Nos. 18-15068, 18-15069, 18-15070, 18-15071,
18-15072, 18-15128, 18-15133, 18-15134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
Plaintiffs-Appellees-Cross-Appellants,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Defendants-Appellants-Cross-Appellees.

On Cross-Appeal from the United States District Court
for the Northern District of California

PRINCIPAL AND RESPONSE BRIEF OF THE STATES OF CALIFORNIA, MAINE, MARYLAND, AND MINNESOTA

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March 13, 2018

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INTRODUCTION

The Deferred Action for Childhood Arrivals (DACA) program has been in place for more than five years. Similar to other programs adopted by presidential administrations of both parties over the past six decades, it provides a channel and framework for individualized deferred action decisions for a defined category of potential applicants. Under DACA, nearly three-quarters of a million young people—who came to this Nation as children and have abided by its laws—have received individual grants of provisional protection from removal as well as work authorization and other benefits. Until recently, the United States had consistently defended the legality of this program. No court has ever held it unlawful.

In September 2017, the federal defendants in this case issued a memorandum abruptly rescinding DACA. They offered a one-sentence explanation, asserting that DACA was so clearly unlawful that they had no choice but to terminate it. They failed to acknowledge that this assertion was a marked departure from the prior positions of the agency and the United States; to address any of the considerations that the agency had previously invoked in defending the legality of the program; or to discuss the reliance interests that had developed around the program since 2012. Instead they sought to shift responsibility for their action to the courts, arguing that prior, inconclusive litigation about a different program made it "clear" that DACA had to end. ER 130.

The district court acted within its discretion in granting a preliminary injunction preventing full implementation of defendants' decision while it is tested in the courts. To ensure public accountability and facilitate judicial review, the Administrative Procedure Act requires agencies to give reasoned explanations for their actions—and, in particular, to acknowledge when they are changing a longstanding position and explain why. The unelaborated and incorrect legal conclusion defendants chose to offer as their sole reason for terminating DACA does not satisfy these requirements, and plaintiffs are therefore likely to succeed on their claim that this decision violated the APA. Defendants do not (and could not) dispute the district court's finding that the equities tilt sharply in favor of provisional relief. The injunction is carefully tailored to partially preserve the status quo. It allows individuals who already received grants of deferred action under DACA to apply for renewal, while permitting defendants to continue to exercise their enforcement discretion on a case-by-case basis. And given the nationwide scope of the DACA program, and the general need for uniformity in matters related to immigration policy, it was proper for the court to order nationwide relief.

In addition, the district court correctly held that plaintiffs' claims were reviewable, and that plaintiffs had stated a claim that defendants violated due process by changing the policy governing their use of the sensitive information

provided by DACA recipients. But the district court erred in dismissing plaintiffs' claim alleging that, under the circumstances, the decision to end DACA should have been made through a notice-and-comment rulemaking process.

STATEMENT OF JURISDICTION

The States agree with defendants that this Court has jurisdiction over defendants' appeals of the preliminary injunction under 28 U.S.C. § 1292(a)(1), and that it has jurisdiction over the appeals of the issues certified by the district court under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES

1. Whether review of plaintiffs' claims is barred by 5 U.S.C. § 701(a)(2) or 8 U.S.C. § 1252(g).

2. Whether the district court abused its discretion by entering a preliminary injunction partially preserving the status quo based on its conclusion that plaintiffs are likely to succeed on their claim that the termination of DACA was arbitrary, capricious, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(A).

3. Whether plaintiffs stated a claim that changes to the federal government's policies regarding the use of information provided by DACA recipients violate due process.

4. Whether plaintiffs stated a claim that the rescission of DACA should have been accomplished through notice-and-comment rulemaking under 5 U.S.C. § 553.

STATEMENT OF THE CASE

A. Deferred Action

Congress has charged the Secretary of the Department of Homeland Security (DHS) with "establishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). It has authorized her to administer and enforce all laws relating to immigration and naturalization, 8 U.S.C. § 1103(a)(1), and to "establish such regulations; . . . issue such instructions; and perform such other acts as [she] deems necessary for carrying out [her] authority," *id.* § 1103(a)(3). "As part of this authority, it is well settled that the Secretary can exercise deferred action." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2016) (*Brewer*), *petition for cert. filed* (U.S. Mar. 29, 2017) (No. 16-1180).

Deferred action involves a provisional decision by the Executive Branch that "no action will thereafter be taken to proceed against an apparently deportable alien." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (*AADC*) (quoting 6 Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)). The Secretary may grant deferred action "for humanitarian reasons or simply for [her] own convenience." *Id.* It is "an act of administrative convenience to the government which gives some cases lower priority." 8 C.F.R. § 274a.12(c)(14).

Although this "commendable" practice initially "developed without express statutory authorization," *AADC*, 525 U.S. at 484 (quoting 6 Gordon et al., *supra*, at § 72.03[2][h]), it has since been recognized by Congress and by federal regulations. The Immigration and Nationality Act (INA) "expressly provides for deferred action as a form of relief that can be granted at the Executive's discretion." *Brewer*, 855 F.3d at 967 (discussing 8 U.S.C. §§ 1154(a)(1)(D)(i)(II), 1227(d)(2), 1229a(e)); *see also* 49 U.S.C. § 30301 note; USA PATRIOT Act, Pub. L. No. 107-56, § 423(b)(1), 115 Stat. 272, 361. Federal regulations allow recipients of deferred action to apply for work authorization and receive other benefits. *See* 8 C.F.R. § 274a.12(c)(14) (work authorization); *id.* § 214.14(d)(3) (no accrual of "unlawful presence" for purposes of re-entry bars); 28 C.F.R. § 1100.35(b)(2) (similar). The courts, too, have recognized that deferred action is a "regular practice." *AADC*, 525 U.S. at 484.

Consistent with this "well settled" practice, the Executive has periodically granted deferred action on a programmatic basis "to different groups of noncitizens present in the United States." *Brewer*, 855 F.3d at 967, 968 n.2. The Administrations of Presidents Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, Reagan, George H.W. Bush, Clinton, George W. Bush, and Obama all granted deferred action or similar forms of discretionary relief to large groups of

individuals in defined categories. *See generally id.* at 968 n.2; SER 265-266. Collectively, millions of people have received relief.

B. The Deferred Action for Childhood Arrivals (DACA) Program

Created in 2012, DACA provides a framework for making individualized deferred action decisions for "certain young people who were brought to this country as children and know only this country as home." ER 141. The memorandum creating DACA directed that, to be eligible for deferred action under this program, an individual must have come to the United States under the age of 16; must have continuously resided here between 2007 and 2012; must be under the age of 30; must meet certain education or military service requirements; and must not have been convicted of a felony, a significant misdemeanor, or multiple misdemeanors, or otherwise pose a threat to national security or public safety. *Id.* It emphasized that requests for deferred action were "to be decided on a case by case basis" as part of the "exercise of prosecutorial discretion." ER 142.

Individuals who are granted deferred action under DACA receive protection from removal for renewable two-year periods. ER 142. They also obtain work authorization, may apply for permission to travel outside the country (known as "advance parole"), and enjoy other associated benefits. ER 8-9. By September 2017, there were nearly 700,000 active DACA recipients nationwide, with an average age of just under 24 years old. ER 9. More than 90 percent of DACA

recipients are employed, and 45 percent are in school. *Id.* DACA has allowed these individuals to contribute lawfully to national and local economies, increasing tax revenue by billions of dollars. *See* SER 359; D.Ct. Dkt. 111 at 14.[1]

Since DACA's inception, there has been no successful legal challenge to the program. In the context of several unsuccessful challenges, the federal government defended the legality of the program, including before this Court. *See, e.g.*, Brief for United States at 1, *Brewer*, 855 F.3d 957 (9th Cir. 2017) (No. 15-15307) (filed Aug. 28, 2015). The Office of Legal Counsel (OLC) at the federal Department of Justice likewise concluded that a general program such as DACA was legally sound so long as immigration officials "retained discretion to evaluate each application on an individualized basis." SER 243 n.8.

A separate program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), was the subject of litigation that resulted in a preliminary injunction. DAPA was announced in 2014 but never actually implemented. It would have applied to adults who, among other things, had been in the United States since 2010, were the parents of citizens or lawful permanent residents, and otherwise were not enforcement priorities. ER 269-273. A district court granted a preliminary injunction in a suit filed by Texas and other States.

[1] Citations to the district court docket are to No. 17-cv-5211.

See Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015). A divided panel of the Fifth Circuit affirmed that preliminary injunction, *see Texas v. United States*, 809 F.3d 134 (2015), and the Supreme Court affirmed the Fifth Circuit's judgment by a four-four vote, *see United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

The federal government operated the DACA program throughout the litigation over DAPA and it continued DACA despite the preliminary injunction suspending implementation of DAPA. After the change in federal administrations in January 2017, the Trump Administration kept DACA in place and continued to accept new and renewal applications for deferred action under the program. A February 2017 memorandum from then-DHS Secretary John Kelly rescinded other immigration policies, but expressly left DACA intact. ER 170. Another memorandum from Secretary Kelly in June 2017 rescinded DAPA, but again explicitly did not disturb DACA. D.Ct. Dkt 64-1 at 235-236. Secretary Kelly separately described "DACA status" as a "commitment . . . by the government towards the DACA person." SER 1334. And President Trump agreed that it would "be the policy of [his] administration to allow the dreamers [*i.e.*, DACA recipients] to stay." SER 1346; *see* https://www.cbsnews.com/news/transcript-of-ap-interview-with-trump/ (last visited Mar. 10, 2018).

C. Defendants' Termination of DACA

On June 29, 2017, the Texas Attorney General and others wrote to Attorney General Sessions indicating that if the administration did not "phase out the DACA program" by September 5, Texas would amend its complaint in the DAPA proceedings (which remained pending) to include a challenge to DACA. ER 275. On September 4, Attorney General Sessions sent a one-page letter to the Acting Secretary of DHS, Elaine Duke. ER 176. The letter advised that DHS "should rescind" DACA because it "was an unconstitutional exercise of authority by the Executive Branch" and "has the same legal and constitutional defects that the courts recognized as to DAPA." *Id.* The next day, the Attorney General announced the termination of DACA at a press conference. *See* SER 1354. He reiterated the new legal positions asserted in his letter, and also characterized DACA as "contribut[ing] to a surge of unaccompanied minors on the southern border" and "den[ying] jobs to hundreds of thousands of Americans." *Id.*

Also on September 5, Acting Secretary Duke issued a memorandum formally rescinding DACA. ER 126-132. The memorandum offered a one-sentence explanation for the decision: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing [DAPA] litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." ER 130. The Acting Secretary instructed DHS to

stop accepting new DACA applications and to accept renewal applications only until October 5, and only from individuals whose current deferred-action status would expire on or before March 5, 2018. *Id.* She also stated that DHS would no longer approve any "applications for advance parole under standards associated with the DACA program[.]" ER 131.

