Consolidated Case 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

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellants.

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

APPELLANTS' OPENING BRIEF

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INTRODUCTION

In 2012, the Secretary of Homeland Security set forth the enforcement policy commonly known as DACA (Deferred Action for Childhood Arrivals). Under that policy, individuals illegally in this country who met certain criteria were granted deferred action, which is a temporary forbearance from removal that may also entail certain collateral benefits. From its inception, the policy was a stop-gap measure in anticipation of potential legislative action, and the government made clear that the policy did not grant any substantive rights, lawful immigration status, or pathway to citizenship. The government later expanded the criteria for DACA and created a new policy known as DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents). Texas and twenty-five other states brought suit challenging the latter policies. The suit resulted in a nationwide injunction that was affirmed by the Fifth Circuit and by an equally divided Supreme Court. Texas then threatened to challenge the original DACA policy.

In September 2017, in light of the prior litigation and the Attorney General's legal analysis, the Acting Secretary of Homeland Security decided to rescind the DACA policy through an orderly wind-down. Plaintiffs in these and other suits challenged that enforcement decision on a variety of grounds under the Administrative Procedure Act (APA) and the Constitution. The district court denied in significant part the Government's motion to dismiss and granted a preliminary injunction. Those remarkable orders require the government to maintain a

discretionary non-enforcement policy that is materially indistinguishable from one previously found unlawful by the Fifth Circuit and four Justices of the Supreme Court, and to thereby affirmatively sanction an ongoing violation of federal law by nearly 700,000 aliens without lawful status. The orders (which have been certified for interlocutory appeal) should be reversed.

First, the Acting Secretary's decision is not subject to judicial review in this action. The decision to rescind DACA is an exercise of enforcement discretion that is traditionally committed to agency discretion under the APA. 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985). And, even assuming that judicial review of this deferred-action rescission were available at all, it could take place only on review of a final removal decision. 8 U.S.C. § 1252(b), (g); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999) (*AADC*).

Second, in any event, the Acting Secretary's decision was not arbitrary and capricious under the APA. For this purely discretionary enforcement decision, the Immigration and Nationality Act (INA) prescribes no legal or factual determinations that must be made or even considered. There is thus no warrant for setting aside the Acting Secretary's entirely rational decision to discontinue the DACA policy in light of the prior nationwide injunction against policies closely related to DACA, as well as the Attorney General's opinion regarding the legal viability of DACA itself.

Third, the Acting Secretary's decision does not violate the Constitution's equal-protection guarantee. The rescission of DACA applies equally to all persons without

regard to their ethnicity. This immigration enforcement policy is not subject to challenge based on the common circumstance that it has a greater impact on members of certain ethnicities than others, especially given the lack of any evidence that the Acting Secretary would have retained DACA if the aliens lacking lawful status had been other than predominantly Latino, let alone in the face of questions about DACA's legality.

In sum, while there is significant room for disagreement over immigration enforcement in general and DACA in particular, such policy decisions belong in the hands of the political branches and should not be judicially second-guessed, at least absent a colorable constitutional claim. The district court's preliminary injunction should be vacated, and its order denying in part the government's motion to dismiss should be reversed.

STATEMENT OF JURISDICTION

The plaintiffs in five related cases invoked the district court's jurisdiction under 28 U.S.C. § 1331. *See, e.g.*, Excerpts of Record (ER.) 76. On January 9, 2018, the district court granted plaintiffs' motion for a preliminary injunction, denied in part the government's motion to dismiss, and certified the issues decided therein for interlocutory appeal. ER.46-48. The defendants filed timely notices of appeal on January 16. *E.g.*, ER.64-68. This court has jurisdiction over the injunction appeals under 28 U.S.C. § 1292(a)(1).

On January 12, 2018, the district court denied in part and granted in part the government's motion to dismiss. ER.62-63. The district court also certified for interlocutory appeal the issues decided in that order, and both sides petitioned this Court to grant permission for interlocutory appeal. On January 25, this Court accepted the district court's orders for interlocutory review. This Court has jurisdiction over the motion-to-dismiss appeals under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES

1. Whether plaintiffs' APA claims are not subject to review because the Acting Secretary's decision to wind down the DACA non-enforcement policy was "committed to agency discretion by law," 5 U.S.C. § 701(a)(2).

