leon Rodriguez, Dir., USCIS, et al., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents" (Nov. 20, 2014).

Topics: [Border Security](#) ([/topics/border-security](#)).

Keywords: [Deferred Action for Childhood Arrivals \(DACA\)](#) ([/keywords/daca](#)).

Last Published Date: September 5, 2017



Homeland Security

June 22, 2018

MEMORANDUM FROM SECRETARY KIRSTJEN M. NIELSEN

On September 5, 2017, Acting Secretary of Homeland Security Elaine C. Duke issued a memorandum (the “Duke memorandum”) rescinding the enforcement policy known as Deferred Action for Childhood Arrivals (DACA). Acting Secretary Duke concluded that, “[t]aking into consideration the Supreme Court’s and the Fifth Circuit’s rulings in the ongoing litigation [over the enforcement policy known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)], and the September 4, 2017 letter from the Attorney General [concerning DACA], it is clear that the June 15, 2012 DACA program should be terminated.” Accordingly, “in the exercise of [her] authority in establishing national immigration policies and priorities,” she “rescind[ed] the June 15, 2012 memorandum,” subject to certain exceptions.

On April 24, 2018, the U.S. District Court for the District of Columbia held that the Duke memorandum was subject to judicial review under the Administrative Procedure Act and that it provided insufficient justification for rescinding the DACA policy. The court vacated the Duke memorandum and remanded to the Department of Homeland Security (DHS). The court issued a 90-day stay of vacatur, however, to afford DHS an opportunity to provide further explanation for rescinding the DACA policy.

Because the D.C. district court has requested further explanation, I am providing such explanation here. Having considered the Duke memorandum and Acting Secretary Duke’s accompanying statement, the administrative record for the Duke memorandum that was produced in litigation, and the judicial opinions reviewing the Duke memorandum, I decline to disturb the Duke memorandum’s rescission of the DACA policy, and it is my understanding that the Department of Justice will continue to seek appellate review of preliminary injunctions that restrict DHS from implementing the Duke memorandum and rescinding the DACA policy. This explanation reflects my understanding of the Duke memorandum and why the decision to rescind the DACA policy was, and remains, sound.

The Secretary of Homeland Security is vested with authority over “the administration and enforcement” of the immigration laws, 8 U.S.C. § 1103(a)(1), including the discretion to “[e]stablish[] national immigration enforcement policies and priorities,” 6 U.S.C. § 202(5). The DACA policy of deferred action was cast as an exercise of enforcement discretion to forbear from removing a certain class of aliens who are subject to removal under law. DHS also had concluded that under pre-existing statutory and regulatory provisions a grant of deferred action would trigger certain collateral benefits for such aliens, such as eligibility for employment authorization. In considering how DHS’s discretion to establish enforcement policies and priorities should be exercised, the DACA policy properly was—and should be—rescinded, for several separate and independently sufficient reasons.

First, as the Attorney General concluded, the DACA policy was contrary to law. The Fifth Circuit ruled that DAPA should be enjoined on a nationwide basis on the ground, among other things, that it likely was contrary to the statutory scheme of the Immigration and Nationality Act (INA). As the Fifth Circuit held, “the INA does not grant the Secretary discretion to grant deferred action and lawful presence on a class-wide basis to 4.3 million otherwise removable aliens.” *Texas v. United States*, 809 F.3d 134, 186 n.202 (5th Cir. 2015). An equally divided Supreme Court affirmed that decision. In light of those decisions and other factors, Secretary Kelly rescinded the DAPA policy in June 2017. Any arguable distinctions between the DAPA and DACA policies are not sufficiently material to convince me that the DACA policy is lawful.

The memorandum announcing the DAPA policy both expanded the DACA policy by loosening the age and residency criteria and adopted a similar deferred action policy for parents of U.S. citizens and lawful permanent residents. The Fifth Circuit’s rejection of DAPA and expanded DACA did not turn on whether the covered aliens had a pathway to lawful status (which not all of them had). Rather, it turned on the incompatibility of such a major non-enforcement policy with the INA’s comprehensive scheme. The Attorney General concluded that the DACA policy has the same statutory defects that the Fifth Circuit identified with DAPA—a determination and ruling by the Attorney General that, in any event, I am bound by pursuant to 8 U.S.C. § 1103(a)(1).

Second, regardless of whether the DACA policy is ultimately illegal, it was appropriately rescinded by DHS because there are, at a minimum, serious doubts about its legality. A central aspect of the exercise of a discretionary enforcement policy is a judgment concerning whether DHS has sufficient confidence in the legality of such policy. Like Acting Secretary Duke, I lack sufficient confidence in the DACA policy’s legality to continue this non-enforcement policy, whether the courts would ultimately uphold it or not.

There are sound reasons for a law enforcement agency to avoid discretionary policies that are legally questionable. Those reasons include the risk that such policies may undermine public confidence in and reliance on the agency and the rule of law, and the threat of burdensome litigation that distracts from the agency’s work. The fact that some courts have recently held or suggested that the DACA policy is legal does not change my view that the DACA policy’s legality is too questionable to warrant continuing the policy, especially in light of the Attorney General’s contrary determination and ruling about the DACA policy and the contrary implication of the decisions of the Fifth Circuit Court of Appeals and the Supreme Court invalidating the DAPA policy.

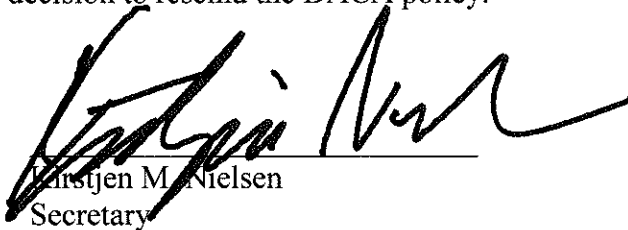
Third, regardless of whether these concerns about the DACA policy render it illegal or legally questionable, there are sound reasons of enforcement policy to rescind the DACA policy. To start, DHS should enforce the policies reflected in the laws adopted by Congress and should not adopt public policies of non-enforcement of those laws for broad classes and categories of aliens under the guise of prosecutorial discretion—particularly a class that Congress has repeatedly considered but declined to protect. Even if a policy such as DACA could be implemented lawfully through the exercise of prosecutorial discretion, it would necessarily lack the permanence and detail of statutory law. DACA recipients continue to be illegally present, unless and until Congress gives them permanent status.

Accordingly, I agree with Acting Secretary Duke and the Attorney General that if a policy concerning the ability of this class of aliens to remain in the United States is to be adopted, it should be enacted legislatively.

In addition, DHS should only exercise its prosecutorial discretion not to enforce the immigration laws on a truly individualized, case-by-case basis. While the DACA policy on its face did allow for individual considerations, a categorical deferred-action policy, at the very least, tilts the scales significantly and has the practical effect of inhibiting assessments of whether deferred action is appropriate in a particular case. Without the DACA policy, DHS may consider deferred action on a case-by-case basis, consistent with the INA. Moreover, considering the fact that tens of thousands of minor aliens have illegally crossed or been smuggled across our border in recent years and then have been released into the country owing to loopholes in our laws—and that pattern continues to occur at unacceptably high levels to the detriment of the immigration system—it is critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens. All of those considerations lead me to conclude that Acting Secretary Duke's decision to rescind the DACA policy was, and remains, sound as a matter of both legal judgment and enforcement policy discretion.

I do not come to these conclusions lightly. I am keenly aware that DACA recipients have availed themselves of the policy in continuing their presence in this country and pursuing their lives. Nevertheless, in considering DHS enforcement policy, I do not believe that the asserted reliance interests outweigh the questionable legality of the DACA policy and the other reasons for ending the policy discussed above. That is especially so because issues of reliance would best be considered by Congress, which can assess and weigh a range of options. In contrast, the DACA policy was announced as a temporary stopgap measure, not a permanent fix; it was expressly limited to two-year renewal periods, it expressly conferred no substantive rights, and it was revocable at any time. In my judgment, neither any individual's reliance on the expected continuation of the DACA policy nor the sympathetic circumstances of DACA recipients as a class overcomes the legal and institutional concerns with sanctioning the continued presence of hundreds of thousands of aliens who are illegally present in violation of the laws passed by Congress, a status that the DACA non-enforcement policy did not change. And in all events, the rescission of the DACA policy does not preclude the exercise of deferred action in individual cases if circumstances warrant.

For these reasons, in setting DHS enforcement policies and priorities, I concur with and decline to disturb Acting Secretary Duke's decision to rescind the DACA policy.



Kirstjen M. Nielsen
Secretary

Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

DEPARTMENT OF HOMELAND SECURITY ET AL. *v.*
REGENTS OF THE UNIVERSITY OF
CALIFORNIA ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 18–587. Argued November 12, 2019—Decided June 18, 2020*

In 2012, the Department of Homeland Security (DHS) issued a memorandum announcing an immigration relief program known as Deferred Action for Childhood Arrivals (DACA), which allows certain unauthorized aliens who arrived in the United States as children to apply for a two-year forbearance of removal. Those granted such relief become eligible for work authorization and various federal benefits. Some 700,000 aliens have availed themselves of this opportunity.

Two years later, DHS expanded DACA eligibility and created a related program known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). If implemented, that program would have made 4.3 million parents of U. S. citizens or lawful permanent residents eligible for the same forbearance from removal, work eligibility, and other benefits as DACA recipients. Texas, joined by 25 other States, secured a nationwide preliminary injunction barring implementation of both the DACA expansion and DAPA. The Fifth Circuit upheld the injunction, concluding that the program violated the Immigration and Nationality Act (INA), which carefully defines eligibility for benefits. This Court affirmed by an equally divided vote, and

*Together with No. 18–588, *Trump, President of the United States, et al. v. National Association for the Advancement of Colored People et al.*, on certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit, and No. 18–589, *Wolf, Acting Secretary of Homeland Security, et al. v. Batalla Vidal et al.*, on certiorari before judgment to the United States Court of Appeals for the Second Circuit.

the litigation then continued in the District Court.

In June 2017, following a change in Presidential administrations, DHS rescinded the DAPA Memorandum, citing, among other reasons, the ongoing suit by Texas and new policy priorities. That September, the Attorney General advised Acting Secretary of Homeland Security Elaine C. Duke that DACA shared DAPA's legal flaws and should also be rescinded. The next day, Duke acted on that advice. Taking into consideration the Fifth Circuit and Supreme Court rulings and the Attorney General's letter, Duke decided to terminate the program. She explained that DHS would no longer accept new applications, but that existing DACA recipients whose benefits were set to expire within six months could apply for a two-year renewal. For all other DACA recipients, previously issued grants of relief would expire on their own terms, with no prospect for renewal.

Several groups of plaintiffs challenged Duke's decision to rescind DACA, claiming that it was arbitrary and capricious in violation of the Administrative Procedure Act (APA) and infringed the equal protection guarantee of the Fifth Amendment's Due Process Clause. District Courts in California (*Regents*, No. 18–587), New York (*Batalla Vidal*, No. 18–589), and the District of Columbia (*NAACP*, No. 18–588) all ruled for the plaintiffs. Each court rejected the Government's arguments that the claims were unreviewable under the APA and that the INA deprived the courts of jurisdiction. In *Regents* and *Batalla Vidal*, the District Courts further held that the equal protection claims were adequately alleged, and they entered coextensive nationwide preliminary injunctions based on the conclusion that the plaintiffs were likely to succeed on their APA claims. The District Court in *NAACP* took a different approach. It deferred ruling on the equal protection challenge but granted partial summary judgment to the plaintiffs on their APA claim, finding that the rescission was inadequately explained. The court then stayed its order for 90 days to permit DHS to reissue a memorandum rescinding DACA, this time with a fuller explanation of the conclusion that DACA was unlawful. Two months later, Duke's successor, Secretary Kirstjen M. Nielsen, responded to the court's order. She declined to disturb or replace Duke's rescission decision and instead explained why she thought her predecessor's decision was sound. In addition to reiterating the illegality conclusion, she offered several new justifications for the rescission. The Government moved for the District Court to reconsider in light of this additional explanation, but the court concluded that the new reasoning failed to elaborate meaningfully on the illegality rationale.

The Government appealed the various District Court decisions to the Second, Ninth, and D. C. Circuits, respectively. While those appeals were pending, the Government filed three petitions for certiorari

Syllabus

before judgment. Following the Ninth Circuit affirmance in *Regents*, this Court granted certiorari.

Held: The judgment in No. 18–587 is vacated in part and reversed in part; the judgment in No. 18–588 is affirmed; the February 13, 2018 order in No. 18–589 is vacated, the November 9, 2017 order is affirmed in part, and the March 29, 2018 order is reversed in part; and all of the cases are remanded.

No. 18–587, 908 F. 3d 476, vacated in part and reversed in part; No. 18–588, affirmed; and No. 18–589, February 13, 2018 order vacated, November 9, 2017 order affirmed in part, and March 29, 2018 order reversed in part; all cases remanded.

THE CHIEF JUSTICE delivered the opinion of the Court, except as to Part IV, concluding:

1. DHS’s rescission decision is reviewable under the APA and is within this Court’s jurisdiction. Pp. 9–13.

(a) The APA’s “basic presumption of judicial review” of agency action, *Abbott Laboratories v. Gardner*, 387 U. S. 136, 140, can be rebutted by showing that the “agency action is committed to agency discretion by law,” 5 U. S. C. §701(a)(2). In *Heckler v. Chaney*, the Court held that this narrow exception includes an agency’s decision not to institute an enforcement action. 470 U. S. 821, 831–832. The Government contends that DACA is a general non-enforcement policy equivalent to the individual non-enforcement decision in *Chaney*. But the DACA Memorandum did not merely decline to institute enforcement proceedings; it created a program for conferring affirmative immigration relief. Therefore, unlike the non-enforcement decision in *Chaney*, DACA’s creation—and its rescission—is an “action [that] provides a focus for judicial review.” *Id.*, at 832. In addition, by virtue of receiving deferred action, 700,000 DACA recipients may request work authorization and are eligible for Social Security and Medicare. Access to such benefits is an interest “courts often are called upon to protect.” *Ibid.* DACA’s rescission is thus subject to review under the APA. Pp. 9–12.

(b) The two jurisdictional provisions of the INA invoked by the Government do not apply. Title 8 U. S. C. §1252(b)(9), which bars review of claims arising from “action[s]” or “proceeding[s] brought to remove an alien,” is inapplicable where, as here, the parties do not challenge any removal proceedings. And the rescission is not a decision “to commence proceedings, adjudicate cases, or execute removal orders” within the meaning of §1252(g). Pp. 12–13.

2. DHS’s decision to rescind DACA was arbitrary and capricious under the APA. Pp. 13–26.

(a) In assessing the rescission, the Government urges the Court to consider not just the contemporaneous explanation offered by Acting Secretary Duke but also the additional reasons supplied by Secretary

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Nielsen nine months later. Judicial review of agency action, however, is limited to “the grounds that the agency invoked when it took the action.” *Michigan v. EPA*, 576 U. S. 743, 758. If those grounds are inadequate, a court may remand for the agency to offer “a fuller explanation of the agency’s reasoning *at the time of the agency action*,” *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U. S. 633, 654 (emphasis added), or to “deal with the problem afresh” by taking new agency action, *SEC v. Chenery Corp.*, 332 U. S. 194, 201. Because Secretary Nielsen chose not to take new action, she was limited to elaborating on the agency’s original reasons. But her reasoning bears little relationship to that of her predecessor and consists primarily of impermissible “*post hoc* rationalization.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 420. The rule requiring a new decision before considering new reasons is not merely a formality. It serves important administrative law values by promoting agency accountability to the public, instilling confidence that the reasons given are not simply convenient litigating positions, and facilitating orderly review. Each of these values would be markedly undermined if this Court allowed DHS to rely on reasons offered nine months after the rescission and after three different courts had identified flaws in the original explanation. Pp. 13–17.

(b) Acting Secretary Duke’s rescission memorandum failed to consider important aspects of the problem before the agency. Although Duke was bound by the Attorney General’s determination that DACA is illegal, see 8 U. S. C. §1103(a)(1), deciding how best to address that determination involved important policy choices reserved for DHS. Acting Secretary Duke plainly exercised such discretionary authority in winding down the program, but she did not appreciate the full scope of her discretion. The Attorney General concluded that the legal defects in DACA mirrored those that the courts had recognized in DAPA. The Fifth Circuit, the highest court to offer a reasoned opinion on DAPA’s legality, found that DAPA violated the INA because it extended eligibility for benefits to a class of unauthorized aliens. But the defining feature of DAPA (and DACA) is DHS’s decision to defer removal, and the Fifth Circuit carefully distinguished that forbearance component from the associated benefits eligibility. Eliminating benefits eligibility while continuing forbearance thus remained squarely within Duke’s discretion. Yet, rather than addressing forbearance in her decision, Duke treated the Attorney General’s conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation. That reasoning repeated the error in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm*—treating a rationale that applied to only part of a policy as sufficient to rescind the entire policy. 463 U. S. 29, 51. While DHS

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was not required to “consider all policy alternatives,” *ibid.*, deferred action was “within the ambit of the existing” policy, *ibid.*; indeed, it was the centerpiece of the policy. In failing to consider the option to retain deferred action, Duke “failed to supply the requisite ‘reasoned analysis.’” *Id.*, at 57.

That omission alone renders Duke’s decision arbitrary and capricious, but it was not the only defect. Duke also failed to address whether there was “legitimate reliance” on the DACA Memorandum. *Smiley v. Citibank (South Dakota), N. A.*, 517 U. S. 735, 742. Certain features of the DACA policy may affect the strength of any reliance interests, but those features are for the agency to consider in the first instance. DHS has flexibility in addressing any reliance interests and could have considered various accommodations. While the agency was not required to pursue these accommodations, it was required to assess the existence and strength of any reliance interests, and weigh them against competing policy concerns. Its failure to do so was arbitrary and capricious. Pp. 17–26.

THE CHIEF JUSTICE, joined by JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN, concluded in Part IV that respondents’ claims fail to establish a plausible inference that the rescission was motivated by animus in violation of the equal protection guarantee of the Fifth Amendment. Pp. 27–29.

ROBERTS, C. J., delivered the opinion of the Court, except as to Part IV. GINSBURG, BREYER, and KAGAN, JJ., joined that opinion in full, and SOTOMAYOR, J., joined as to all but Part IV. SOTOMAYOR, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which ALITO and GORSUCH, JJ., joined. ALITO, J., and KAVANAUGH, J., filed opinions concurring in the judgment in part and dissenting in part.

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SUPREME COURT OF THE UNITED STATES

Nos. 18–587, 18–588, and 18–589

DEPARTMENT OF HOMELAND SECURITY,
ET AL., PETITIONERS
18–587 *v.*
REGENTS OF THE UNIVERSITY OF
CALIFORNIA, ET AL.
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL., PETITIONERS
18–588 *v.*
NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE, ET AL.; AND
ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

CHAD WOLF, ACTING SECRETARY OF HOMELAND
SECURITY, ET AL., PETITIONERS
18–589 *v.*
MARTIN JONATHAN BATALLA VIDAL, ET AL.
ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 18, 2020]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part IV.

In the summer of 2012, the Department of Homeland Security (DHS) announced an immigration program known as Deferred Action for Childhood Arrivals, or DACA. That program allows certain unauthorized aliens who entered the United States as children to apply for a two-year forbearance of removal. Those granted such relief are also eligible for work authorization and various federal benefits. Some 700,000 aliens have availed themselves of this opportunity.

Five years later, the Attorney General advised DHS to rescind DACA, based on his conclusion that it was unlawful. The Department's Acting Secretary issued a memorandum terminating the program on that basis. The termination was challenged by affected individuals and third parties who alleged, among other things, that the Acting Secretary had violated the Administrative Procedure Act (APA) by failing to adequately address important factors bearing on her decision. For the reasons that follow, we conclude that the Acting Secretary did violate the APA, and that the rescission must be vacated.

I
A

In June 2012, the Secretary of Homeland Security issued a memorandum announcing an immigration relief program for “certain young people who were brought to this country as children.” App. to Pet. for Cert. in No. 18–587, p. 97a (App. to Pet. for Cert.). Known as DACA, the program applies to childhood arrivals who were under age 31 in 2012; have continuously resided here since 2007; are current students, have completed high school, or are honorably discharged veterans; have not been convicted of any serious crimes; and do not threaten national security or public

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safety. *Id.*, at 98a. DHS concluded that individuals who meet these criteria warrant favorable treatment under the immigration laws because they “lacked the intent to violate the law,” are “productive” contributors to our society, and “know only this country as home.” *Id.*, at 98a–99a.

“[T]o prevent [these] low priority individuals from being removed from the United States,” the DACA Memorandum instructs Immigration and Customs Enforcement to “exercise prosecutorial discretion[] on an individual basis . . . by deferring action for a period of two years, subject to renewal.” *Id.*, at 100a. In addition, it directs U. S. Citizenship and Immigration Services (USCIS) to “accept applications to determine whether these individuals qualify for work authorization during this period of deferred action,” *id.*, at 101a, as permitted under regulations long predating DACA’s creation, see 8 CFR §274a.12(c)(14) (2012) (permitting work authorization for deferred action recipients who establish “economic necessity”); 46 Fed. Reg. 25080–25081 (1981) (similar). Pursuant to other regulations, deferred action recipients are considered “lawfully present” for purposes of, and therefore eligible to receive, Social Security and Medicare benefits. See 8 CFR §1.3(a)(4)(vi); 42 CFR §417.422(h) (2012).

In November 2014, two years after DACA was promulgated, DHS issued a memorandum announcing that it would expand DACA eligibility by removing the age cap, shifting the date-of-entry requirement from 2007 to 2010, and extending the deferred action and work authorization period to three years. App. to Pet. for Cert. 106a–107a. In the same memorandum, DHS created a new, related program known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. That program would have authorized deferred action for up to 4.3 million parents whose children were U. S. citizens or lawful permanent residents. These parents were to enjoy the same forbearance, work eligibility, and other benefits as DACA

recipients.

Before the DAPA Memorandum was implemented, 26 States, led by Texas, filed suit in the Southern District of Texas. The States contended that DAPA and the DACA expansion violated the APA's notice and comment requirement, the Immigration and Nationality Act (INA), and the Executive's duty under the Take Care Clause of the Constitution. The District Court found that the States were likely to succeed on the merits of at least one of their claims and entered a nationwide preliminary injunction barring implementation of both DAPA and the DACA expansion. See *Texas v. United States*, 86 F. Supp. 3d 591, 677–678 (2015).

A divided panel of the Court of Appeals for the Fifth Circuit affirmed the preliminary injunction. *Texas v. United States*, 809 F. 3d 134, 188 (2015). In opposing the injunction, the Government argued that the DAPA Memorandum reflected an unreviewable exercise of the Government's enforcement discretion. The Fifth Circuit majority disagreed. It reasoned that the deferred action described in the DAPA Memorandum was “much more than nonenforcement: It would affirmatively confer ‘lawful presence’ and associated benefits on a class of unlawfully present aliens.” *Id.*, at 166. From this, the majority concluded that the creation of the DAPA program was not an unreviewable action “committed to agency discretion by law.” *Id.*, at 169 (quoting 5 U. S. C. §701(a)(2)).

The majority then upheld the injunction on two grounds. It first concluded the States were likely to succeed on their procedural claim that the DAPA Memorandum was a substantive rule that was required to undergo notice and comment. It then held that the APA required DAPA to be set aside because the program was “manifestly contrary” to the INA, which “expressly and carefully provides legal designations allowing defined classes” to “receive the benefits” associated with “lawful presence” and to qualify for work

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authorization, 809 F. 3d, at 179–181, 186 (internal quotation marks omitted). Judge King dissented.

This Court affirmed the Fifth Circuit’s judgment by an equally divided vote, which meant that no opinion was issued. *United States v. Texas*, 579 U. S. ____ (2016) (*per curiam*). For the next year, litigation over DAPA and the DACA expansion continued in the Southern District of Texas, while implementation of those policies remained enjoined.

Then, in June 2017, following a change in Presidential administrations, DHS rescinded the DAPA Memorandum. In explaining that decision, DHS cited the preliminary injunction and ongoing litigation in Texas, the fact that DAPA had never taken effect, and the new administration’s immigration enforcement priorities.

Three months later, in September 2017, Attorney General Jefferson B. Sessions III sent a letter to Acting Secretary of Homeland Security Elaine C. Duke, “advis[ing]” that DHS “should rescind” DACA as well. App. 877. Citing the Fifth Circuit’s opinion and this Court’s equally divided affirmance, the Attorney General concluded that DACA shared the “same legal . . . defects that the courts recognized as to DAPA” and was “likely” to meet a similar fate. *Id.*, at 878. “In light of the costs and burdens” that a rescission would “impose[] on DHS,” the Attorney General urged DHS to “consider an orderly and efficient wind-down process.” *Ibid.*

The next day, Duke acted on the Attorney General’s advice. In her decision memorandum, Duke summarized the history of the DACA and DAPA programs, the Fifth Circuit opinion and ensuing affirmance, and the contents of the Attorney General’s letter. App. to Pet. for Cert. 111a–117a. “Taking into consideration the Supreme Court’s and the Fifth Circuit’s rulings” and the “letter from the Attorney General,” she concluded that the “DACA program should be terminated.” *Id.*, at 117a.

Duke then detailed how the program would be wound down: No new applications would be accepted, but DHS would entertain applications for two-year renewals from DACA recipients whose benefits were set to expire within six months. For all other DACA recipients, previously issued grants of deferred action and work authorization would not be revoked but would expire on their own terms, with no prospect for renewal. *Id.*, at 117a–118a.

B

Within days of Acting Secretary Duke’s rescission announcement, multiple groups of plaintiffs ranging from individual DACA recipients and States to the Regents of the University of California and the National Association for the Advancement of Colored People challenged her decision in the U. S. District Courts for the Northern District of California (*Regents*, No. 18–587), the Eastern District of New York (*Batalla Vidal*, No. 18–589), and the District of Columbia (*NAACP*, No. 18–588). The relevant claims are that the rescission was arbitrary and capricious in violation of the APA and that it infringed the equal protection guarantee of the Fifth Amendment’s Due Process Clause.¹

All three District Courts ruled for the plaintiffs, albeit at different stages of the proceedings.² In doing so, each court rejected the Government’s threshold arguments that the

¹ Plaintiffs also raised notice and comment claims, which uniformly failed below, and assorted due process challenges, some of which survived motions to dismiss. Those claims are not before us.

² In a related challenge not at issue here, the District Court for the District of Maryland granted partial summary judgment in favor of the Government. *Casa de Maryland v. United States Dept. of Homeland Security*, 284 F. Supp. 3d 758 (2018). After the Government filed petitions for certiorari in the instant cases, the Fourth Circuit reversed that decision and vacated Acting Secretary Duke’s rescission as arbitrary and capricious. *Casa de Maryland v. United States Dept. of Homeland Security*, 924 F. 3d 684 (2019), cert. pending, No. 18–1469. The Fourth Circuit has since stayed its mandate.

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claims were unreviewable under the APA and that the INA deprived the court of jurisdiction. 298 F. Supp. 3d 209, 223–224, 234–235 (DC 2018); 279 F. Supp. 3d 1011, 1029–1033 (ND Cal. 2018); 295 F. Supp. 3d 127, 150, 153–154 (EDNY 2017).

In *Regents* and *Batalla Vidal*, the District Courts held that the equal protection claims were adequately alleged. 298 F. Supp. 3d 1304, 1315 (ND Cal. 2018); 291 F. Supp. 3d 260, 279 (EDNY 2018). Those courts also entered coextensive nationwide preliminary injunctions, based on the conclusion that the plaintiffs were likely to succeed on the merits of their claims that the rescission was arbitrary and capricious. These injunctions did not require DHS to accept new applications, but did order the agency to allow DACA recipients to “renew their enrollments.” 279 F. Supp. 3d, at 1048; see 279 F. Supp. 3d 401, 437 (EDNY 2018).

In *NAACP*, the D. C. District Court took a different course. In April 2018, it deferred ruling on the equal protection challenge but granted partial summary judgment to the plaintiffs on their APA claim, holding that Acting Secretary Duke’s “conclusory statements were insufficient to explain the change in [the agency’s] view of DACA’s lawfulness.” 298 F. Supp. 3d, at 243. The District Court stayed its order for 90 days to permit DHS to “reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority.” *Id.*, at 245.