D. Procedural Background

On September 11, 2017, the States filed this suit (ER 88), which was later related to four other cases. Collectively, the complaints alleged (among other things) that defendants' termination of DACA was arbitrary, capricious, or otherwise not in accordance with law, in violation of the APA; that the decision was procedurally deficient because it was not made through a notice-and-comment rulemaking process; and that changes to policies regarding information use violated the Due Process Clause of the Fifth Amendment. *See, e.g.*, ER 119-123. On November 1, defendants moved to dismiss and plaintiffs moved for provisional relief.[2]

[2] During the district court proceedings, defendants sought mandamus relief, in both this Court and the Supreme Court, regarding a district court order requiring them to produce a complete administrative record. This court denied mandamus. *See In re United States*, 875 F.3d 1200, 1205 (9th Cir. 2017). The Supreme Court declined to rule on defendants' substantive arguments, but vacated this Court's judgment with procedural instructions. *See In re United States*, 138 S. Ct. 443, 445 (2017); *see also In re United States*, 877 F.3d 1080 (9th Cir. 2017). The district court has complied with those directives, and has stayed defendants' obligation to complete

On January 9, the district court largely denied defendants' Rule 12(b)(1) motion to dismiss on threshold grounds and granted a limited preliminary injunction. ER 48. The court first rejected defendants' argument that the decision to rescind DACA was "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). It concluded that "there *is* law to apply" in this case, because the "main, if not exclusive, rationale for ending DACA was its supposed illegality." ER 21. And it reasoned that the decision had none of the characteristics of unreviewable non-enforcement actions described in *Heckler v. Chaney*, 470 U.S. 821 (1985). ER 18-21. The court also rejected defendants' argument that 8 U.S.C. § 1252(g) stripped it of jurisdiction to hear the case, concluding that the decision at issue here was not one of the "three discrete actions" that Section 1252(g) covers. *AADC*, 525 U.S. at 482; *see* ER 21-23.

Turning to plaintiffs' request for provisional relief, the court determined that plaintiffs were likely to succeed on their claim that the decision to rescind DACA was arbitrary, capricious, or not in accordance with law. It first considered defendants' stated explanation that they rescinded DACA because it was unlawful. ER 29. After reviewing the deep historical and legal pedigree of deferred action

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the record until after these appellate proceedings are completed. D.Ct. Dkt. 266 at 12. To date, defendants have not produced any administrative record supporting their decision to terminate DACA other than the 14 publicly available documents they originally proffered in October 2017.

programs (ER 29-33), the court concluded that plaintiffs were likely to establish "that the rescission was based on a flawed legal premise and must be set aside" (ER 38). Although "the main ground given by the Attorney General for illegality was the Fifth Circuit's decision in the DAPA litigation" (ER 35), the Fifth Circuit recognized that there were important differences between DAPA and DACA (ER 36), and its decision "was not a death knell for DACA" (ER 37).

Next, the district court addressed the alternative rationale advanced by defendants' counsel for the decision to rescind DACA: that it was "a reasonable judgment call involving management of litigation risk and agency resources." ER 38. The court concluded that this was a post hoc rationale (ER 39), and that, in any event, it did not satisfy the APA's requirement that an agency must give a reasoned explanation for its actions (ER 39-43).

The remaining factors of the preliminary injunction test weighed in favor of provisional relief. ER 43-46. The court found that plaintiffs had "clearly demonstrated that they are likely to suffer serious irreparable harm absent an injunction." ER 43. Individual plaintiffs would lose their work authorization and suffer other hardships. *Id.* The States and other entity plaintiffs would "face irreparable harm as they begin to lose valuable students and employees in whom they have invested," a loss that would "have a detrimental impact on their organization interests, economic output, public health, and safety." *Id.* And the

public interest would be harmed for similar reasons. ER 45-46. Those harms substantially outweighed any hardship asserted by defendants, especially in light of the President's expressions of support for the policy. *Id.*

The court therefore entered a preliminary injunction partially preserving the status quo. As to individuals who had already received deferred action, it required petitioners "to maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017, including allowing DACA enrollees to renew their enrollments." ER 46. It made clear, however, that the government need not process new applications from individuals who have never before received deferred action; that the "advance parole" feature of DACA "need not be continued for the time being for anyone"; and that defendants "may take administrative steps to make sure fair discretion is exercised on an individualized basis for each renewal application." *Id.* It also emphasized that DHS may "proceed[ ] to remove any individual, including any DACA enrollee, who it determines poses a risk to national security or public safety, or otherwise deserves, in its judgment, to be removed." *Id.* Defendants announced on January 13 that they would comply with the injunction. *See* AOB 11 n.2. They have not sought a stay of the injunction in any court.

On January 12, the court granted in part and denied in part defendants' motion to dismiss under Rule 12(b)(6). ER 62. Among other things, it denied the

motion with respect to plaintiffs' substantive APA claim (ER 51) and the claim that changes to information-sharing policies violated due process (ER 55-57), but granted the motion as to the claim that the rescission of DACA should have been accomplished through notice-and-comment rulemaking (ER 51-53).

The district court certified a number of issues for interlocutory appeal under 28 U.S.C. § 1292(b). ER 48-49, 62-63. On January 16, defendants filed a notice of appeal in the district court (ER 357-358), as well as a petition for permission to appeal in this Court regarding certain certified issues. Plaintiffs filed their own petitions for permission to appeal on January 22. None of the petitions was opposed. This Court granted all of the petitions, consolidated those appeals with the pending appeals of the preliminary injunction, expedited the case, and set a consolidated briefing schedule.[3]

SUMMARY OF ARGUMENT

1. Defendants' decision to terminate DACA, based on the asserted conclusion that the program is clearly unlawful, is subject to judicial review. It is not "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), both because there are judicially manageable standards to review the assertion that DACA

[3] While these appeals were proceeding, defendants returned to the Supreme Court, this time to file a petition for certiorari before judgment. The Supreme Court denied that petition on February 26. *DHS v. Regents of the Univ. of Cal.*, ___ S. Ct. ____, 2018 WL 1037642 (2018).

exceeds defendants' statutory and constitutional authority, and because the decision does not fall into any category of agency action that courts have traditionally viewed as presumptively unreviewable. *See Chaney*, 470 U.S. at 830-833. Nor is review barred by 8 U.S.C. § 1252(g), which applies only to three discrete actions in individual removal proceedings. *See AADC*, 525 U.S. at 482. None of those actions is at issue here.

2. The district court properly entered a preliminary injunction partially restoring the status quo. Plaintiffs are likely to prevail on their claim that defendants' abrupt termination of DACA was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). For purposes of transparency and public accountability, the APA requires agencies to give a reasoned (and genuine) explanation for their actions. This requirement is not satisfied by the explanation defendants gave here: a one-sentence assertion that DACA is so clearly unlawful that it must be terminated. That assertion is a marked and unexplained departure from a position the United States repeatedly and successfully defended in the past, and on which hundreds of thousands of young people and their employers have relied. It is also premised on a flawed legal conclusion, which itself is a basis for holding the action invalid. The INA gives the Secretary of DHS broad authority to set immigration enforcement policies and priorities; presidential administrations of both parties have correctly viewed that

authority as including the power to establish programs like DACA, which guide the exercise of deferred action and similar forms of enforcement discretion.

Equitable considerations weigh heavily in favor of a preliminary injunction. Absent an injunction, plaintiffs and hundreds of thousands of others would have suffered irreparable injury as DACA recipients lost their protected status, their work authorizations, and their ability to contribute lawfully to our economy. Defendants do not identify any concrete harm inflicted on them by the injunction. Indeed, defendants do not even address the district court's balancing of the equities. In light of the nationwide harm inflicted by defendants' action and the need for a uniform immigration policy, it was also appropriate for the district court to grant nationwide relief.

3. The district court correctly refused to dismiss plaintiffs' due process claim regarding changes defendants made to their policy governing the use of DACA recipients' personal information. That policy change departs from a mutual understanding about the federal government's commitment to protecting this sensitive information. Under the circumstances, it amounts to a broken promise that "'shock[s] the conscience' and 'offend[s] the community's sense of fair play and decency.'" *Marsh v. Cty. of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012).

4. The district court did err, however, in dismissing plaintiffs' claim that the decision to rescind DACA should have been made through a notice-and-comment

rulemaking process. *See* 5 U.S.C. § 553. Unlike the 2012 memorandum establishing DACA, which provided guidance on how officials should exercise existing discretion while preserving their flexibility to make individualized determinations, the 2017 memorandum adopted a categorical legal determination that the DACA program was unlawful. The agency has made clear that it intends to be bound by that new legal position, and a substantive rule of that sort may only be adopted by following notice-and-comment procedures. *See Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1014 (9th Cir. 1987).

STANDARD OF REVIEW

This Court applies the abuse of discretion standard to a district court's grant of a preliminary injunction, reviewing findings of fact for clear error and legal conclusions de novo. *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017). It reviews a district court's rulings on a motion to dismiss de novo. *SEC v. Colello*, 139 F.3d 674, 675 (9th Cir. 1998).

ARGUMENT

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

A. The Decision is Not "Committed to Agency Discretion By Law"

The district court correctly held that review is not barred by 5 U.S.C. § 701(a)(2). Consistent with "'the strong presumption that Congress intends judicial review of administrative action,'" *Traynor v. Turnage*, 485 U.S. 535, 542 (1988), the APA "embod[ies] a 'basic presumption of judicial review,'" *Lincoln v.*

Vigil, 508 U.S. 182, 190 (1993); *see* 5 U.S.C. § 702.[4] Section 701(a)(2) recognizes a "very narrow exception" to that presumption, for "'agency action [that] is committed to agency discretion by law.'" *Citizens to Preserve Overton Park. Inc. v. Volpe*, 401 U.S. 402, 410 (1971). It is only "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply,'" *id.*, and where "a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Chaney*, 470 U.S. at 830; *see Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 719 (9th Cir. 2011) (courts may "look to 'regulations, established agency policies, or judicial decisions' for a meaningful standard to review").