2. Whether the district court lacked jurisdiction to consider plaintiffs' claims in light of the jurisdiction-channeling provisions in 8 U.S.C. § 1252(b), (g).

3. Whether plaintiffs failed to state a claim that the Acting Secretary's decision was arbitrary and capricious;

4. Whether plaintiffs failed to state a claim that the Acting Secretary's decision violated equal protection;

5. Whether plaintiffs failed to state a claim that the implementation of the DACA rescission will violate due process; and

6. Whether the district court erred in granting a preliminary injunction requiring the government to maintain DACA on a nationwide basis.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum.

STATEMENT OF THE CASE

A. Overview of "deferred action" and the Acting Secretary's decision to wind down the discretionary DACA non-enforcement policy

1. The INA charges the Secretary of Homeland Security "with the administration and enforcement" of the INA and "all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1). Individuals are subject to removal if, *inter alia*, "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona v. United States*, 567 U.S. 387, 396 (2012); *see* 8 U.S.C. §§ 1182(a), 1227(a).

As a practical matter, the federal government cannot remove every removable alien, and a "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396. The Secretary of Homeland Security is vested with authority to "[e]stablish[ ] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). In light of such policies and priorities, officials of the Department of Homeland Security (DHS) must first "decide whether it makes sense to pursue removal at all." *Arizona*, 567 U.S. at 396. "At each stage" of the process, moreover, "the Executive has discretion to abandon the endeavor." *AADC*, 525 U.S. at 483. Like other exercises of enforcement discretion, this may

involve "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Chaney*, 470 U.S. at 831.

2. This case concerns an application of the practice of "deferred action" by which the Secretary of Homeland Security may exercise discretion to forbear from seeking the removal of an alien for a designated period. *See AADC*, 525 U.S. at 483-84; 8 C.F.R. § 274a.12(c)(14) (describing "deferred action" as "an act of administrative convenience to the government which gives some cases lower priority"). In addition to the temporary relief from removal directly flowing from a grant of deferred action, certain collateral consequences may flow under pre-existing laws and regulations, including the ability to apply for work authorization in certain circumstances. *See, e.g.*, 8 C.F.R. § 247a.12(c)(14). However, DHS retains the discretion to revoke deferred action unilaterally, and an individual with deferred action remains removable at any time. *See AADC*, 525 U.S. at 484-85.

On June 15, 2012, DHS announced the policy known as DACA, which makes deferred action available to "certain young people who were brought to this country as children." ER.140. Following successful completion of a background check and review, an alien who met certain age, residence, and other guidelines could receive deferred action for a period of two years, subject to renewal. ER.142-43. The DACA Memo stated that it "confer[red] no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights." ER.143. DHS later expanded DACA by loosening certain guidelines and

extending the period of deferred action to three years, and it also created a new, similar policy known as DAPA for parents of Americans and lawful permanent residents. ER.269.

The District Court for the Southern District of Texas entered a nationwide preliminary injunction against DAPA and the expansion of DACA. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015). The Fifth Circuit affirmed, concluding that the policy violated both the INA and the APA's notice-and-comment requirements. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). The Supreme Court affirmed the injunction by an equally divided Court. *United States v. Texas,* 136 S. Ct. 2271 (2016) (per curiam). In response, then-Secretary John Kelly rescinded DAPA and the DACA expansion in June 2017. ER.176. Shortly thereafter, Texas threatened to challenge the original DACA policy. ER.274.

3. On September 5, 2017, DHS decided to wind down the remaining DACA policy in an orderly fashion. ER.125. As Acting Secretary Elaine Duke explained in the memorandum, "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and [a] September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." ER.130. Therefore, "[i]n the exercise of [her] authority in establishing national immigration policies and priorities," the Acting Secretary determined to begin an orderly wind-down of the policy. *Id.* The memorandum provides that DHS will "adjudicate—on an individual, case by case basis—properly filed pending DACA

renewal requests . . . from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017." *Id.* The memorandum further provides that DHS "[w]ill not terminate the grants of previously issued deferred action or revoke Employment Authorization Documents solely based on the directives in this memorandum" for the remaining periods of deferred action. *Id.*

B. Prior proceedings

1. Shortly after the Acting Secretary's decision, plaintiffs—consisting of individual DACA recipients, a union with DACA recipient members, the University of California and its president, and various States and localities—brought these five related suits in the Northern District of California challenging the rescission of DACA. *See* Case Nos. 17-5211, 17-5235, 17-5329, 17-5380, 17-5813 (N.D. Cal.). Similar challenges are pending in other district courts. Plaintiffs challenged the rescission on substantive and procedural grounds under the APA. Plaintiffs also alleged that the rescission violated equal protection and that its implementation violated due process.