Two months later, Duke’s successor, Secretary Kirstjen M. Nielsen, responded via memorandum. App. to Pet. for Cert. 120a–126a. She explained that, “[h]aving considered the Duke memorandum,” she “decline[d] to disturb” the rescission. *Id.*, at 121a. Secretary Nielsen went on to articulate her “understanding” of Duke’s memorandum, identifying three reasons why, in Nielsen’s estimation, “the decision to rescind the DACA policy was, and remains, sound.” *Ibid.* First, she reiterated that, “as the Attorney

General concluded, the DACA policy was contrary to law.” *Id.*, at 122a. Second, she added that, regardless, the agency had “serious doubts about [DACA’s] legality” and, for law enforcement reasons, wanted to avoid “legally questionable” policies. *Id.*, at 123a. Third, she identified multiple policy reasons for rescinding DACA, including (1) the belief that any class-based immigration relief should come from Congress, not through executive non-enforcement; (2) DHS’s preference for exercising prosecutorial discretion on “a truly individualized, case-by-case basis”; and (3) the importance of “project[ing] a message” that immigration laws would be enforced against all classes and categories of aliens. *Id.*, at 123a–124a. In her final paragraph, Secretary Nielsen acknowledged the “asserted reliance interests” in DACA’s continuation but concluded that they did not “outweigh the questionable legality of the DACA policy and the other reasons” for the rescission discussed in her memorandum. *Id.*, at 125a.

The Government asked the D. C. District Court to revise its prior order in light of the reasons provided by Secretary Nielsen, but the court declined. In the court’s view, the new memorandum, which “fail[ed] to elaborate meaningfully” on the agency’s illegality rationale, still did not provide an adequate explanation for the September 2017 rescission. 315 F. Supp. 3d 457, 460, 473–474 (2018).

The Government appealed the various District Court decisions to the Second, Ninth, and D. C. Circuits, respectively. In November 2018, while those appeals were pending, the Government simultaneously filed three petitions for certiorari before judgment. After the Ninth Circuit affirmed the nationwide injunction in *Regents*, see 908 F. 3d 476 (2018), but before rulings from the other two Circuits, we granted the petitions and consolidated the cases for argument. 588 U. S. ____ (2019). The issues raised here are (1) whether the APA claims are reviewable, (2) if so,

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whether the rescission was arbitrary and capricious in violation of the APA, and (3) whether the plaintiffs have stated an equal protection claim.

II

The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.

The APA “sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.” *Franklin v. Massachusetts*, 505 U. S. 788, 796 (1992). It requires agencies to engage in “reasoned decisionmaking,” *Michigan v. EPA*, 576 U. S. 743, 750 (2015) (internal quotation marks omitted), and directs that agency actions be “set aside” if they are “arbitrary” or “capricious,” 5 U. S. C. §706(2)(A). Under this “narrow standard of review, . . . a court is not to substitute its judgment for that of the agency,” *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 513 (2009) (internal quotation marks omitted), but instead to assess only whether the decision was “based on a consideration of the relevant factors and whether there has been a clear error of judgment,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 416 (1971).

But before determining whether the rescission was arbitrary and capricious, we must first address the Government’s contentions that DHS’s decision is unreviewable under the APA and outside this Court’s jurisdiction.

A

The APA establishes a “basic presumption of judicial review [for] one ‘suffering legal wrong because of agency action.’” *Abbott Laboratories v. Gardner*, 387 U. S. 136, 140 (1967) (quoting §702). That presumption can be rebutted by a showing that the relevant statute “preclude[s]” review,

§701(a)(1), or that the “agency action is committed to agency discretion by law,” §701(a)(2). The latter exception is at issue here.

To “honor the presumption of review, we have read the exception in §701(a)(2) quite narrowly,” *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 586 U. S. ___, ___ (2018) (slip op., at 12), confining it to those rare “administrative decision[s] traditionally left to agency discretion,” *Lincoln v. Vigil*, 508 U. S. 182, 191 (1993). This limited category of unreviewable actions includes an agency’s decision not to institute enforcement proceedings, *Heckler v. Chaney*, 470 U. S. 821, 831–832 (1985), and it is on that exception that the Government primarily relies.

In *Chaney*, several death-row inmates petitioned the Food and Drug Administration (FDA) to take enforcement action against two States to prevent their use of certain drugs for lethal injection. The Court held that the FDA’s denial of that petition was presumptively unreviewable in light of the well-established “tradition” that “an agency’s decision not to prosecute or enforce” is “generally committed to an agency’s absolute discretion.” *Id.*, at 831. We identified a constellation of reasons that underpin this tradition. To start, a non-enforcement decision “often involves a complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise,” such as “whether the particular enforcement action requested best fits the agency’s overall policies.” *Ibid.* The decision also mirrors, “to some extent,” a prosecutor’s decision not to indict, which has “long been regarded as the special province of the Executive Branch.” *Id.*, at 832. And, as a practical matter, “when an agency refuses to act” there is no action to “provide[] a focus for judicial review.” *Ibid.*

The Government contends that a general non-enforcement policy is equivalent to the individual non-enforcement decision at issue in *Chaney*. In each case, the Government argues, the agency must balance factors peculiarly within

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its expertise, and does so in a manner akin to a criminal prosecutor. Building on that premise, the Government argues that the rescission of a non-enforcement policy is no different—for purposes of reviewability—from the adoption of that policy. While the rescission may lead to increased enforcement, it does not, by itself, constitute a particular enforcement action. Applying this logic to the facts here, the Government submits that DACA is a non-enforcement policy and that its rescission is therefore unreviewable.

But we need not test this chain of reasoning because DACA is not simply a non-enforcement policy. For starters, the DACA Memorandum did not merely “refus[e] to institute proceedings” against a particular entity or even a particular class. *Ibid.* Instead, it directed USCIS to “establish a clear and efficient process” for identifying individuals who met the enumerated criteria. App. to Pet. for Cert. 100a. Based on this directive, USCIS solicited applications from eligible aliens, instituted a standardized review process, and sent formal notices indicating whether the alien would receive the two-year forbearance. These proceedings are effectively “adjudicat[i]ons.” *Id.*, at 117a. And the result of these adjudications—DHS’s decision to “grant deferred action,” Brief for Petitioners 45—is an “affirmative act of approval,” the very opposite of a “refus[al] to act,” *Chaney*, 470 U. S., at 831–832. In short, the DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program—and its rescission—is an “action [that] provides a focus for judicial review.” *Id.*, at 832.

The benefits attendant to deferred action provide further confirmation that DACA is more than simply a non-enforcement policy. As described above, by virtue of receiving deferred action, the 700,000 DACA recipients may request work authorization and are eligible for Social Security and Medicare. See *supra*, at 3. Unlike an agency’s refusal to take requested enforcement action, access to these

types of benefits is an interest “courts often are called upon to protect.” *Chaney*, 470 U. S., at 832. See also *Barnhart v. Thomas*, 540 U. S. 20 (2003) (reviewing eligibility determination for Social Security benefits).

Because the DACA program is more than a non-enforcement policy, its rescission is subject to review under the APA.

B

The Government also invokes two jurisdictional provisions of the INA as independent bars to review. Neither applies.

Section 1252(b)(9) bars review of claims arising from “action[s]” or “proceeding[s] brought to remove an alien.” 66 Stat. 209, as amended, 8 U. S. C. §1252(b)(9). That targeted language is not aimed at this sort of case. As we have said before, §1252(b)(9) “does not present a jurisdictional bar” where those bringing suit “are not asking for review of an order of removal,” “the decision . . . to seek removal,” or “the process by which . . . removability will be determined.” *Jennings v. Rodriguez*, 583 U. S. ___, ___–___ (2018) (plurality opinion) (slip op., at 10–11); *id.*, at ___ (BREYER, J., dissenting) (slip op., at 31). And it is certainly not a bar where, as here, the parties are not challenging any removal proceedings.

Section 1252(g) is similarly narrow. That provision limits review of cases “arising from” decisions “to commence proceedings, adjudicate cases, or execute removal orders.” §1252(g). We have previously rejected as “implausible” the Government’s suggestion that §1252(g) covers “all claims arising from deportation proceedings” or imposes “a general jurisdictional limitation.” *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 482 (1999). The rescission, which revokes a deferred action program with associated benefits, is not a decision to “commence proceedings,” much less to “adjudicate” a case or “execute” a

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removal order.

With these preliminary arguments out of the way, we proceed to the merits.

III

A

Deciding whether agency action was adequately explained requires, first, knowing where to look for the agency’s explanation. The natural starting point here is the explanation provided by Acting Secretary Duke when she announced the rescission in September 2017. But the Government urges us to go on and consider the June 2018 memorandum submitted by Secretary Nielsen as well. That memo was prepared after the D. C. District Court vacated the Duke rescission and gave DHS an opportunity to “reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority.” 298 F. Supp. 3d, at 245. According to the Government, the Nielsen Memorandum is properly before us because it was invited by the District Court and reflects the views of the Secretary of Homeland Security—the official responsible for immigration policy. Respondents disagree, arguing that the Nielsen Memorandum, issued nine months after the rescission, impermissibly asserts prudential and policy reasons not relied upon by Duke.

It is a “foundational principle of administrative law” that judicial review of agency action is limited to “the grounds that the agency invoked when it took the action.” *Michigan*, 576 U. S., at 758. If those grounds are inadequate, a court may remand for the agency to do one of two things: First, the agency can offer “a fuller explanation of the agency’s reasoning *at the time of the agency action*.” *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U. S. 633, 654 (1990) (emphasis added). See also *Alpharma, Inc. v.*

Leavitt, 460 F. 3d 1, 5–6 (CADCA 2006) (Garland, J.) (permitting an agency to provide an “amplified articulation” of a prior “conclusory” observation (internal quotation marks omitted)). This route has important limitations. When an agency’s initial explanation “indicate[s] the determinative reason for the final action taken,” the agency may elaborate later on that reason (or reasons) but may not provide new ones. *Camp v. Pitts*, 411 U. S. 138, 143 (1973) (*per curiam*). Alternatively, the agency can “deal with the problem afresh” by taking new agency action. *SEC v. Chenery Corp.*, 332 U. S. 194, 201 (1947) (*Chenery II*). An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

The District Court’s remand thus presented DHS with a choice: rest on the Duke Memorandum while elaborating on its prior reasoning, or issue a new rescission bolstered by new reasons absent from the Duke Memorandum. Secretary Nielsen took the first path. Rather than making a new decision, she “decline[d] to disturb the Duke memorandum’s rescission” and instead “provide[d] further explanation” for that action. App. to Pet. for Cert. 121a. Indeed, the Government’s subsequent request for reconsideration described the Nielsen Memorandum as “additional explanation for [Duke’s] decision” and asked the District Court to “leave in place [Duke’s] September 5, 2017 decision to rescind the DACA policy.” Motion to Revise Order in No. 17–cv–1907 etc. (D DC), pp. 2, 19. Contrary to the position of the Government before this Court, and of JUSTICE KAVANAUGH in dissent, *post*, at 4 (opinion concurring in judgment in part and dissenting in part), the Nielsen Memorandum was by its own terms not a new rule implementing a new policy.

Because Secretary Nielsen chose to elaborate on the reasons for the initial rescission rather than take new administrative action, she was limited to the agency’s original reasons, and her explanation “must be viewed critically” to

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ensure that the rescission is not upheld on the basis of impermissible “*post hoc* rationalization.” *Overton Park*, 401 U. S., at 420. But despite purporting to explain the Duke Memorandum, Secretary Nielsen’s reasoning bears little relationship to that of her predecessor. Acting Secretary Duke rested the rescission on the conclusion that DACA is unlawful. Period. See App. to Pet. for Cert. 117a. By contrast, Secretary Nielsen’s new memorandum offered three “separate and independently sufficient reasons” for the rescission, *id.*, at 122a, only the first of which is the conclusion that DACA is illegal.

Her second reason is that DACA is, at minimum, legally *questionable* and should be terminated to maintain public confidence in the rule of law and avoid burdensome litigation. No such justification can be found in the Duke Memorandum. Legal uncertainty is, of course, related to illegality. But the two justifications are meaningfully distinct, especially in this context. While an agency might, for one reason or another, choose to do nothing in the face of uncertainty, illegality presumably requires remedial action of some sort.

The policy reasons that Secretary Nielsen cites as a third basis for the rescission are also nowhere to be found in the Duke Memorandum. That document makes no mention of a preference for legislative fixes, the superiority of case-by-case decisionmaking, the importance of sending a message of robust enforcement, or any other policy consideration. Nor are these points included in the legal analysis from the Fifth Circuit and the Attorney General. They can be viewed only as impermissible *post hoc* rationalizations and thus are not properly before us.

The Government, echoed by JUSTICE KAVANAUGH, protests that requiring a new decision before considering Nielsen’s new justifications would be “an idle and useless formality.” *NLRB v. Wyman-Gordon Co.*, 394 U. S. 759, 766,

n. 6 (1969) (plurality opinion). See also *post*, at 5. Procedural requirements can often seem such. But here the rule serves important values of administrative law. Requiring a new decision before considering new reasons promotes “agency accountability,” *Bowen v. American Hospital Assn.*, 476 U. S. 610, 643 (1986), by ensuring that parties and the public can respond fully and in a timely manner to an agency’s exercise of authority. Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply “convenient litigating position[s].” *Christopher v. SmithKline Beecham Corp.*, 567 U. S. 142, 155 (2012) (internal quotation marks omitted). Permitting agencies to invoke belated justifications, on the other hand, can upset “the orderly functioning of the process of review,” *SEC v. Chenery Corp.*, 318 U. S. 80, 94 (1943), forcing both litigants and courts to chase a moving target. Each of these values would be markedly undermined were we to allow DHS to rely on reasons offered nine months after Duke announced the rescission and after three different courts had identified flaws in the original explanation.

JUSTICE KAVANAUGH asserts that this “foundational principle of administrative law,” *Michigan*, 576 U. S., at 758, actually limits only what lawyers may argue, not what agencies may do. *Post*, at 5. While it is true that the Court has often rejected justifications belatedly advanced by advocates, we refer to this as a prohibition on *post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether *post hoc* justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves. See *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U. S. 490, 539 (1981) (“[T]he *post hoc* rationalizations of the agency . . . cannot serve as a sufficient predicate for agency action.”); *Overton*

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Park, 401 U. S., at 419 (rejecting “litigation affidavits” from agency officials as “merely ‘*post hoc*’ rationalizations”).³

Justice Holmes famously wrote that “[m]en must turn square corners when they deal with the Government.” *Rock Island, A. & L. R. Co. v. United States*, 254 U. S. 141, 143 (1920). But it is also true, particularly when so much is at stake, that “the Government should turn square corners in dealing with the people.” *St. Regis Paper Co. v. United States*, 368 U. S. 208, 229 (1961) (Black, J., dissenting). The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.

B

We turn, finally, to whether DHS’s decision to rescind DACA was arbitrary and capricious. As noted earlier, Acting Secretary Duke’s justification for the rescission was succinct: “Taking into consideration” the Fifth Circuit’s conclusion that DAPA was unlawful because it conferred benefits in violation of the INA, and the Attorney General’s conclusion that DACA was unlawful for the same reason, she concluded—without elaboration—that the “DACA program should be terminated.” App. to Pet. for Cert. 117a.⁴

³JUSTICE KAVANAUGH further argues that the contemporaneous explanation requirement applies only to agency adjudications, not rulemakings. *Post*, at 5–6 (opinion concurring in judgment in part and dissenting in part). But he cites no authority limiting this basic principle—which the Court regularly articulates in the context of rulemakings—to adjudications. The Government does not even raise this unheralded argument.

⁴The Government contends that Acting Secretary Duke also focused on litigation risk. Although the background section of her memo references a letter from the Texas Attorney General threatening to challenge DACA, the memo never asserts that the rescission was intended to avert litigation. And, given the Attorney General’s conclusion that the policy was unlawful—and thus presumably could not be maintained or defended in its current form—it is difficult to see how the risk of litigation

Respondents maintain that this explanation is deficient for three reasons. Their first and second arguments work in tandem, claiming that the Duke Memorandum does not adequately explain the conclusion that DACA is unlawful, and that this conclusion is, in any event, wrong. While those arguments carried the day in the lower courts, in our view they overlook an important constraint on Acting Secretary Duke’s decisionmaking authority—she was *bound* by the Attorney General’s legal determination.

The same statutory provision that establishes the Secretary of Homeland Security’s authority to administer and enforce immigration laws limits that authority, specifying that, with respect to “all questions of law,” the determinations of the Attorney General “shall be controlling.” 8 U. S. C. §1103(a)(1). Respondents are aware of this constraint. Indeed they emphasized the point in the reviewability sections of their briefs. But in their merits arguments, respondents never addressed whether or how this unique statutory provision might affect our review. They did not discuss whether Duke was required to explain a legal conclusion that was not hers to make. Nor did they discuss whether the current suits challenging Duke’s rescission decision, which everyone agrees was within her legal authority under the INA, are proper vehicles for attacking the Attorney General’s legal conclusion.

Because of these gaps in respondents’ briefing, we do not evaluate the claims challenging the explanation and correctness of the illegality conclusion. Instead we focus our attention on respondents’ third argument—that Acting Secretary Duke “failed to consider . . . important aspect[s] of the problem” before her. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983).

carried any independent weight.

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Whether DACA is illegal is, of course, a legal determination, and therefore a question for the Attorney General. But deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA. Those policy choices are for DHS.

Acting Secretary Duke plainly exercised such discretionary authority in winding down the program. See App. to Pet. for Cert. 117a–118a (listing the Acting Secretary’s decisions on eight transition issues). Among other things, she specified that those DACA recipients whose benefits were set to expire within six months were eligible for two-year renewals. *Ibid.*

But Duke did not appear to appreciate the full scope of her discretion, which picked up where the Attorney General’s legal reasoning left off. The Attorney General concluded that “the DACA policy has the same legal . . . defects that the courts recognized as to DAPA.” App. 878. So, to understand those defects, we look to the Fifth Circuit, the highest court to offer a reasoned opinion on the legality of DAPA. That court described the “core” issue before it as the “Secretary’s decision” to grant “eligibility for benefits”—including work authorization, Social Security, and Medicare—to unauthorized aliens on “a class-wide basis.” *Texas*, 809 F. 3d, at 170; see *id.*, at 148, 184. The Fifth Circuit’s focus on these benefits was central to every stage of its analysis. See *id.*, at 155 (standing); *id.*, at 163 (zone of interest); *id.*, at 164 (applicability of §1252(g)); *id.*, at 166 (reviewability); *id.*, at 176–177 (notice and comment); *id.*, at 184 (substantive APA). And the Court ultimately held that DAPA was “manifestly contrary to the INA” precisely because it “would make 4.3 million otherwise removable aliens” eligible for work authorization and public benefits. *Id.*, at 181–182 (internal quotation marks omitted).⁵

⁵As the Fifth Circuit noted, DAPA recipients were eligible for Social

But there is more to DAPA (and DACA) than such benefits. The defining feature of deferred action is the decision to defer removal (and to notify the affected alien of that decision). See App. to Pet. for Cert. 99a. And the Fifth Circuit was careful to distinguish that forbearance component from eligibility for benefits. As it explained, the “challenged portion of DAPA’s deferred-action program” was the decision to make DAPA recipients eligible for benefits. See *Texas*, 809 F. 3d, at 168, and n. 108. The other “[p]art of DAPA,” the court noted, “involve[d] the Secretary’s decision—at least temporarily—not to enforce the immigration laws as to a class of what he deem[ed] to be low-priority illegal aliens.” *Id.*, at 166. Borrowing from this Court’s prior description of deferred action, the Fifth Circuit observed that “the states do not challenge the Secretary’s decision to ‘decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.’” *Id.*, at 168 (quoting *Reno*, 525 U. S., at 484). And the Fifth Circuit underscored that nothing in its decision or the preliminary injunction “requires the Secretary to remove any alien or to alter” the Secretary’s class-based “enforcement priorities.” *Texas*, 809 F. 3d, at 166, 169. In other words, the Secretary’s forbearance authority was unimpaired.

Acting Secretary Duke recognized that the Fifth Circuit’s holding addressed the benefits associated with DAPA. In her memorandum she explained that the Fifth Circuit con-

Security and Medicare benefits because they had been designated “lawfully present.” *Texas*, 809 F. 3d, at 168. Lawful presence is a statutory prerequisite for receipt of certain benefits. See *id.*, at 148 (citing 8 U. S. C. §1611). It is not the same as forbearance nor does it flow inexorably from forbearance. Thus, while deferred action recipients have been designated lawfully present for purposes of Social Security and Medicare eligibility, see 8 CFR §1.3; 42 CFR §417.422(h), agencies can also exclude them from this designation, see 45 CFR §152.2(8) (2019) (specifying that DACA recipients are not considered lawfully present for purposes of coverage under the Affordable Care Act).

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cluded that DAPA “conflicted with the discretion authorized by Congress” because the INA “‘flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization.’” App. to Pet. for Cert. 114a (quoting *Texas*, 809 F. 3d, at 184). Duke did not characterize the opinion as one about forbearance.

In short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for “[e]stablishing national immigration enforcement policies and priorities.” 116 Stat. 2178, 6 U. S. C. §202(5). But Duke’s memo offers no reason for terminating forbearance. She instead treated the Attorney General’s conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.

That reasoning repeated the error we identified in one of our leading modern administrative law cases, *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.* There, the National Highway Traffic Safety Administration (NHTSA) promulgated a requirement that motor vehicles produced after 1982 be equipped with one of two passive restraints: airbags or automatic seatbelts. 463 U. S., at 37–38, 46. Four years later, before the requirement went into effect, NHTSA concluded that automatic seatbelts, the restraint of choice for most manufacturers, would not provide effective protection. Based on that premise, NHTSA rescinded the passive restraint requirement in full. *Id.*, at 38.

We concluded that the total rescission was arbitrary and capricious. As we explained, NHTSA’s justification supported only “disallow[ing] compliance by means of” automatic seatbelts. *Id.*, at 47. It did “not cast doubt” on the

“efficacy of airbag technology” or upon “the need for a passive restraint standard.” *Ibid.* Given NHTSA’s prior judgment that “airbags are an effective and cost-beneficial lifesaving technology,” we held that “the mandatory passive restraint rule [could] not be abandoned without any consideration whatsoever of an airbags-only requirement.” *Id.*, at 51.

While the factual setting is different here, the error is the same. Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients, that conclusion supported only “disallow[ing]” benefits. *Id.*, at 47. It did “not cast doubt” on the legality of forbearance or upon DHS’s original reasons for extending forbearance to childhood arrivals. *Ibid.* Thus, given DHS’s earlier judgment that forbearance is “especially justified” for “productive young people” who were brought here as children and “know only this country as home,” App. to Pet. for Cert. 98a–99a, the DACA Memorandum could not be rescinded in full “without any consideration whatsoever” of a forbearance-only policy, *State Farm*, 463 U. S., at 51.⁶

The Government acknowledges that “[d]eferred action coupled with the associated benefits are the two legs upon which the DACA policy stands.” Reply Brief 21. It insists, however, that “DHS was not required to consider whether DACA’s illegality could be addressed by separating” the

⁶The three-page memorandum that established DACA is devoted entirely to forbearance, save for one sentence directing USCIS to “determine whether [DACA recipients] qualify for work authorization.” App. to Pet. for Cert. 101a. The benefits associated with DACA flow from a separate regulation. See 8 CFR §1.3(a)(4)(vi); see also 42 CFR §417.422(h) (cross-referencing 8 CFR §1.3). Thus, DHS could have addressed the Attorney General’s determination that such benefits were impermissible under the INA by amending 8 CFR §1.3 to exclude DACA recipients from those benefits without rescinding the DACA Memorandum and the forbearance policy it established. But Duke’s rescission memo shows no cognizance of this possibility.

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two. *Ibid.* According to the Government, “It was not arbitrary and capricious for DHS to view deferred action and its collateral benefits as importantly linked.” *Ibid.* Perhaps. But that response misses the point. The fact that there may be a valid reason not to separate deferred action from benefits does not establish that DHS considered that option or that such consideration was unnecessary.

The lead dissent acknowledges that forbearance and benefits are legally distinct and can be decoupled. *Post*, at 21–22, n. 14 (opinion of THOMAS, J). It contends, however, that we should not “dissect” agency action “piece by piece.” *Post*, at 21. The dissent instead rests on the Attorney General’s legal determination—which considered only benefits—“to supply the ‘reasoned analysis’” to support rescission of both benefits and forbearance. *Post*, at 22 (quoting *State Farm*, 463 U. S., at 42). But *State Farm* teaches that when an agency rescinds a prior policy its reasoned analysis must consider the “alternative[s]” that are “within the ambit of the existing [policy].” *Id.*, at 51. Here forbearance was not simply “within the ambit of the existing [policy],” it was the centerpiece of the policy: DACA, after all, stands for “*Deferred Action* for Childhood Arrivals.” App. to Pet. for Cert. 111a (emphasis added). But the rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. Duke “entirely failed to consider [that] important aspect of the problem.” *State Farm*, 463 U. S., at 43.

That omission alone renders Acting Secretary Duke’s decision arbitrary and capricious. But it is not the only defect. Duke also failed to address whether there was “legitimate reliance” on the DACA Memorandum. *Smiley v. Citibank (South Dakota), N. A.*, 517 U. S. 735, 742 (1996). When an agency changes course, as DHS did here, it must “be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’” *Encino Motorcars, LLC v. Navarro*, 579 U. S. ___, ___ (2016)

(slip op., at 9) (quoting *Fox Television*, 556 U. S., at 515). “It would be arbitrary and capricious to ignore such matters.” *Id.*, at 515. Yet that is what the Duke Memorandum did.

For its part, the Government does not contend that Duke considered potential reliance interests; it counters that she did not need to. In the Government’s view, shared by the lead dissent, DACA recipients have no “legally cognizable reliance interests” because the DACA Memorandum stated that the program “conferred no substantive rights” and provided benefits only in two-year increments. Reply Brief 16–17; App. to Pet. for Cert. 125a. See also *post*, at 23–24 (opinion of THOMAS, J). But neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review. There was no such consideration in the Duke Memorandum.

Respondents and their *amici* assert that there was much for DHS to consider. They stress that, since 2012, DACA recipients have “enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance” on the DACA program. Brief for Respondent Regents of Univ. of California et al. in No. 18–587, p. 41 (Brief for Regents). The consequences of the rescission, respondents emphasize, would “radiate outward” to DACA recipients’ families, including their 200,000 U. S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. See *id.*, at 41–42; Brief for Respondent State of New York et al. in No. 18–589, p. 42 (Brief for New York). See also Brief for 143 Businesses as *Amici Curiae* 17 (estimating that hiring and training replacements would cost employers \$6.3 billion).

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In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of \$215 billion in economic activity and an associated \$60 billion in federal tax revenue over the next ten years. Brief for Regents 6. Meanwhile, States and local governments could lose \$1.25 billion in tax revenue each year. *Ibid.*

These are certainly noteworthy concerns, but they are not necessarily dispositive. To the Government and lead dissent's point, DHS could respond that reliance on forbearance and benefits was unjustified in light of the express limitations in the DACA Memorandum. Or it might conclude that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight. And, even if DHS ultimately concludes that the reliance interests rank as serious, they are but one factor to consider. DHS may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests. Making that difficult decision was the agency's job, but the agency failed to do it.

DHS has considerable flexibility in carrying out its responsibility. The wind-down here is a good example of the kind of options available. Acting Secretary Duke authorized DHS to process two-year renewals for those DACA recipients whose benefits were set to expire within six months. But Duke's consideration was solely for the purpose of assisting the agency in dealing with "administrative complexities." App. to Pet. for Cert. 116a–118a. She should have considered whether she had similar flexibility in addressing any reliance interests of DACA recipients. The lead dissent contends that accommodating such interests would be "another exercise of unlawful power," *post*, at 23 (opinion of THOMAS, J.), but the Government does not make that argument and DHS has already extended benefits for purposes other than reliance, following consultation with the Office of the Attorney General. App. to Pet. for Cert. 116a.

Had Duke considered reliance interests, she might, for example, have considered a broader renewal period based on the need for DACA recipients to reorder their affairs. Alternatively, Duke might have considered more accommodating termination dates for recipients caught in the middle of a time-bounded commitment, to allow them to, say, graduate from their course of study, complete their military service, or finish a medical treatment regimen. Or she might have instructed immigration officials to give salient weight to any reliance interests engendered by DACA when exercising individualized enforcement discretion.

To be clear, DHS was not required to do any of this or to “consider all policy alternatives in reaching [its] decision.” *State Farm*, 463 U. S., at 51. Agencies are not compelled to explore “every alternative device and thought conceivable by the mind of man.” *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U. S. 519, 551 (1978). But, because DHS was “not writing on a blank slate,” *post*, at 22, n. 14 (opinion of THOMAS, J.), it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.

The lead dissent sees all the foregoing differently. In its view, DACA is illegal, so any actions under DACA are themselves illegal. Such actions, it argues, must cease immediately and the APA should not be construed to impede that result. See *post*, at 19–23 (opinion of THOMAS, J.).

The dissent is correct that DACA was rescinded because of the Attorney General’s illegality determination. See *ante*, at 20. But nothing about that determination foreclosed or even addressed the options of retaining forbearance or accommodating particular reliance interests. Acting Secretary Duke should have considered those matters but did not. That failure was arbitrary and capricious in violation of the APA.

Opinion of ROBERTS, C. J.

IV

Lastly, we turn to respondents' claim that the rescission violates the equal protection guarantee of the Fifth Amendment.