In a typical case, then, the application of Section 701(a)(2) turns on whether the agency has overcome the "strong presumption" of reviewability, such as by establishing an absence of judicially manageable standards that leaves the courts with no "meaningful role to play in reviewing [the] agency action." *Robbins v. Reagan*, 780 F.2d 37, 44, 46 (D.C. Cir. 1985) (per curiam). But there is a "shift in the presumption," *id.* at 44, if the action falls within one of the select "categories of administrative decisions that courts traditionally have regarded as committed to agency discretion," and as to which courts "have long been hesitant to intrude,"

[4] The "strong presumption" of reviewability applies in the immigration context, as elsewhere. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

Vigil, 508 U.S. at 191, 192 (internal quotation marks omitted). Traditionally unreviewable actions, such as an agency's decision not to take enforcement action, are "presumptively unreviewable." *Chaney*, 470 U.S. at 832. That special treatment is premised on the understanding that Congress "did not intend to alter" the "'common law' of judicial review of agency action" that existed before the APA. *Id.*; *see ICC v. Bhd. of Locomotive Eng'rs.*, 482 U.S. 270, 282 (1987) (*BLE*). Such actions may still be reviewed in appropriate circumstances, however, including if an agency bases a non-enforcement decision on the erroneous belief that it lacks jurisdiction. *Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990); *see also Chaney*, 470 U.S. at 833 n.4.

1. The decision to terminate DACA is plainly reviewable under the typical approach. Indeed, defendants appear to have retreated from their prior argument that "there is . . . no 'law to apply' here." Defts.' Pet. for Permission to Appeal (Pet.) 13; *see* AOB 15-25; *infra* n.5. And sensibly so. As the district court held, "there *is* law to apply" in this case because "the rationale for ending DACA was its supposed illegality." ER 21.

The "question of whether there exists law to apply focuses on the particular allegations" in a complaint, *Robbins*, 780 F.2d at 47, and must be answered "on a case-by-case basis," *Mada-Luna*, 813 F.2d at 1015. Review is barred by Section 701(a)(2) "only when the agency action of which plaintiff complains fails to raise a

legal issue which can be reviewed by the court with reference to statutory standards and legislative intent." *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1449 (9th Cir. 1985). Here, defendants chose to frame their decision to terminate DACA as one that was compelled by law. ER 130, 176. They insist that they *lacked* discretion to maintain DACA, because the program was "unlawful" and beyond DHS's authority under the INA. *E.g.*, AOB 38. There is no absence of judicially manageable standards by which to assess plaintiffs' APA challenge to that decision. To the contrary, questions related to defendants' conclusion that DACA clearly exceeded their authority are well suited to review by the courts. ER 21; *cf. Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 791-792 (9th Cir. 1986).

2. Defendants thus rely entirely on the argument that the decision to end DACA is a type of agency action "that 'traditionally' [has] been regarded as unsuitable for judicial review." AOB 15-16. Courts generally conduct a retrospective analysis to see if a category of agency action is traditionally unreviewable. In *Chaney*, for example, the Supreme Court reviewed the "long history" of administrative discretion regarding non-enforcement decisions, citing cases going back to the nineteenth century. *Sierra Club v. Whitman*, 268 F.3d 898, 902 (9th Cir. 2001); *see Chaney*, 470 U.S. at 831. In holding that an agency's refusal to reconsider a decision on grounds of material error was unreviewable in

BLE, the Court pointed to "a similar tradition of nonreviewability," 482 U.S. at 282, including decades of case law, *see id.* at 280; *cf. Vigil*, 508 U.S. at 192-193.

Here, defendants have not identified any settled practice of treating as unreviewable an agency's decision to terminate a broad program setting guidelines for the exercise of a discretionary authority—particularly when the termination is based solely on an assertion that the program is unlawful. To the contrary, the courts that have examined the precise question raised here have held that this type of decision is reviewable. *See* ER 18-21; *Batalla Vidal v. Duke*, ___ F. Supp. 3d ___, 2017 WL 5201116, at *10 (E.D.N.Y. Nov. 9, 2017) (*Batalla Vidal I*) (courts may review the decision to rescind DACA "in light of, among other sources, the text of the INA and other statutes, the history of the use of deferred action by immigration authorities, and the OLC Opinion"); *Casa de Md. v. DHS*, ___ F. Supp. 3d ____, 2018 WL 1156769, at *7-*8 (D. Md. Mar. 5, 2018) (similar); *see also Texas*, 809 F.3d at 167-168 (decision to adopt DAPA was reviewable); *Noel v. Chapman*, 508 F.2d 1023, 1029 (2d Cir. 1975) (rescission of policy allowing officials to suspend voluntary departure dates was reviewable).

Defendants fare no better in arguing (at 16-17) that their termination of DACA fits within the category of decisions "not to undertake certain enforcement

actions," which were recognized as presumptively unreviewable in *Chaney*. 470 U.S. at 831. None of the considerations that *Chaney* relied on applies here.[5]

First, a decision to strip hundreds of thousands of people of protection from removal, of work authorization, and of other benefits, is not at all like "the decision of a prosecutor in the Executive Branch not to indict" in a particular case. *Chaney*, 470 U.S. at 832. A "major policy decision," such as defendants' termination of an established framework regarding deferred action decisions for a defined category of individuals, is "quite different from day-to-day agency nonenforcement decisions." *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988); *see Robbins*, 780 F.2d at 47 (no similarity "between a prosecutor's decision not to indict and an agency's decision to rescind a commitment").[6]

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[5] For that reason, *Chaney*'s discussion of factors that can rebut the presumption that non-enforcement actions are unreviewable, *see* 470 U.S. at 831-835, is not directly relevant here. *See* AOB 23-24.

[6] Defendants invoke (at 18-19) a footnote in *Morales de Soto v. Lynch*, 824 F.3d 822, 827 n.4 (9th Cir. 2016) for the argument that an agency's rescission of a non-enforcement policy is unreviewable in the same way as its "adopt[ion of] a non-enforcement policy." AOB 18. But the Court's analysis turned on the conclusion that "there [was] 'no law to apply'" in that case because the petitioner merely sought to force the agency to re-weigh its "discretionary decision to reinstate a prior removal order" in light of new memoranda regarding prosecutorial discretion. *Morales*, 824 F.3d at 827 & n.4; *but see id.* at 827-828 (such a decision might be reviewable under different circumstances). *Morales* does not establish that decisions to rescind "a non-enforcement policy" are categorically or presumptively unreviewable under *Chaney*. *Cf. Mada-Luna*, 813 F.2d at 1011 & n.4 (ultimate denial of deferred action status to an *individual* not reviewable).

Second, defendants' suggestion (at 16-17) that this decision involves no exercise of the agency's "coercive power," *Chaney*, 470 U.S. at 832 (emphasis omitted), is not plausible. Defendants have left no ambiguity as to the coercive consequences of their decision. They have told Congress that undocumented immigrants "should be uncomfortable" and "need to be worried" (ER 116), and have announced that DACA recipients should "use the time remaining on their work authorizations to prepare for and arrange their departure from the United States" (ER 83). Defendants' decision exposes nearly three-quarters of a million people to the possibility of proceedings intended to remove them from this country. Regardless of whether that decision "technically implicate[s] liberty and property interests," it will undoubtedly "exert much more direct influence on the" affected population than an agency's one-time decision not to institute a particular enforcement action. *Robbins*, 780 F.2d at 47.

Moreover, *Chaney* relied on this consideration because the absence of an exercise of coercive power generally leaves no "focus for judicial review" of decisions not to enforce. *Chaney*, 470 U.S. at 832. While courts "often are called upon to" consider the concrete facts and circumstances involved in enforcing a statute against a particular individual, *id.*, judicial review of a decision *not* to enforce is more likely to involve "a focusless evaluation of agency policy and priorities—a role for which courts are not suited," *Robbins*, 780 F.2d at 47. That

concern is absent when an agency has established a concrete deferred-action program for a specific population containing detailed criteria—and then terminated that program based on the asserted conclusion that it exceeds the agency's statutory and constitutional authority. Such a decision is eminently suitable for focused judicial review. *See* ER 21.

Third, as framed by defendants, this decision did not "involv[e] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," such as how best to direct agency resources and what activities suit the agency's policy goals. *Chaney*, 470 U.S. at 831. Defendants instead asserted that their decision to terminate DACA was legally compelled. ER 130, 176.[7] As a more general matter, broad policies regarding the exercise of prosecutorial discretion (or deferred action) are "abstracted from the particular combination of facts the agency would encounter in individual enforcement proceedings," and are less likely to involve "the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision." *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676-677 (D.C. Cir. 1994).

[7] This case is thus quite different from *Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 935 (9th Cir. 1987), which involved a challenge to an agency decision not to enforce based on "[p]olitical and geographical considerations" about what enforcement strategy would be most effective. *See* AOB 21.

Defendants argue that the stated basis for their decision is irrelevant, because the fact "that an 'agency gives a "reviewable" reason for otherwise unreviewable action' does not mean that 'the action becomes reviewable.'" AOB 23 (quoting *BLE*, 482 U.S. at 283). That argument misunderstands the principle on which defendants rely. In *BLE*, the Supreme Court noted that an action that has *already* been found to fall within a "tradition of nonreviewability" does not become reviewable merely because the stated reason for the action would be reviewable in a different context. 482 U.S. at 282; *see id.* at 283. For example, "the refusal to prosecute cannot be the subject of judicial review" even if the stated reason for a particular decision is "that the law will not sustain a conviction." *Id.* at 283. But when dealing with a type of decision for which no tradition of unreviewability has been established—such as the one at issue here—the fact that the agency made the decision in a way that is subject to judicially manageable standards of review is of central relevance in determining whether Section 701(a)(2) applies. *Supra* p. 18.

Indeed, the analysis in *BLE* actually underscores why judicial review of defendants' termination of DACA is appropriate. In addition to evidence of tradition, the Supreme Court relied on practical considerations in holding that an agency's refusal to re-open a prior proceeding based on allegations of new evidence or changed circumstances *is* reviewable, whereas a refusal to re-open based on a renewed argument that the underlying decision was erroneous is not.

See BLE, 482 U.S. at 278-279. Courts are adept at reviewing whether new evidence or circumstances provide a basis for reconsideration, *see id.* at 278, and "the petitioner will have been deprived of all opportunity for judicial consideration" if such review is unavailable, *id.* at 279; *cf.* Fed. R. Civ. P. 60(b). In contrast, review of a denial of reconsideration based on allegations of material error "is simply not workable" in the typical case, because "the vast majority of" such denials are "made *without statement of reasons*," *BLE*, 482 U.S. at 283; and treating such a denial as unreviewable does not disadvantage the petitioner in the same way, because the allegations could have been brought to the court through a timely appeal from the original order, *id.* at 279.

Those functional considerations weigh in favor of review in this case. The kind of broad policy decision at issue here will often be accompanied by a reviewable statement of the agency's reasons. *Cf. Crowley Caribbean Transp.*, 37 F.3d at 677 ("[A]n agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy[.]"). And the plaintiffs here had no previous opportunity to raise their present claims, and would have no other opportunity to seek judicial review if Section 701(a)(2) applied.