Planning to move to dismiss on threshold grounds, the government asked the district court to permit it to brief dispositive issues in the case prior to any discovery or record proceedings. The district court rejected that request, and the government filed the administrative record. Dkt.No.64.

The district court then ordered the government to "complete" the administrative record with "all emails, letters, memoranda, notes, media items, opinions and other materials directly or indirectly considered in the final agency decision to rescind DACA," including "all DACA-related materials considered by persons (anywhere in the government)" who provided the Acting Secretary with written or verbal advice. Dkt.No.79, at 12-13. The district court further determined that, because the Acting Secretary's decision referred to concerns about DACA's legality, the government had categorically "waived attorney-client privilege over" certain materials. *Id.* at 10. And the court ruled—without briefing—that thirty-five documents identified on a court-ordered privilege log must be filed on the public docket. *Id.* at 13. In the meantime, plaintiffs served burdensome discovery requests upon the government and took numerous depositions from government personnel, including high-level officials and senior advisors.

2. In response to these extraordinary rulings, the government sought relief first from this Court and, after a divided panel of this Court denied mandamus, from the Supreme Court, which stayed the district court's orders and ultimately vacated this Court's decision. *In re United States*, 138 S. Ct. 443, 445 (Dec. 20, 2017) (per curiam). The Court made clear that the government's threshold defenses deserve close attention, noting that the district court should "consider certifying [its] ruling for interlocutory appeal under 28 U.S.C. § 1292(b)" and only consider whether an expanded record was necessary following resolution of threshold issues. *Id.* at 445.

3. While the mandamus proceedings were pending, the government filed a motion to dismiss, and plaintiffs filed a motion for a preliminary injunction.

On January 9, 2018, the district court denied in substantial part the government's justiciability arguments in its motion to dismiss and granted plaintiffs' preliminary injunction motion. ER.1. Although the court acknowledged that, under *Heckler v. Chaney*, "decisions not to prosecute or initiate enforcement actions are generally not reviewable," it declared that "[o]ur case is different from *Chaney*" on various grounds. ER.19-21. It further held that its jurisdiction was unaffected by 8 U.S.C. § 1252(g), ER.22-23, which channels claims against actions taken to remove an alien into the review of final removal orders, thus protecting "'no deferred action' decisions and similar discretionary determinations." *AADC*, 525 U.S. at 483, 485. The court concluded that this provision did not restrict its jurisdiction because plaintiffs challenged "the across-the-board cancellation of a nationwide program" rather than "already-commenced deportation or removal proceedings." ER.22. The court explained that its order rejecting the bulk of the government's threshold arguments met the criteria for interlocutory appeal under 28 U.S.C. § 1292(b) and certified that order accordingly. ER.48-49.[1]

[1] The district court accepted the government's threshold arguments only to the extent it held that plaintiffs Minnesota and Maine did not have statutory standing because the interests they asserted were only "marginally related" to the INA's purposes. ER.28.

In issuing a preliminary injunction, the court concluded that plaintiffs were likely to succeed on their claim that the DACA rescission was arbitrary and capricious. First, the court held that the rescission was "'not in accordance with law' because it was based on the flawed legal premise that the agency lacked authority to implement DACA." ER.29. Second, the district court held that the government's invocation of litigation risk was a "post-hoc rationalization" because the memorandum "can only be reasonably read as" relying on a claim of illegality, and that, in any event, the Acting Secretary failed to consider factors weighing against the rescission of DACA, including reliance interests of DACA recipients. ER.39-40.[2]

4. On January 12, the district court denied in part and granted in part the government's merits arguments in its motion to dismiss. ER.50. The court held that plaintiffs had stated a claim that the rescission of DACA was arbitrary and capricious for the reasons given in its prior opinion. ER.51. The court also held that plaintiffs had stated a claim that the DACA rescission denied them equal protection because "93 percent of DACA recipients" are "Latinos and Mexican nationals," and plaintiffs' allegations regarding "campaign rhetoric" raised "a plausible inference that racial animus towards Mexicans and Latinos was a motivating factor in the decision to end

[2] Although the government appeals the injunction, it has taken steps to comply in the interim. *See Response to Preliminary Injunction* (Jan. 13, 2018), https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction.