The parties dispute the proper framing of this claim. The Government contends that the allegation that the Executive, motivated by animus, ended a program that disproportionately benefits certain ethnic groups is a selective enforcement claim. Such a claim, the Government asserts, is barred by our decision in *Reno v. American-Arab Anti-Discrimination Committee*. See 525 U. S., at 488 (holding that “an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation”). Respondents counter that their claim falls outside the scope of that precedent because they are not challenging individual enforcement proceedings. We need not resolve this debate because, even if the claim is cognizable, the allegations here are insufficient.

To plead animus, a plaintiff must raise a plausible inference that an “invidious discriminatory purpose was a motivating factor” in the relevant decision. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). Possible evidence includes disparate impact on a particular group, “[d]epartures from the normal procedural sequence,” and “contemporary statements by members of the decisionmaking body.” *Id.*, at 266–268. Tracking these factors, respondents allege that animus is evidenced by (1) the disparate impact of the rescission on Latinos from Mexico, who represent 78% of DACA recipients; (2) the unusual history behind the rescission; and (3) pre- and post-election statements by President Trump. Brief for New York 54–55.

None of these points, either singly or in concert, establishes a plausible equal protection claim. First, because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized

share of recipients of any cross-cutting immigration relief program. See B. Baker, DHS, Office of Immigration Statistics, Population Estimates, Illegal Alien Population Residing in the United States: January 2015, Table 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf. Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds.

Second, there is nothing irregular about the history leading up to the September 2017 rescission. The lower courts concluded that “DACA received reaffirmation by [DHS] as recently as three months before the rescission,” 908 F. 3d, at 519 (quoting 298 F. Supp. 3d, at 1315), referring to the June 2017 DAPA rescission memo, which stated that DACA would “remain in effect,” App. 870. But this reasoning confuses abstention with reaffirmation. The DAPA memo did not address the merits of the DACA policy or its legality. Thus, when the Attorney General later determined that DACA shared DAPA’s legal defects, DHS’s decision to reevaluate DACA was not a “strange about-face.” 908 F. 3d, at 519. It was a natural response to a newly identified problem.

Finally, the cited statements are unilluminating. The relevant actors were most directly Acting Secretary Duke and the Attorney General. As the *Batalla Vidal* court acknowledged, respondents did not “identif[y] statements by [either] that would give rise to an inference of discriminatory motive.” 291 F. Supp. 3d, at 278. Instead, respondents contend that President Trump made critical statements about Latinos that evince discriminatory intent. But, even as interpreted by respondents, these statements—remote in time and made in unrelated contexts—do not qualify as “contemporary statements” probative of the decision at issue. *Arlington Heights*, 429 U. S., at 268. Thus, like respondents’ other points, the statements fail to

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raise a plausible inference that the rescission was motivated by animus.

* * *

We do not decide whether DACA or its rescission are sound policies. “The wisdom” of those decisions “is none of our concern.” *Chenery II*, 332 U. S., at 207. We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.

The judgment in *NAACP*, No. 18–588, is affirmed.⁷ The judgment in *Regents*, No. 18–587, is vacated in part and reversed in part. And in *Batalla Vidal*, No. 18–589, the February 13, 2018 order granting respondents’ motion for a preliminary injunction is vacated, the November 9, 2017 order partially denying the Government’s motion to dismiss is affirmed in part, and the March 29, 2018 order partially denying the balance of the Government’s motion to dismiss is reversed in part. All three cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

⁷Our affirmance of the *NAACP* order vacating the rescission makes it unnecessary to examine the propriety of the nationwide scope of the injunctions issued by the District Courts in *Regents* and *Batalla Vidal*.

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SUPREME COURT OF THE UNITED STATES

Nos. 18–587, 18–588, and 18–589

DEPARTMENT OF HOMELAND SECURITY,
ET AL., PETITIONERS
18–587 *v.*

REGENTS OF THE UNIVERSITY OF
CALIFORNIA, ET AL.

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

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL., PETITIONERS
18–588 *v.*
NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE, ET AL.; AND

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

CHAD WOLF, ACTING SECRETARY OF HOMELAND
SECURITY, ET AL., PETITIONERS
18–589 *v.*
MARTIN JONATHAN BATALLA VIDAL, ET AL.

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

[June 18, 2020]

JUSTICE SOTOMAYOR, concurring in part, concurring in
the judgment in part, and dissenting in part.

The majority rightly holds that the Department of Homeland Security (DHS) violated the Administrative Procedure Act in rescinding the Deferred Action for Childhood Arrivals (DACA) program. But the Court forecloses any challenge to the rescission under the Equal Protection Clause. I believe that determination is unwarranted on the existing record and premature at this stage of the litigation. I would instead permit respondents to develop their equal protection claims on remand.

Respondents' equal protection challenges come to us in a preliminary posture. All that respondents needed to do at this stage of the litigation was state sufficient facts that would "allo[w a] court to draw the reasonable inference that [a] defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U. S. 662, 678 (2009). The three courts to evaluate respondents' pleadings below held that they cleared this modest threshold. 908 F. 3d 476, 518–520 (CA9 2018) (affirming the District Court's denial of the Government's motion to dismiss); see also *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 274 (EDNY 2018).

I too would permit respondents' claims to proceed on remand. The complaints each set forth particularized facts that plausibly allege discriminatory animus. The plurality disagrees, reasoning that "[n]one of these points, either singly or in concert, establishes a plausible equal protection claim." *Ante*, at 27. But it reaches that conclusion by discounting some allegations altogether and by narrowly viewing the rest.

First, the plurality dismisses the statements that President Trump made both before and after he assumed office. The *Batalla Vidal* complaints catalog then-candidate Trump's declarations that Mexican immigrants are "people that have lots of problems," "the bad ones," and "criminals, drug dealers, [and] rapists." 291 F. Supp. 3d, at 276 (internal quotation marks omitted). The *Regents* complaints ad-

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ditionally quote President Trump’s 2017 statement comparing undocumented immigrants to “animals” responsible for “the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, [and] MS13.” 298 F. Supp. 3d 1304, 1314 (ND Cal. 2018) (internal quotation marks omitted). The plurality brushes these aside as “unilluminating,” “remote in time,” and having been “made in unrelated contexts.” *Ante*, at 28.

But “nothing in our precedent supports [the] blinkered approach” of disregarding any of the campaign statements as remote in time from later-enacted policies. *Trump v. Hawaii*, 585 U. S. ___, ___, n. 3 (2018) (SOTOMAYOR, J., dissenting) (slip op., at 11, n. 3). Nor did any of the statements arise in unrelated contexts. They bear on unlawful migration from Mexico—a keystone of President Trump’s campaign and a policy priority of his administration—and, according to respondents, were an animating force behind the rescission of DACA. Cf. *ibid.* (noting that Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017), which barred entry of individuals from several Muslim-majority countries, was an outgrowth of the President’s campaign statements about Muslims). Taken together, “the words of the President” help to “create the strong perception” that the rescission decision was “contaminated by impermissible discriminatory animus.” 585 U. S., at ___ (opinion of SOTOMAYOR, J.) (slip op., at 13). This perception provides respondents with grounds to litigate their equal protection claims further.

Next, the plurality minimizes the disproportionate impact of the rescission decision on Latinos after considering this point in isolation. *Ante*, at 28 (“Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds”). But the impact of the policy decision must be viewed in the context of the President’s public statements on and off the campaign trail. At the motion-to-dismiss

stage, I would not so readily dismiss the allegation that an executive decision disproportionately harms the same racial group that the President branded as less desirable mere months earlier.

Finally, the plurality finds nothing untoward in the “specific sequence of events leading up to the challenged decision.” *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 267 (1977). I disagree. As late as June 2017, DHS insisted it remained committed to DACA, even while rescinding a related program, the Deferred Action for Parents of Americans and Lawful Permanent Residents. App. 718–720. But a mere three months later, DHS terminated DACA without, as the plurality acknowledges, considering important aspects of the termination. The abrupt change in position plausibly suggests that something other than questions about the legality of DACA motivated the rescission decision. Accordingly, it raises the possibility of a “significant mismatch between the decision . . . made and the rationale . . . provided.” *Department of Commerce v. New York*, 588 U. S. ___, ___ (2019) (slip op., at 26). Only by bypassing context does the plurality conclude otherwise.

* * *

The facts in respondents’ complaints create more than a “sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U. S., at 678. Whether they ultimately amount to actionable discrimination should be determined only after factual development on remand. Because the Court prematurely disposes of respondents’ equal protection claims by overlooking the strength of their complaints, I join all but Part IV of the opinion and do not concur in the corresponding part of the judgment.

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SUPREME COURT OF THE UNITED STATES

Nos. 18–587, 18–588, and 18–589

DEPARTMENT OF HOMELAND SECURITY,
ET AL., PETITIONERS
18–587 *v.*

REGENTS OF THE UNIVERSITY OF
CALIFORNIA, ET AL.

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

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL., PETITIONERS
18–588 *v.*
NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE, ET AL.; AND

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

CHAD WOLF, ACTING SECRETARY OF HOMELAND
SECURITY, ET AL., PETITIONERS
18–589 *v.*
MARTIN JONATHAN BATALLA VIDAL, ET AL.

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

[June 18, 2020]

JUSTICE THOMAS, with whom JUSTICE ALITO and
JUSTICE GORSUCH join, concurring in the judgment in part
and dissenting in part.

Between 2001 and 2011, Congress considered over two dozen bills that would have granted lawful status to millions of aliens who were illegally brought to this country as children. Each of those legislative efforts failed. In the wake of this impasse, the Department of Homeland Security (DHS) under President Barack Obama took matters into its own hands. Without any purported delegation of authority from Congress and without undertaking a rulemaking, DHS unilaterally created a program known as Deferred Action for Childhood Arrivals (DACA). The three-page DACA memorandum made it possible for approximately 1.7 million illegal aliens to qualify for temporary lawful presence and certain federal and state benefits. When President Donald Trump took office in 2017, his Acting Secretary of Homeland Security, acting through yet another memorandum, rescinded the DACA memorandum. To state it plainly, the Trump administration rescinded DACA the same way that the Obama administration created it: unilaterally, and through a mere memorandum.

Today the majority makes the mystifying determination that this rescission of DACA was unlawful. In reaching that conclusion, the majority acts as though it is engaging in the routine application of standard principles of administrative law. On the contrary, this is anything but a standard administrative law case.

DHS created DACA during the Obama administration without any statutory authorization and without going through the requisite rulemaking process. As a result, the program was unlawful from its inception. The majority does not even attempt to explain why a court has the authority to scrutinize an agency's policy reasons for rescinding an unlawful program under the arbitrary and capricious microscope. The decision to countermand an unlawful agency action is clearly reasonable. So long as the agency's determination of illegality is sound, our review should be at an end.

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Today's decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision. The Court could have made clear that the solution respondents seek must come from the Legislative Branch. Instead, the majority has decided to prolong DHS' initial overreach by providing a stopgap measure of its own. In doing so, it has given the green light for future political battles to be fought in this Court rather than where they rightfully belong—the political branches. Such timidity forsakes the Court's duty to apply the law according to neutral principles, and the ripple effects of the majority's error will be felt throughout our system of self-government.

Perhaps even more unfortunately, the majority's holding creates perverse incentives, particularly for outgoing administrations. Under the auspices of today's decision, administrations can bind their successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda. Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a successor administration unless the successor provides sufficient policy justifications to the satisfaction of this Court. In other words, the majority erroneously holds that the agency is not only permitted, but required, to continue administering unlawful programs that it inherited from a previous administration. I respectfully dissent in part.¹

I
A

In 2012, after more than two dozen attempts by Congress to grant lawful status to aliens who were brought to this country as children,² the then-Secretary of Homeland Security Janet Napolitano announced, by memorandum, a new

¹I concur in the judgment insofar as the majority rejects respondents' equal protection claim.

²See Immigrant Children's Educational Advancement and Dropout

“prosecutorial discretion” policy known as DACA. App. to Pet. for Cert. in No. 18–587, p. 97a. The memorandum directed immigration enforcement officers not to remove “certain young people who were brought to this country as children” that met delineated criteria. *Id.*, at 97a–98a. In the Secretary’s view, the program was consistent with “the framework of the existing law.” *Id.*, at 101a.

DACA granted a renewable 2-year period of “deferred action” that made approximately 1.7 million otherwise removable aliens eligible to remain in this country temporarily.³ By granting deferred action, the memorandum also made recipients eligible for certain state and federal benefits, including Medicare and Social Security. See 8 U. S. C. §§1611(b)(2)–(4); 8 CFR §1.3(a)(4)(vi) (2020); 45 CFR §152.2(4)(vi) (2019). In addition, deferred action enabled the recipients to seek work authorization. 8 U. S. C.

Prevention Act of 2001, H. R. 1582, 107th Cong., 1st Sess.; Student Adjustment Act of 2001, H. R. 1918, 107th Cong., 1st Sess.; DREAM Act, S. 1291, 107th Cong., 1st Sess. (2001); DREAM Act, S. 1545, 108th Cong., 1st Sess. (2003); Student Adjustment Act of 2003, H. R. 1684, 108th Cong., 1st Sess.; DREAM Act, S. 2863, 108th Cong., 2d Sess., Tit. XVIII (2003); DREAM Act of 2005, S. 2075, 109th Cong., 1st Sess.; Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., 2d Sess., Tit. VI, Subtitle C; American Dream Act, H. R. 5131, 109th Cong., 2d Sess. (2006); DREAM Act of 2007, S. 774, 110th Cong., 1st Sess.; DREAM Act of 2007, S. 2205, 110th Cong., 1st Sess.; STRIVE Act of 2007, H. R. 1645, 110th Cong., 1st Sess., Tit. VI, Subtitle B; Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong., 1st Sess., Tit. VI, Subtitle C; DREAM Act of 2009, S. 729, 111th Cong., 1st Sess.; American Dream Act, H. R. 1751, 111th Cong., 1st Sess.; Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong., 2d Sess., Tit. V, Subtitle D; DREAM Act of 2010, S. 3827, 111th Cong., 2d Sess.; DREAM Act of 2010, S. 3962, 111th Cong., 2d Sess.; DREAM Act of 2010, S. 3963, 111th Cong., 2d Sess.; DREAM Act of 2010, S. 3992, 111th Cong., 2d Sess.; DREAM Act of 2010, H. R. 6497, 111th Cong., 2d Sess.; DREAM Act of 2011, S. 952, 112th Cong., 1st Sess.

³See J. Passel & M. Lopez, Pew Research Center, Up to 1.7 Million Unauthorized Immigrant Youth May Benefit From New Deportation Rules (Aug. 14, 2012).

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§1324a(h)(3)(B); 8 CFR §274a.12(c)(14). Despite these changes, the memorandum contradictorily claimed that it “confer[red] no substantive right [or] immigration status,” because “[o]nly the Congress, acting through its legislative authority, can confer these rights.” App. to Pet. for Cert. in No. 18–587, at 101a.

In 2014, then-Secretary of Homeland Security Jeh Johnson broadened the deferred-action program in yet another brief memorandum. This 2014 memorandum expanded DACA eligibility by extending the deferred-action period to three years and by relaxing other criteria. It also implemented a related program, known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). DAPA allowed unlawfully present parents to obtain deferred action derivatively through their children who were either citizens or lawful permanent residents. Approximately 4.3 million aliens qualified for DAPA and, as with DACA, these individuals would have become eligible for certain federal and state benefits upon the approval of their DAPA applications. See *Texas v. United States*, 809 F. 3d 134, 181 (CA5 2015). Nevertheless, the 2014 memorandum repeated the incongruous assertion that these programs “d[id] not confer any form of legal status in this country” and added that deferred action “may be terminated at any time at the agency’s discretion.” App. to Pet. for Cert. in No. 18–587, at 104a.

B

Twenty-six States filed suit to enjoin the implementation of these new programs, DAPA and “expanded DACA,” maintaining that they violated the Constitution, the Administrative Procedure Act (APA), and the Immigration and Naturalization Act (INA). The States contended that, because the 2014 memorandum allowed aliens to receive deferred action and other benefits, it amounted to a legislative rule that had to comply with the APA’s notice and

comment procedures. The States also argued that DHS' decision to recategorize an entire class of aliens from "unlawfully present" to "lawfully present" exceeded its statutory authority under the federal immigration laws. According to the States, these defects rendered the 2014 memorandum arbitrary, capricious, or otherwise not in accordance with law.

The District Court preliminarily enjoined DAPA and expanded DACA. The Fifth Circuit affirmed, rejecting DHS' claim that the programs were an exercise of prosecutorial discretion. *Texas*, 809 F. 3d, at 167, 188. The court concluded that the States were likely to succeed on their claim that the 2014 memorandum was a legislative rule that had to be adopted through notice and comment rulemaking. *Id.*, at 171–178. The court further concluded that the 2014 memorandum was "substantively contrary to law" because the INA did not grant DHS the statutory authority to implement either program. *Id.*, at 170, 178–186.

This Court affirmed the Fifth Circuit's judgment by an equally divided vote. *United States v. Texas*, 579 U. S. ____ (2016) (*per curiam*).

C

The 2014 memorandum was rescinded on June 15, 2017, before taking effect. Shortly after that rescission, several of the plaintiff States sent a letter to then-Attorney General Sessions III. They contended that the 2012 DACA memorandum was also legally defective because, "just like DAPA, DACA unilaterally confers eligibility for . . . lawful presence without any statutory authorization from Congress." App. 873. The States wrote that they would amend their complaint to challenge DACA if the administration did not rescind the 2012 memorandum creating DACA by September 5, 2017.

On September 4, then-Attorney General Sessions wrote to then-Acting Secretary of Homeland Security Elaine

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Duke, advising her to rescind DACA. Sessions stated that, in his legal opinion, DACA took effect “through executive action, without proper statutory authority and with no established end-date, after Congress’ repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch.” *Id.*, at 877. The letter also stated that DACA was infected with the “same legal . . . defects that the courts recognized as to DAPA,” *id.*, at 878, and thus DACA would likely be enjoined as well.

Then-Acting Secretary Duke rescinded DACA the next day, also through a memorandum. Her memorandum began by noting that DACA “purported to use deferred action . . . to confer certain benefits to illegal aliens that Congress had not otherwise acted to provide by law.” App. to Pet. for Cert. in No. 18–587, at 112a. It described the history of the Fifth Circuit litigation, noting that the court had concluded that DAPA “conflicted with the discretion authorized by Congress” because “the [INA] flatly does not permit the reclassification of millions of illegal aliens as lawfully present.” *Id.*, at 114a (internal quotation marks omitted). Finally, the memorandum accepted then-Attorney General Sessions’ legal determination that DACA was unlawful for the same reasons as DAPA. See §1103(a)(1). In light of the legal conclusions reached by the Fifth Circuit and the Attorney General, then-Acting Secretary Duke set forth the procedures for winding down DACA.

These three cases soon followed. In each, respondents claimed, among other things, that DACA’s rescission was arbitrary and capricious under the APA. Two District Courts granted a preliminary nationwide injunction, while the third vacated the rescission.

II

“[A]n agency literally has no power to act . . . unless and

until Congress confers power upon it.” *Arlington v. FCC*, 569 U. S. 290, 317 (2013) (ROBERTS, C. J., dissenting) (quoting *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U. S. 355, 374 (1986)). When an agency exercises power beyond the bounds of its authority, it acts unlawfully. See, e.g., *SAS Institute Inc. v. Iancu*, 584 U. S. ___, ___, n. (2018) (slip op., at 11, n.). The 2012 memorandum creating DACA provides a poignant illustration of ultra vires agency action.

DACA alters how the immigration laws apply to a certain class of aliens. “DACA [recipients] primarily entered the country either by overstaying a visa or by entering without inspection, and the INA instructs that aliens in both classes are removable.” *Texas v. United States*, 328 F. Supp. 3d 662, 713 (SD Tex. 2018) (footnote omitted). But DACA granted its recipients deferred action, *i.e.*, a decision to “decline to institute [removal] proceedings, terminate [removal] proceedings, or decline to institute a final order of [removal].” *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 484 (1999) (internal quotation marks omitted). Under other regulations, recipients of deferred action are deemed lawfully present for purposes of certain federal benefits. See *supra*, at 4. Thus, DACA in effect created a new exception to the statutory provisions governing removability and, in the process, conferred lawful presence on an entire class of aliens.

To lawfully implement such changes, DHS needed a grant of authority from Congress to either reclassify removable DACA recipients as lawfully present, or to exempt the entire class of aliens covered by DACA from statutory removal procedures. No party disputes that the immigration statutes lack an express delegation to accomplish either result. And, an examination of the highly reticulated immigration regime makes clear that DHS has no implicit discretion to create new classes of lawful presence or to grant relief from removal out of whole cloth. Accordingly, DACA is substantively unlawful.

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This conclusion should begin and end our review. The decision to rescind an unlawful agency action is *per se* lawful. No additional policy justifications or considerations are necessary. And, the majority’s contrary holding—that an agency is not only permitted, but required, to continue an *ultra vires* action—has no basis in law.

A

Congress has not authorized DHS to reclassify an entire class of removable aliens as lawfully present or to categorically exempt aliens from statutory removal provisions.

1

I begin with lawful presence. As just stated, nothing in the federal immigration laws expressly delegates to DHS the unfettered discretion to create new categories of lawfully present aliens. And, there is no basis for concluding that Congress implicitly delegated to DHS the power to reclassify categories of aliens as lawfully present. The immigration statutes provide numerous ways to obtain lawful presence, both temporary and permanent. The highly detailed nature of these provisions indicates that Congress has exhaustively provided for all of the ways that it thought lawful presence should be obtainable, leaving no discretion to DHS to add new pathways.

For example, federal immigration laws provide over 60 temporary nonimmigrant visa options, including visas for ambassadors, full-time students and their spouses and children, those engaged to marry a United States citizen within 90 days of arrival, athletes and performers, and aliens with specialized knowledge related to their employers. See §§1101(a)(15)(A)–(V), 1184; 8 CFR §214.1; see also Congressional Research Service, J. Wilson, Nonimmigrant and Immigrant Visa Categories: Data Brief 1–6 (2019) (Table 1). In addition, the statutes permit the Attorney General to grant temporary “parole” into the United States “for urgent

humanitarian reasons or [a] significant public benefit,” 8 U. S. C. §1182(d)(5)(A); provide for temporary protected status when the Attorney General finds that removal to a country with an ongoing armed conflict “would pose a serious threat to [an alien’s] personal safety,” §1254a(b)(1)(A); and allow the Secretary of Homeland Security (in consultation with the Secretary of State) to waive visa requirements for certain aliens for up to 90 days, §§1187(a)–(d).

The immigration laws are equally complex and detailed when it comes to obtaining lawful permanent residence. Congress has expressly specified numerous avenues for obtaining an immigrant visa, which aliens may then use to become lawful permanent residents. §§1201, 1255(a). Among other categories, immigrant visas are available to specified family-sponsored aliens, aliens with advanced degrees or exceptional abilities, certain types of skilled and unskilled workers, “special immigrants,” and those entering the country to “engag[e] in a new commercial enterprise.” §§1153(a)–(b), 1154; see also Congressional Research Service, *Nonimmigrant and Immigrant Visa Categories*, at 6–7 (Table 2). Refugees and asylees also may receive lawful permanent residence under certain conditions, §1159; 8 CFR §§209.1, 209.2.⁴ As with temporary lawful presence, each avenue to lawful permanent residence status has its own set of rules and exceptions.⁵

As the Fifth Circuit held in the DAPA litigation, a conclusion with which then-Attorney General Sessions agreed, “specific and detailed provisions[of] the INA expressly and

⁴The immigration statutes also provide for conditional lawful permanent residence status. See §1186a(b)(1)(A)(i) (two years for spouses to demonstrate that the marriage “was [not] entered into for the purpose of procuring an alien’s admission as an immigrant”); §1186b (qualifying business entrepreneurs).

⁵For instance, Congress has carved out rules for aliens who served in the Armed Forces, §§1438–1440, and alien spouses who have been subject to domestic abuse, §§1186a(c)(4)(C)–(D).

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carefully provid[e] legal designations allowing defined classes of aliens to be lawfully present.” *Texas*, 809 F. 3d, at 179. In light of this elaborate statutory scheme, the lack of any similar provision for DACA recipients convincingly establishes that Congress left DHS with no discretion to create an additional class of aliens eligible for lawful presence. Congress knows well how to provide broad discretion, and it has provided open-ended delegations of authority in statutes too numerous to name. But when it comes to lawful presence, Congress did something strikingly different. Instead of enacting a statute with “broad general directives” and leaving it to the agency to fill in the lion’s share of the details, *Mistretta v. United States*, 488 U. S. 361, 372 (1989), Congress put in place intricate specifications governing eligibility for lawful presence. This comprehensive scheme indicates that DHS has no discretion to supplement or amend the statutory provisions in any manner, least of all by memorandum. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 125 (2000) (An agency “may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted” (internal quotation marks omitted)); see also *ETSI Pipeline Project v. Missouri*, 484 U. S. 495, 509–510 (1988).

2

The relief that Congress has extended to removable aliens likewise confirms that DACA exceeds DHS’ delegated authority. Through deferred action, DACA grants temporary relief to removable aliens on a programmatic scale. See *Texas*, 328 F. Supp. 3d, at 714. But as with lawful presence, Congress did not expressly grant DHS the authority to create categorical exceptions to the statute’s removal requirements. And again, as with lawful presence, the intricate level of detail in the federal immigration laws regarding relief from removal indicates that DHS has no discretionary authority to supplement that relief with an

entirely new programmatic exemption.

At the outset, Congress clearly knows how to provide for classwide deferred action when it wishes to do so. On multiple occasions, Congress has used express language to make certain classes of individuals eligible for deferred action. See 8 U. S. C. §§1154(a)(1)(D)(i)(II), (IV) (certain individuals covered under the Violence Against Women Act are “eligible for deferred action”); Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1522 (“Any individual described in subclause (I) is eligible for deferred action”); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, §423(b), 115 Stat. 361 (“Such spouse, child, son, or daughter may be eligible for deferred action”); National Defense Authorization Act for Fiscal Year 2004, §§1703(c)(1)(A), (2), 117 Stat. 1694–1695 (“Such spouse or child shall be eligible for deferred action”).⁶ Congress has failed to provide similar explicit provisions for DACA recipients, and the immigration laws contain no indication that DHS can, at will, create its own categorical policies for deferred action.

Other provisions pertaining to relief from removal further demonstrate that DHS lacked the delegated authority

⁶In the DAPA litigation, DHS noted that some deferred-action programs have been implemented by the Executive Branch without explicit legislation. But “‘past practice does not, by itself, create [executive] power.’” *Medellín v. Texas*, 552 U. S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U. S. 654, 686 (1981)). If any of these programs had been challenged, it would seem that they would be legally infirm for the same reasons as DACA. Moreover, if DHS had the authority to create new categories of aliens eligible for deferred action, then all of Congress’ deferred-action legislation was but a superfluous exercise. *Duncan v. Walker*, 533 U. S. 167, 174 (2001). Finally, whereas some deferred-action programs were followed by legislation, DACA has existed for eight years, and Congress is no closer to a legislative solution than it was in 2012. See, e.g., American Dream and Promise Act of 2019, H. R. 6, 116th Cong., 1st Sess.

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to create DACA. As with lawful presence, Congress has provided a plethora of methods by which aliens may seek relief from removal. For instance, both permanent and temporary residents can seek cancellation of removal if they meet certain residency requirements and have not committed certain crimes. §§1229b(a)–(b). And certain nonpermanent residents may have their status adjusted to permanent residence during these proceedings. §1229b(b)(2). Aliens can apply for asylum or withholding of removal during removal proceedings unless they have committed certain crimes. §§1158, 1231(b)(3). Applicants for certain nonimmigrant visas may be granted a stay of removal until the visa application is adjudicated. §1227(d). And, aliens may voluntarily depart rather than be subject to an order of removal. §1229c.

In sum, like lawful presence, Congress has provided for relief from removal in specific and complex ways. This nuanced detail indicates that Congress has provided the full panoply of methods it thinks should be available for an alien to seek relief from removal, leaving no discretion to DHS to provide additional programmatic forms of relief.⁷

3

Finally, DHS could not appeal to general grants of authority, such as the Secretary’s ability to “perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter,” §1103(a)(3), or to “[e]stablis[h] national immigration enforcement policies and priorities,” 6 U. S. C. §202(5). See also 8 U. S. C. §1103(g)(2). Because we must interpret the statutes “as a

⁷It is uncontested that deferred action frequently occurs on a case-by-case basis, often justified on the grounds that the agency lacks resources to remove all removable aliens. Even assuming that these ad hoc exercises of discretion are permissible, however, we have stated that “[a]n agency confronting resource constraints may change its own conduct, but it cannot change the law.” *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 327 (2014).

symmetrical and coherent regulatory scheme,” *Gustafson v. Alloyd Co.*, 513 U. S. 561, 569 (1995), these grants of authority must be read alongside the express limits contained within the statute. Basing the Secretary’s ability to completely overhaul immigration law on these general grants of authority would eviscerate that deliberate statutory scheme by “allow[ing the Secretary of DHS] to grant lawful presence . . . to any illegal alien in the United States.” *Texas*, 809 F. 3d, at 184. Not only is this “an untenable position in light of the INA’s intricate system,” *ibid.*, but it would also render many of those provisions wholly superfluous due to DHS’ authority to disregard them at will, *Duncan v. Walker*, 533 U. S. 167, 174 (2001). And in addition to these fatal problems, adopting a broad interpretation of these general grants of authority would run afoul of the presumption that “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.” *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). And it would also conflict with the major questions doctrine, which is based on the expectation that Congress speaks clearly when it delegates the power to make “decisions of vast economic and political significance.” *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324 (2014) (*UARG*) (internal quotation marks omitted); see also *Texas*, 787 F. 3d, at 760–761.