Finally, defendants profess concern that if a chief prosecutor publicly announces a policy of not enforcing criminal laws against certain offenders, and

her successor rescinds that policy on the ground that it is legally invalid, the district court's reasoning could allow drug offenders to seek judicial review of the rescission. AOB 24-25. But the district court was not addressing a policy regarding criminal prosecutions, which would need to be analyzed in light of the separate history and tradition regarding the Executive Branch's prerogatives in that area. *See, e.g.*, *Chaney*, 470 U.S. at 832. As to a non-enforcement policy adopted by an agency in a context similar to this one, it is not clear why requiring some reasoned explanation of the decision to terminate it would impose any "untenable intrusion." AOB 24. If that explanation demonstrated that the termination was based on truly discretionary considerations, the decision might very well be unreviewable. If the decision were based on an asserted conclusion that the original policy exceeded the agency's statutory or constitutional authority, there would be no obvious reason why a court could not effectively review and either validate or dispel that asserted legal concern. Such a decision would be analogous to an agency's refusal to institute enforcement "proceedings based solely on the belief that it lacks jurisdiction," *Chaney*, 470 U.S. at 833 n.4, which this Court has recognized to be reviewable, *see Mont. Air Chapter No. 29*, 898 F.2d at 756.

B. Section 1252(g) Does Not Deprive this Court of Jurisdiction to Review Defendants' Termination of DACA

Defendants also contend that plaintiffs' claims are barred by 8 U.S.C. § 1252(g), which directs that "no court shall have jurisdiction to hear any cause or

claim by or on behalf of any alien arising from the decision or action by the [Secretary] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." A "'jurisdictional bar is not to be expanded beyond its precise language,'" and "the narrower construction of" such a "provision is favored over the broader one." *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004). Here, the district court correctly held that Section 1252(g) does not deprive the federal courts of jurisdiction to review plaintiffs' challenge to the termination of DACA. ER 21-22; *see Batalla Vidal I*, 2017 WL 5201116, at *12-*13 (same); *Casa de Md.*, 2018 WL 1156769, at *7-*8 (same); *see also Texas*, 809 F.3d at 164 (similar).

Section 1252(g) applies only to a "cause or claim by or on behalf of an[] alien." It does not apply to claims brought by other persons or entities on their *own* behalf, such as the States' claims here. That is one reason why the Fifth Circuit held that Section 1252(g) did not apply to the state suit challenging the DAPA policy: "the states [were] not bringing a 'cause or claim by or on behalf of any alien'—they assert[ed] their own right to the APA's procedural protections." *Texas*, 809 F.3d at 164; *see also Batalla Vidal I*, 2017 WL 5201116, at *13

(similar). Despite embracing the *Texas* decision in other respects, defendants do not even address this aspect of the decision.[8]

In any event, Section 1252(g) does not apply to the type of claim at issue here. Consistent with the statutory text and the strong presumption favoring review, courts "have narrowly construed § 1252(g)." *Wong v. United States*, 373 F.3d 952, 964 (9th Cir. 2004). It does not "cover[] the universe of deportation claims." *AADC*, 525 U.S. at 482. Instead, it "applies only to [the] three discrete actions" enumerated by Congress: the "'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.*; *see Wong*, 373 F.3d at 963-965. Defendants' decision to terminate the DACA program is none of these. *See* ER 22.

Defendants argue that the decision to rescind DACA is "an initial 'action' in the agency's 'commence[ment of] proceedings' against aliens." AOB 26. That argument is foreclosed by *AADC*, which made clear that the narrow phrasing of Section 1252(g) is not "a shorthand way of referring to all claims arising from deportation proceedings." 525 U.S. at 482. The provision does not apply to the "many other decisions or actions that may be part of the deportation process,"

[8] This Court "'may affirm the district court on any ground supported by the record, even if the ground is not relied on by the district court.'" *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 615 (9th Cir. 2010).

including those preceding the commencement of removal proceedings, such as "the decisions to open an investigation" or "to surveil the suspected violator." *Id.* This Court, too, has recognized that "§ 1252(g) does not bar review of the actions that occurred *prior* to any decision to 'commence proceedings.'" *Wong*, 373 F.3d at 965.

Defendants also highlight (at 25-26) *AADC*'s observation that Section 1252(g) "seems clearly designed to" address deferred action decisions, 525 U.S. at 485, but they ignore the context of that statement. The Supreme Court discussed deferred action in explaining why Congress made special provisions for the three "discrete acts" listed in Section 1252(g), "which represent the initiation or prosecution of various stages in the deportation process." *Id.* at 483. At each of those stages, the "Executive has discretion to abandon the endeavor" by engaging in the practice "known as 'deferred action,'" and individuals had sometimes sought judicial review of specific "'no deferred action'" decisions made *during* their removal proceedings. *Id.* at 483-484, 485. From that historical experience, the Court inferred that Section 1252(g) was intended to "give some measure of protection" to such decisions. *Id.* at 485. Nothing about that discussion suggests that Section 1252(g) bars plaintiffs from challenging defendants' decision to terminate a general policy about the exercise of authority with respect to deferred

action—a decision occurring *before* the commencement of removal proceedings in any particular case.[9]

Nor is defendants' interpretation supported by other provisions in Section 1252. AOB 26-27. Defendants note that Section 1252(b)(9), which the Supreme Court has described as an "unmistakable 'zipper' clause," *AADC*, 525 U.S. at 483, "channels into the review of final removal orders all questions of law or fact arising from any action taken to remove an alien," AOB 26. Far from evidencing an intent to foreclose judicial review under the circumstances here, the breadth of Section 1252(b)(9) illustrates that Congress was "familiar with the normal manner of imposing" a "general jurisdictional limitation," *AADC*, 525 U.S. at 482, but chose not to do so with § 1252(g), *see id.*[10]

What is more, defendants do not explain how the claims presented in this case could ever be effectively adjudicated if, as they contend, such claims may only be raised in the context of "review of a final order of removal." AOB 26. Defendants' understanding of the law would apparently leave the States and other

[9] For that reason, the district court correctly distinguished *Vasquez v. Aviles*, 639 F. App'x 898, 901 (3d Cir. 2016), and *Botezatu v. INS*, 195 F.3d 311, 314 (7th Cir. 1999), both of which "stemmed from already-commenced deportation or removal proceedings." ER 22 (emphasis omitted); *see* AOB 26.

[10] Section 1252(a)(2)(B), also invoked by defendants (at 26-27), applies only to certain specific denials of discretionary relief, not to broad challenges to decisions about general deferred action policies.

plaintiff entities, who are not parties to a "proceeding brought to remove an alien from the United States," 8 U.S.C. § 1252(b)(9), with no forum in which to raise their claims. Even as to individuals, it is not clear that the courts of appeals would be able to resolve the type of broad challenge presented here in the context of reviewing a final order of removal. It is the position of the United States that "deferred action does not . . . provide any defense to removal" and that even "[a]n individual with deferred action remains removable at any time." Opp. to Mot. for Class Certification, *Inland Empire v. Nielsen*, No. 17-cv-2048 (C.D. Cal. Feb. 1, 2018) Dkt. 53 at 9. If an individual raised a challenge to the rescission of DACA in a petition for review of a final order of removal, the United States would presumably argue that such a claim, even if valid, would provide no basis for individual relief.

C. The States Have Established Standing

Defendants do not identify standing as one of the issues presented (AOB 4), and they did not list it as one of the controlling questions of law on which they sought permission to appeal (Pet. 1). In contending that the district court erred in granting a nationwide preliminary injunction, however, they argue that the interests of the States and other entity plaintiffs "do not even satisfy Article III" and "fall outside the INA's zone of interests." AOB 54, 55. To the extent those arguments are properly before the Court, they are incorrect.

As to Article III standing, the district court concluded that the States will suffer injuries that are directly traceable to the decision to terminate DACA—including in their capacities as proprietors of universities and public health programs and as employers of DACA recipients who will lose their work authorization. ER 23-25; *see* ER 94-104. Defendants' only response (at 54-55) is that the States' interests as employers do not satisfy Article III in light of *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). That case held that a plaintiff could not seek to enjoin a district attorney from declining to prosecute fathers for failing to support their children, because the plaintiff had not shown a "direct nexus" between her injury (her lack of child support) and the decision not to prosecute. *Id.* at 618-619. Here, the States and other entity plaintiffs have established that the decision to terminate DACA will directly harm their interests by, among other things, stripping their employees of work authorization. ER 26.[11] Although *Linda R.S.* observed that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," 410 U.S. at 619, that was not a basis for the Court's holding; in any event, that principle does not apply to a suit brought by States that does not involve criminal prosecutions. And defendants yet again fail

[11] Because of those direct injuries, the Court need not consider defendants' arguments about third-party standing. AOB 56 n.8. In any event, this Court recently recognized third-party standing under similar circumstances. *See Washington v. Trump*, 847 F.3d 1151, 1160-1161 (9th Cir. 2017).

to acknowledge that the Fifth Circuit considered the same argument in *Texas*, and concluded that *Linda R.S.* was not a barrier to state standing. *Texas*, 809 F.3d at 154 & n.50; *see also id.* at 154 ("[T]he states are entitled to 'special solicitude' in the standing inquiry.").

The States' APA claims also satisfy the zone-of-interests requirement.[12] That requirement is not "'especially demanding,'" and "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). That is not the case here. *See* ER 27-28. Among other things, the INA contains detailed provisions regarding work authorization. *See, e.g.*, 8 U.S.C. § 1324a(a), (h)(3); *see also* 8 C.F.R. § 274a.12(c)(14). And the interests asserted by the States include those as employers of DACA recipients. *See* ER 93-103. The States have invested time and resources in hiring and training these employees and would be harmed if they lost their work authorization. Defendants' termination of DACA also impairs the

[12] The district court held that the facts alleged by California and Maryland regarding their APA claims satisfied the zone-of-interest requirement, but the facts alleged by Maine and Minnesota did not. ER 27-28. It granted Maine and Minnesota leave to amend their allegations, which they intend to do. *See* D.Ct. Dkt. 267.

States' interests in ensuring that students can enroll and participate in their educational institutions (ER 95, 100, 102-103), interests that this Court has recognized as falling within the INA's zone of interests. *See Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017), *cert. granted* (U.S. Jan. 19, 2018) (No. 17-965) (relying on State's interests in student- and employment-based visa petitions).