DACA." ER.59-61. The court additionally denied the motion to dismiss plaintiffs' claim that the rescission's implementation violated substantive due process. ER.55-57.

The court dismissed plaintiffs' claim that the Acting Secretary was required to use notice-and-comment rulemaking to rescind DACA. ER.51-53. The court also rejected plaintiffs' claims that the DACA rescission violated an equal protection right to pursue a livelihood, violated due process, and was equitably estopped. ER.53-61.The court again certified its order for interlocutory review. ER.62-63.

5. On January 16, the government filed a notice of appeal from the district court's order granting a preliminary injunction. ER.64-68. Both the government and the plaintiffs also filed petitions under 28 U.S.C. § 1292(b) asking this Court to accept the district court's certification of its orders for interlocutory appeal. This Court granted those petitions on January 25, and, on January 26, this Court *sua sponte* consolidated the various appeals and issued an omnibus briefing schedule.[3]

SUMMARY OF ARGUMENT

1. In rescinding the previous non-enforcement policy embodied in DACA, the Acting Secretary reset the agency's enforcement priorities. A determination of general enforcement policy, like other enforcement decisions, is traditionally committed to agency discretion by law and thus not subject to APA claims. *See* 5 U.S.C. § 701(a)(2);

[3] The government also filed a petition for writ of certiorari before judgment on January 18, 2018. *See Department of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 17-1003. That petition is currently scheduled for consideration at the Supreme Court's February 16, 2018, conference.

Heckler v. Chaney, 470 U.S. 821, 831 (1985). That is particularly true in the immigration context, where the "broad discretion exercised by immigration officials" is a "principal feature of the removal system." *Arizona v. United States*, 567 U.S. 387, 396-97 (2012). That the Acting Secretary's discretionary enforcement decision was based on legal analysis is immaterial, because the fact that an "agency gives a 'reviewable' *reason* for otherwise unreviewable action" does not mean that "the *action* becomes reviewable." *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (*BLE*) (emphases added).

Nothing in the INA cabins that discretion here. To the contrary, 8 U.S.C. § 1252(g) precludes jurisdiction over challenges to "'no deferred action' decisions and similar discretionary determinations . . . outside the streamlined process that Congress has designed" for litigating an alien's removal. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 & n.9 (1999) (*AADC*); *see also* 8 U.S.C. § 1252(b)(9). Thus, even if the Acting Secretary's exercise of enforcement discretion were subject to review at all, that review could take place only in a petition from a final removal order.

2. Assuming that the Acting Secretary's decision to wind down DACA were nevertheless subject to review here, the decision would plainly satisfy the APA's deferential standard. Regardless whether the original DACA policy was consistent with the INA, there is no claim that it was mandated by the statute or that rescinding it violated the statute. And the Acting Secretary's discretionary rescission of DACA based on her clearly expressed concern that it would be enmeshed in litigation and

likely enjoined nationwide was eminently reasonable, given the *Texas* litigation invalidating DAPA and expanded DACA, as well as the Attorney General's opinion that DACA would and should meet the same fate. Neither precedent nor the APA required the Secretary to spell out the subsidiary legal reasons why it is illusory to distinguish DACA from expanded DACA and DAPA, and there likewise is no basis for a court to set aside the Secretary's purely discretionary enforcement decision based on mere disagreement with her reasonable legal conclusion.

The Acting Secretary's decision in no way violates equal protection rights. The DACA rescission applies equally to persons of all ethnicities, although, like virtually all immigration policies, it has a disproportionate effect on certain ethnicities—here, Latinos from Central and South America. A challenge to such a facially-neutral immigration enforcement policy based on allegations of discriminatory motive is not permitted under *AADC*. 525 U.S. at 488-92. And, even assuming such a challenge could proceed at all under *AADC*, plaintiffs have come nowhere near alleging the clear evidence of outrageous government conduct necessary to make out a claim of discriminatory enforcement in the immigration context. *Id.*

Plaintiffs' due process challenge to the DACA rescission's implementation is similarly meritless. Plaintiffs do not and cannot offer any plausible factual basis for their conclusory (and incorrect) assertion that the government has changed its policy regarding whether information provided by DACA recipients to U.S. Citizenship and Immigration Services (USCIS) will be shared with other DHS components for

purposes of immigration enforcement proceedings. And plaintiffs in any event fail to identify a deprivation of a protected interest that would be a conscience-shocking violation of substantive due process rights.