Read together, the detailed statutory provisions governing temporary and lawful permanent resident status, relief from removal, and classwide deferred-action programs lead ineluctably to the conclusion that DACA is “inconsisten[t] with the design and structure of the statute as a whole.” *University of Tex. Southwestern Medical Center v. Nassar*, 570 U. S. 338, 353 (2013). As the District Court stated in the DAPA litigation and as then-Attorney General Sessions agreed, “[i]nstead of merely refusing to enforce the INA’s removal laws against an individual, the DHS has enacted a wide-reaching program that awards legal presence . . . to

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individuals Congress has deemed deportable or removable.” *Texas v. United States*, 86 F. Supp. 3d 591, 654 (SD Tex. 2015). The immigration statutes contain a level of granular specificity that is exceedingly rare in the modern administrative state. It defies all logic and common sense to conclude that a statutory scheme detailed enough to provide conditional lawful presence to groups as narrowly defined as “alien entrepreneurs,” §1186b, is simultaneously capacious enough for DHS to grant lawful presence to almost two million illegal aliens with the stroke of a Cabinet secretary’s pen.

B

Then-Attorney General Sessions concluded that the initial DACA program suffered from the “same legal . . . defects” as DAPA and expanded DACA, finding that, like those programs, DACA was implemented without statutory authority. App. 877–878. Not only was this determination correct, but it is also dispositive for purposes of our review. “It is axiomatic that an administrative agency’s power . . . is limited to the authority granted by Congress.” *Bowen v. Georgetown Univ. Hospital*, 488 U. S. 204, 208 (1988). DHS had no authority here to create DACA, and the unlawfulness of that program is a sufficient justification for its rescission.

The majority opts for a different path, all but ignoring DACA’s substantive legal defect. See *ante*, at 18–19. On the majority’s understanding of APA review, DHS was required to provide additional policy justifications in order to rescind an action that it had no authority to take. This rule “has no basis in our jurisprudence, and support for [it] is conspicuously absent from the Court’s opinion.” *Massachusetts v. EPA*, 549 U. S. 497, 536 (2007) (ROBERTS, C. J., dissenting).

The lack of support for the majority’s position is hardly

surprising in light of our Constitution’s separation of powers. No court can compel Executive Branch officials to exceed their congressionally delegated powers by continuing a program that was void *ab initio*. Cf. *Clinton v. City of New York*, 524 U. S. 417 (1998); *INS v. Chadha*, 462 U. S. 919 (1983); see also *EPA v. EME Homer City Generation, L. P.*, 572 U. S. 489, 542, n. 5 (2014) (Scalia, J., dissenting); *Public Citizen v. Department of Justice*, 491 U. S. 440, 487 (1989) (Kennedy, J., concurring in judgment). In reviewing agency action, our role is to ensure that Executive Branch officials do not transgress the proper bounds of their authority, *Arlington*, 569 U. S., at 327 (ROBERTS, C. J., dissenting), not to perpetuate a decision to unlawfully wield power in direct contravention of the enabling statute’s clear limits, see *UARG*, 573 U. S., at 327–328; *Barnhart v. Sigmon Coal Co.*, 534 U. S. 438, 462 (2002).

Under our precedents, DHS can only exercise the authority that Congress has chosen to delegate to it. See *UARG*, 573 U. S., at 327. In implementing DACA, DHS under the Obama administration arrogated to itself power it was not given by Congress. Thus, every action taken by DHS under DACA is the unlawful exercise of power. Now, under the Trump administration, DHS has provided the most compelling reason to rescind DACA: The program was unlawful and would force DHS to continue acting unlawfully if it carried the program forward.

III

The majority’s demanding review of DHS’ decisionmaking process is especially perverse given that the 2012 memorandum flouted the APA’s procedural requirements—the very requirements designed to prevent arbitrary decisionmaking. Even if DHS were authorized to create DACA, it could not do so without undertaking an administrative rulemaking. The fact that DHS did not engage in this process likely provides an independent basis for rescinding

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DACA. But at the very least, this procedural defect compounds the absurdity of the majority’s position in these cases.

As described above, DACA fundamentally altered the immigration laws. It created a new category of aliens who, as a class, became exempt from statutory removal procedures, and it gave those aliens temporary lawful presence. Both changes contravened statutory limits. DACA is thus what is commonly called a substantive or legislative rule.⁸ As the name implies, our precedents state that legislative rules are those that “have the force and effect of law.” *Chrysler Corp. v. Brown*, 441 U. S. 281, 295 (1979) (internal quotation marks omitted).

Our precedents allow the vast majority of legislative rules to proceed through so-called “informal” notice and comment rulemaking. See *United States v. Florida East Coast R. Co.*, 410 U. S. 224, 237–238 (1973).⁹ But under our precedents, an agency must engage in certain procedures mandated by the APA before its rule carries legal force. *Kisor v. Wilkie*, 588 U. S. ___, ___ (2019) (plurality opinion) (slip op., at 23) (“[A] legislative rule, . . . to be valid[,] must go through notice and comment”); *id.*, at ___ (GORSUCH, J., concurring in judgment) (slip op., at 17) (same); *Perez v. Mortgage Bankers Assn.*, 575 U. S. 92, 96 (2015); cf. *Azar v. Allina Health Services*, 587 U. S. ___, ___ (2019) (slip op., at 1) (same with respect to materially identical procedures under the Medicare Act). These procedures specify that the agency “shall” publish a notice of proposed rulemaking in

⁸The majority tacitly acknowledges as much, as it must. See *ante*, at 11–12. Otherwise, the majority would have to accept that DACA was nothing more than a policy of prosecutorial discretion, which would make its rescission unreviewable. See *Heckler v. Chaney*, 470 U. S. 821, 831 (1985).

⁹As I have previously pointed out, “the APA actually contemplated a much more formal process for most rulemaking.” *Perez v. Mortgage Bankers Assn.*, 575 U. S. 92, 128, n. 5 (2015) (opinion concurring in judgment).

the Federal Register, justify the rule by reference to legal authority, describe “the subjects and issues involved” in the rule, and allow interested parties to submit comments. 5 U. S. C. §§553(b)–(c); see also *Kisor*, 588 U. S., at ____ (opinion of GORSUCH, J.) (slip op., at 17). As we have recognized recently, use of the word “shall” indicates that these procedures impose mandatory obligations on the agency before it can adopt a valid binding regulation. See *Maine Community Health Options v. United States*, 590 U. S. ___, ____ (2020) (slip op., at 12). After undergoing notice and comment, the agency then publishes the final rule, which must “articulate a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (internal quotation marks omitted). Only after completing this process is the legislative rule a valid law. See *Kisor*, 588 U. S., at ____ (opinion of GORSUCH, J.) (slip op., at 17).¹⁰

Because DACA has the force and effect of law, DHS was required to observe the procedures set out in the APA if it wanted to promulgate a legislative rule. It is undisputed, however, that DHS did not do so. It provided no opportunity for interested parties to submit comments regarding the effect that the program’s dramatic and very significant change in immigration law would have on various aspects of society. It provided no discussion of economic considerations or national security interests. Nor did it provide any substantial policy justifications for treating young people

¹⁰The APA also provides certain exceptions from notice and comment rulemaking. For example, an agency may promulgate a legally binding rule without notice and comment if good cause exists to do so. 5 U. S. C. §553(b)(B). This text would become a nullity if the agency could achieve the same effect by simply dispensing with notice and comment procedures altogether.

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brought to this country differently from other classes of aliens who have lived in the country without incident for many years. And, it did not invoke any law authorizing DHS to create such a program beyond its inexplicable assertion that DACA was consistent with existing law. Because DHS failed to engage in the statutorily mandated process, DACA never gained status as a legally binding regulation that could impose duties or obligations on third parties. See *id.*, at ____ (plurality opinion) (slip op., at 23); *id.*, at ____ (opinion of GORSUCH, J.) (slip op., at 17).

Given this state of affairs, it is unclear to me why DHS needed to provide any explanation whatsoever when it decided to rescind DACA. Nothing in the APA suggests that DHS was required to spill *any* ink justifying the rescission of an invalid legislative rule, let alone that it was required to provide policy justifications beyond acknowledging that the program was simply unlawful from the beginning. And, it is well established that we do not remand for an agency to correct its reasoning when it was required by law to take or abstain from an action. See *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U. S. 527, 544–545 (2008). Here, remand would be futile, because no amount of policy explanation could cure the fact that DHS lacked statutory authority to enact DACA in the first place.

Instead of recognizing this, the majority now requires the rescinding Department to treat the invalid rule as though it were legitimate. As just explained, such a requirement is not supported by the APA.¹¹ It is also absurd, as evidenced by its application to DACA in these cases. The majority insists that DHS was obligated to discuss its choices regarding benefits and forbearance in great detail, even

¹¹ Thus, it is not that the APA “*should* not” be construed to support the majority’s result, *ante*, at 26 (emphasis added), it is that the APA does not and *cannot* support that result.

though no such detailed discussion accompanied DACA's issuance. And, the majority also requires DHS to discuss reliance interests at length, even though deferred action traditionally does not take reliance interests into account and DHS was not forced to explain its treatment of reliance interests in the first instance by going through notice and comment. See *infra*, at 23–24. The majority's demand for such an explanation here simply makes little sense.

At bottom, of course, none of this matters, because DHS *did* provide a sufficient explanation for its action. DHS' statement that DACA was ultra vires was more than sufficient to justify its rescission.¹² By requiring more, the majority has distorted the APA review process beyond recognition, further burdening all future attempts to rescind unlawful programs. Plaintiffs frequently bring successful challenges to agency actions by arguing that the agency has impermissibly dressed up a legislative rule as a policy statement and must comply with the relevant procedures before functionally binding regulated parties. See, e.g., *Mendoza v. Perez*, 754 F. 3d 1002 (CA DC 2014); *Natural Resources Defense Council v. EPA*, 643 F. 3d 311 (CA DC 2011); *National Family Planning & Reproductive Health Assn., Inc. v. Sullivan*, 979 F. 2d 227 (CA DC 1992). But going forward, when a rescinding agency inherits an invalid legislative rule that ignored virtually every rulemaking requirement of the APA, it will be obliged to overlook that reality. Instead of simply terminating the program because it did not go through the requisite process, the agency will be compelled to treat an invalid legislative rule as though it were legitimate.¹³

¹²I express no view on what other reasons would justify an agency's decision to rescind a procedurally unlawful action. I merely point out that correctly concluding that the program was illegal is sufficient.

¹³In my view, even if DACA were permitted under the federal immigration laws and had complied with the APA, it would still violate the Constitution as an impermissible delegation of legislative power. See

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IV

Even if I were to accept the majority’s premise that DACA’s rescission required additional policy justifications, the majority’s reasons for setting aside the agency’s decision still fail.

A

First, the majority claims that the Fifth Circuit discussed only the legality of the 2014 memorandum’s conferral of benefits, not its “forbearance component”—*i.e.*, the decision not to place DACA recipients into removal proceedings. *Ante*, at 20. The majority, therefore, claims that, notwithstanding the then-Attorney General’s legal conclusion, then-Acting Secretary Duke was required to consider revoking DACA recipients’ lawful presence and other attendant benefits while continuing to defer their removal. *Ante*, at 22–23. Even assuming the majority correctly characterizes the Fifth Circuit’s opinion, it cites no authority for the proposition that arbitrary and capricious review *requires* an agency to dissect an unlawful program piece by piece, scrutinizing each separate element to determine whether it would independently violate the law, rather than just to rescind the entire program.¹⁴

Department of Transportation v. Association of American Railroads, 575 U. S. 43, 77 (2015) (THOMAS, J., concurring in judgment). Putting aside this constitutional concern, however, the notice and comment process at least attempts to provide a “surrogate political process” that takes some of the sting out of the inherently undemocratic and unaccountable rule-making process. Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 708 (1999).

¹⁴The majority’s interpretation of the Fifth Circuit’s opinion is highly questionable. Because a grant of deferred action renders DACA recipients eligible for certain benefits and work authorization, it is far from clear that the Department could separate DACA’s “forbearance component” from the major benefits it conferred without running into yet another APA problem. The majority points to the fact that, under the Patient Protection and Affordable Care Act of 2010, relevant regulations exclude those receiving deferred action through DACA from coverage.

The then-Attorney General reviewed the thorough decisions of the District Court and the Fifth Circuit. Those courts exhaustively examined the INA’s text and structure, the relevant provisions of other federal immigration statutes, the historical practice of deferred action, and the general grants of statutory authority to set immigration policy. Both decisions concluded that DAPA and expanded DACA violated the carefully crafted federal immigration scheme, that such violations could not be justified through reference to past exercises of deferred action, and that the general grants of statutory authority did not give DHS the power to enact such a sweeping nonenforcement program. Based on the reasoning of those decisions, then-Attorney General Sessions concluded that DACA was likewise implemented without statutory authority. He directed DHS to restore the rule of law. DHS followed the then-Attorney General’s legal analysis and rescinded the program. This legal conclusion more than suffices to supply the “reasoned analysis” necessary to rescind an unlawful program. *State Farm*, 463 U. S., at 42.

The majority has no answer except to suggest that this approach is inconsistent with *State Farm*. See *ante*, at 21–22. But in doing so, the majority ignores the fact that, unlike the typical “prior policy” contemplated by the Court in

Ante, at 19, n. 5. But that misses the point. Those regulations were promulgated before “anyone with deferred action under the DACA process applie[d]” for those benefits. See 77 Fed. Reg. 52616 (2012). By contrast, DACA recipients have been eligible for and have received Medicare, Social Security, and work authorization for years. DHS therefore is not writing on a blank slate. Under the majority’s rule, DHS would need to amend all relevant regulations and explain why *all* recipients of deferred action who have previously received such benefits may no longer receive them. Alternatively and perhaps more problematically, it would need to provide a reason why other recipients of deferred action should continue to qualify, while DACA recipients should not. It thus seems highly likely that the majority’s proposed course of action would be subject to serious arbitrary and capricious challenges.

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State Farm, DACA is unlawful. Neither *State Farm* nor any other decision cited by the majority addresses what an agency must do when it has inherited an unlawful program. It is perhaps for this reason that, rather than responding with authority of its own, the majority simply opts to excise the “unlawful policy” aspect from its discussion.

B

Second, the majority claims that DHS erred by failing to take into account the reliance interests of DACA recipients. *Ante*, at 23–26. But reliance interests are irrelevant when assessing whether to rescind an action that the agency lacked statutory authority to take. No amount of reliance could ever justify continuing a program that allows DHS to wield power that neither Congress nor the Constitution gave it. Any such decision would be “not in accordance with law” or “in excess of statutory . . . authority.” 5 U. S. C. §§706(2)(A), (C). Accordingly, DHS would simply be engaging in yet another exercise of unlawful power if it used reliance interests to justify continuing the initially unlawful program, and a court would be obligated to set aside that action.¹⁵

Even if reliance interests were sometimes relevant when rescinding an ultra vires action, the rescission still would not be arbitrary and capricious here. Rather, as the majority does not dispute, the rescission is consistent with how deferred action has always worked. As a general matter, deferred action creates no rights—it exists at the Government’s discretion and can be revoked at any time. See App.

¹⁵The majority contends that this argument does not carry force because the rescission implemented a winddown period during which recipients would continue to receive benefits. But whether DHS’ decision to wind down DACA was lawful is a separate question from whether DHS was required to consider reliance interests before discontinuing an unlawful program.

to Pet. for Cert. in No. 18–587, at 104a (DACA and expanded DACA); 8 CFR §214.11(j)(3) (T visas); §214.14(d)(2) (U visas); 62 Fed. Reg. 63249, 63253 (1997) (discussing Exec. Order No. 12711 for certain citizens of the People’s Republic of China). The Government has made clear time and again that, because “deferred action is not an immigration status, no alien has the right to deferred action. It is used solely in the discretion of the [Government] and confers no protection or benefit upon an alien.” DHS Immigration and Customs Enforcement Office of Detention and Removal, Detention and Deportation Officers’ Field Manual §20.8 (Mar. 27, 2006); see also Memorandum from D. Meissner, Comm’r, INS, to Regional Directors et al., pp. 11–12 (Nov. 17, 2000); Memorandum from W. Yates, Assoc. Director of Operations, DHS, Citizenship and Immigration Servs., to Director, Vt. Serv. Center, p. 5 (2003). Thus, contrary to the majority’s unsupported assertion, *ante*, at 23, this longstanding administrative treatment of deferred action provides strong evidence and authority for the proposition that an agency need not consider reliance interests in this context.¹⁶

Finally, it is inconceivable to require DHS to study reliance interests before rescinding DACA considering how the program was previously defended. DHS has made clear since DACA’s inception that it would not consider such reliance interests. Contemporaneous with the DACA memo, DHS stated that “DHS can terminate or renew deferred action at any time at the agency’s discretion.” Consideration

¹⁶The majority’s approach will make it far more difficult to change deferred-action programs going forward, which is hardly in keeping with this Court’s own understanding that deferred action is an “exercise in administrative discretion” used for administrative “convenience.” *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 484 (1999). Agencies will likely be less willing to grant deferred action knowing that any attempts to undo it will require years of litigation and time-consuming rulemakings.

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of Deferred Action for Childhood Arrivals Process, 89 Interpreter Releases 1557, App. 4, p. 2 (Aug. 20, 2012). In fact, DHS repeatedly argued in court that the 2014 memorandum was a valid exercise of prosecutorial discretion in part *because* deferred action created no rights on which recipients could rely. Before the Fifth Circuit, DHS stated that “DHS may revoke or terminate deferred action and begin removal proceedings at any time at its discretion.” Brief for Appellants in *Texas v. United States*, No. 15–40238, p. 7; see also *id.*, at 45–46. And before this Court, in that same litigation, DHS reiterated that “DHS has absolute discretion to revoke deferred action unilaterally, without notice or process.” Brief for United States in *United States v. Texas*, O. T. 2015, No. 15–674, p. 5; see also *id.*, at 37. If that treatment of reliance interests was incorrect, it provides yet one more example of a deficiency in DACA’s issuance, not its rescission.

* * *

President Trump’s Acting Secretary of Homeland Security inherited a program created by President Obama’s Secretary that was implemented without statutory authority and without following the APA’s required procedures. Then-Attorney General Sessions correctly concluded that this ultra vires program should be rescinded. These cases could—and should—have ended with a determination that his legal conclusion was correct.

Instead, the majority today concludes that DHS was required to do far more. Without grounding its position in either the APA or precedent, the majority declares that DHS was required to overlook DACA’s obvious legal deficiencies and provide additional policy reasons and justifications before restoring the rule of law. This holding is incorrect, and it will hamstring all future agency attempts to undo actions that exceed statutory authority. I would

therefore reverse the judgments below and remand with instructions to dissolve the nationwide injunctions.

Opinion of ALITO, J.

SUPREME COURT OF THE UNITED STATES

Nos. 18–587, 18–588, and 18–589

DEPARTMENT OF HOMELAND SECURITY,
ET AL., PETITIONERS
18–587 *v.*

REGENTS OF THE UNIVERSITY OF
CALIFORNIA, ET AL.

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

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL., PETITIONERS
18–588 *v.*
NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE, ET AL.; AND

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

CHAD WOLF, ACTING SECRETARY OF HOMELAND
SECURITY, ET AL., PETITIONERS
18–589 *v.*
MARTIN JONATHAN BATALLA VIDAL, ET AL.

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

[June 18, 2020]

JUSTICE ALITO, concurring in the judgment in part and
dissenting in part.

Anyone interested in the role that the Federal Judiciary

now plays in our constitutional system should consider what has happened in these cases. Early in the term of the current President, his administration took the controversial step of attempting to rescind the Deferred Action for Childhood Arrivals (DACA) program. Shortly thereafter, one of the nearly 700 federal district court judges blocked this rescission, and since then, this issue has been mired in litigation. In November 2018, the Solicitor General filed petitions for certiorari, and today, the Court still does not resolve the question of DACA’s rescission. Instead, it tells the Department of Homeland Security to go back and try again. What this means is that the Federal Judiciary, without holding that DACA cannot be rescinded, has prevented that from occurring during an entire Presidential term. Our constitutional system is not supposed to work that way.

I join JUSTICE THOMAS’s opinion. DACA presents a delicate political issue, but that is not our business. As JUSTICE THOMAS explains, DACA was unlawful from the start, and that alone is sufficient to justify its termination. But even if DACA were lawful, we would still have no basis for overturning its rescission. First, to the extent DACA represented a lawful exercise of prosecutorial discretion, its rescission represented an exercise of that same discretion, and it would therefore be unreviewable under the Administrative Procedure Act. 5 U. S. C. §701(a)(2); see *Heckler v. Chaney*, 470 U. S. 821, 831–832 (1985). Second, to the extent we could review the rescission, it was not arbitrary and capricious for essentially the reasons explained by JUSTICE KAVANAUGH. See *post*, at 4–6 (opinion concurring in the judgment in part and dissenting in part).

Opinion of KAVANAUGH, J.

SUPREME COURT OF THE UNITED STATES

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

[June 18, 2020]

JUSTICE KAVANAUGH, concurring in the judgment in part
and dissenting in part.

For the last 20 years, the country has engaged in consequential policy, religious, and moral debates about the legal status of millions of young immigrants who, as children, were brought to the United States and have lived here ever since. Those young immigrants do not have legal status in the United States under current statutory law. They live, go to school, and work here with uncertainty about their futures. Despite many attempts over the last two decades, Congress has not yet enacted legislation to afford legal status to those immigrants.

In 2012, exercising its view of the Executive's prosecutorial discretion under Article II and the immigration laws, President Obama's administration unilaterally instituted a program known as Deferred Action for Childhood Arrivals, or DACA. Under DACA, eligible young immigrants may apply for and receive deferred action. They must renew their DACA status every two years. Under the program, the Executive Branch broadly forbears from enforcing certain immigration removal laws against DACA recipients. And by virtue of the forbearance, DACA recipients also become eligible for work authorization and other benefits.

Since 2017, President Trump's administration has sought to rescind DACA based on its different and narrower understanding of the Executive's prosecutorial discretion under Article II and the immigration laws. In its view, the Executive Branch legally may not, and as a policy matter should not, *unilaterally* forbear from enforcing the immigration laws against such a large class of individuals. The current administration has stated that it instead wants to work with Congress to enact comprehensive legislation that would address the legal status of those immigrants together with other significant immigration issues.

The question before the Court is whether the Executive Branch acted lawfully in ordering rescission of the ongoing DACA program. To begin with, all nine Members of the Court accept, as do the DACA plaintiffs themselves, that

Opinion of KAVANAUGH, J.

the Executive Branch possesses the legal authority to rescind DACA and to resume pre-DACA enforcement of the immigration laws enacted by Congress. Having previously adopted a policy of prosecutorial discretion and nonenforcement with respect to a particular class of offenses or individuals, the Executive Branch has the legal authority to rescind such a policy and resume enforcing the law enacted by Congress. The Executive Branch's exercise of that rescission authority is subject to constitutional constraints and may also be subject to statutory constraints. The narrow legal dispute here concerns a statutory constraint—namely, whether the Executive Branch's action to rescind DACA satisfied the general arbitrary-and-capricious standard of the Administrative Procedure Act, or APA.

The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. As the Court has long stated, judicial review under that standard is deferential to the agency. The Court may not substitute its policy judgment for that of the agency. The Court simply ensures that the agency has acted within a broad zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision. See *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502 (2009); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983).

The Executive Branch explained its decision to rescind DACA in two sequential memorandums by successive Secretaries of Homeland Security: the 2017 Duke Memorandum and the 2018 Nielsen Memorandum. The Duke Memorandum focused on DACA's perceived legal flaws. The Court today finds the Duke Memorandum insufficient under the APA's arbitrary-and-capricious standard.

But regardless of whether the Court is correct about the Duke Memorandum, the Nielsen Memorandum more fully explained the Department's legal reasons for rescinding

DACA, and clarified that even if DACA were lawful, the Department would still rescind DACA for a variety of policy reasons. The Nielsen Memorandum also expressly addressed the reliance interests of DACA recipients. The question under the APA’s deferential arbitrary-and-capricious standard is not whether we agree with the Department’s decision to rescind DACA. The question is whether the Nielsen Memorandum reasonably explained the decision to rescind DACA. Under ordinary application of the arbitrary-and-capricious standard, the Nielsen Memorandum—with its alternative and independent rationales and its discussion of reliance—would pass muster as an explanation for the Executive Branch’s action.

The Nielsen Memorandum was issued nine months after the Duke Memorandum. Under the Administrative Procedure Act, the Nielsen Memorandum is itself a “rule” setting forth “an agency statement of general . . . applicability and future effect designed to implement . . . policy.” 5 U. S. C. §551(4). Because it is a rule, the Nielsen Memorandum constitutes “agency action.” §551(13). As the Secretary of Homeland Security, Secretary Nielsen had the authority to decide whether to stick with Secretary Duke’s decision to rescind DACA, or to make a different decision. Like Secretary Duke, Secretary Nielsen chose to rescind DACA, and she provided additional explanation. Her memorandum was akin to common forms of agency action that follow earlier agency action on the same subject—for example, a supplemental or new agency statement of policy, or an agency order with respect to a motion for rehearing or reconsideration. Courts often consider an agency’s additional explanations of policy or additional explanations made, for example, on agency rehearing or reconsideration, or on remand from a court, even if the agency’s bottom-line decision itself does not change.

Yet the Court today jettisons the Nielsen Memorandum by classifying it as a *post hoc* justification for rescinding

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DACA. *Ante*, at 14–16. Under our precedents, however, the *post hoc* justification doctrine merely requires that courts assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced *by agency lawyers during litigation* (or by judges). See, e.g., *State Farm*, 463 U. S., at 50 (“courts may not accept appellate counsel’s *post hoc* rationalizations for agency action”); *FPC v. Texaco Inc.*, 417 U. S. 380, 397 (1974) (same); *NLRB v. Metropolitan Life Ins. Co.*, 380 U. S. 438, 443–444 (1965) (same); *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 168–169 (1962) (same). As the D. C. Circuit has explained, the *post hoc* justification doctrine “is not a time barrier which freezes an agency’s exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning. It is a rule directed at reviewing courts which forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper decisionmakers.” *Alpharma, Inc. v. Leavitt*, 460 F. 3d 1, 6 (2006) (Garland, J.) (internal quotation marks omitted).

Indeed, the ordinary judicial remedy for an agency’s insufficient explanation is to remand for further explanation by the relevant agency personnel. It would make little sense for a court to exclude official explanations by agency personnel such as a Cabinet Secretary simply because the explanations are purportedly *post hoc*, and then to turn around and remand for further explanation by those same agency personnel. Yet that is the upshot of the Court’s application of the *post hoc* justification doctrine today. The Court’s refusal to look at the Nielsen Memorandum seems particularly mistaken, moreover, because the Nielsen Memorandum shows that the Department, back in 2018, considered the policy issues that the Court today says the Department did not consider. *Ante*, at 20–26.

To be sure, cases such as *Overton Park* and *Camp v. Pitts* suggest that courts reviewing certain agency *adjudications*

may in some circumstances decline to examine an after-the-fact agency explanation. See *Camp v. Pitts*, 411 U. S. 138, 142–143 (1973) (*per curiam*); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 419–421 (1971). But agency adjudications are “concerned with the determination of past and present rights and liabilities,” Attorney General’s Manual on the Administrative Procedure Act 14 (1947), and implicate the due process interests of the individual parties to the adjudication. Judicial review of an adjudication therefore ordinarily focuses on what happened during the agency’s adjudication process of deciding that individual case.

Even if certain agency adjudications have a slightly more stringent restriction on *post hoc* explanations, the APA is “based upon a dichotomy between rule making and adjudication,” *ibid.*, and this case involves an ongoing agency rule that has future effect—the rescission of DACA. The Nielsen Memorandum implements and explains the rescission of DACA. I am aware of no case from this Court, and the Court today cites none, that has employed the *post hoc* justification doctrine to exclude an agency’s official explanation of an agency rule. For purposes of arbitrary-and-capricious review, it does not matter whether the latest official explanation was two years ago or three years ago. What matters is whether the explanation was reasonable and followed the requisite procedures. In my view, the Court should consider the Nielsen Memorandum in deciding whether the Department’s rescission of DACA satisfies the APA’s arbitrary-and-capricious standard.