II. THE DISTRICT COURT PROPERLY ENTERED A PRELIMINARY INJUNCTION

To obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). An injunction may also issue "where the likelihood of success is such that 'serious questions going to the merits [are] raised and the balance of hardships tips sharply in [plaintiff's] favor.'" *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Crafting a preliminary injunction is "an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). The tailored preliminary injunction entered by the district court here, which partially preserves the status quo as to individuals who had already received deferred action under DACA, was well within the court's discretion.

A. Plaintiffs Are Likely to Establish That the Decision to Rescind DACA Was Arbitrary, Capricious, or Contrary to Law

The APA prohibits agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The district court correctly held that plaintiffs are likely to succeed on their claim that the decision to terminate DACA, as framed in the Acting Secretary's September 5 rescission memorandum, violated that requirement. ER 29-43.

1. The APA required defendants to provide a reasoned explanation for their decision

Section 706(2)(A) requires an agency to "articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That explanation must be "based on consideration of the relevant factors," and may not "fail[] to consider an important aspect of the problem." *Id.* at 42, 43. Where an agency departs from its prior position, it must supply a "reasoned analysis for the change"—including by "display[ing] awareness that it *is* changing position," "show[ing] that there are good reasons for the new policy," and explaining why it chose to disregard any "serious reliance interests" engendered by the prior policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514, 515 (2009).

Defendants assert that "nothing in the INA requires any aspect of the DACA policy," and argue that they should not have to "provide a robust explanation" for

rescinding DACA. AOB 29. Those arguments misunderstand the governing legal framework. Everyone appreciates that "[e]lections have policy consequences." *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 967 (9th Cir. 2015) (en banc). New federal administrations may change policies—but they must do so within the constraints of federal law. *See id.* at 966-970. Even where an action is conceivably "within the responsible agency's authority," it is invalid if "the agency gave the wrong reasons for, or failed to adequately explain, its decision." *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 408 (E.D.N.Y. 2018) (*Batalla Vidal II*) (citing *State Farm*, 463 U.S. at 42-43, 48-56 and *Overton Park*, 401 U.S. at 416, 420). So whether or not defendants chose to give a "robust" explanation for terminating this substantial program, they were required to give one that was sufficiently reasoned to satisfy the APA.

The APA's reasoned-explanation requirement serves important functions in our democratic system. It helps to hold agencies "accountable to the public." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). This "political accountability" is "the very premise of administrative discretion in all its forms." *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000). Requiring federal agencies to explain why they take actions prevents them from "wield[ing] power without owning up to the consequences." *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring). It allows voters to assess whether

they agree with the reasons for government action and to exercise their franchise accordingly. *Cf. New York v. United States*, 505 U.S. 144, 168-169 (1992) (political accountability is diminished when officials who "devised the regulatory program" are "insulated from the electoral ramifications of their decision"); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (*Chenery I*) ("'The administrative process will best be vindicated by clarity in its exercise.'"). Just as the federal government may not escape political accountability by dragooning state or local officials into implementing a federal policy, so too the Executive Branch may not escape responsibility for a policy decision by failing to explain its actions, or by passing them off as compelled by Congress, the Constitution, or the courts.

2. The stated basis for defendants' decision does not satisfy the APA

In this case, the Acting Secretary provided the public and the courts with a single sentence explaining the decision to rescind DACA: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing [DAPA] litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 5, 2012 DACA program should be terminated." ER 130. Under the circumstances, this unelaborated explanation is inadequate to sustain the decision to terminate DACA.

a. The rescission of DACA involved a marked change in the position of the Executive Branch

The one-sentence rationale for ending DACA reflects a purported conclusion that the program was so "clear[ly]" unlawful that it could not be continued. ER 130; *see* AOB 38 (Acting Secretary concluded "that indefinitely continuing the DACA policy would itself have been unlawful").[13] The memorandum does not acknowledge, however, that this conclusion was a 180-degree change in agency position.

Until very recently, the United States consistently (and successfully) took the position that DACA was lawful. Before the program was announced, the Office of Legal Counsel orally advised "that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis." SER 243 n.8. The memorandum creating DACA accordingly directed that "requests for relief pursuant to this memorandum are to be decided on a case by case basis," as "part of th[e] exercise of prosecutorial discretion." ER 142. In August 2015—months after the order granting a preliminary injunction in the DAPA litigation—the United States told this Court that "DACA is a valid exercise of the Secretary's broad authority and discretion to

[13] *See also, e.g.*, Nakamura et al., *Justices Decline to Hear Case on DACA*, Wash. Post, Feb. 27, 2018, at A1 (reporting White House statement that DACA is "clearly unlawful").

set policies for enforcing the immigration laws, which includes according deferred action and work authorization to certain aliens who, in light of real-world resource constraints and weighty humanitarian concerns, warrant deferral rather than removal." Brief for United States at 1, *Brewer*, 855 F.3d 957. It took the same position before the D.C. Circuit in another brief filed after DAPA was preliminarily enjoined. *See* Brief for United States at 46, *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015) (No. 14-5325) (filed Mar. 2, 2015).

Even in the DAPA litigation, the United States reiterated its position that DACA was lawful—including in the Supreme Court after the Fifth Circuit's affirmance of the preliminary injunction. *See, e.g.*, Brief for United States at 45, 50, 59-60, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (filed Mar. 1, 2016). Those briefs demonstrated that DACA and similar programs have "deep historical roots" and that federal law provides DHS with "ample authority" to adopt them. *Id.* at 16; *see id.* at 42-60 (discussing, among other things, 6 U.S.C. § 202(5) and 8 U.S.C. § 1103(a)). They explained why the adoption of a deferred-action policy "is exempt from the APA's notice-and-comment requirements because it is a general statement of policy regarding how DHS will exercise its enforcement discretion under the INA." *Id.* at 65; *see id.* at 65-73. And they addressed why the creation of such a policy is consistent with the Take Care

Clause, because "the Secretary is faithfully executing the weighty and complex task of administering and enforcing the INA." *Id.* at 17; *see id.* at 73-76.

After the Supreme Court affirmed the DAPA preliminary injunction, DHS continued the DACA program—including by soliciting, accepting, and processing hundreds of thousands of new and renewal applications for deferred action from qualifying individuals. That continued operation of the program extended through the last seven months of the Obama Administration and into the first seven months of the Trump Administration. On two occasions since the change of administrations, the Secretary of DHS rescinded other immigration policies, but pointedly kept DACA in place. *See supra* p. 8. In continuing to operate DACA, defendants presumably believed they were "follow[ing] the law," *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010), or at least not clearly violating it.

The September 2017 conclusion by the Acting Secretary and the Attorney General that DACA was so clearly unlawful that it had to be terminated thus represented a sharp departure from the prior positions taken by the United States. Of course, agencies and administrations can change their minds. But when doing so involves agency action, the APA requires that they provide an adequate explanation, advancing the goals of transparency and accountability. *See, e.g.*, *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 322, 328-

329 (D.C. Cir. 2006) (unexplained change in agency's interpretation of statute was arbitrary and capricious).

b. Defendants did not adequately explain their change in position

Here, the only considerations cited to explain the agency's new legal position are the one-page letter from Attorney General Sessions and the rulings in the DAPA litigation. ER 130. Neither of those considerations establishes that DACA is clearly unlawful or adequately explains why the agency reversed course.

The Attorney General's letter asserts that DACA is "an unconstitutional exercise of authority by the Executive Branch" and "has the same legal and constitutional defects that the courts recognized as to DAPA." ER 176. As to the suggestion of statutory invalidity, the letter cites the opinions in the DAPA litigation, but does not explain why the rulings in those opinions control the legality of DACA—or why defendants had abandoned their view that those rulings were incorrect. As to the assertion of constitutional invalidity, the letter offers no explanation at all. It appears to rest on the understanding that the Fifth Circuit and the Southern District of Texas recognized "constitutional defects" in DAPA. *Id.* But that is "flatly incorrect": "Both courts expressly declined to reach the plaintiffs' constitutional claim that DAPA violated the Take Care Clause of the

U.S. Constitution or the separation of powers." *Batalla Vidal II*, 279 F. Supp. 3d at 427 (internal citations omitted).[14]

Because the Attorney General's letter offers no reasoned explanation for the conclusion that DACA is clearly unlawful, this case comes down to whether the Acting Secretary's cursory reference to rulings in the *Texas* litigation satisfies the APA's reasoned-explanation requirement. It does not. Nothing in the Acting Secretary's memorandum or the proffered administrative record responds to the considerations—previously relied on by the United States, *see supra* pp. 39-41—establishing that a program such as DACA is within existing agency authority. Those include:

- As a substantive matter, DACA falls within the Secretary's broad authority under the INA to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and to carry out the "administration and enforcement of" the INA "and all other law relating to the immigration and naturalization of aliens," 8 U.S.C. § 1103(a)(1). *See Brewer*, 855 F.3d at 968 ("[T]he exercise of prosecutorial discretion in deferred action flows from the authority conferred on the Secretary by the INA."). The practice of deferred action is so well established that it has repeatedly been recognized by federal statutes, regulations, and court decisions. *See* ER 30-33; *supra* pp. 4-5.

[14] The Attorney General further muddied the waters the day after he sent the letter, when he (not the Acting Secretary) announced the rescission of DACA, in a statement strongly suggesting that the decision was motivated by policy views regarding the program's supposed effects on public safety and the economy. *See* SER 1354. If that was true, then DHS was required to acknowledge as much, and to provide a record explaining and supporting those views.

- As a historical matter, the federal government has established policies to guide and channel decisions about deferred action (and similar forms of enforcement discretion) since the 1950s, often on a programmatic basis applying to large groups of immigrants. *See* ER 5-6; *Brewer*, 855 F.3d at 968 n.2; *supra* pp. 5-6.

- As a procedural matter, the APA's notice-and-comment requirements do not apply to "general statements of policy." 5 U.S.C. § 553(b)(3)(A). Such statements include guidance that "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Vigil*, 508 U.S. at 197 (internal quotation marks omitted). The 2012 memorandum establishing DACA merely "set[s] forth how" DHS agents should "exercise . . . discretion" on a "case by case basis." ER 141, 142.

These considerations led the district court to conclude that further review of DACA would likely lead to a "hold[ing] that DACA was and remains a lawful exercise of authority by DHS." ER 38; *see also Batalla Vidal II*, 279 F. Supp. 3d at 425-426. The Acting Secretary and the Attorney General did not address any of them.