3. Finally, even if injunctive relief were appropriate, the nationwide injunction entered would be patently overbroad. Bedrock principles of standing and equitable discretion limit the scope of any injunction to plaintiffs in this case, and only those plaintiffs with a cognizable injury—*i.e.*, the particular DACA recipients who are named plaintiffs or validly represented by the union plaintiff.

STANDARD OF REVIEW

"[T]he legal premises underlying a preliminary injunction" are reviewed de novo. *Federal Trade Comm'n v. Enforma Nat. Prods., Inc.*, 362 F.3d 1204, 1211 (9th Cir. 2004). Otherwise, the district court's entry of the preliminary injunction is reviewed for abuse of discretion. *Id.* The district court's decision on the motion to dismiss is reviewed de novo. *Steckman v. Hart Brewing Inc.,* 143 F.3d 1293, 1295 (9th Cir. 1998).

ARGUMENT

I. Plaintiffs' Claims Are Non-Justiciable.

A. The Acting Secretary's decision is not subject to APA review because it is committed to agency discretion by law.

1. The APA precludes review of agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This provision applies to various types of agency decisions that "traditionally" have been regarded as unsuitable for judicial

review, *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993), including the decision whether or not to institute enforcement actions, *Chaney*, 470 U.S. at 831. Such exercises of discretion, the Supreme Court has explained, can involve "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* An agency may "not only assess whether a violation has occurred," but "whether agency resources are best spent on this violation or another"; whether enforcement in a particular scenario "best fits the agency's overall policies"; and whether the agency "has enough resources to undertake the action at all." *Id.* In addition, when an agency declines to enforce, it "generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. In this way and others, agency enforcement discretion "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch [whether or] not to indict—a decision which has long been regarded as the special province of the Executive Branch." *Id.*; *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[T]he decision *whether or not* to prosecute . . . generally rests entirely in [the prosecutor's] discretion." (emphasis added)). Such discretionary enforcement actions "cannot be the subject of judicial review" even when an agency (or a prosecutor) bases them on what would be "a 'reviewable' reason" in another context. *BLE*, 482 U.S. at 283.

The Acting Secretary's decision to discontinue a prior non-enforcement policy falls well within the types of enforcement decisions that traditionally have been

understood as "committed to agency discretion." Like the decision to adopt a policy of selective non-enforcement, the decision whether to retain such a policy can "involve[] a complicated balancing" of factors that are "peculiarly within [the] expertise" of the agency, including determining how the agency's resources are best spent and how the non-enforcement policy fits with the agency's overall policies. *Chaney*, 470 U.S. at 831. Likewise, a decision to abandon an existing non-enforcement policy will not, in itself, deprive any individual of liberty or property. Indeed, an agency's decision to reverse a prior policy of civil non-enforcement is akin to changes in policy as to criminal prosecutorial discretion, which regularly occur within the Department of Justice both during and across presidential administrations, and which, as noted, are generally not amenable to judicial review. Judicial review is available if a decision to enforce results in an adverse final determination that deprives an individual of liberty or property, but that review is limited to the substance of the final determination; an individual cannot escape his guilt of the criminal or civil offense by bringing an APA challenge to an agency's discretionary decision to enforce the law.

This presumption of nonreviewability applies with particular force in the context of immigration enforcement discretion. In general, the "broad discretion exercised by immigration officials" has become a "principal feature of the removal system." *Arizona v. United States*, 567 U.S. 387, 396 (2012); *see also, e.g.*, 6 U.S.C. § 202(5) (vesting authority in the Secretary of Homeland Security to "[e]stablish[] national immigration enforcement policies and priorities"). And more specifically, a

suit challenging a discretionary decision to enforce the immigration laws would entail the extraordinary relief of ordering the government to allow a "continuing violation of United States law" to persist. *AADC*, 525 U.S. at 490. The revocation of a prior immigration non-enforcement policy is thus plainly a decision that is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and not subject to attack under the APA.

2. The district court's reasons for rejecting that conclusion are all contrary to precedent and unpersuasive on their own terms.