Because the Court excludes the Nielsen Memorandum, the Court sends the case back to the Department of Homeland Security for further explanation. Although I disagree with the Court’s decision to remand, the only practical consequence of the Court’s decision to remand appears to be some delay. The Court’s decision seems to allow the Department on remand to relabel and reiterate the substance

Opinion of KAVANAUGH, J.

of the Nielsen Memorandum, perhaps with some elaboration as suggested in the Court’s opinion. *Ante*, at 23–26.*

* * *

The Court’s resolution of this narrow APA issue of course cannot eliminate the broader uncertainty over the status of the DACA recipients. That uncertainty is a result of Congress’s inability thus far to agree on legislation, which in turn has forced successive administrations to improvise, thereby triggering many rounds of relentless litigation with the prospect of more litigation to come. In contrast to those necessarily short-lived and stopgap administrative measures, the Article I legislative process could produce a sturdy and enduring solution to this issue, one way or the other, and thereby remove the uncertainty that has persisted for years for these young immigrants and the Na-

* Because I conclude that the Executive Branch satisfied the APA’s arbitrary-and-capricious standard, I need not consider whether its prosecutorial enforcement policy was “committed to agency discretion by law” and therefore not subject to APA arbitrary-and-capricious review in the first place. 5 U. S. C. §701(a)(2). Several judges have advanced arguments suggesting that DACA—at least to the extent it was simply an exercise of forbearance authority—and the repeal of DACA are decisions about whether and to what extent to exercise prosecutorial discretion against a class of offenses or individuals, and are therefore unreviewable under the APA as “committed to agency discretion by law.” *Ibid.*; see *Casa De Maryland v. United States Dept. of Homeland Security*, 924 F. 3d 684, 709–715 (CA4 2019) (Richardson, J., concurring in part and dissenting in part); *Regents of Univ. Cal. v. United States Dept. of Homeland Security*, 908 F. 3d 476, 521–523 (CA9 2018) (Owens, J., concurring in judgment); see also *Texas v. United States*, 809 F. 3d 134, 196–202 (CA5 2015) (King, J., dissenting); *Texas v. United States*, 787 F. 3d 733, 770–776 (CA5 2015) (Higginson, J., dissenting); cf. *Heckler v. Chaney*, 470 U. S. 821, 831–835 (1985); *ICC v. Locomotive Engineers*, 482 U. S. 270, 277–284 (1987); *United States v. Nixon*, 418 U. S. 683, 693 (1974) (“the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case”); *In re Aiken County*, 725 F. 3d 255, 262–264 (CAD9 2013).

tion's immigration system. In the meantime, as to the narrow APA question presented here, I appreciate the Court's careful analysis, but I ultimately disagree with its treatment of the Nielsen Memorandum. I therefore respectfully dissent from the Court's judgment on plaintiffs' APA claim, and I concur in the judgment insofar as the Court rejects plaintiffs' equal protection claim.

Secretary

U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

July 28, 2020

MEMORANDUM FOR: Mark Morgan
Senior Official Performing the Duties of Commissioner
U.S. Customs and Border Protection

Matthew Albence
Senior Official Performing the Duties of Director
U.S. Immigration and Customs Enforcement

Joseph Edlow
Deputy Director of Policy
U.S. Citizenship and Immigration Services

FROM: Chad F. Wolf 
Acting Secretary

SUBJECT: **Reconsideration of the June 15, 2012 Memorandum
Entitled "Exercising Prosecutorial Discretion with Respect to
Individuals Who Came to the United States as Children"**

On June 15, 2012, Secretary of Homeland Security Janet Napolitano established the policy known as Deferred Action for Childhood Arrivals (DACA) through a memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." Ever since, the policy has been subject to substantial controversy. In recent years, Acting Secretary of Homeland Security Elaine Duke and Secretary of Homeland Security Kirstjen Nielsen concluded that the DACA policy should be fully rescinded and issued additional memoranda in 2017 and 2018, respectively, to effect that decision.

On June 18, 2020, the U.S. Supreme Court issued a decision that did not question the authority of the Department of Homeland Security (DHS) to rescind the DACA policy, but determined that the 2017 and 2018 memoranda had not complied with certain requirements for doing so. See *Department of Homeland Security v. Regents of the University of California*, Nos. 18-587, 18-588, 18-589. Accordingly, the Court concluded that the rescission must be vacated and remanded to DHS so that it "may consider the problem anew." *Regents*, Slip op. at 29.

By this memorandum, I am rescinding the 2017 and 2018 memoranda, and making certain immediate changes to the DACA policy to facilitate my thorough consideration of how to address DACA in light of the Supreme Court's decision. For the reasons outlined below, pending my full reconsideration of the DACA policy, I direct DHS personnel to take all appropriate actions to reject all pending and future initial requests for DACA, to reject all

pending and future applications for advance parole absent exceptional circumstances, and to shorten DACA renewals consistent with the parameters established in this memorandum.

Background

On June 15, 2012, Secretary Napolitano issued the memorandum (Napolitano Memorandum) establishing the DACA policy. The policy provided for the granting of deferred action to certain individuals with no lawful immigration status “who were brought to this country as children” and who satisfied a list of additional specified criteria. The memorandum described this deferred action as an exercise of “prosecutorial discretion” to forbear from removing an alien who would otherwise be subject to removal. Under pre-existing regulations, a grant of deferred action made aliens eligible for certain other attendant benefits, such as work authorization. The memorandum directed U.S. Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS) to establish procedures for granting deferred action and work authorization to eligible aliens for a two-year period, subject to renewal, and for notifying those aliens of DHS’s decision to do so. The memorandum stated, however, that it “confer[red] no substantive right, immigration status or pathway to citizenship.”

On November 20, 2014, Secretary of Homeland Security Jeh Johnson issued a memorandum (Johnson Memorandum) to expand the DACA policy and establish a new, related policy known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). With regard to DACA, this memorandum eliminated a criterion relating to the age of DACA requestors when the policy was announced, extended the deferred-action and work-authorization period from two to three years, and adjusted the date by which requestors must have entered the United States to be eligible for DACA. The DAPA policy allowed for deferred action to be provided to certain parents whose children are U.S. citizens or lawful permanent residents through a process similar to DACA.

Shortly thereafter, the U.S. District Court for the Southern District of Texas issued a nationwide preliminary injunction preventing both the DAPA policy and the expansion of the DACA policy from taking effect. In 2015, the U.S. Court of Appeals for the Fifth Circuit affirmed, holding that DAPA and expanded DACA likely violated both the Administrative Procedure Act (APA) and the Immigration and Nationality Act (INA). In 2016, the U.S. Supreme Court affirmed the court of appeals’ decision by an equally divided vote. On June 15, 2017, Secretary of Homeland Security John Kelly issued a memorandum rescinding the Johnson Memorandum.

Also in June 2017, several of the state plaintiffs from the Texas lawsuit announced their intent to amend their complaint in the then still-pending litigation to challenge the original DACA policy as well. The States argued that the DACA policy was unlawful for the same reasons as the DAPA policy and the expansion of the DACA policy. On September 4, 2017, then-Attorney General Jefferson B. Sessions III issued a letter to Acting Secretary Duke (Sessions Letter), concluding that the DACA policy was indeed unlawful and likely would also be enjoined.

On September 5, 2017, Acting Secretary Duke issued her memorandum (Duke Memorandum) rescinding the Napolitano Memorandum and initiating an orderly wind-down of the DACA policy. The Duke Memorandum explained that, “[t]aking into consideration the Supreme Court’s and the Fifth Circuit’s rulings” in the litigation concerning the Johnson Memorandum, and the Sessions Letter, it was clear to the Acting Secretary that the DACA policy “should be terminated.”

Litigation challenging the Duke Memorandum promptly ensued. As relevant here, suits were filed in the U.S. District Courts for the Northern District of California, Eastern District of New York, District of Maryland, and the District of Columbia. The District of Columbia district court vacated the rescission entirely, but stayed its ruling for 90 days to permit DHS to reissue a memorandum rescinding the DACA policy and providing a fuller explanation.

In response to that ruling, on June 22, 2018, Secretary Nielsen issued an additional memorandum (Nielsen Memorandum) providing further explanation for the rescission of the DACA policy. The Nielsen Memorandum explained that “the DACA policy properly was—and should be—rescinded, for several separate and independently sufficient reasons,” including that the policy is contrary to law; that, even if it were not unlawful, Secretary Nielsen lacked sufficient confidence in the policy’s legality to continue it; and that it was not sound enforcement policy in multiple respects. Despite the Nielsen Memorandum, the District of Columbia district court declined to reconsider its previous order vacating the rescission.

On June 18, 2020, having granted review in the California, New York, and D.C. cases, the U.S. Supreme Court held that the rescission of the DACA policy must be vacated. See *Department of Homeland Security v. Regents of the University of California*, Nos. 18-587, 18-588, 18-589. The Court observed that “[a]ll parties agree[d]” that “DHS may rescind DACA,” and the Court provided no reason to doubt that consensus. Slip op. at 9. But it held that DHS violated the APA in the manner in which it had rescinded the policy.

As a threshold matter, the Court determined that, although agency non-enforcement decisions are generally not reviewable under the APA, the rescission of the DACA policy was reviewable “because DACA is not simply a non-enforcement policy.” *Id.* at 11. Rather, the Court stated, the Napolitano Memorandum “created a program for conferring affirmative immigration relief,” the creation and rescission of which is subject to review under the APA. *Id.* And it added that the “benefits attendant to deferred action provide further confirmation that DACA is more than simply a non-enforcement policy.” *Id.*

On the merits, the Court found that when DHS rescinded the DACA policy, it failed to consider important aspects of the problem. In making that determination, the Court declined to consider the Nielsen Memorandum. Instead, the Court characterized that memorandum as an impermissible post hoc rationalization of the rescission, because in the Court’s view Secretary Nielsen “chose to elaborate on the reasons for the initial rescission rather than take new administrative action.” *Id.* at 14. As to the Duke Memorandum, the Court held that it was arbitrary and capricious because (1) the Acting Secretary did not adequately consider whether DHS could and should address the illegality of the DACA policy by retaining the forbearance aspect of the policy (i.e., deferred action), while declining to make DACA recipients eligible for the other associated benefits, such as work authorization, *id.* at 17-23; and (2) the Acting Secretary did not adequately consider how, if at all, to address any “legitimate reliance” on the Napolitano Memorandum, *id.* at 23-26. The Court thus concluded that the rescission must be vacated and that the matter should be “remand[ed] to DHS so that it may consider the problem anew.” *Id.* at 29.

The Court affirmed the District of Columbia district court’s final judgment, vacated the Ninth Circuit’s affirmance of the preliminary injunction issued by the Northern District of California, and vacated the preliminary injunction issued by the Eastern District of New York. *Id.*

On June 30, 2020, Attorney General William Barr withdrew the Sessions Letter and directed the Department of Justice's Office of Legal Counsel to withdraw all guidance it had provided to DHS on the legality of DACA and related deferred-action policies, including an Office of Legal Counsel opinion that briefly addressed the legality of DACA in connection with related deferred-action policies. Attorney General Barr explained that he did not "wish to maintain a determination as the Attorney General about the legality of DACA that might constrain the discretion [I] otherwise possess as Acting Secretary of Homeland Security to consider whether and how to rescind DACA."

Rescission of the Nielsen and Duke Memoranda, and Reconsideration of the Napolitano Memoranda

In light of the Supreme Court's decision to vacate the Duke Memorandum and remand to the Department of Homeland Security, and in my capacity as the Acting Secretary of Homeland Security, I am considering anew the DACA policy. To date, I have considered the Napolitano Memorandum itself, the Duke Memorandum and Acting Secretary Duke's accompanying statement, the Nielsen Memorandum, the administrative record produced in litigation challenging the Duke Memorandum, the briefs and joint appendix filed in the Supreme Court from that litigation, the joint appendix filed in the Fourth Circuit on appeal in the District of Maryland litigation, all of the judicial opinions issued in the litigation over the Duke Memorandum, including the June 18 decision of the Supreme Court, the letter from Attorney General Barr, and letters expressing support for the DACA policy that have been submitted to the President and DHS since the Supreme Court's June 18 decision.

As those materials demonstrate, whether to retain the DACA policy presents significant questions of law and legal policy. More importantly for present purposes, having considered those materials, I have concluded that the DACA policy, at a minimum, presents serious policy concerns that may warrant its full rescission. At the same time, I have concluded that fully rescinding the policy would be a significant administration decision that warrants additional careful consideration. Accordingly, in the exercise of my authority and discretion in establishing national immigration policies and priorities, see 8 U.S.C. § 1103(a)(1); 6 U.S.C. § 202(5), I am rescinding the Nielsen Memorandum and the Duke Memorandum, and making certain immediate changes to the DACA policy to mitigate my enforcement policy concerns while I conduct a full and careful consideration of a full rescission. Below, I address each of my enforcement policy concerns and then explain the immediate interim changes.

Enforcement Policy Concerns: There are several reasons of enforcement policy that may warrant the full rescission of the DACA policy.

First, even if the DACA policy could have been justified as a temporary measure when it was created, Congress arguably has had more than sufficient time to consider affording permanent status or immigration relief to the class of aliens covered by the policy. And yet, although various proposals have been advanced to do that, Congress has so far declined to take action. Particularly in the face of this failure to reach a legislative solution, I have serious doubts as to whether DHS should continue to provide either a reprieve from removal or a grant of attendant benefits to more than half a million aliens through a broad, class-based deferred-action policy.

By contrast, rescinding DACA entirely may well create a more pressing need for Congress to decide whether it wants to address this issue and the underlying conditions that led to a

population of this size to remain in the United States in violation of our immigration laws for so long, and any other efforts to reform our immigration system in a manner that advances the national interest. As unilateral executive action, the DACA policy necessarily lacks the permanence of statutory law; it is more akin to a stopgap measure. For example, DACA recipients, as such, are not entitled to become lawful permanent residents and are not on a path to citizenship. Congress is best positioned to address that and other concerns on a more permanent basis through duly enacted statutes.

Second, there has been much debate about the discretion exercised by DHS personnel in implementing the DACA policy. In my view, however, regardless of the amount of discretion that has been exercised or could be exercised under the policy, I have reservations as a matter of policy about setting out a list of detailed criteria, and maintaining a formal process, for non-enforcement. I am concerned that doing so may tilt the scales in deciding which aliens should receive deferred action and may inhibit individualized consideration of each case, at least for a non-enforcement policy of this scale.

Third, because DHS is a law enforcement agency, I am concerned about sending mixed messages about DHS's intention to consistently enforce the immigration laws as Congress has written them. DACA makes clear that, for certain large classes of individuals, DHS will at least tolerate, if not affirmatively sanction, their ongoing violation of the immigration laws. I am deeply troubled that the message communicated by non-enforcement policies like DACA may contribute to the general problem of illegal immigration in a manner that is inconsistent with DHS's law enforcement mission.

Fourth, these concerns are all the more pressing in the context of children. It is vitally important to convey a message that discourages individuals from undertaking what can often be a perilous journey to this country with no legitimate claim to enter or remain. Of course, the DACA policy would not apply to children who are sent or brought to this country today. But rescinding the DACA policy may further DHS's efforts to discourage illegal immigration involving children going forward. By contrast, I am concerned that retaining the policy creates some risk of communicating the contrary message and encouraging such illegal conduct by suggesting a potential for similar future policies.

Changes Pending Reconsideration of the DACA Policy: In accordance with the Supreme Court's decision, I am determined to give careful consideration to whether the DACA policy should be maintained, rescinded, or modified. In the meantime, given my serious concerns about the policy, I have determined that some changes should immediately be made to the policy to limit its scope in the interim. First, while my reconsideration of the DACA policy continues, no new initial requests for DACA should be accepted. Second, advance parole should be granted to current DACA beneficiaries only in exceptional circumstances. Third, going forward, renewals of deferred action and the accompanying work authorization should be granted for one-year, rather than two-year, periods.

These changes will mitigate my concerns without encroaching materially on the reliance interests that have been raised by individuals, organizations, and state and local governments during the course of the extensive litigation over the Duke and Nielsen Memoranda, and in recent letters to the President and DHS. As noted by the Supreme Court, these groups have argued that, as the Napolitano Memorandum itself stated, many DACA recipients were brought or sent to the country as children, through no fault of their own, and may have never known another home.

They assert that DACA recipients have structured their lives around the expectation that DHS would forbear from enforcing the immigration laws against them and have come to rely on the other associated benefits—like work authorization, Social Security, and Medicare, as well as advance parole—that are made available to DACA recipients. They point out that other parties, too, would be affected by the rescission of the DACA policy, including the family members, schools, employers, and employees of DACA recipients. They have offered estimates of the amount of economic activity DACA recipients generate and the federal, state, and local tax revenue that DACA recipients provide. And some have even argued that the current COVID-19 and economic crises provide additional reasons to continue the DACA policy, in light of the many DACA recipients who have pursued careers in healthcare and other essential services or who serve in other critical roles in the workforce.

Whatever the merits of these asserted reliance interests on the maintenance of the DACA policy, they are significantly lessened, if not entirely lacking, with regard to aliens who have never before received deferred action pursuant to the policy. And any reliance interests possessed by an alien or a third party within the United States on that alien's ability to remain in the country does not depend on the extraordinary ability to come and go from the country as they please. In light of my concerns about the policy as a whole, I do not believe that, at least absent exceptional circumstances, DHS should continue to make the benefit of advance parole available while I reconsider whether the DACA policy itself should exist. Indeed, even after determining that DHS's prior full rescission of the policy was likely unlawful, the district courts in the previous litigation did not require DHS to consider requests for DACA from aliens who had not previously received it or to grant any requests for advance parole. Accordingly, that has been the status quo for more than two years. It makes sense to continue that approach while I reconsider whether to rescind or revise the policy. If I ultimately determine to maintain the policy, there is nothing in the policy that would preclude aliens from making an initial request for DACA or renewing requests for advance parole at that time. And, even in the interim, nothing in this memorandum precludes the exercise of deferred action on a truly individualized, case-by-case basis when and if warranted.

Nor are the asserted reliance interests significantly affected by shortening the renewal periods from two years to one year. Shortening renewal periods granted during this reconsideration period will have the potential benefit of significantly lessening the lasting effects of the DACA policy if I ultimately decide to rescind it. And the costs will be limited in the meantime, because the aliens who currently have DACA grants and have structured their affairs based on their expectation of its continuance may still seek renewal. They will merely have to seek renewal on an annual, rather than biannual, basis. In a similar manner, the third parties who are benefiting from those aliens' continued presence today will continue to receive the same derivative benefits that they are receiving as long as the aliens' renewals continue—whether on an annual or bi-annual basis. Put differently, even assuming that aliens with DACA have legitimate reliance interests in being able to renew at all, they have minimal if any reliance interests in the length of each renewal period, especially since a grant of DACA was and remains revocable.

I recognize that shortening renewal periods on a prospective basis will have the effect, during this interim period as I consider how to address the DACA policy, of increasing the total amount of renewal fees that an alien will be required to pay over a multi-year period. But the fee per application will remain constant, and the fee that DHS charges for the application is associated with the processing costs to DHS. DHS personnel should consider whether it is possible to

reduce renewal fees during this interim period of reconsideration. In my current view, however, even if renewal fees cannot be reduced, shortening the renewal period is still warranted by my strong desire to limit the scope of the policy during this interim period despite any additional fees incurred by DACA beneficiaries as a result.

Finally, to further mitigate my concerns, I have determined that these changes should apply both to DACA and advance parole requests submitted after the issuance of this memorandum and requests that are currently pending before the agency. Since the issuance of the Supreme Court's decision, DHS has, on an interim basis, generally held properly submitted initial requests for DACA in anticipation of potential policy changes. Since July 24, DHS has likewise, on an interim basis, held all requests for advanced parole from current DACA recipients.¹ Consistent with the Court's express remand for the agency's reconsideration and the Napolitano Memorandum's clear statement that it conferred no substantive rights, DHS did not expand beyond the status quo of the past several years for a few weeks while it was determining next steps. I now conclude that all pending and future requests should be treated in the same manner, rather than be subject to differential treatment depending on the fortuity of when DHS received the request within a short period of uncertainty. Nothing in the Napolitano Memo purports to preclude me from exercising my enforcement discretion to make these changes on an interim basis while I consider whether to make more substantial changes on a permanent basis. Even under the Napolitano Memo, no aliens had a legal entitlement to receive DACA—much less a legal entitlement to a particular renewal period. Nor can aliens with pending requests assert any meaningfully greater reliance interests in their initial or continued enjoyment of the policy and the attendant benefits than aliens who submit such requests after the issuance of this memorandum.

Accordingly, effective immediately, DHS shall:

- Reject all initial DACA requests and associated applications for Employment Authorization Documents, and refund all associated fees, without prejudice to re-filing such requests should DHS determine to begin accepting initial requests again in the future.
- Adjudicate all pending and future properly submitted DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries.
- Limit the period of any deferred action granted pursuant to the DACA policy after the issuance of this memorandum (and thereby limit the period of any associated work authorization) to one year.
- Refrain from terminating any grants of previously issued deferred action or revoking any Employment Authorization Documents based solely on the directives in this memorandum for the remaining duration of their validity periods.

¹ Prior to July 24, DHS's treatment of advance parole requests from DACA recipients varied. Many were rejected, while some were accepted and receipted. To the extent any rejected requestor believes exceptional circumstances support his or her request, he or she may now renew the request for advance parole, and it will be adjudicated on the terms set forth in this memorandum.

- Reject all pending and future Form I-131 applications for advance parole from beneficiaries of the DACA policy and refund all associated fees, absent exceptional circumstances.
- Refrain from terminating any grants of previously approved advance parole based solely on the directives in this memorandum for the remaining duration of their validity periods.
- Exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate.
- Continue to comply with the information-sharing policy as reflected in the DACA Frequently Asked Questions issued alongside the Napolitano Memorandum, and as set forth in USCIS's Form I-821D instructions. Nothing in this memorandum makes any change to that policy.

* * * * *

This document is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or equity by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS. Finally, if any aspect of the changes to the DACA policy in this memorandum is found to be unlawful, the remainder of the changes should nonetheless continue in effect.

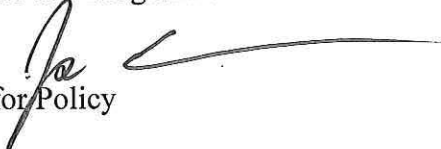


U.S. Citizenship
and Immigration
Services

August 21, 2020

Memorandum

TO: Associate Directors and Program Office Chiefs

FROM: Joseph Edlow 
Deputy Director for Policy

SUBJECT: Implementing Acting Secretary Chad Wolf's July 28, 2020 Memorandum, "Reconsideration of the June 15, 2012 Memorandum 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children'"

On July 28, 2020, Acting Secretary of Homeland Security Chad Wolf issued a memorandum entitled, "Reconsideration of the June 15, 2012 Memorandum Entitled 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.'" In light of the U.S. Supreme Court's decision in *Department of Homeland Security (DHS), et al. v. Regents of the University of California, et al.* Nos. 18-587, 18-588, 18-589, Acting Secretary Wolf rescinded memoranda issued by former Acting Secretary Elaine Duke in 2017 and former Secretary Kirstjen Nielsen in 2018 that had concluded that the Deferred Action for Childhood Arrivals (DACA) policy established on June 15, 2012 by former Secretary Janet Napolitano¹ (hereafter "the Napolitano memorandum") should be rescinded after an orderly wind-down process.

Acting Secretary Wolf's memorandum (hereafter "the Wolf Memorandum") also set forth departmental action to effect certain immediate changes to limit the scope of the DACA policy pending a full and careful reconsideration of the DACA policy. Through this memorandum, I am providing additional guidance to facilitate implementation of the specific changes to the DACA policy that are within the purview of USCIS.

The Wolf Memorandum directed the following actions, effective immediately:

- Reject all initial DACA requests and associated applications for Employment Authorization Documents, and refund all associated fees, without prejudice to re-filing

¹ Memorandum for David Aguilar, Acting Commissioner, CBP, et al., from Janet Napolitano, Secretary, DHS, Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) ("Napolitano memorandum").

such requests should DHS determine to begin accepting initial requests again in the future;

- Adjudicate all pending and future properly submitted DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries;
- Limit the period of any deferred action granted pursuant to the DACA policy after the issuance of this memorandum (and thereby limit the period of any associated work authorization) to one year;
- Refrain from terminating any grants of previously issued deferred action or revoking any Employment Authorization Documents based solely on the directives in this memorandum for the remaining duration of their validity periods;
- Reject all pending and future Form I-131 applications for advance parole from beneficiaries of the DACA policy and refund all associated fees, absent exceptional circumstances;
- Refrain from terminating any grants of previously approved advance parole based solely on the directives in this memorandum for the remaining duration of their validity periods;
- Exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate; and
- Continue to comply with the information-sharing policy as reflected in the DACA Frequently Asked Questions issued alongside the Napolitano memorandum, and as set forth in USCIS's Form I-821D instructions. Nothing in this memorandum changes that policy.

To facilitate implementation of the Wolf Memorandum, I am providing additional guidance to USCIS personnel as follows:

- **Reject all initial DACA requests and associated applications for Employment Authorization Documents, and return all associated fees, without prejudice to re-filing such requests should DHS determine to begin accepting initial requests again in the future.**

The Wolf Memorandum makes clear that these changes should apply to all initial DACA requests submitted by aliens who have never before received DACA, whether submitted after the issuance of his memorandum or pending before USCIS at the time his memorandum was issued. In accordance with the Wolf Memorandum, USCIS shall reject and return the fees for any DACA requests and associated applications for employment authorization submitted by aliens *who have never before received a grant of DACA*. Since the Supreme Court's decision in

Regents, these requests, if properly filed, have generally been on hold at the USCIS filing location pending further action by USCIS.²

Historically, USCIS policy on DACA renewals has permitted DACA recipients to request renewal of DACA for up to one year after their underlying DACA grant has expired. DACA recipients who failed to submit their renewal requests within the one-year time period following expiration have generally been permitted to request DACA anew. Given the lapse of time between these aliens’ last DACA period and their subsequent request to again receive DACA, however, USCIS has treated such requests as requests for “initial” DACA for required evidence, processing, and adjudication purposes. Likewise, DACA recipients whose most recent period of DACA has been terminated by USCIS (rather than expired on its own terms) have also been permitted to request DACA anew, but such requests are treated as requests for “initial” DACA (even if the lapse of time between the termination of their most recent period of DACA and their subsequent request to receive DACA again is less than one year).

Under the preliminary injunctions issued in January and February of 2018,³ USCIS has accepted and adjudicated DACA requests from aliens who have previously received grants of DACA *at any time*—including requests that are treated as “initial” requests for the reasons described above. Given the Acting Secretary’s desire to maintain the status quo of the past few years, USCIS will continue to accept and adjudicate such requests notwithstanding any language in the Wolf Memorandum about rejecting “all” requests for initial DACA.

➤ **Adjudicate all pending and future DACA renewal requests and associated applications for Employment Authorization Documents from DACA recipients.**

USCIS shall continue to adjudicate all pending DACA renewal requests and renewal requests received after the Wolf Memorandum, as well as certain initial requests as discussed above, under the general adjudicative guidelines in place for DACA. USCIS will continue to reject, without prejudice to re-submission, DACA renewal requests that are not properly filed in accordance with form instructions and USCIS filing guidance, as it has done since USCIS first started accepting DACA renewal requests. While USCIS will continue to adjudicate DACA requests under the same general adjudicative guidelines, USCIS is implementing certain immediate changes to DACA processing consistent with and in furtherance of the Wolf Memorandum.

Since June 2014 when DHS and USCIS announced the DACA renewal process, USCIS has consistently instructed DACA recipients to file renewal requests between 150 days and 120 days

² Initial DACA requests that were properly filed prior to September 5, 2017, should be adjudicated to completion in the event that any of these requests still remain pending with USCIS. This guidance to reject and return the fees for pending initial DACA requests does not apply to initial DACA requests properly filed prior to September 5, 2017.

³ See <https://www.uscis.gov/humanitarian/deferred-action-for-childhood-arrivals-response-to-january-2018-preliminary-injunction>

prior to their DACA expiration.⁴ Previously, USCIS has accepted renewal requests filed in advance of that period. In furtherance of the directives in the Wolf Memorandum, USCIS will generally reject DACA renewal requests received more than 150 days prior to the expiration of the DACA recipient's current DACA validity period. The Wolf Memorandum expressed concerns with the scope of the DACA policy during the interim period the policy is under review. Exercising discretion to generally reject DACA renewal requests received more than 150 days prior to the expiration of the alien's current period of DACA is more consistent with our long-existing guidance to DACA recipients and serves other important operational interests to improve USCIS's processing and operational efficiencies as a whole. Additionally, implementing these case intake procedures recognizes that the DACA policy is under comprehensive legal and policy review and may be modified or entirely rescinded by the Acting Secretary once DHS's review of the DACA policy is complete. Therefore, USCIS believes that it is more prudent to generally reject DACA renewal requests received more than 150 days prior to the expiration of the DACA recipient's current DACA validity period as the DACA policy may be revised or rescinded before USCIS would normally take final adjudicative action on these early filed renewal requests.