As the Acting Secretary's memorandum notes, a divided panel of the Fifth Circuit took a different view of these considerations when assessing the likelihood that a challenge to the separate DAPA program would succeed on the merits, and the Supreme Court affirmed the Fifth Circuit's judgment by a four-four vote. But an interlocutory decision by a single court of appeals does not conclusively resolve the legality of a federal program—let alone that of a different program not directly

before the court.[15] Nor does the Supreme Court's non-precedential affirmance of a judgment sustaining a preliminary injunction. *See Neil v. Biggers*, 409 U.S. 188, 192 (1972) (affirmance by an equally divided court "not entitled to precedential weight"). Such an affirmance could have been based on any number of factors, including deference to the lower courts' balancing of equitable factors in an interlocutory posture. *See, e.g.*, *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087.

Moreover, much of the reasoning of the majority opinion in *Texas* would not apply in the same way to the DACA program. For example, the Fifth Circuit noted that the INA contained "an intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status," and concluded that DAPA was substantively unlawful because it was inconsistent with that statutory scheme. *Texas*, 809 F.3d at 179; *see also id.* at 186. There is no

[15] Defendants repeatedly emphasize that the district court injunction at issue in *Texas* applied to "expanded DACA" (*i.e.*, a 2014 decision to broaden eligibility criteria for DACA and expand the period of deferred action from two to three years). AOB 1, 14, 29, 30-33, 36, 38-39. That expanded program was distinct from the original DACA policy, which was "unchallenged" in the *Texas* litigation. Brief for United States at 45, *Texas*, 136 S. Ct. 2271; *see Texas*, 86 F. Supp. 3d at 606. In any event, the Fifth Circuit's opinion contained no analysis specific to the "expanded DACA" program. It merely noted that it was including that program in the term "DAPA." *Texas*, 809 F.3d at 147 n.11.

similar statutory process for the individuals who are eligible for DACA.[16] The Fifth Circuit also suggested that the number of people potentially eligible for DAPA—4.3 million—suggested administrative overreach. *See id.* at 181. Substantially fewer people were eligible for DACA. *See id.* at 174 n.138. Indeed, the population covered by DACA is much smaller than that covered by the non-statutory Family Fairness Program under Presidents Reagan and George H.W. Bush, which "ultimately provided immigration relief to approximately 1.5 million people." ER 5; *see Brewer*, 855 F.3d at 968 n.2. While the Fifth Circuit certainly recognized some similarities between DACA and DAPA, it ultimately "concluded only that 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*, 809 F.3d at 186 n.202.

In other respects, the reasoning of the Fifth Circuit majority was simply incorrect. For example, the majority's analysis of the notice-and-comment issue turned on purported "evidence from DACA's implementation that DAPA's discretionary language was pretextual." *Texas*, 809 F.3d at 173. That "evidence"

[16] Defendants argue that this statutory pathway to legal status for people eligible for DAPA made DAPA more consistent with the INA than DACA. AOB 32. That is not how the Fifth Circuit saw things. Its conclusion that DAPA was "foreclosed" turned on the "careful plan" Congress had adopted for "how parents may derive an immigration classification on the basis of their child's status." *Texas*, 809 F.3d at 186.

does not withstand scrutiny. It includes the fact that "only about 5% of the 723,000 applications accepted for evaluation had been denied." *Id.* at 172. But a low rejection rate is "unsurprising given the self-selecting nature of the program." *Id.* at 210 (King, J., dissenting). Only "those highly likely to receive deferred action will apply," since unsuccessful "applicants would risk revealing their immigration status and other identifying information to authorities, thereby risking removal (and the loss of a sizeable fee)." *Id.*; *see also Batalla Vidal II*, 279 F. Supp. 3d at 425. The court also relied on a declaration from the president of the union representing USCIS employees, *see Texas*, 809 F.3d at 172, even though a competing declaration from the head of the USCIS service centers at issue "created a factual dispute warranting an evidentiary hearing," *id.* at 213 (King, J., dissenting); *cf. Crane v. Johnson*, 783 F.3d 244, 254-255 (5th Cir. 2015) (original DACA policy "clear[ly]" directs agents to "exercise their discretion . . . on a case-by-case basis").

In addition, as the United States previously explained, the Fifth Circuit's substantive analysis "seriously misconstrued immigration law" and ignored decades of settled practice. Brief for United States at 13, *Texas*, 136 S. Ct. 2271; *see id.* at 42-64. For example, the Fifth Circuit held that Congress had "directly addressed the precise question" at issue there and foreclosed a policy like DAPA. *Texas*, 809 F.3d at 179 (internal quotation marks omitted). But it did not "identify

any express statutory provision barring DHS from exercising its discretion in this manner." Brief for United States at 61, *Texas*, 136 S. Ct. 2271. And the Fifth Circuit's reading of the INA was "untenable" in light of the long history of deferred action policies, which were always viewed as legitimate "exercises of the general vesting power that Congress bestowed in Section 1103." *Id.*

Neither the Acting Secretary's memorandum, nor the Attorney General's letter, nor anything else in the proffered administrative record, acknowledges or addresses the many reasons why *Texas* does not control the question of DACA's legality. Defendants belatedly offer pages of arguments in their appellate brief explaining why they *now* think the Fifth Circuit's decision about DAPA doomed the separate DACA program. *See* AOB 2, 29-30, 31-34. But the "*post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981).

Defendants counter that the APA did not require the "Acting Secretary to provide the equivalent of a bench memo setting out the subsidiary legal arguments" underlying her stated conclusion that DACA was clearly unlawful. AOB 31. Perhaps not; but accepting that proposition does not excuse the agency from its obligation to provide *some* reasoned rationale for its abrupt change in position, including a reasonably discernible explanation why it was abandoning the

position that DACA was within its statutory and constitutional authority. Such an explanation is necessary for the agency to be held accountable—by both the public and the courts—for its actions. The Acting Secretary's memorandum did not provide one, and "[a]rbitrary and capricious review strictly prohibits [courts] from upholding agency action based only on [their] best guess as to what reasoning truly motivated it." *Williams Gas*, 475 F.3d at 328-329.

c. The decision is also based on a flawed legal premise

As two district courts have now held, defendants' assertion that DACA is clearly unlawful is not just unexplained, it is legally flawed. The program fits comfortably within DHS's authority under the INA and was promulgated in a manner that satisfied procedural requirements. *See* ER 29-38; *Batalla Vidal II*, 279 F. Supp. 3d at 420-427; *cf. Brewer*, 855 F.3d at 976 ("[T]he INA is replete with provisions that confer prosecutorial discretion on the Executive to establish its own enforcement priorities.").

Defendants contend (at 39) that the district court erred in concluding that an "agency action [that] is based on a flawed legal premise . . . may be set aside" under Section 706(2)(A). ER 29; *cf. Casa de Md.*, 2018 WL 1156769, at *9. But it is settled law that an agency action based "'not on the agency's own judgment but on an erroneous view of the law'" must be set aside, even if the agency might be able to take the same action "in the exercise of its discretion." *Int'l Bhd. of*

Elec. Workers, Local Union No. 474 v. NLRB, 814 F.2d 697, 708 (D.C. Cir. 1987); *see also Chenery I*, 318 U.S. at 94 ("[A]n order may not stand if the agency has misconceived the law."); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1101-1102 (9th Cir. 2007) (agency determination based on "legally erroneous" conclusion is "'arbitrary, capricious, or otherwise not in accordance with law' for the purposes of our review").[17]

So defendants are not correct that the decision to terminate DACA must survive APA review regardless of the fact that it was expressly and exclusively based on a stated legal rationale that the district court concluded (and this Court should conclude) was incorrect. And even if this Court viewed DHS's authority to continue DACA as a more debatable question than the district court did, that would not excuse defendants' failure to explain in a reasoned manner why they abandoned the Executive Branch's longstanding position that DACA was lawful, in favor of a new and unelaborated assertion that the program is clearly unlawful.

d. Defendants failed to address the substantial reliance interests engendered by DACA

The inadequacy of defendants' explanation for terminating DACA becomes particularly apparent when considered in light of the reliance interests at stake. *See*

[17] Defendants' only argument on this front is to distinguish *Massachusetts v. EPA*, 549 U.S. 497 (2007), on its facts. *See* AOB 39-40. They do not address *Chenery I* or *Safe Air for Everyone*, which the district court also cited for this venerable principle.

ER 40. If an agency changes existing policies, it "must be cognizant that longstanding policies may have engendered serious reliance interests," and must demonstrate that it has taken those interests "into account." *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125-2126 (2016) (quoting *Fox Television*, 556 U.S. at 515) (internal quotation marks omitted). Here, there is no discussion of reliance interests in the rescission memorandum or the administrative record.

Defendants reason that "reliance interests [were] not 'an important aspect' of the decision whether to retain DACA." AOB 34. But hundreds of thousands of young people have organized their lives around this program. They have paid "a hefty fee" ($465) and provided the federal government with "substantial personal information" in order to apply for deferred action status. ER 20. Those who received deferred action have made important life decisions in reliance on their new status and the opportunity to renew it, such as by enrolling in undergraduate and graduate programs, taking out student loans, beginning careers, buying homes, and starting families. *See generally* D.Ct. Dkt. 111 at 7-8, 14-15, 21-22. The States and other employers of DACA recipients have also relied on the program and its renewable grants of protected status, including by investing time and resources into training employees who are authorized to work here only because they have deferred action. *See, e.g.*, *id.* at 22; ER 96-97, 100. These decisions were undoubtedly informed by the repeated representations—from the highest

levels of the Executive Branch in successive administrations—that DACA is a valid and lawful program. *See, e.g.*, SER 1334 (March 2017 statement of Secretary Kelly describing DACA as a "commitment . . . by the government towards the DACA person"). Defendants characterize these reliance interests as "insubstantial" when compared to the interests of car dealers in not paying overtime to service advisors. AOB 35 (discussing *Encino Motorcars*). It was not unreasonable for the district court to disagree with that characterization. *See* ER 40-42.

Defendants also argue that "DACA confers no legitimate reliance interests" because it was "available for only two-year periods, which could 'be terminated at any time' at the agency's discretion." AOB 34 (quoting ER 151). Agencies frequently have latitude to alter policies on which individuals and entities have relied. *See, e.g.*, *Encino Motorcars*, 136 S. Ct. at 2125. Legitimate reliance interests can nonetheless build up around such a policy, and those interests underscore the need for the agency to give a reasoned explanation for the change. *See id.* at 2126; *Fox Television*, 556 U.S. at 515-516. Finally, defendants assert that the reliance interests of DACA recipients did not "necessitate express consideration" in light of the "change in circumstances that arose as a result of the Supreme Court's affirmance of the Fifth Circuit's decision." AOB 35. But their own data show that they processed and approved more than 400,000 new and

renewal applications for deferred action under DACA *after* that affirmance and before their abrupt decision to terminate the program. *See* https://go.usa.gov/xnSGf; https://go.usa.gov/xnSGG (USCIS statistics).

3. Defendants' alternative "litigation risk" rationale cannot sustain their decision

In this litigation, defendants have downplayed the rescission memorandum's assertion that DACA is unlawful (AOB 38-40), focusing instead on a "litigation-risk rationale" for terminating DACA (AOB 29-38). Both courts that have closely examined the memorandum and the proffered administrative record have correctly found this to be a post hoc rationalization. ER 38; *Batalla Vidal II*, 279 F. Supp. 3d at 429-430. Defendants disagree, describing the memorandum as rescinding DACA "based on [a] clearly expressed concern that [DACA] would be enmeshed in litigation and likely enjoined nationwide." AOB 13-14. That description is not accompanied by a citation, however, and understandably so—no clear expression of this concern can be found anywhere in the seven-page memorandum. *See* ER 126-132. Defendants also argue that the memorandum "focused from beginning to end principally on litigation concerns, not the legality of DACA *per se*." AOB 36. But that argument rests almost entirely on a series of quotations from the neutral "Background" section of the memorandum, which do not address the Acting Secretary's rationale. *See* ER 127-129. A factual description of past events in "the litigation surrounding the DAPA" program (AOB

36), for example, does not indicate even to an attentive reader that the Acting Secretary terminated *DACA* based on a "litigation-risk" rationale.

And even if the decision could fairly be characterized as one based on an assessment of litigation risk, it could not be sustained on that basis. *See* ER 40-43; *Batalla Vidal II*, 279 F. Supp. 3d at 430-433. As this Court recently recognized, a bare assertion of litigation risk will rarely be sufficient to justify changing an agency's position. In *Organized Village of Kake*, an agency sought to explain its decision to grant an exemption to the "Roadless Rule" (which limits road construction and timber harvesting in national forests) by referencing "litigation over the last two years." 795 F.3d at 967 (internal quotation marks omitted). That rationale was arbitrary and capricious because the agency "could not have rationally expected that the Tongass Exemption would . . . have brought certainty" to the matter; indeed, the exemption "predictably led to [another] lawsuit." *Id.* at 970. The same is true here.

Moreover, while the Acting Secretary's memorandum notes that Texas had threatened to amend its lawsuit to add a challenge to DACA (ER 129), there is no indication in the memorandum or the proffered administrative record that the agency conducted a reasoned assessment of that threat. Such an assessment would have had to consider the availability of possible defenses, both procedural and on the merits, against the threatened suit. For example, it would have considered

whether it really was "likely" that the courts would issue and affirm a nationwide preliminary injunction against DACA (AOB 14)—in the context of a suit brought by States that had waited more than five years to challenge the program, and after hundreds of thousands of young people had received deferred action and entered the workforce as a result of the program. *Cf.* ER 40 (discussing possible laches defense); *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087 (availability of provisional relief often depends "as much on the equities of a given case as the substance of the legal issues it presents").

Any rational explanation for terminating DACA based on threatened litigation also would have balanced that threat against the costs to be inflicted on individual DACA recipients, the federal government, the States, and the overall economy by abandoning a policy that has allowed nearly three-quarters of a million people to obtain work authorization and other benefits. *See* ER 40. But the 14-document administrative record produced by defendants is bereft of any indication that the agency balanced the perceived litigation threat against any "competing policy considerations." *Id.*

Defendants' only response is that it was "suitably respectful of the interests of existing DACA recipients" and "by far, the more humane choice" to wind down DACA rather than risk the possibility of an injunction being entered against the program. AOB 35, 36. Perhaps humanity is in the eye of the beholder, but the

requirements of the APA are not. It may well be that defendants "can end the DACA program." *Batalla Vidal II*, 279 F. Supp. 3d at 408. They must, however, follow the requisite procedures and offer a candid and rational explanation for doing so. *See supra* pp. 36-38. The APA does not allow them to avoid public accountability and meaningful review with a one-sentence explanation that attempts to shift responsibility for this momentous decision from current policymakers to the courts.[18]

B. The Equities and the Public Interest Favor the Entry of a Preliminary Injunction

As the district court held, the remaining factors of the *Winter* test weigh heavily in favor of provisional relief. ER 43-46. The district court accordingly entered a preliminary injunction partially preserving the status quo, only for those who had already applied for and received deferred action under DACA. ER 46. The injunction preserves DHS's pre-existing ability to exercise discretion on an individualized basis for each person who applies for renewal, and to proceed to remove anyone, at any time, on any lawful ground. *Id.* Tellingly, defendants do not advance any criticism of the district court's balancing of the equitable factors governing issuance of a preliminary injunction. By choosing not to challenge the district court's conclusion that the balance of the equities favors a preliminary

[18] For all these reasons, the district court also correctly denied defendants' motion to dismiss with respect to plaintiffs' substantive APA claim. ER 51.

injunction under *Winter* (and under the alternative, "sliding-scale" test (ER 46 n.19)), defendants have forfeited any such argument. *See, e.g.*, *Anderson v. Suburban Teamsters of N. Ill. Pension Fund Bd. of Trs.*, 588 F.3d 641, 649 n.4 (9th Cir. 2009).

1. As the district court found, plaintiffs "have clearly demonstrated that they are likely to suffer serious irreparable harm absent an injunction." ER 43. The States employ and educate substantial numbers of DACA recipients (*see, e.g.*, ER 95-96) and will "face irreparable harm as they begin to lose valuable students and employees in whom they have invested" (ER 43). That "loss of DACA recipients from the workforce will have a detrimental impact on their organization interests, economic output, public health, and safety." *Id.* The other entity plaintiffs face similar prospects. *Id.* And the harm facing the individual plaintiffs (and other DACA recipients across the country) is even more severe. Without the injunction, thousands of DACA recipients would have lost their work authorization and deferred action status beginning in March 2018 (ER 44)—and thousands more the next month, and each succeeding month, until nearly three-quarters of a million young Americans would be shunted back into the shadows of our society. That would profoundly damage the individual plaintiffs, the States and the other entity plaintiffs, our communities, our educational institutions, our businesses, and the entire Nation. *See* ER 43-44.

In contrast to the abundant evidence of harm that the plaintiffs and the public would suffer in the absence of provisional relief, the district court found no credible indication that a preliminary injunction would harm defendants. ER 45-46. "The only hardship raised by defendants" before the district court was "interference with the agency's judgment on how best to allocate its resources" and on "phasing out DACA." ER 45. But it is difficult to credit this as an allegation of serious harm when defendants' decision was putatively based not on any judgment about a preferred use of resources, but on a legal conclusion that the current policy was unlawful. Moreover, defendants themselves decided to leave DACA in place for the first seven months of the current administration, with the President proclaiming that the policy of his Administration would be "to allow the dreamers to stay." *Supra* p. 8; *see* ER 45. Even in rescinding DACA, defendants chose to allow some recipients to continue to receive deferred action and associated benefits until 2020. *See* ER 130.

Indeed, the district court's uncontroverted equitable findings established that "preliminary relief would also be appropriate" under the alternative sliding-scale approach to preliminary injunctions. ER 46 n.19. Where, as here, the "balance of hardships tips sharply in Plaintiffs' favor, and the public interest favors a preliminary injunction," a preliminary injunction is appropriate under the sliding-scale approach if the "Plaintiffs have at least presented serious questions going to

the merits of their" claims. *M.R. v. Dreyfus*, 697 F.3d 706, 733, 739 (9th Cir. 2012). For example, "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *All. for the Wild Rockies*, 632 F.3d at 1131. Again, defendants do not challenge the district court's application of this standard.

2. Defendants do challenge the geographic scope of the district court's injunction. *See* AOB 48-54. Despite their professed belief that it was "likely" and "inevitable" that the DACA program would have been "enjoined nationwide" if Texas had challenged it (AOB 14; D.Ct. Dkt. 204 at 1), they argue that the district court here "erred in enjoining the rescission of DACA on a 'nationwide basis'" (AOB 48). In support of that argument, defendants primarily discuss Supreme Court precedent regarding the requirements for a plaintiff to establish Article III standing. AOB 49-50. But that discussion is misplaced; defendants do not dispute that there are plaintiffs in this case who have Article III standing, for whom "any concrete application" of the decision to rescind DACA "threatens imminent harm." AOB 50 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009)); *see* ER 23.

Moreover, defendants neglect to mention the Supreme Court's admonition that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v.*

Yamasaki, 442 U.S. 682, 702 (1979). They also ignore that Court's recent decision to leave two nationwide injunctions regarding President Trump's second travel ban "in place with respect to respondents and those similarly situated" while appellate proceedings played out. *See Int'l Refugee Assistance Project*, 137 S. Ct. at 2087. And they do not address the reasoning of the Fifth Circuit's *Texas* decision, which acknowledged the "power of a [district] court, in appropriate circumstances, to issue a nationwide injunction." *Texas*, 809 F.3d at 188. As *Texas* recognized, *see id.* at 187-188, and as this Court recently affirmed, nationwide injunctive relief is particularly likely to be appropriate in the immigration context, given constitutional and statutory requirements for a uniform immigration policy and the concern that "piecemeal relief would fragment immigration policy." *Hawaii*, 878 F.3d at 701; *cf. Washington v. Trump*, 847 F.3d 1151, 1166-1167 (9th Cir. 2017).

In important respects, this case is a far better candidate for a nationwide injunction than *Texas* was. The only credible evidence of harm before the district court in that case was Texas's claim that it would have to spend several million dollars to provide driver's licenses to immigrants if DAPA took effect. *See* 809 F.3d at 155, 186. Here, DACA recipients in all 50 States will lose their protected status and work authorization if defendants' decision is implemented (SER 1480-1481), and the plaintiffs in this action include States from across the Nation, each of which will be harmed by the termination of DACA. A preliminary injunction

limited to the geographic boundaries of the plaintiff entities would create a patchwork immigration policy, in which DACA recipients in certain States could apply for renewal, while those in other States could not. It is difficult to comprehend how such an order would "increase[]" uniformity, as defendants contend. AOB 53. And defendants do not even attempt to explain how such an injunction would be workable in view of the fact that DACA grantees are "free to move among the states." *Texas*, 809 F.3d at 188; *see Batalla Vidal II*, 279 F. Supp. 3d at 437-438; *cf. Washington*, 847 F.3d at 1167.