USCIS understands that applicants, petitioners, and requestors have an interest in timely adjudications. This is particularly true for aliens granted temporary authorization to work in the United States who then apply to USCIS to renew their employment authorization documents before their temporary employment authorization expires. The interim adjustment discussed in this memorandum with respect to early filed DACA renewals balances concerns with the scope of the DACA policy during this interim period with the interests DACA recipients have in preventing gaps in DACA and associated employment authorization. Further, this guidance reflects an understanding that USCIS processes millions of requests for immigration benefits every year in addition to DACA requests, and therefore USCIS must also balance the interests of all other individuals requesting immigration benefits from the agency. Of course, this balancing of interests must be done with consideration given to available resources.

USCIS has seen thousands of instances of current DACA recipients filing for DACA renewal when they still have more than 150 days remaining in their current DACA validity. USCIS data shows that as of June 30, 2020, there were over 11,000 active DACA recipients with DACA renewals pending before USCIS whose current DACA was not set to expire until after January 1, 2021; further, there were nearly 400 active DACA recipients with pending renewal requests whose DACA was not set to expire until the year 2022.

In an effort to minimize overlapping validity periods between an alien's renewed DACA validity period and an alien's current DACA validity period, USCIS has generally withheld issuing final approval of a DACA renewal request until the alien's remaining DACA validity period is closer to the expiration date. USCIS will continue to manage DACA renewal processing to limit significant overlaps in the renewal validity period and the alien's current DACA validity period. However, permitting and accepting DACA renewal requests filed many months in advance of

⁴ See DACA FAQ 50; <https://www.uscis.gov/archive/frequently-asked-questions#renewal>; See also: <https://www.dhs.gov/news/2014/06/05/secretary-johnson-announces-process-daca-renewal>

DACA expiration only to be preliminarily processed by USCIS and placed on hold is not an efficient use of agency resources.

In assessing whether USCIS should exercise its discretion to begin generally rejecting DACA renewal requests filed more than 150 days prior to expiration, I considered the interests DACA renewal requestors may have in being permitted to file for renewal more than 150 days prior to DACA expiration. In consideration of these potential interests, I examined DACA renewal processing times. USCIS data shows that from August 1, 2019 to August 1, 2020, approximately ninety-six percent of DACA renewal requests processed were completed in 120 or fewer days.

The data demonstrate that in the overwhelming majority of DACA renewal cases, it is not necessary to accept DACA renewal requests more than 150 days before the alien’s current DACA period expires in order to facilitate timely processing and minimize gaps in DACA and associated employment authorization. For those aliens, the only effect of this change will be for those early requesters either to wait until the specified period to request renewal or to re-file an early-filed renewal request at the appropriate time. In cases where the requestor may not continue to meet the DACA guidelines, including concerns that arise from background check results, renewal processing may require more time, but these outliers do not reasonably justify permitting routine acceptance of early filings during this interim period while the DACA policy is under review given USCIS’s other policy and operational concerns.

Lastly, nothing precludes USCIS from exercising its discretion to accept a DACA renewal request filed 150 days or more in advance of expiration if there are legitimate reasons for doing so, and nothing precludes USCIS from again modifying recommended filing timelines either during this interim period or should DHS announce changes to the DACA policy in the future.

- **Limit the period of any deferred action granted pursuant to the DACA policy after the issuance of this memorandum (and thereby limit the period of any associated work authorization) to one year.**

As described in the Wolf Memorandum, all requests for DACA and associated employment authorization granted after July 28, 2020 will be for a validity period of no more than one year.⁵

The one-year validity period shall begin on the date the DACA request receives final approval, consistent with past practices, and have an ending validity date that is no more than one year minus one day from the date of approval. Also consistent with past practices, the associated employment authorization validity period shall end on the same date that the DACA validity period ends.

The Wolf Memorandum acknowledged that shortening validity periods to one year during this interim period will have the effect of increasing the total amount of fees DACA requestors would pay over a multi-year period and asked USCIS to consider whether it is possible to reduce renewal fees during this time. USCIS is currently considering the merits and feasibility of

⁵ 8 CFR 274a.12(c) states in pertinent part that “USCIS, in its discretion, may establish a specific validity period for an employment authorization document . . .”

reducing DACA-related fees during the interim period the DACA policy is under review. Pursuant to INA Section 286(m), DHS may set fees at a level that will "ensure recovery of full costs" of providing adjudication services. While USCIS has never charged a fee for Form I-821D, Consideration of Deferred Action for Childhood Arrivals, all DACA requestors are required to file Form I-765, Application for Employment Authorization, which does require a fee with very limited exemptions. DACA requestors are also required to pay a biometrics fee.

USCIS notes that the [new fee rule](#), which becomes effective on Oct. 2, 2020, includes a fee increase for the Form I-765, Application for Employment Authorization, for all categories of employment authorization **except** for the DACA category. The fee for DACA-based applications for employment authorization will remain at \$410, plus an \$85 biometrics fee, for the time being. Lastly, as noted above, USCIS will continue to manage DACA renewal processing to limit significant overlaps in the renewal validity period and the alien's current DACA validity period, which may lessen some of the economic impact from shortened DACA renewal validity periods.

- **Refrain from terminating any grants of previously issued deferred action or revoking any Employment Authorization Documents based solely on the directives in this memorandum for the remaining duration of their validity periods.**

Notwithstanding the prospective changes made by the Wolf Memorandum, USCIS will allow previous two-year grants of DACA and associated employment authorization to remain undisturbed during their existing two-year validity periods (unless USCIS terminates an alien's DACA and associated employment authorization for other reasons). Consistent with this guidance, two-year DACA recipients who apply for a replacement EAD due to loss, theft, or the mutilation of their prior EAD will receive a replacement EAD with the same expiration date based on the original two-year validity period, assuming the application is otherwise approvable.

- **Reject all pending and future Form I-131 applications for advance parole from DACA recipients and refund all associated fees, absent exceptional circumstances.**

Acting Secretary Wolf states the following in his memorandum with respect to advance parole:

"In light of my concerns about the policy as a whole, I do not believe that, at least absent exceptional circumstances, DHS should continue to make the benefit of advance parole available while I reconsider whether the DACA policy itself should exist."

Because USCIS will not be able to determine whether Form I-131 applications already received at the DACA-specific filing location fit within Secretary Wolf's stated parole policy without adjudicating the applications, and applicants who filed their Form I-131 before the Wolf Memorandum was issued did not have prior knowledge of the guidance in the memorandum, USCIS has determined that it would be more efficient and fair if applicants refile their applications under the new guidance. Therefore, USCIS shall reject and return the fees for all Form I-131 applications received at the DACA specific filing location that have been held since July 24, 2020.

If those DACA recipients still wish to submit a request for advance parole, they may submit their Form I-131 applications consistent with filing instructions that will be announced on the USCIS website. The Form I-131 rejection notice shall inform applicants that they may re-apply for advance parole consistent with the Wolf Memorandum and filing instructions that will be announced on the USCIS website.

Regarding Form I-131 applications filed by DACA recipients at non-DACA filing locations before the Wolf Memorandum was issued and therefore accepted, USCIS will treat these applications similarly to those that have been on hold at the DACA-specific filing location. USCIS will administratively close these cases and refund the fees. USCIS will issue notices informing these applicants that their application has been administratively closed consistent with the Wolf Memorandum. The notice shall inform applicants that they may re-apply for advance parole consistent with the Wolf Memorandum and filing instructions that will be announced on the USCIS website.

USCIS will continue to maintain the current policy for DACA recipients who apply for advance parole in association with other non-DACA immigration requests. For instance, if a DACA recipient has a pending Form I-485 Application to Register Permanent Residence or Adjust Status and requests advance parole on the basis of his or her pending Form I-485, USCIS will adjudicate the advance parole request under the existing policies for Form I-485-based advance parole requests. USCIS will not apply this memorandum to a parole request by a DACA recipient if the request is associated with another underlying immigration benefit (i.e., other than DACA) as described in the instructions to Form I-131 or in USCIS policy guidance.

DACA recipients who have no separate basis for requesting advance parole as described in the instructions to Form I-131 may request advance parole if they have valid DACA and can demonstrate that they warrant the extraordinary privilege of being permitted to return to the United States after traveling abroad, even without a lawful immigration status, pursuant to a valid advance parole travel document.

The Wolf Memorandum sets forth new agency guidance with respect to management of the adjudication of advance parole applications submitted by DACA recipients who do not have a non-DACA basis for advance parole. For nearly three years, advance parole applications submitted by DACA recipients were rejected or denied by USCIS (the applications that were accepted and then denied were accepted solely because they were submitted to an incorrect filing location).

The Wolf Memorandum does not revive the prior DACA-based advance parole standards⁶ or add a supplementary exceptional circumstances test to those standards. Rather, the Wolf

⁶ The prior policy for granting advance parole based on DACA stated that USCIS would generally only grant advance parole if the DACA recipient's travel abroad would be in the furtherance of:

- Humanitarian purposes, including travel to obtain medical treatment, attending funeral services for a family member, or visiting an ailing relative;
- Educational purposes, such as semester-abroad programs and academic research, or;

Memorandum institutes a new general hold on granting advance parole to DACA recipients based on prior DACA-based advance parole standards during an interim period while DHS conducts a full review of the DACA policy. As Acting Secretary Wolf noted, it makes sense to continue this approach while he reconsiders whether to rescind or revise the prior policy. The only difference is that the Wolf Memorandum permits USCIS to process advance parole applications submitted by DACA recipients consistent with INA Section 212(d)(5) and based on a full consideration of all the discretionary factors presented in the alien's application.

Such grants of advance parole should, as a threshold matter, be consistent with the statutory description of parole under INA Section 212(d)(5), 8 U.S.C. § 1182(d)(5)(A), which mandates a case-by-case assessment and a determination that parole of the alien is for urgent humanitarian reasons or significant public benefit. Accordingly, I am directing USCIS officers to ensure that any grants of advance parole to DACA recipients are consistent with the statute and take into consideration all other discretionary factors present in the case under the totality of circumstances.

Secretary Wolf's memorandum providing for "exceptional circumstances" should be understood in the context of this existing high statutory standard for parole found in INA Section 212(d)(5). Therefore, in most instances, traveling abroad for educational purposes, employment related purposes, or to visit family members living abroad will not warrant advance parole under Secretary Wolf's interim policy regarding the discretionary exercise of parole for urgent humanitarian reasons or significant public benefit. Additionally, as USCIS has noted since DACA recipients were first permitted to apply for advance parole, travel for vacation is not a valid basis for advance parole.

While the determination of whether to grant advance parole to a DACA recipient based on exceptional circumstances is a case-by-case assessment involving the assessment of the totality of factors presented, some examples of travel that may fit within the statutory standard for parole include, but are not limited to the following:

- Travel to support the national security interests of the United States including U.S. military interests;
- Travel in furtherance of U.S. federal law enforcement interests;
- Travel to obtain life-sustaining medical treatment that is not otherwise available to the alien in the United States;
- Travel needed to support the immediate safety, well-being, or care of an *immediate* relative, particularly minor children of the alien.

The burden shall be on the alien to establish eligibility for parole pursuant to INA section 212(d)(5).

-
- Employment purposes such as overseas assignments, interviews, conferences or, training, or meetings with clients overseas.

USCIS will consider all discretionary factors presented in the application before making a decision on the advance parole request. The advance permission to travel abroad and return to the United States pursuant to an advance parole travel document is an extraordinary privilege. It is a particularly extraordinary privilege when conferred to an alien who has resided in the United States contrary to our immigration laws (irrespective of when the alien arrived in the United States). The June 15, 2012 Napolitano memorandum itself contained no directive to provide this extraordinary benefit to DACA recipients, and USCIS has not granted this benefit to DACA recipients since the issuance of the September 5, 2017, Duke memorandum.

To ensure compliance with this interim policy, I am directing that any applications for advance parole preliminarily assessed to be approvable by the Service Center(s) designated to adjudicate such applications, receive concurrence from no lower than the Deputy Associate Director for Service Center Operations Directorate (SCOPS) prior to final approval. SCOPS will develop a process to facilitate this review in a timely manner.

SCOPS shall immediately work with the Office of Intake and Document Production (OIDP) and the External Affairs Directorate (EXA) to develop public guidance consistent with this memorandum. The public guidance shall make clear that any applications for advance parole submitted by DACA recipients and received at the designated filing location will be considered a DACA-based application for advance parole based on the Wolf Memorandum.

The public guidance shall make clear that USCIS will accept the application if properly completed and process the fee prior to making an adjudicative determination on whether advance parole should be granted. The public guidance shall also make clear that any applications denied by USCIS because USCIS finds that the application does not merit approval, in the exercise of its discretion, under INA Section 212(d)(5), are not appealable and shall not receive a refund of application fees.

As noted above, INA Section 286(m) gives USCIS authority to collect application fees that "ensure recovery of the full costs of providing [adjudication services]." The determination of whether to grant advance parole under INA Section 212(d)(5) must be made by a trained Immigration Officer after required background checks and other processing requirements are completed. Those services cost money which USCIS recoups from the application fee. As those services must be completed prior to a final determination on whether the alien merits a grant of advance parole USCIS will not refund the application fees on advance parole applications that USCIS denies, consistent with USCIS standard practice.

SCOPS will work with the Office of Policy and Strategy (OP&S) and the Office of the Chief Counsel (OCC) to develop additional training or guidance materials to assist officers in the adjudication of these applications consistent with this memorandum.

- **Refrain from terminating any grants of previously approved advance parole based solely on the directives in this memorandum for the remaining duration of their validity periods.**

USCIS shall not terminate any previously approved advance parole documents issued to DACA recipients during the stated validity period of the existing advance parole document, absent a

valid, separate legal basis distinct from the directives in the Wolf Memorandum for terminating advance parole.⁷

- **Exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate.**

Based on the immediate review of the DACA policy, including the immediate interim changes to the policy discussed in the Wolf Memorandum and this memorandum, I am directing SCOPS to immediately review the internal guidance document referred to as the DACA SOP last revised on August 28, 2013. SCOPS should work with OCC and OP&S to immediately update the DACA SOP consistent with the Wolf Memorandum and this memorandum. The updated DACA SOP shall make clear that it is intended solely for the instruction of USCIS personnel in the performance of their official duties, and that the SOP is not legally binding, does not confer any substantive rights to removable aliens, and does not otherwise constrain DHS' authority to enforce the immigration laws passed by Congress.

SCOPS should also review other internal DACA operational guidance and training materials currently in use to ensure that they are consistent with the Wolf Memorandum and this memorandum.

USCIS must continue to follow the DACA termination procedures required by all relevant court orders as long as they remain in effect.

- **Continue to comply with the information-sharing policy as reflected in the DACA Frequently Asked Questions issued alongside the Napolitano memorandum, and as set forth in USCIS's Form I-821D instructions. Nothing in this memorandum makes any change to that policy.**

USCIS shall continue to operate under the DACA information sharing policy described above. Nothing in this memorandum or the Wolf Memorandum makes any change to that policy.

Use

This memorandum is intended solely for the instruction of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable at law, or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

⁷ USCIS has not granted advance parole based on the standards associated with DACA since September 5, 2017.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SANTA FE DREAMERS PROJECT; SPANISH
COMMUNITY CENTER; and AMERICAN
GATEWAYS,

Plaintiffs,

vs.

CHAD F. WOLF, in his purported official capacity
as Acting Secretary of Homeland Security;
KENNETH T. CUCCINELLI, in his purported
official capacities as Senior Official Performing the
Duties of Deputy Secretary of Homeland Security
and Acting Director of U.S. Citizenship and
Immigration Services; TONY H. PHAM, in his
purported official capacity as Senior Official
Performing the Duties of Director of U.S.
Immigration and Customs Enforcement; JOSEPH
EDLOW, in his purported official capacity as Deputy
Director for Policy of U.S. Citizenship and
Immigration Services; MARK A. MORGAN, in his
purported official capacity as Senior Official
Performing the Duties of Commissioner of U.S.
Customs and Border Protection; UNITED STATES
DEPARTMENT OF HOMELAND SECURITY;
UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES; UNITED STATES
CUSTOMS AND IMMIGRATION
ENFORCEMENT; and UNITED STATES
CUSTOMS AND BORDER PROTECTION,

Defendants.

Case No. 1:20-CV-02465 (RBW)

**PLAINTIFFS' NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT**

TO DEFENDANTS AND ALL OTHER INTERESTED PARTIES:

Please take notice that pursuant to Federal Rule of Civil Procedure 56, Plaintiffs Santa Fe Dreamers Project, Spanish Community Center, and American Gateways will and hereby do move

the Court for an order granting summary judgment to Plaintiffs and against Defendants; declaring unlawful, vacating, and setting aside:

1. the July 28, 2020 memorandum entitled “Reconsideration of the June 15, 2012 Memorandum Entitled ‘Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children’” issued by Defendant Chad F. Wolf in his purported capacity as Acting Secretary of Homeland Security (the “Wolf Memorandum”); and
2. the August 21, 2020 policy directives entitled “Implementing Acting Secretary Chad Wolf’s July 28, 2020 Memorandum, ‘Reconsideration of the June 15, 2012 Memorandum Entitled ‘Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children’” issued by Defendant Joseph Edlow in his purported capacity as Deputy Director for Policy of Defendant United States Citizenship and Immigration Services (the “USCIS Directives”);

and immediately and permanently enjoining Defendants, and anyone in active concert or participation with any of them, from implementing or enforcing any part of the Wolf Memorandum and USCIS Directives, among other, additional forms of relief.

As set forth more fully in Plaintiffs’ Memorandum of Points and Authorities in Support of this Motion, there is no genuine dispute as to any material fact, and Plaintiffs are entitled to judgment as a matter of law. In particular, the Wolf Memorandum and USCIS Directives were issued in violation of the Homeland Security Act, 6 U.S.C. § 113(g); the Federal Vacancies Reform Act, 5 U.S.C. § 3345 *et seq.*; the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*; and the Appointments Clause of the United States Constitution and are therefore *ultra vires*, without force or effect, and void.

Plaintiffs' Motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities; the Declarations; Plaintiffs' Statement of Material Facts; all papers, pleadings, records and files in this case; all matters of which judicial notice may be taken; and such other argument or evidence as may be presented to this Court at a hearing on this Motion.

Dated: September 11, 2020

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SANTA FE DREAMERS PROJECT; SPANISH
COMMUNITY CENTER; and AMERICAN
GATEWAYS,

Plaintiffs,

vs.

CHAD F. WOLF, in his purported official capacity
as Acting Secretary of Homeland Security;
KENNETH T. CUCCINELLI, in his purported
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DEPARTMENT OF HOMELAND SECURITY;
UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES; UNITED STATES
CUSTOMS AND IMMIGRATION
ENFORCEMENT; and UNITED STATES
CUSTOMS AND BORDER PROTECTION,

Defendants.

Case No. 1:20-CV-02465-RBW

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

* Defendant Tony H. Pham purported to succeed Matthew T. Albence as Senior Official Performing the Duties of Director of U.S. Immigration and Customs Enforcement. Under Fed. R. Civ. P. 25(d), he is automatically substituted for Mr. Albence as a defendant. The parties' motion for leave to amend the caption to reflect this substitution on this and all subsequent filings, as well as to set an expedited schedule for briefing cross-motions for summary judgment, is pending. See Dkt. No. 10.

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INTRODUCTION

Since 2012, the Deferred Action for Childhood Arrivals initiative (“DACA”) has provided renewable periods of forbearance from removal and work authorization to nearly a million young people who came to the United States as children, grew up and were educated here, and call this country home. The young people who earned these protections are widely accepted as integral members of our communities: they serve in our military, work in all our professions, pose no threat to our security or stability, and have made a lasting and invaluable contribution to our country’s character and economy.

Nonetheless, the Trump Administration has made every effort to undermine DACA and destabilize the lives of the young people the program protects. In June of this year, the United States Supreme Court invalidated the Trump Administration’s 2017 attempt to rescind DACA entirely. Undeterred, however, the Administration moved promptly to substantially limit DACA once again. On July 28, 2020, Defendant Chad F. Wolf, the Department of Homeland Security’s Under Secretary for Strategy, Policy, and Plans and the federal official purporting to serve as Acting Secretary of Homeland Security, issued a memorandum (the “Wolf Memorandum” or “Memorandum”) that, among other draconian directives, (1) prohibits immigration officials from accepting first-time DACA applications; (2) caps renewed periods of deferred action and work authorization for current beneficiaries at one year rather than two; (3) denies advance parole to DACA beneficiaries who wish to travel outside of the United States absent “exceptional circumstances”; and (4) permits officials to “terminate or deny” DACA “at any time when immigration officials determine termination or denial of deferred action is appropriate.” Through a set of policy directives issued on August 21, 2020 (the “USCIS Directives”), Defendant Joseph Edlow, the purported Deputy Director for Policy of Defendant U.S. Immigration and Citizenship Services (“USCIS”), has begun to implement the Wolf Memorandum’s new restrictions on DACA.

When he issued the Memorandum, however, Defendant Wolf acted without any lawful authority to sit atop DHS as Acting Secretary, let alone to exercise that office's powers to establish this country's immigration policies. Because an order issued without authority is no order at all, Plaintiffs—three nonprofit organizations that provide vital legal services to immigrants in New Mexico, Illinois, and Texas—respectfully ask this Court to declare the Wolf Memorandum and USCIS Directives invalid and permanently enjoin Defendants or their agents from enforcing the Memorandum or Directives' terms against any person.

Plaintiffs are entitled to judgment as a matter of law. Under the Homeland Security Act and the Federal Vacancies Reform Act, Congress has provided for the lawful succession of officials to serve as Acting Secretary of Homeland Security in the event the permanent Secretary dies, resigns, or becomes unavailable to serve. Pursuant to these provisions, past Secretaries of Homeland Security have explicitly established the order of succession to that office in the event rampant vacancies in the Department—of the sort the Trump Administration has long maintained—render Congress's succession statutes inadequate. None of these governing authorities—or for that matter the Constitution—allowed Defendant Wolf to assume office as Acting Secretary of Homeland Security.

First, Defendant Wolf purportedly assumed office as Acting Secretary contrary to 6 U.S.C. § 113(g)(2), the Homeland Security Act provision that permits permanent and acting Secretaries of Homeland Security to designate their own successors from within the Department's ranks. This alone rendered his issuance of the Memorandum *ultra vires* and void. *Second*, by the time Defendant Wolf took *de facto* control of DHS, the office of Secretary of Homeland Security had been vacant for more than 210 days, meaning that any action Defendant Wolf purportedly took as Acting Secretary—including issuing the Memorandum and appointing Defendant Edlow to the post from which he issued the USCIS Directives—lacked “force or effect” under the Federal

Vacancies Reform Act, 5 U.S.C. §§ 3346(a)(1), 3348(d)(1). *Third*, because Defendant Wolf issued his Memorandum without authority to do so, the Memorandum and USCIS Directives also violate the APA and must be vacated. *See* 5 U.S.C. § 706(2). *Fourth*, to the extent the Homeland Security Act and Federal Vacancies Reform Act somehow permitted Defendant Wolf to assume office as the acting head of the Department of Homeland Security, his service violates the Appointments Clause, which requires the President to nominate, and the Senate to confirm, officers who serve as the heads of executive departments indefinitely. *See* U.S. Const. art. II, § 2, cl. 2. The Wolf Memorandum was therefore issued without authority and is void.

Riddled as they are with these legal infirmities, the Wolf Memorandum and USCIS Directives are dead letters. The Court should grant Plaintiffs' motion for summary judgment and vacate the Wolf Memorandum and USCIS Directives.

FACTUAL AND STATUTORY BACKGROUND

I. DEFERRED ACTION FOR CHILDHOOD ARRIVALS

On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano issued a memorandum establishing DACA. *See* Martinez Decl. ex. 4. In its most recent iteration before July 28, 2020, DACA provided renewable, two-year periods of forbearance from removal proceedings, temporary work authorization, and eligibility for other benefits to young, undocumented people who entered the United States before the age of sixteen; have lived continuously in the United States since June 2007; are in school, have attained certain educational milestones, or served honorably in the United States armed services; have no significant criminal history; and pose no threat to national security, among other criteria. *Id.* at 1-2.¹ By March 31,

¹ The U.S. Supreme Court's decision in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), describes the initial DACA framework and the Obama Administration's ultimately unsuccessful effort in November 2014 to expand the program to provide for three-year forbearance periods and extend similar benefits to undocumented parents of U.S. citizens and permanent residents, among other changes. *Id.* at 1902. Because all subsequent efforts to expand or eliminate DACA have been vacated, the

2020, over 825,000 young people had benefitted from DACA’s protections. *See* Martinez Decl. ex. 6 at 1. The importance of DACA to those young people, and their contributions to the economic and social fabric of their communities and their adopted country, are well documented.²

In September 2017, acting on advice from then-Attorney General Jefferson B. Sessions III, then-Acting Secretary of Homeland Security Elaine C. Duke issued a memorandum (the “Duke Memorandum”) purporting to rescind the Napolitano Memorandum and terminate DACA. *See Regents*, 140 S. Ct. at 1903; Martinez Decl. ex. 7 (Duke Memorandum); *id.* ex. 8 (Sessions letter). Within days, “multiple groups of plaintiffs ranging from individual DACA recipients and States to the Regents of the University of California and the National Association for the Advancement of Colored People” sued to block the Duke Memorandum. *Regents*, 140 S. Ct. at 1903. Several courts around the country subsequently enjoined the Memorandum’s enforcement on the ground that it inadequately explained the Department of Homeland Security’s (“DHS”) reasons for rescinding DACA, in violation of the Administrative Procedure Act (“APA”). *Id.* at 1903-04. In response, the new Secretary of Homeland Security, Kirstjen M. Nielsen, issued a second memorandum (the “Nielsen Memorandum”) on June 22, 2018, purporting to clarify and elaborate on the Duke Memorandum’s reasoning and recommitting DHS to rescinding DACA. *Id.* at 1904; Martinez Decl. ex. 9 (Nielsen Memorandum).

The battle over DACA’s future eventually landed in the Supreme Court. The Court held, among other things, that it had jurisdiction to review DACA’s rescission under the APA, *see Regents*, 140 S. Ct. at 1905-07, and that the Nielsen Memorandum’s purported clarifications of the

Napolitano Memorandum and the eligibility criteria it imposed governed DACA from June 2012 until Defendant Wolf purported to again restrict the initiative on July 28, 2020.

² *See, e.g., Regents*, 140 S. Ct. at 1914; Jie Zong et al., A Profile of Current DACA Recipients by Education, Industry, and Occupation 2, 4-8 (Nov. 2017), <https://www.migrationpolicy.org/research/profile-current-daca-recipients-education-industry-and-occupation>; Miriam Jordan, *Immigrant ‘Dreamers’ in Search of a Job Are Being Turned Away*, N.Y. Times (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/us/immigration-daca-dreamers-employers.html>.

Duke Memorandum were “impermissible *post hoc* rationalizations” that the Court could not properly consider, *see id.* at 1908-10 (internal quotation marks omitted). On the merits of the APA claims, the Court further held that the Duke Memorandum was arbitrary and capricious and violated the APA because it (1) failed to adequately consider or explain why the Memorandum’s assertion that DACA’s extension of work authorization and other benefits was illegal required the rescission of both eligibility for those benefits *and* the initiative’s forbearance-from-removal component; and (2) altogether “failed to address whether there was legitimate reliance” on DACA. *Id.* at 1910-15 (internal quotation marks omitted). Having concluded that these “dual failure[s]” raised “doubts about whether [DHS] appreciated the scope of its discretion or exercised that discretion in a reasonable manner,” the Court affirmed the vacatur of the rescission of DACA and remanded the matter “to DHS so that it may consider the problem anew.” *Id.* at 1916 & n.7.

On remand, DHS again attempted in effect to rescind DACA by issuing the Wolf Memorandum. This time, however, DHS’s action suffers from a different fatal flaw: Defendant Wolf had no authority to issue the Memorandum because he was purporting to serve as Acting Secretary of Homeland Security in violation of two federal statutes, the Federal Vacancies Reform Act (“FVRA”) and the Homeland Security Act (“HSA”), and, alternatively, the Appointments Clause of the United States Constitution.

II. THE FEDERAL VACANCIES REFORM ACT AND THE HOMELAND SECURITY ACT

The FVRA and HSA govern the appointment of Acting Secretaries of Homeland Security.

“Article II of the Constitution requires that the President obtain ‘the Advice and Consent of the Senate’ before appointing ‘Officers of the United States.’” *N.L.R.B. v. SW General, Inc.*, 137 S. Ct. 929, 934 (2017) (quoting U.S. Const. art. II, § 2, cl. 2). When an office requiring Senate confirmation becomes vacant, its responsibilities “may go unperformed if . . . the President and Senate cannot promptly agree on a replacement.” *Id.* Recognizing this gap, Congress has

authorized the President to direct certain officials in certain circumstances to carry out the responsibilities of a vacant office temporarily, without Senate confirmation. “The Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345 *et seq.*, is the latest version of that authorization.” *Id.*

The FVRA provides three methods by which a person may take office as an acting official of an executive department without having been nominated and confirmed to that position. *First*, under 5 U.S.C. § 3345(a)(1), when a permanent official dies, resigns, or is otherwise unable to discharge his or her office, the official’s “first assistant” automatically assumes “the functions and duties of the office temporarily in an acting capacity.” *Second*, under 5 U.S.C. § 3345(a)(2), notwithstanding Subsection (a)(1), the President may designate as an acting official a person who has been nominated and confirmed to another federal office. *Third*, under 5 U.S.C. § 3345(a)(3), again notwithstanding Subsection (a)(1), the President may designate as an acting official a person who has not been nominated and confirmed to any federal office but who has held a position and minimum salary at the same department for at least ninety days over the previous year.

No matter the method by which an acting official assumes office, he or she may serve as such “for no longer than 210 days beginning on the date the vacancy occurs,” subject to certain exceptions not relevant here, 5 U.S.C. § 3346(a)(1), at which point the office “shall remain vacant,” *id.* § 3348(b)(1). Any “action taken” in “the performance of any function or duty of [the] vacant office” by “any person who is not acting” consistent with these designation provisions and temporal limitations “ha[s] no force or effect” and “may not be ratified.” *Id.* § 3348(d)(1)-(2).

The FVRA is the “exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency” for which “appointment is required to be made by the President, by and with the advice and consent of the Senate”—unless, as relevant here, another statute either itself “authorizes . . . the head of an Executive department[] to

designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity” or “designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.” 5 U.S.C. § 3347(a)(1)(A)-(B).

The Homeland Security Act does both, thereby offering additional means for the designation of Acting Homeland Security Secretaries. One of the HSA’s provisions, 6 U.S.C. § 113(a)(1)(A), provides that the Deputy Secretary of Homeland Security is the Secretary’s first assistant for purposes of 5 U.S.C. § 3345(a)(1), which satisfies the first of the FVRA’s three appointment methods described above. Similarly, 6 U.S.C. § 113(a)(1)(F) provides that the Under Secretary for Management is the Deputy Secretary’s first assistant for FVRA purposes. A later subsection of the statute, 6 U.S.C. § 113(g)(1), eliminates the President’s authority under the FVRA, 5 U.S.C. § 3345(a)(2) and (3), to designate someone other than the Under Secretary for Management as Acting Secretary if that office is occupied while the Deputy Secretary position is vacant: “Notwithstanding chapter 33 of Title 5, the Under Secretary for Management shall serve as the Acting Secretary if by reason of absence, disability, or vacancy in office, neither the Secretary nor Deputy Secretary is available to exercise the duties of the Office of the Secretary.” Finally, the next subsection of the HSA authorizes the Secretary of Homeland Security to establish a “further order of succession to serve as Acting Secretary” in the event the Secretary, the Deputy Secretary, and the Under Secretary for Management are unable to serve as such. 6 U.S.C. § 113(g)(2).

II. DEFENDANT WOLF’S PURPORTED ACCESSION AS ACTING SECRETARY OF HOMELAND SECURITY AND ISSUANCE OF THE JULY 28, 2020 MEMORANDUM

A. The DHS Order of Succession Before April 10, 2019

Before Secretary Nielsen departed office in April 2019, the order of succession at DHS beyond the Deputy Secretary and Under Secretary of Management was governed by two documents: an executive order signed by President Obama on December 9, 2016 (“Executive

Order 13753”), and a directive—DHS Delegation Number 00106—signed by then-Secretary of Homeland Security Jeh Johnson on December 15, 2016 (“Directive 00106”) pursuant to his authority under 6 U.S.C. § 113(g)(2). *See* Martinez Decl. exs. 10, 11. Consistent with the Homeland Security Act, Executive Order 13753 designated the order of DHS officials who, provided they could assume office consistent with the FVRA and were not already holding office in an acting capacity, would become Acting Secretary “during any period in which the Secretary has died, resigned, or otherwise become unable to perform the functions and duties of the office of Secretary.” *Id.* ex. 10 § 1. Section II.A of Directive 00106 adopted the order of succession laid out in Executive Order 13753 “[i]n case of the Secretary’s death, resignation, or inability to perform the functions of the Office.” *Id.* ex. 11 § II.A. But Section II.B of the Directive imposed a separate and different order of succession for Acting Secretary, to “the extent not otherwise prohibited by law,” in the event the Secretary becomes “unavailable to act during a disaster or catastrophic emergency.” *Id.* § II.B. This second order of succession for disasters and emergencies was laid out in an appendix to the Directive called “Annex A.” *Id.* at A-1. Directive 00106 and Annex A would remain as Secretary Johnson left them until April 10, 2019.

B. Secretary Nielsen Amends DHS’s Order of Succession

On April 7, 2019, after serving as President Trump’s Homeland Security Secretary for less than two years, Secretary Nielsen announced via Twitter that she had resigned her office effective that day. Martinez Decl. ex. 12. A little over three hours later, however, she tweeted that she had “agreed to stay on as Secretary through Wednesday, April 10th to assist with an orderly transition and ensure that key DHS missions are not impacted.” *Id.* ex. 13.

Before leaving office, Secretary Nielsen signed a memorandum that amended Directive 00106 by striking the text of Annex A and replacing it with a new order of succession for Secretary. Martinez Decl. ex. 14 at 2. Although it amended Annex A to the Directive, Secretary Nielsen’s

order did not amend the text of the Directive itself, *see id.*—including the language in Sections II.A and B of the Directive providing, respectively, that Executive Order 13753 would govern the order of succession for Secretary “[i]n case of the Secretary’s death, *resignation*, or inability to perform the functions of the Office” and that Annex A would govern the order only in the event the Secretary is “unavailable to act *during a disaster or catastrophic emergency.*” *Id.* ex. 11 §§ II.A, II.B (emphases added).

Under Secretary Nielsen’s new Annex A—issued pursuant to “the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2)” —the Commissioner of U.S. Customs and Border Protection (“CBP”), a position then held by Kevin McAleenan, became third in line to serve as Acting Secretary in the event of the Secretary’s unavailability due to a disaster or catastrophic emergency, after the Deputy Secretary and Under Secretary for Management. Martinez Decl. ex. 14 at 2 (April 2019 Nielsen order replacing Annex A); *see also id.* ex. 11 § II.B, A-1 (Directive 00106 as updated on April 10, 2019). But under the unamended Section II.A, which retained the order of succession laid out in Executive Order 13753, Commissioner McAleenan was *seventh* in line to become Acting Secretary in the event of the Secretary’s *resignation*—after the Deputy Secretary of Homeland Security; the Under Secretary for Management; the Administrator of the Federal Emergency Management Agency; the Under Secretary for National Protection and Programs; the Under Secretary for Science and Technology; and the Under Secretary for Intelligence and Analysis, to the extent those positions were filled by presidentially nominated and Senate-confirmed appointees. *See id.* ex. 11 § II.A (Directive 00106 as updated on April 10, 2019); *see also id.* ex. 10 § 1 (Executive Order 13753 as issued on December 9, 2016).

C. Kevin McAleenan Purports to Assume Office as Acting Secretary

When Secretary Nielsen departed the office of Secretary on April 10, 2019, the offices of Deputy Secretary of Homeland Security,³ Under Secretary for Management,⁴ FEMA Administrator,⁵ and Under Secretary for Science and Technology⁶ were vacant, but two nominated-and-confirmed appointees, Christopher Krebs and David J. Glawe, were serving as Under Secretary for National Protection and Programs and Under Secretary for Intelligence and Analysis, respectively.⁷ Under Section II.A of Directive 00106 and Executive Order 13753—neither of which Secretary Nielsen’s order had affected—Krebs and then Glawe were next in line to take over for Nielsen as Acting Secretary. *See* Martinez Decl. exs. 11 § II.A (Directive 00106 as updated on April 10, 2019), 10 § 1 (Executive Order 13753 as issued on December 9, 2016). Notwithstanding the proper order of succession, CBP Commissioner McAleenan leapfrogged over Krebs and Glawe and claimed to assume office as Acting Secretary on April 10, 2019, in total disregard of the Directive. *See id.* ex. 21.

McAleenan would purport to serve as Acting Secretary until November 2019. On October 11, 2019, President Trump tweeted that McAleenan would be departing DHS. *See* Martinez Decl. ex. 22. On November 8, 2019—212 days after Nielsen departed and the office of Secretary had

³ The office of Deputy Secretary had been vacant since Elaine Duke resigned the role in April 2018. *See* Martinez Decl. ex. 15.

⁴ Secretary Nielsen’s Under Secretary for Management, Claire Grady, resigned and departed office the same day as Nielsen; she had been serving as Acting Deputy Secretary under 6 U.S.C. § 113(a)(1)(F). *See* Martinez Decl. exs. 16, 20.

⁵ The office of FEMA Administrator had been vacant since Brock Long resigned the role in February 2019. *See* Martinez Decl. ex. 17.

⁶ It appears that the office of Under Secretary for Science and Technology has been vacant since at least May 30, 2017, when, according to Defendant DHS’s website, the current “Senior Official Performing the Duties of the Under Secretary for Science and Technology (DHS),” William N. Bryan, assumed office. *See* Martinez Decl. ex. 18.

⁷ *See* Martinez Decl. ex. 19, 20.

become vacant—McAleenan issued an order that struck the text of Section II.A of Directive 00106 and replaced it with language providing that Annex A would govern the order of succession for Secretary “[i]n case of the Secretary’s death, resignation, or inability to perform the functions of the Office,” rather than—as the Directive had provided since December 2016—only in the event of the Secretary’s unavailability due to a disaster or catastrophic emergency. *See id.* ex. 23 at 1. Exercising his purported authority as Acting Secretary under 6 U.S.C. § 113(g)(2), McAleenan’s order also struck the text of Annex A and replaced it with a new order of succession in which the CBP Commissioner and the Under Secretary for Strategy, Policy, and Plans would become third and fourth in line to serve as Acting Secretary, respectively, after the Deputy Secretary and Under Secretary for Management. *Id.* When McAleenan issued this purported order, the offices of Deputy Secretary, Under Secretary for Management, and Under Secretary for Strategy, Policy, and Plans were vacant.⁸ But President Trump’s nomination of Defendant Chad T. Wolf as Under Secretary for Strategy, Policy, and Plans was pending in the Senate. *See id.* ex. 24 at S1443 (reflecting Defendant Wolf’s nomination on February 25, 2019).

D. Defendant Wolf Purports to Take Control as Acting Secretary

On November 13, 2019—less than a week after McAleenan purportedly amended Directive 00106 and 217 days after Nielsen vacated the office of Secretary⁹—the Senate confirmed Defendant Wolf as Under Secretary for Strategy, Policy, and Plans. *See* Martinez Decl. ex. 25 at S6519-20. Within hours, McAleenan departed as Acting Secretary, and Wolf was promptly sworn

⁸ *See supra* nn. 3-4.

⁹ The Complaint alleges that the office of Secretary had been vacant for at least 216 days by the time Defendant Wolf purported to assume office as Acting Secretary. *See* Dkt. No. 1 ¶ 88. While true, 217 days passed between April 10, 2019, when Secretary Nielsen left office, and November 13, 2019, when Defendant Wolf purportedly assumed his position as Acting Secretary.

in as Under Secretary for Strategy, Policy, and Plans and claimed to take office as Acting Secretary of Homeland Security. *See id.* exs. 26, 27.

Defendant Wolf continues to serve as Under Secretary for Strategy, Policy, and Plans and purportedly as Acting Secretary of Homeland Security to this day. On February 19, 2020, in his purported capacity as Acting Secretary, he appointed Defendant Edlow as USCIS’s Deputy Director for Policy. *See* Martinez Decl. exs. 28, 34.

E. The Wolf Memorandum and USCIS Directives

Just weeks after the Supreme Court rejected the Trump Administration’s effort to rescind DACA, Defendant Wolf, on July 28, 2020, issued a memorandum entitled “Reconsideration of the June 15, 2012 Memorandum Entitled ‘Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.’” *See* Martinez Decl. ex. 1.

The Wolf Memorandum purports to rescind the Duke and Nielsen Memoranda invalidated by the Supreme Court and announces that Defendant Wolf has “concluded that the DACA policy, at a minimum, presents serious policy concerns that may warrant its full rescission”; that Wolf is therefore “considering” the policy “anew”; and that he is “making certain immediate changes to the DACA policy to mitigate” his purported “enforcement policy concerns while [he] conduct[s] a full and careful consideration of a full rescission.” Martinez Decl. ex. 1 at 1, 4. Specifically, the Wolf Memorandum purports to order DHS officials¹⁰ to take the following steps, among others, “effective immediately”:

- Reject all initial applications for DACA participation, reject associated applications for work authorization, and refund all associated fees, purportedly “without prejudice to re-

¹⁰ The Wolf Memorandum was addressed to Defendant Mark A. Morgan, purportedly the “Senior Official Performing the Duties of Commissioner of [Defendant] U.S. Customs and Border Protection”; Matthew T. Albence, then the Deputy Director and purportedly the “Senior Official Performing the Duties of Director” of Defendant U.S. Immigration and Customs Enforcement; and Defendant Joseph Edlow, purportedly the Deputy Director for Policy of Defendant USCIS. *See* Martinez Decl. ex. 1, at 1. Since the Wolf Memorandum was issued, Defendant Tony H. Pham purported to succeed Mr. Albence as “Senior Official Performing the

filing such requests should DHS determine to begin accepting initial requests again in the future”;

- Process all pending and future properly submitted DACA- and work-authorization-renewal applications submitted by current DACA recipients;
- Limit any DACA or related work-authorization renewals to one year rather than two;
- Reject all pending and future applications for advance parole from DACA beneficiaries “absent” unexplained “exceptional circumstances”;
- Refrain from terminating previously approved grants of deferred action, work authorization, or advance parole “for the remaining duration of their validity periods” solely on the basis of the Memorandum’s purported directives; and
- Exercise “discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate.”

Id. at 7-8.

On August 21, 2020, Defendant Edlow, in his capacity as Deputy Director for Policy of USCIS, the DHS unit that primarily administers DACA, released the USCIS Directives implementing the Wolf Memorandum. *See* Martinez Decl. ex. 2. Shortly thereafter, USCIS publicly announced that it had begun implementing the Memorandum by, among other things, “reject[ing] all initial DACA requests from aliens who have never previously received DACA and return[ing] all fees” and limiting “grants of deferred action and employment authorization under DACA to no more than one year.” *See id.* ex. 3 at 1. Pursuant to the USCIS Directives, USCIS has already capped at one year DACA forbearance renewals for some of Plaintiffs’ clients and rejected first-time DACA applications submitted by others. Madrigal ¶ 16; Yang Decl. ¶ 21. Together, the Wolf Memorandum and USCIS Directives rescinded DACA for new applicants in all but name and severely restricted its protections for current recipients.

Duties of the Director” of Defendant U.S. Immigration and Customs Enforcement. *See id.* ex. 32.

F. GAO Concludes Defendant Wolf Assumed Office as Acting Secretary Unlawfully

On November 15, 2019, Bennie G. Thompson, Chairman of the House Committee on Homeland Security, and Carolyn B. Maloney, Acting Chairwoman of the House Committee on Oversight and Reform, wrote the United States Comptroller General—head of the United States Government Accountability Office (“GAO”)—expressing skepticism that Commissioner McAleenan lawfully assumed office as Acting Secretary of Homeland Security consistent with 6 U.S.C. § 113(g), that he lawfully amended Directive 00106 on November 8, 2019 consistent with the Federal Vacancies Reform Act, 6 U.S.C. § 3345 *et seq.*, and that Defendant Wolf lawfully purported to succeed McAleenan as Acting Secretary. *See* Martinez Decl. ex. 29. The letter requested that the GAO “conduct an expedited review to resolve whether Mr. Wolf,” who is “now engaged in decision-making that impact[s] the security of every American,” is “legally serving in the position” of Acting Secretary of Homeland Security. *Id.* at 2.

On August 14, 2020, the GAO’s General Counsel issued a report in response to these concerns. *See* Martinez Decl. ex. 30. Observing that Commissioner “McAleenan assumed the title of Acting Secretary upon the resignation of Secretary Nielsen” contrary to “the express terms of the existing designation” that governed the order of succession to that office, the GAO report concluded that “McAleenan did not have the authority to amend the Secretary’s existing designation” to permit Defendant Wolf to succeed him as Acting Secretary and that, “[a]ccordingly,” Defendant Wolf assumed the title of Acting Secretary “by reference to an invalid order of succession.” *Id.* at 11. The report announced that GAO would refer the questions of “who should be serving as the Acting Secretary and the Senior Official Performing the Duties of Deputy Secretary” and the “consequences of actions taken by these officials” to the “DHS Office of Inspector General for its review.” *Id.*

On August 25, 2020, President Trump announced via Twitter that he intends to nominate Defendant Wolf as the permanent Secretary of Homeland Security. *See* Martinez Decl. ex. 31. As of September 11, 2020, he has not done so. Nor has he ever designated Wolf as Acting Secretary of Homeland Security. In the meantime, the Administration continues to implement the Wolf Memorandum and the USCIS Directives.

LEGAL STANDARD

This Court grants summary judgment if the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law,” Fed. R. Civ. P. 56(a), viewing the evidence in the light most favorable to the non-moving party, *Stand Up for California! v. U.S. Dep’t of Interior*, 298 F.Supp.3d 136, 139 (D.D.C. 2018). In an APA case, summary judgment “serves as the mechanism for deciding, as a matter of law, whether the agency action is . . . consistent with the APA standard of review.” *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). Thus “[t]he entire case . . . is a question of law,” and the district court “sits as an appellate tribunal.” *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (quotation marks and footnote omitted). Under the APA, the Court “shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706. The Court must “hold unlawful and set aside agency action . . . found to be . . . not in accordance with law” or “in excess of statutory . . . authority.” *Id.* § 706(2).

ARGUMENT

The Wolf Memorandum and USCIS Directives are *ultra vires*, without force or effect, and void because, for four principal reasons, Defendants Wolf and Edlow lacked authority to issue them. *First*, because McAleenan never lawfully assumed office as Acting Secretary, he never lawfully revised the order of succession for that office, meaning that Defendant Wolf

assumed the title of Acting Secretary in violation of the HSA, that he lacked authority to issue the Wolf Memorandum or appoint Defendant Edlow to office, and that Defendant Edlow in turn lacked authority to issue the USCIS Directives. *Second*, Defendant Wolf assumed office in violation of the FVRA because, by the time his predecessor issued the revised order of succession and Wolf purportedly took office as Acting Secretary, the office of Secretary had been vacant for longer than the 210 days that the FVRA permits. This, too, means that Defendant Wolf's issuance of the Wolf Memorandum and appointment of Defendant Edlow, and thus Edlow's issuance of the USCIS Directives, were *ultra vires* with no force or effect. *Third*, because Defendants Wolf and Edlow issued the Wolf Memorandum and USCIS Directives without lawful authority to do so, the Memorandum and Directives violate the APA and must be set aside. And *fourth*, if the HSA and FVRA did authorize Defendant Wolf to take office as Acting Secretary indefinitely without Presidential nomination and Senate consent, he nevertheless issued the Wolf Memorandum and appointed Defendant Edlow in violation of the Appointments Clause.

I. THE WOLF MEMORANDUM WAS ISSUED IN VIOLATION OF THE HSA AND IS *ULTRA VIRES*.

Defendant Wolf never lawfully occupied the office of Acting Secretary of Homeland Security because he assumed office in contravention of the Directive governing the DHS line of succession, in violation of the HSA. He therefore lacked authority to promulgate the Wolf Memorandum, rendering the Memorandum *ultra vires*.

Executive action is *ultra vires* if it is made in excess of statutory authority. *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 307 (D.C. Cir. 2014) (citation omitted). An executive official acts *ultra vires* when, among other circumstances, he issues rules without statutory authority to do so. *See, e.g., Am. Clinical Lab. Assoc. v. Azar*, 931 F.3d 1195, 1208 (D.C. Cir. 2019); *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172-73 (D.C. Cir. 2003).

The HSA did not authorize Defendant Wolf to take office as Acting Secretary because the amended DHS order of succession that purportedly allowed him to do so was itself *ultra vires* and void. Under Directive 00106 and Executive Order 13753, which governed the DHS order of succession pursuant to the HSA when Secretary Nielsen resigned, *see supra* 8-10, Commissioner McAleenan was not next in line to succeed her as Acting Secretary. *See* Martinez Decl. exs. 11 § II.A (Directive 00106 as updated on April 10, 2019), 10 § 1 (Executive Order 13753 as issued on December 9, 2016). When McAleenan jumped the line in contravention of that order of succession, he violated Section 113(g)(2) and therefore never lawfully assumed the powers and duties of Acting Secretary.

Defendant Wolf's purported accession as Acting Secretary is in turn the fruit of McAleenan's unlawful succession, for Wolf's claim to that position rests solely on McAleenan's unlawful amendment of the DHS line of succession. Section 113(g)(2) empowers only the Secretary of Homeland Security or a lawfully designated Acting Secretary to assign "other officers of the Department in further order of succession to serve as Acting Secretary." Commissioner McAleenan thus did not have authority to amend the order of succession, and his November 8, 2019 order purporting to do so was *ultra vires* and void.¹¹

From this, it follows that Defendant Wolf's purported accession as Acting Secretary was likewise unlawful. Defendant Wolf's sole basis for claiming the office of Acting Secretary was McAleenan's November 8, 2019 order, which in itself was null and void because McAleenan never

¹¹ If anything, McAleenan's defective November 8, 2019 order purporting to amend the DHS order of succession for all purposes, not just in the event the Secretary is unavailable due to a disaster or catastrophic emergency, *see* Martinez Decl. ex. 23, was an implicit acknowledgment that Secretary Nielsen's April 2019 order amending the DHS order of succession had failed to amend the order of succession in the event of the Secretary's *resignation*, *see id.* exs. 14 at 2 (Nielsen's April 2019 order), 11 § II.A (section of Directive 00106, as updated on April 10, 2019, providing that Executive Order 13753 would govern the DHS order of succession "[i]n case of the Secretary's death, *resignation*, or inability to perform the functions of the Office" (emphasis added)).

lawfully assumed office. The *valid*, governing order of succession did not include Defendant Wolf's position of Under Secretary for Strategy, Policy, and Plans at all.¹² See Martinez Decl. exs. 11 § II.A (Directive 00106 as updated on April 10, 2019), 10 § 1 (Executive Order 13753 as issued on December 9, 2016). Accordingly, Defendant Wolf never assumed the functions and duties of Acting Secretary in conformity with Section 113(g)(2).

Because he never lawfully assumed the office of Acting Secretary, Defendant Wolf lacked any authority to issue the Memorandum purportedly restricting DACA. This is the very definition of *ultra vires* agency action. The authority of the executive branch, including the heads of executive agencies, to act “must stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *see also, e.g., City of Arlington v. F.C.C.*, 569 U.S. 290, 297-98 (2013) (observing that administrative agencies’ “power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, *no less than when they act beyond their jurisdiction*, what they do is *ultra vires*” (emphasis added)); *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (“[N]o provision in the Constitution . . . authorizes the President to enact, to amend, or to repeal statutes.”). Executive actions issued without such authority are void. *See, e.g., Itserve All., Inc. v. Cissna*, 443 F. Supp. 3d 14, 30 (D.D.C. 2020) (“[A]gency actions beyond delegated authority are *ultra vires* and should be invalidated.”); *see also, e.g., City of Los Angeles v. Barr*, 941 F.3d 931, 942 (9th Cir. 2019) (“Because none of DOJ’s proffered bases for statutory authority gives the Attorney General or the Assistant AG the power to impose the notice and access conditions, the conditions are *ultra vires*.”); *City of Philadelphia v. Att’y Gen. of U.S.*, 916 F.3d 276, 284-92 (3d Cir. 2019) (holding

¹² Indeed, when President Obama signed Executive Order 13753 on December 9, 2016, the position of Under Secretary for Strategy, Policy, and Plans did not even exist. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1902, 130 Stat. 2000, 2670-72 (2016) (December 23, 2016 law creating Office of Strategy, Policy, and Plans and position of Under Secretary for the same).

the same). Defendant Wolf had no lawful authority to issue the Memorandum. The Wolf Memorandum is therefore *ultra vires* as a matter of law.

II. THE WOLF MEMORANDUM WAS ISSUED IN VIOLATION OF THE FVRA AND LACKS FORCE OR EFFECT.

Even if Defendant Wolf’s purported accession to the office of Acting Secretary did not violate the HSA, it was unlawful under the FVRA. One court in this Circuit recently vacated as void a USCIS policy issued by Defendant Cuccinelli on the ground that he took office as acting director of Defendant USCIS in violation of the FVRA. *See L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 23-36 (D.D.C. 2020). This Court should do the same with respect to the Wolf Memorandum and USCIS Directives. Both Commissioner McAleenan’s order amending the order of succession and Defendant Wolf’s issuance of the Memorandum are void because they violated the FVRA’s time limitations on the service of acting federal officials. The Wolf Memorandum and any actions purporting to implement it are *ultra vires* and void on this ground as well.

As explained above, *supra* 5-6, the FVRA caps an officer’s ability to serve as an acting agency head at 210 days beginning “on the date the vacancy” in the office he is filling “occurs,” 5 U.S.C. § 3346(a)(1), at which point the office is deemed “vacant,” and any action “in the performance of any function or duty” of that office by any acting official purporting to continue in the office has “no force or effect” and “may not be ratified,” *id.* § 3348(b)(1)-(2), (d)(1)-(2).

The FVRA’s 210-day cap on the service of acting officials applies to those who assume office as Acting Secretary of Homeland Security under Section 113 of the HSA. Sections 113(g)(1) and (g)(2) authorize the DHS Under Secretary for Management and “such other officers of the Department” as “the Secretary may designate” to become Acting Secretary “[n]otwithstanding chapter 33 of Title 5,” respectively. *See supra* 7. But that phrase does not exempt Acting Secretaries who take office under those provisions from the FVRA’s 210-day limitation. “In statutes, the word [notwithstanding] ‘shows which provision prevails *in the event*

of a clash.” *SW Gen.*, 137 S. Ct. at 939 (emphasis added) (quoting Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Texts* 126-27 (2012)). There is no such clash between Sections 113(g)(1) and (g)(2) with respect to the FVRA’s 210-day cap. The HSA simply provides one method by which DHS officials down the chain can assume the office of Acting Secretary lawfully under the FVRA. It says nothing about the FVRA’s time limits, let alone supplants them.

What is more, reading Sections 113(g)(1) and (g)(2) of the HSA wholly to supplant the FVRA would also put those sections in irreconcilable tension with other provisions of the HSA that plainly subject Deputy Secretaries and Under Secretaries for Management who become Acting Secretaries and Acting Deputy Secretaries, respectively, to the FVRA’s 210-day cap. *See* 6 U.S.C. § 113(a)(1)(A), (F) (providing that the Deputy Secretary of Homeland Security is “the Secretary’s first assistant” and that the Under Secretary for Management is the “first assistant to the Deputy Secretary” for FVRA purposes, including its 210-day cap). Such a reading would violate basic rules of statutory interpretation. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (explaining the “fundamental canon of statutory construction that the words of a statute must be read in their context,” “with a view to their place in the overall statutory scheme,” and to “fit, if possible, all parts into an harmonious whole.” (internal quotation marks omitted)); *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (explaining that “[s]tatutory construction . . . is a holistic endeavor” and that a “provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law”). It would also render Section 113(g)(1) and (2) of the HSA unconstitutional by allowing certain Acting Secretaries to serve indefinitely without Presidential nomination and Senate confirmation—a reading that defies the principle that “when deciding

which of two plausible statutory constructions to adopt,” a court should select the one that avoids raising “a multitude of constitutional problems.” *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

Defendant Wolf’s purported accession as Acting Secretary violated the FVRA’s 210-day cap in two ways. *First*, when McAleenan attempted to amend the DHS order of succession on November 8, 2019, the office of Homeland Security Secretary had been vacant since Secretary Nielsen departed DHS on April 10, 2019—for a total of 212 days.¹³ Thus, on November 8, 2019, the office of Secretary was “vacant” under the FVRA, 5 U.S.C. § 3348(b)(1), and McAleenan’s order on that date claiming to amend Directive 00106 lacked “force or effect,” *id.* § 3348(d)(2). This means that Section II.A of the Directive continued to govern the DHS order of succession when McAleenan resigned and Defendant Wolf was sworn in as Under Secretary for Strategy, Policy, and Plans on November 13, 2019. Because Defendant Wolf had no place in the valid line of succession, *see* Martinez Decl. exs. 11 § II.A, 10 § 1, he unlawfully assumed office as Acting Secretary and issued the Wolf Memorandum without authority to do so.