Defendants instead invoke decisions from outside the immigration context holding that nationwide injunctions were inappropriate under the facts of particular cases. *See Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664-665 (9th Cir. 2011); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994). Those cases establish that a court may abuse its discretion by granting a nationwide injunction that "would not be in the public interest" in a suit brought by a single hospice company, *Los Angeles Haven Hospice, Inc.*, 638 F.3d at 665, or by prohibiting a branch of the armed forces "from applying its regulations" to "all . . . military personnel" based on a suit seeking the reinstatement of a single petty officer, *Meinhold*, 34 F.3d at 1480. But there "is no general requirement that an injunction affect only the parties in the suit," *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987), as defendants suggest (AOB 50-51). And the provisional

relief granted against defendants here is particularly appropriate in light of the nature of the violation, the need for a uniform immigration policy, and the nationwide harm that the public would suffer in the absence of such relief.[19]

Finally, defendants contend that the grant of provisional relief in this case "foreclos[es]" adjudication of similar issues in other courts. AOB 51. They acknowledge, however, that the Eastern District of New York continued to adjudicate these issues and granted its own provisional relief notwithstanding the issuance of the preliminary injunction in this case. *Id.* Nothing about the relief granted by the district court below prevents the parties to DACA suits in New York, Maryland, and elsewhere from pressing their claims and defenses and seeking prompt appellate review of trial court rulings.

III. PLAINTIFFS STATED A DUE PROCESS CLAIM REGARDING THE USE OF INFORMATION PROVIDED BY DACA RECIPIENTS

Defendants contend that the district court erred by refusing to dismiss plaintiffs' due process claim regarding changes to the policy governing the use of DACA recipients' sensitive information. *See* AOB 45-48. The district court certified this issue for interlocutory appeal (ER 63), but defendants did not include

[19] Defendants also cite *Zepeda v. INS*, 753 F.2d 719, 730 n.1 (9th Cir. 1983). *See* AOB 49. The "import of the rule underlying *Zepeda* is that an injunction cannot issue against an entity that is not a party to the suit." *Bresgal*, 843 F.2d at 1170. That rule does not prohibit the Court from affirming an injunction issued against federal defendants who *are* parties to a suit—as it did in *Bresgal*. *See id.* at 1170-1171; *see also Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004).

it in their petition for permission to appeal before this Court (*see* Pet. 1), as required by the federal rules, *see* Fed. R. App. P. 5(b)(1) ("The petition must include the following: . . . (B) the question itself"). Review under 28 U.S.C. § 1292(b) is at the discretion of the court of appeals, and this Court may decline to consider the issue based on that omission alone. *Cf. McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1263 (11th Cir. 2004); *In re GGM, P.C.*, 165 F.3d 1026, 1032 (5th Cir. 1999). In any event, defendants' arguments lack merit.

Plaintiffs have plausibly alleged that defendants changed their policies regarding the use of sensitive personal information. *See generally Starr v. Baca,* 652 F.3d 1202, 1217 (9th Cir. 2011) (plaintiffs need only "'plausibly suggest an entitlement to relief'" and "raise a reasonable expectation that discovery will" lead to evidence supporting their allegations). Originally, DHS told applicants for deferred action that the information they provided would be "protected from disclosure to ICE and CBP for the purposes of immigration enforcement proceedings" except in two narrow circumstances. ER 114, 149. In 2016, then-Secretary of DHS Jeh Johnson acknowledged that "these representations made by the U.S. government, upon which DACA applicants most assuredly relied, must continue to be honored." ER 108. Defendants changed course when they terminated DACA in September 2017. Outside of the two narrow circumstances already identified as bases for disclosure, they now state only that, "*[g]enerally*,

information provided in DACA requests will not be *proactively* provided to other law enforcement entities[.]" ER 114 (emphasis added).

As the district court held, plaintiffs have adequately alleged that the federal government's prior policy and representations established "a 'mutually explicit understanding' giving rise to a protected interest" in the confidential information. ER 56; *see Gerhart v. Lake Cty.*, 637 F.3d 1013, 1020 (9th Cir. 2011) (citing *Perry v. Sindermann*, 408 U.S. 593, 601 (1972)). Defendants invited individuals to come forward and apply for protected status and other benefits, requiring them to provide sensitive personal information that defendants promised would be affirmatively safeguarded from disclosure. ER 105-109; *cf. Casa de Md.*, 2018 WL 1156769, at *14-*15 ("find[ing] that the Government promised not to transfer or use the information gathered from Dreamers for immigration enforcement"). And plaintiffs "clearly alleged that DHS changed its information-sharing policy such that now, rather than affirmatively protecting DACA recipients' information from disclosure, the government will only refrain from 'proactively' providing their information for purposes of immigration enforcement proceedings." ER 56. In light of that abrupt change, the reliance interests surrounding the prior mutual understanding about confidentiality, and the profoundly harmful consequences that could result from the policy change, the district court correctly held that plaintiffs have plausibly alleged a "broken promise" that "'shock[s] the conscience and

offend[s] the community's sense of fair play and decency.'" ER 57 (quoting *Marsh*, 680 F.3d at 1154); *cf. Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (removal is a "particularly severe 'penalty'").

Defendants respond, on the one hand, that they were free to change the information-sharing policy, pointing to language in the original and modified policies stating that the policies "'may be modified, superseded, or rescinded at any time.'" AOB 46. As the district court explained, however, that language is at least ambiguous. It is readily susceptible to the reading that it "allows the government to change its policy in connection with future applicants," but not in connection with those who disclosed sensitive information while the original policy was in place. ER 56-57. In light of the surrounding circumstances, including defendants' announcement that they have "consistently made clear that information provided by applicants will be collected and considered for the primary purpose of adjudicating their DACA requests and would be safeguarded from other immigration-related purposes" (SER 1330), the general reservation of rights does not defeat plaintiffs' due process claim. *See Perry*, 408 U.S. at 602 (protected interest may be established "from 'the promisor's words and conduct in the light of the surrounding circumstances'").

On the other hand, defendants argue that their policy has not changed. AOB 46-47. They point to another DHS website posted in December 2017—

months after the States' complaint was filed, and the day before defendants' reply in support of their motion to dismiss was due—stating that the "information-sharing policy has not changed in any way since it was first announced[.]" AOB 47. But the language defendants cite does not restore the protections contained in the original policy. To the contrary, it reiterates the troubling terminology found in the new policy. *See* USCIS, Guidance on Rejected DACA Requests, https://go.usa.gov/xnSFj (repeating statement regarding not "proactively provid[ing]" information, rather than statement that information will be "protected from disclosure").

IV. PLAINTIFFS STATED A CLAIM THAT DEFENDANTS VIOLATED THE APA'S NOTICE-AND-COMMENT REQUIREMENT

Plaintiffs also alleged that defendants violated the APA because they rescinded DACA without providing the public with notice and an opportunity to comment on that decision. The district court dismissed that claim, concluding that the Acting Secretary's 2017 memorandum was a "general statement[] of policy," and was therefore exempt from those procedural requirements. ER 51; *see* 5 U.S.C. §§ 553(b)(3)(A), 706(2)(D). It further concluded "that because the original promulgation of the discretionary program did not require notice and comment, a return to the status quo ante also does not require notice and comment." ER 52. Both conclusions are flawed.

A general statement of policy, for which notice-and-comment procedures are not required, "merely provides *guidance* to agency officials in exercising their discretionary powers while preserving their flexibility and their opportunity to make 'individualized determination[s.]'" *Mada-Luna*, 813 F.2d at 1013. In contrast, a directive that "'narrowly limits administrative discretion' or establishes a 'binding norm' . . . effectively replaces agency discretion with a new 'binding rule of substantive law,'" and must go through notice-and-comment rulemaking proceedings. *Id.* at 1014 (emphasis omitted). The "ultimate issue" in deciding whether an agency statement is a policy statement or a substantive rule is "'the agency's intent to be bound.'" *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1325 (9th Cir. 1992) (quoting *Public Citizen, Inc. v. USNRC*, 940 F.2d 679, 681-682 (D.C. Cir. 1991)).

The 2012 memorandum establishing DACA was a policy statement because it furnished agency officials with guidance about how to exercise their discretion in making deferred action decisions, while at the same time preserving their ability to deny requests for relief on a "case by case basis." ER 142. The 2017 memorandum, in contrast, adopts the Attorney General's categorical "legal determination" that DACA was unlawful. ER 129; *see* ER 130, 176; AOB 38. It establishes a new rule of substantive law for the agency: that DHS lacks the legal authority to create (or continue) deferred-action programs like DACA and DAPA.

And it leaves no doubt that the agency intends to be bound by this substantive determination, by asserting that it is "clear that the . . . DACA program should be terminated"; by requiring agency officials to reject "all DACA initial requests" filed after September 5, 2017; and by providing that the agency will not approve "any new Form I-131 applications for advance parole under standards associated with the DACA program." ER 130-131. The agency intends the 2017 memorandum to be "'finally determinative of the issue[] . . . addressed.'" *Mada-Luna*, 813 F.2d at 1014. Such a rule may only be adopted through notice-and-comment procedures. *Id.*

Even accepting defendants' new position that they were required to go through the notice-and-comment process before adopting DACA in 2012 (AOB 29-30), that would not excuse them from following those procedures before terminating the policy. When an agency believes that an existing substantive rule was defectively promulgated, it still must conduct a notice-and-comment process to modify or repeal that rule. *See Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982) (question whether original rule was defectively promulgated is itself "one worthy of notice and an opportunity to comment"). Otherwise, agencies could "circumvent the requirements of [Section] 553" any time they wanted to alter a rule, simply by asserting that the rule was "defective in some respect." *Id.* That principle should apply whether the agency

attempts to rescind a substantive rule that was "defectively promulgated" through a notice-and-comment process, *see id.*, or seeks to rescind a substantive rule that it now believes should have been adopted through a notice-and-comment process in the first instance. *Cf. Mada-Luna*, 813 F.2d at 1017 n.12 ("[W]hen the government seeks to repeal a regulation, it is generally not bound for section 553 purposes by the way it classified that regulation at the time of its promulgation."). Accordingly, regardless of what procedures were required to adopt DACA in the first place, plaintiffs stated a valid claim that the decision to terminate it had to be made using notice-and-comment procedures.

CONCLUSION

The order granting a preliminary injunction should be affirmed. The order regarding defendants' Rule 12(b)(6) motion to dismiss should be affirmed with respect to the substantive APA claim and the due process claim regarding information sharing, and reversed with respect to the notice-and-comment claim.

Respectfully submitted,

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Dated: March 13, 2018

STATEMENT OF RELATED CASES

The States are not aware of any related cases, as defined by Ninth Circuit Rule 28-2.6, that are currently pending in this Court and are not already consolidated here.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a)(5)-(6) and Ninth Circuit Rule 28.1-1(c) because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, and contains 16,432 words.

Dated: March 13, 2018

s/ Michael J. Mongan

CERTIFICATE OF SERVICE

I certify that on March 13, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 13, 2018

s/ Michael J. Mongan