Second, even assuming that McAleenan somehow lawfully amended the order of succession on November 8, 2019, by the time Defendant Wolf claimed office as Acting Secretary pursuant to that amended succession order on November 13, 2019, the office of Secretary had been vacant for at least 217 days—seven days more than the 210 days that Section 3346(a)(1) permits for the service of an acting official.¹⁴ Under Section 3348(b)(1), the office was to “remain vacant” unless and until a permanent Secretary was nominated and confirmed, and under Section

¹³ In fact, it is possible that Secretary Nielsen vacated her office even earlier, when she tendered her resignation letter to President Trump and announced her resignation via Twitter on April 7, 2019. *See* Martinez Decl. ex. 12. If so, then the office of Secretary had been vacant for 215 days when McAleenan purported to amend the DHS order of succession on November 8, 2019.

¹⁴ If Secretary Nielsen resigned on April 7 rather than April 10, 2019, then her office had been vacant for 220 days by the time Defendant Wolf was confirmed as Under Secretary for Strategy, Policy, and Plans on November 13, 2019.

3348(d)(1), any “action taken . . . in the performance of any function or duty” of that office “by any person” purporting to occupy it had “no force or effect.” Defendant Wolf claimed office as Acting Secretary in violation of the first of these provisions. As a result, under the second of these provisions, his issuance of the Wolf Memorandum in his purported capacity as Acting Secretary had no force or effect.

Because the FVRA’s 210-day cap on the service of acting federal officials governs officials who purport to become Acting Secretary pursuant to the HSA, and because Defendant Wolf took office as Acting Secretary in double violation of that cap, the Wolf Memorandum has “no force or effect” under 5 U.S.C. § 3348(d)(1) and was “void ab initio.” *SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 78 (D.C. Cir. 2015); *see also, e.g., L.M.-M.*, 442 F. Supp. 3d at 29-36 (vacating USCIS asylum directives issued by Defendant Cuccinelli under both the FVRA, 5 U.S.C. § 3348(d), and the APA, 5 U.S.C. § 706(2)(A), (C), because Cuccinelli assumed office in violation of FVRA).

III. THE USCIS DIRECTIVES IMPLEMENTING THE WOLF MEMORANDUM ARE ALSO VOID.

Because the Wolf Memorandum is void, the USCIS Directives purportedly implementing it are void as well.

First, the Directives purport to restrict DACA, a lawful DHS initiative issued by a prior, duly appointed Secretary of Homeland Security, in deference to an *ultra vires* order that has no force or effect. As a component agency of DHS, *see* 6 U.S.C. § 271(a), USCIS and its personnel must act consistent with, not contrary to, policy directives issued by the Secretary of Homeland Security, who “is the head of the Department,” *id.* § 112(a)(2); “shall have direction, authority, and control over it,” *id.*; and is “responsible for . . . [e]stablishing national immigration enforcement policies and priorities,” *id.* § 202(5). USCIS personnel certainly cannot contradict governing Department policy in furtherance of a contrary policy that is *ultra vires* and without force or effect. Yet that is precisely what the USCIS Directives purport to do.

Second, the officer who issued and implemented the USCIS Directives, Defendant Edlow, did so without lawful authority. For the same reasons Defendant Wolf lacked statutory authority under the HSA or FVRA to issue the Wolf Memorandum, Wolf lacked statutory authority to appoint Defendant Edlow USCIS's Deputy Director for Policy. Defendant Edlow therefore never lawfully assumed the functions, duties, and powers of that office, including the authority to issue the USCIS Directives. Thus, those Directives are *ultra vires* and void, too.

IV. THE WOLF MEMORANDUM AND USCIS DIRECTIVES VIOLATE THE APA.

For the same reasons they were issued in violation of the HSA and FVRA, the Wolf Memorandum and USCIS Directives violate, and must be vacated pursuant to, the APA. Under the APA, this Court must “hold unlawful and set aside agency action” when, among other circumstances, the action is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or was issued “not in accordance with law.” *See* 5 U.S.C. § 706(2)(A), (C). The Wolf Memorandum and USCIS Directives are plainly unlawful under those provisions.

A. The Wolf Memorandum and USCIS Directives Are Final Agency Actions Under the APA.

As a threshold matter, the Wolf Memorandum and USCIS Directives are “final agency action[s]” under the APA. *See* 5 U.S.C. § 704. The Wolf Memorandum was issued by the *de facto* (though not *de jure*) head of the department that promulgated DACA and is charged with its administration; provides that its policy directives are “effective immediately,” Martinez Decl. ex. 1 at 7; and mentions no deadline or sunset period for those directives or timeframe for the supposed policy reconsideration the directives are supposedly designed to facilitate. Moreover, USCIS has publicly announced, and Plaintiffs’ declarations confirm, that it is already capping DACA renewals to one year and rejecting first-time DACA applications pursuant to the Memorandum and Directives. *Id.* ex. 2 (USCIS Directives) at 5-6, ex. 3 (USCIS press release); Madrigal Decl. ¶ 16; Yang Decl. ¶ 21. Similarly, the USCIS Directives were issued by an official purporting to

occupy the USCIS office charged with establishing USCIS policy. *See* Martinez Decl. ex. 2. They purport to order “certain immediate changes to DACA processing consistent with and in furtherance of the Wolf Memorandum” and, like the Wolf Memorandum, purport to govern indefinitely until further notice. *Id.* at 3.

The Memorandum and USCIS Directives therefore “mark the consummation” of DHS and USCIS’s “decisionmaking process,” respectively; “determine” legal “rights or obligations”; and are thus final agency actions reviewable under the APA. *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)); *id.* at 1815 (emphasizing the “pragmatic approach . . . long taken to finality” (internal quotation marks omitted)); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435-36 (D.C. Cir. 1986).

B. The Wolf Memorandum and USCIS Directives Were Issued in Excess of Statutory Authority and Not in Accordance with Law.

For the same reasons the Wolf Memorandum is *ultra vires* and lacks force or effect under the HSA and FVRA, it was issued in excess of Defendant Wolf’s statutory authority within the meaning of the APA. And for the same reasons the USCIS Directives are *ultra vires*, they were issued in excess of Defendant Edlow’s statutory authority within the meaning of the APA.

The APA requires a court to “hold unlawful and set aside agency action” that is found to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or “not in accordance with law.” 5 U.S.C. § 706(2)(A), (C); *see also, e.g., Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 498 (D.C. Cir. 2010) (Brown, J., concurring in judgment) (“When an agency has acted beyond its delegated authority, a reviewing court will hold such action *ultra vires* . . . or a violation of the Administrative Procedure Act . . .”). Actions by agency officials holding office without lawful authority violate the APA. *See, e.g., SW Gen.*, 796 F.3d at 78-83 (vacating agency order under 5 U.S.C. § 706 because administrative complaint that triggered order was issued by an acting general counsel serving in violation of the FVRA); *L.M.-M.*, 442 F. Supp.

3d at 29-36 (vacating Defendant Cuccinelli’s asylum directives under both 5 U.S.C. § 706(2)(A) and (C) and 5 U.S.C. § 3348(d) because Cuccinelli assumed office in violation of the FVRA); *see also, e.g., Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2141-42 (2016) (noting that an agency head’s “shenanigans” in excess of his “statutory limits” may be “properly reviewable . . . under the Administrative Procedure Act, which enables reviewing courts to ‘set aside agency action’ that is . . . ‘in excess of statutory jurisdiction’” (quoting 5 U.S.C. § 706(2)(A)-(D))).

As explained above, *see supra* Parts I-II, neither the HSA nor the FVRA authorized Defendant Wolf to assume the office of Acting Secretary of Homeland Security, so the Wolf Memorandum—which Defendant Wolf purportedly issued pursuant to the duties and functions of that office—violates the APA. Moreover, because the USCIS Directives purport to contradict the Napolitano Memorandum in furtherance of the Wolf Memorandum, and because in any event the Directives were issued by a purported USCIS Deputy Director for Policy never lawfully appointed to that office, *see supra* Part III, the USCIS Directives also violate the APA.

Accordingly, for the same reasons the Wolf Memorandum and USCIS Directives are *ultra vires* and lack force or effect, they are also agency actions rendered in excess of statutory authority and not in accordance with law. *See* 5 U.S.C. § 706(2)(A), (C).

V. ALTERNATIVELY, THE WOLF MEMORANDUM AND USCIS DIRECTIVES WERE ISSUED IN VIOLATION OF THE APPOINTMENTS CLAUSE.

Defendant Wolf took office in violation of the HSA and FVRA, so the Wolf Memorandum and USCIS Directives are void under those statutes and the APA. But if the Court disagrees, Plaintiffs are nonetheless entitled to judgment as a matter of law for another reason: because Defendant Wolf’s service violates the Appointments Clause, he lacked constitutional authority to issue the Wolf Memorandum. This renders the USCIS Directives unlawful as well, both because Defendant Wolf lacked constitutional authority to appoint Defendant Edlow as USCIS’s Deputy

Director for Policy and because the Directives purport to implement a policy directive issued without constitutional authority.

The Appointments Clause provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law” U.S. Const. art. II, § 2, cl. 2. The nomination-and-consent procedure is a carefully wrought “structural safeguard of the constitutional scheme,” *SW Gen.*, 137 S. Ct. at 935 (alteration adopted) (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)), both because it “prevents congressional encroachment upon the Executive,” *Edmond*, 520 U.S. at 659, and because it imposes “‘an excellent check upon a spirit of favoritism in the President’ and a guard against ‘the appointment of unfit characters . . . from family connection, from personal attachment, or from a view to popularity,’” *SW Gen.*, 137 S. Ct. at 935 (quoting *The Federalist* No. 76, p. 457 (C. Rossiter ed. 1961) (A. Hamilton)). Enforcing the Appointments Clause’s terms ensures that the “consciousness of this check will make the president more circumspect, and deliberate in his nominations for office.” 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1525 (1833).

Defendant Wolf assumed office in violation of the Appointments Clause. That Clause vests in the President “the exclusive power to select the principal (noninferior) officers of the United States” and in the Senate the sole authority to confirm those officers. *Edmond*, 520 U.S. at 659-60; *see also SW Gen.*, 137 S. Ct. at 945 (“Principal officers must be appointed by the President by and with the advice and consent of the Senate.”). As the purported Acting Secretary of Homeland Security, Defendant Wolf claims to be the “head” of an executive department, 6 U.S.C. § 112(a)(2) (providing that the Secretary of Homeland Security is “the head of the Department and shall have direction, authority, and control over it”), and therefore to exercise the powers,

functions, and duties of a principal officer. But the President has never nominated him, and the Senate has never confirmed him, to the office of Secretary of Homeland Security.

Nor does the fact that Defendant Wolf has been purporting to serve only “temporarily” change the constitutional analysis. He is not an “inferior Officer[]” whom the Appointments Clause authorizes a “Head[] of [a] Department[]” to appoint. U.S. Const. art. II, § 2, cl. 2. To the extent the Constitution permits principal officers to designate their own successors in the event of resignation, they may do so only “[b]ecause the subordinate officer is charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions.” *United States v. Eaton*, 169 U.S. 331, 343 (1898). By contrast, Defendant Wolf has purported for nearly a year to “exercise[] all of the statutory duties” of an office that has been vacant for nearly a year and half. *SW Gen.*, 137 S. Ct. at 946 n.1 (Thomas, J., concurring). He has purported to rescind policy directives issued by prior, duly appointed permanent Secretaries of Homeland Security, as he claimed to do in the Wolf Memorandum; to appoint officers of DHS and its constituent agencies, including Defendant Edlow as USCIS’s Deputy Director for Policy; and to dictate the disbursement of billions of dollars of DHS funds.¹⁵ “There was thus nothing ‘special and temporary’ about [Defendant Wolf’s] appointment.” *Id.* (quoting *Eaton*, 169 U.S. at 343). Accordingly, even if he was ostensibly designated to serve “temporarily,” Defendant Wolf has in fact been serving as Secretary of Homeland Security since November 13, 2019 in all but name. “[T]he structural protections of the Appointments Clause” cannot “be avoided based on such trivial distinctions.” *Id.* Holding otherwise would permit precisely the pre-Revolutionary “‘grievance[]’”

¹⁵ See, e.g., Martinez Decl. ex. 33 (stating that Defendant Wolf “announced final allocations of \$385 million for seven Fiscal Year (FY) 2020 DHS competitive preparedness grant programs” on the advice of “[his] Homeland Security Advisory Council,” in addition to “more than \$1.3 billion in non-competitive grant funding” allocated earlier).

the Clause was meant to avoid: “the manipulation of appointments.” *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1656-57 (2020).

For these reasons, even if the Court concludes that the HSA and FVRA authorized Defendant Wolf to assume office, issue the Wolf Memorandum, and appoint Defendant Edlow, Defendant Wolf nonetheless took these actions in violation of the Appointments Clause. This renders the Wolf Memorandum—and the USCIS Directives that Defendant Edlow issued in furtherance of the Wolf Memorandum, *see supra* Part III—void. *See, e.g., Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 (2018) (vacating as void action by agency official appointed in violation of Appointments Clause). Plaintiffs are thus entitled to judgment as a matter of law on their Appointments Clause claim, and the Wolf Memorandum and USCIS Directives must be vacated, even if they do not prevail on their claims under the HSA, FVRA, and APA.

VI. THE COURT SHOULD VACATE THE WOLF MEMORANDUM AND USCIS DIRECTIVES AND ENJOIN THEIR ENFORCEMENT NATIONWIDE.

Because the Wolf Memorandum and USCIS Directives are unlawful, this Court should vacate the Memorandum and Directives and permanently enjoin Defendants or their agents from enforcing them.

In this Circuit, “[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.” *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (alteration in original) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)); *see also, e.g., Blue Water Navy Viet. Veterans Ass’n, Inc. v. McDonald*, 830 F.3d 570, 578 (D.C. Cir. 2016) (“[V]acatur is the normal remedy.” (internal quotation marks omitted)). A “nationwide remedy is necessary to provide complete relief for promulgation of an unlawful rule” because, “when a plaintiff proves that a rule was unlawfully promulgated, halting the rule’s application to the plaintiff may lessen the real-world impact of the unlawful rule on the

plaintiff but does not fully redress ‘the violation established’—that is, the promulgation of an unlawful rule.” *District of Columbia v. U.S. Dep’t of Agric.*, 444 F. Supp. 3d 1, 49 (D.D.C. 2020); *see also, e.g., Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 18-19 (D.D.C. 2004) (entering a permanent injunction, after having issued a preliminary injunction, of the Department of Defense’s “involuntary anthrax inoculation program” as to “all persons,” not just plaintiffs).

Prompt resolution of this issue permanently and on a nationwide basis is particularly important here. The Wolf Memorandum and USCIS Directives are harming immigrants across at least three states in disparate regions and forcing at least three nonprofit immigrant-services organizations to dramatically divert their finite staffing and budgetary resources to counteract those harms, at grave risk to their core missions and other clients. *See* Madrigal Decl. ¶¶ 9-22; Gloria Decl. ¶¶ 17-31; O’Sullivan Decl. ¶¶ 7-12; Wilkes Decl. ¶ 8-11; Love Decl. ¶¶ 17-36; Yang Decl. ¶¶ 11-22. Similar organizations across the country are at risk of the same harms as Plaintiffs’ and, like Plaintiffs, will have to redirect organizational resources to counteract those harms. Gloria Decl. ¶ 31; Love Decl. ¶ 36. These widespread impacts merit nationwide relief.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for summary judgment, vacate the Wolf Memorandum and USCIS Directives in their entirety, and permanently enjoin Defendants or their agents from enforcing any part of the Memorandum or Directives.

Dated: September 11, 2020

Respectfully submitted,

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Counsel for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SANTA FE DREAMERS PROJECT; SPANISH
COMMUNITY CENTER; and AMERICAN
GATEWAYS,

Plaintiffs,

vs.

CHAD F. WOLF, in his purported official capacity
as Acting Secretary of Homeland Security;
KENNETH T. CUCCINELLI, in his purported
official capacities as Senior Official Performing the
Duties of Deputy Secretary of Homeland Security
and Acting Director of U.S. Citizenship and
Immigration Services; TONY H. PHAM, in his
purported official capacity as Senior Official
Performing the Duties of Director of U.S.
Immigration and Customs Enforcement; JOSEPH
EDLOW, in his purported official capacity as Deputy
Director for Policy of U.S. Citizenship and
Immigration Services; MARK A. MORGAN, in his
purported official capacity as Senior Official
Performing the Duties of Commissioner of U.S.
Customs and Border Protection; UNITED STATES
DEPARTMENT OF HOMELAND SECURITY;
UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES; UNITED STATES
CUSTOMS AND IMMIGRATION
ENFORCEMENT; and UNITED STATES
CUSTOMS AND BORDER PROTECTION,

Defendants.

Case No. 1:20-CV-02465-RBW

**STATEMENT OF MATERIAL FACTS IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, pursuant to Local Rule 7(h), respectfully submit the following statement of material facts as to which they contend there is no genuine issue:

1. Plaintiffs are three non-profit organizations that provide free or low-cost legal services to immigrants: Santa Fe Dreamers Project, Spanish Community Center, and American Gateways. Plaintiff Santa Fe Dreamers Project is based in Santa Fe, New Mexico. Plaintiff Spanish Community Center is based in Joliet, Illinois. Plaintiff American Gateways is based in Austin, Texas. Among other services, Plaintiffs assist immigrants with renewing and applying for temporary forbearance from removal and eligibility for benefits under the Deferred Action for Childhood Arrivals initiative (“DACA”). See Love Decl. ¶¶ 3, 5-10, 12, 15-16; O’Sullivan Decl. ¶¶ 2, 5, 7; Wilkes Decl. ¶¶ 2, 5, 7; Gloria Decl. ¶¶ 2, 5-15; Madrigal Decl. ¶¶ 3, 6-8; Yang Decl. ¶¶ 7, 9-10.

2. DACA is an initiative of Defendant U.S. Department of Homeland Security (“DHS”) initiative that defers removal for eligible young immigrants who were brought to the United States as children. Before July 28, 2020, DACA provided recipients with two-year periods of forbearance from removal and eligibility for work authorization and other benefits. See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901-05 (2020) (tracing DACA’s history and status as of June 2020); see also Martinez Decl. ex. 4.

3. By March 31, 2020, over 825,000 young people had benefitted from DACA’s protections. See Martinez Decl. ex. 6 at 1.

4. In September 2017, acting on advice from then-Attorney General Jefferson B. Sessions III, then-Acting Secretary of Homeland Security Elaine C. Duke issued a memorandum (the “Duke Memorandum”) purporting to rescind the Napolitano Memorandum and terminate DACA. See *Regents*, 140 S. Ct. at 1903; Martinez Decl. ex. 7 (Duke Memorandum); *id.* ex. 8 (Sessions letter).

5. Several courts around the country subsequently enjoined the Duke Memorandum's enforcement on the ground that it inadequately explained the Department of Homeland Security's ("DHS") reasons for rescinding DACA, in violation of the Administrative Procedure Act ("APA"). *Regents*, 140 S. Ct. at 1903-04. In response, the new Secretary of Homeland Security, Kirstjen M. Nielsen, issued a second memorandum (the "Nielsen Memorandum") on June 22, 2018, purporting to clarify and elaborate on the Duke Memorandum's reasoning and recommitting DHS to rescinding DACA. *Id.* at 1904; Martinez Decl. ex. 9 (Nielsen Memorandum).

6. On June 18, 2020, the United States Supreme Court held that the Duke Memorandum was arbitrary and capricious and violated the APA because it (1) failed to adequately consider or explain why the Memorandum's assertion that DACA's extension of work authorization and other benefits was illegal required the rescission of both eligibility for those benefits *and* the initiative's forbearance-from-removal component; and (2) altogether "failed to address whether there was 'legitimate reliance'" on DACA. *Regents*, 140 S. Ct. at 1910-15 (internal quotation marks omitted). Having concluded that these "dual failure[s]" raised "doubts about whether [DHS] appreciated the scope of its discretion or exercised that discretion in a reasonable manner," the Court affirmed the vacatur of the rescission of DACA and remanded the matter "to DHS so that it may consider the problem anew." *Id.* at 1916 & n.7.

7. On December 9, 2016, President Obama issued Executive Order 13753, *Amending the Order of Succession in the Department of Homeland Security*, which invoked his authority under the Federal Vacancies Reform Act of 1998, 5 U.S.C. § 3345 *et seq.*, to establish the order of succession for the Secretary of Homeland Security during any period in which the Secretary has died, resigned, or otherwise become unable to perform the functions and duties of the office of Secretary. *See* Martinez Decl. ex. 10.

8. On December 15, 2016, then-Secretary of Homeland Security Jeh Johnson issued DHS Delegation Number 00106 (“Directive 00106”) pursuant to his authority under 6 U.S.C. § 113(g)(2). *See* Martinez Decl. ex. 11. Directive 00106 contained two sections amending the order of succession for Secretary. Section II.A adopted the order of succession laid out in Executive Order 13753 in the event of the Secretary’s death, resignation, or inability to perform the functions of the Office. *Id.* § II.A. Section II.B imposed a separate and different order of succession for Acting Secretary, to “the extent not otherwise prohibited by law,” in the event the Secretary becomes “unavailable to act during a disaster or catastrophic emergency.” *Id.* § II.B. This second order of succession for disasters and emergencies was laid out in an appendix to the Directive called “Annex A.” *Id.* at A-1.

9. On April 7, 2019, then-Secretary of Homeland Security Nielsen announced via Twitter that she would resign as Secretary effective that day. *See* Martinez Decl. ex. 12. A little over three hours later, she announced on Twitter that she had agreed to stay on as Secretary through Wednesday, April 10, 2019. *See id.* ex. 13.

10. Prior to leaving office, Secretary Nielsen signed an April 9, 2019 memorandum amending Directive 00106 by striking and replacing the text of Annex A. *See* Martinez Decl. ex. 14 at 2. The new text of Annex A listed the CBP Commissioner as third in line to serve as Acting Secretary, after the Deputy Secretary and the Under Secretary for Management. *Id.*

11. On April 10, 2019, under Section II.A of Directive 00106 and Executive Order 13753, the order of succession in the event of the Secretary of Homeland Security’s resignation was as follows, in relevant part: Deputy Secretary of Homeland Security; Under Secretary for Management; Administrator of the Federal Emergency Management Agency; Under Secretary for National Protection and Programs; Under Secretary for Science and Technology; Under Secretary

for Intelligence and Analysis; and Customs and Border Protection (“CBP”) Commissioner. *See* Martinez Decl. ex. 11 § II.A; *id.* ex. 10 § 1; *see also id.* ex. 14 at 2.

12. On April 10, 2019, the offices of Deputy Secretary of Homeland Security, Under Secretary for Management, FEMA Administrator, and Under Secretary for Science and Technology were vacant, but two nominated-and-confirmed appointees, Christopher Krebs and David J. Glawe, were serving as Under Secretary for National Protection and Programs and Under Secretary for Intelligence and Analysis, respectively. *See* Martinez Decl. exs. 15-20. Under Section II.A of Directive 00106 and the Obama executive order that section incorporated, Krebs and then Glawe were next in line to take over for Nielsen as Acting Secretary. *See id.* exs. 11 § II.A, 10 § 1.

13. On April 10, 2019, Secretary Nielsen resigned, and CBP Commissioner Kevin McAleenan purported to assume office as Acting Secretary of Homeland Security. *See* Martinez Decl. ex. 21.

14. On November 8, 2019, 212 days after Nielsen vacated the office of Secretary of Homeland Security, Commissioner McAleenan issued an order in his purported capacity as Acting Secretary striking the text of Section II.A in Directive 00106 and replacing it with language providing that Annex A would govern in the case of the Secretary’s death, resignation, or inability to perform the functions of the Office. His order also purportedly modified the order of succession in Annex A to include the Under Secretary for Strategy, Policy, and Plans as fourth in line to serve as Acting Secretary, after the Deputy Secretary, Under Secretary for Management, and CBP Commissioner. *See* Martinez Decl. ex. 23 at 1.

15. On November 13, 2019, 217 days after Nielsen vacated the office of Secretary, the Senate confirmed Defendant Chad F. Wolf as Under Secretary for Strategy, Policy, and Plans. *See*

Martinez Decl. ex. 25 at S6519-20. That same day, Commissioner McAleenan resigned as Acting Secretary of Homeland Security, and Defendant Wolf purportedly took office as Acting Secretary of Homeland Security. *See id.* exs. 26, 27. Defendant Wolf continues to serve as Under Secretary for Strategy, Policy, and Plans and purportedly as Acting Secretary of Homeland Security to this day. *See id.* ex. 26.

16. On February 19, 2020, Defendant Wolf purported to appoint Defendant Joseph Edlow to the position of Deputy Director of U.S. Citizenship and Immigration Services. *See* Martinez Decl. exs. 28, 34.

17. On July 28, 2020, Defendant Wolf issued a memorandum (the “Wolf Memorandum”) purporting to order immediate changes to the DACA policy, including rejecting all initial applications for DACA participation and associated applications for work authorization; processing all pending and future properly submitted DACA- and work-authorization- renewal applications submitted by current DACA recipients; limiting any DACA or related work-authorization renewals to one year; and rejecting all pending and future applications for advance parole from DACA beneficiaries absent exceptional circumstances, among other changes. The Wolf Memorandum was addressed to Matthew T. Albence and Defendants Joseph Edlow and Mark A. Morgan in their official capacities as Deputy Director and Senior Official Performing the Duties of Director of U.S. Immigration and Customs Enforcement, Deputy Director for Policy of U.S. Citizenship and Immigration Services, and Senior Official Performing the Duties of Commissioner of U.S. Customer and Border Protection, respectively. *See* Martinez Decl. ex. 1.

18. On August 21, 2020, U.S. Citizenship and Immigration Services (“USCIS”) issued policy directives purporting to implement the Wolf Memorandum’s changes to DACA (“USCIS Directives”). *See* Martinez Decl. exs. 2-3.

19. Defendant Tony H. Pham purported to succeed Mr. Albence as “Senior Official Performing the Duties of the Director” of Defendant U.S. Immigration and Customs Enforcement and therefore has automatically been substituted for Mr. Albence as a Defendant. *See* Martinez Decl. ex. 32; *see also* Fed. R. Civ. P. 25(d).

20. Under the Wolf Memorandum and USCIS Directives, USCIS has already capped at one year DACA forbearance renewals for some of Plaintiffs’ clients and rejected first-time DACA applications submitted by others. *See* Madrigal Decl. ¶ 16; Yang Decl. ¶ 21.

21. The Wolf Memorandum and USCIS Directives are harming Plaintiffs by forcing them to divert resources to counteract the Memorandum and Directives’ effects on their workloads and clients; depleting the resources they are able to expend serving clients with needs unrelated to DACA; jeopardizing their eligibility for key grant funding; undermining the substantial goodwill they have cultivated with the communities they serve; and thereby impeding their abilities to carry out their core organizational missions of assisting every immigrant who seeks their services, among other harms. *See* Love Decl. ¶¶ 17-33; O’Sullivan Decl. ¶¶ 7-12; Wilkes Decl. ¶ 8-11; Madrigal Decl. ¶¶ 9-22; Gloria Decl. ¶¶ 17-30; Yang Decl. ¶¶ 11-22.

22. Similar organizations across the country are at risk of suffering the same harms as Plaintiffs’ and, like Plaintiffs, likely will have to redirect organizational resources to counteract those harms. *See* Gloria Decl. ¶ 31; Love Decl. ¶ 36.

23. The Wolf Memorandum and USCIS Directives are also harming Plaintiffs’ clients, whose ability to remain in this country, to lawfully work here, and to utilize government services largely depends on the free and low-cost immigration services that Plaintiffs provide. *See* Madrigal Decl. ¶¶ 16, 21-22; Love Decl. ¶¶ 34-35; Yang Decl. ¶ 21-22. By impairing Plaintiffs’ ability to provide critical assistance to DACA recipients and other immigrants alike, the Wolf

Memorandum and USCIS Directives put at serious risk the livelihoods, residency, and quality of life of those immigrants and their families. *See* Madrigal Decl. ¶¶ 21-22; Gloria Decl. ¶ 31; Love Decl. ¶¶ 34-36; Yang Decl. ¶ 22.

24. These harms will continue so long as the Wolf Memorandum and USCIS Directives remain in place. *See* Gloria Decl. ¶¶ 18-19, 30; Madrigal Decl. ¶¶ 16, 20; Love Decl. ¶¶ 17, 24, 28; Wilkes Decl. ¶¶ 8, 11; O’Sullivan Decl. ¶ 12; Yang Decl. ¶ 18.

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Respectfully submitted,

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