First, the district court reasoned that the Acting Secretary's decision was reviewable because, rather than adopting a non-enforcement policy, it rescinded one. ER.21 ("An agency action to terminate [an existing non-enforcement policy] bears no resemblance to an agency decision not to regulate something never before regulated."). That distinction is irreconcilable with this Court's decision in *Morales de Soto v. Lynch*, 824 F.3d 822 (9th Cir. 2016), which expressly rejected the notion that *Chaney*'s rule would apply only to a "decision *not* to enforce agency regulations" and not "the contrary decision *to* enforce." *Id.* at 827 n.4. In that case, an alien had unlawfully reentered the country after being ordered removed, and Immigration and Customs Enforcement (ICE) had chosen to "reinstate the prior order of removal" (without a hearing), rather than exercise its "prosecutorial discretion to initiate a new removal proceeding before an immigration judge." *Id.* at 825. The Court held that, under *Chaney*, it had "no authority to review the merits of ICE's discretionary decision

to reinstate a prior removal order," even though the agency had exercised its discretion "*to* enforce" that order rather than "*not* to enforce" it. *Id.* at 827 & n.4. *Morales de Soto* and *Chaney* compel a similar conclusion here. As explained above, a decision to enforce and a decision not to enforce are both traditionally committed to agency discretion as they both implicate "the same need for 'a complicated balancing of a number of factors . . . peculiarly within [the agency's] expertise.'" *Id.* (quoting *Chaney*, 470 U.S. at 831).[4]

Second, the district court reasoned that the rescission of DACA was reviewable because it addressed "broad enforcement policies," instead of "an individual enforcement decision." ER.20. As an initial matter, this distinction mischaracterizes *Chaney*. The non-enforcement decision in *Chaney* was not an individualized decision by the FDA to forgo enforcement of the Federal Food, Drug, and Cosmetic Act against an alleged violator. Rather, the plaintiffs in *Chaney* requested the FDA to enforce the statute's misbranding prohibition against the use of certain drugs for capital punishment, by taking "various investigatory and enforcement actions" against "drug manufacturers," "prison administrators," and "all [others] in the chain of distribution"; the FDA, however, *categorically* concluded that its enforcement discretion "should not be exercised to interfere with this particular aspect of state criminal

[4] For the same reason, an agency's decision whether, and on what terms, to settle an enforcement action is likewise committed to its discretion by law. *See Garcia v. McCarthy*, 649 F. App'x 589, 591 (9th Cir. 2016) (collecting cases).

justice systems." 470 U.S. at 824-25. Similarly, in *Lincoln*, the Indian Health Service's unreviewable decision reallocated funds from an entire regional treatment program in the Southwest to other nationwide Service programs, not from an individual's treatment plan. 508 U.S. at 184, 188. In short, the question under Section 701(a)(2) is whether the type of agency decision at issue is inherently discretionary in nature, not the number of people to whom it applies.[5]

Common sense would dictate this conclusion even if it were not already settled law. Agency decisions about how its "resources are best spent" or how certain enforcement activity "best fits the agency's overall policies," *Chaney*, 470 U.S. at 831, are at least as susceptible to implementation through broad guidance as through case-by-case enforcement decisions. *See Sierra Club v. Whitman*, 268 F.3d 898, 903 (9th Cir. 2001) (explaining that "[t]o leave enforcement decisions to the discretion of the [agency]" means that the agency must decide "the most effective way to accomplish the objectives of the [law] as a whole").

[5] *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671 (D.C. Cir. 1994), does not, as the district court appeared to believe, establish a different rule. In that case, the D.C. Circuit distinguished between a "*single-shot* non-enforcement decision" and a "*general enforcement policy*," but did so on the ground that broad enforcement policies "are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision." *Id.* at 676-77. But this case involves no embedded interpretation of the INA's substantive commands. The Acting Secretary's decision to wind down the DACA non-enforcement policy did not directly interpret the INA's provisions governing the primary conduct of aliens and other parties, but rather addressed (at most) the INA's constraints on her enforcement discretion.

For example, in *Alaska Fish & Wildlife Federation & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933 (9th Cir. 1987), this Court explained that "[p]olitical and geographical considerations" led the agency "to conclude that traditional methods of enforcing game laws are not effective in the vast reaches of rural Alaska" and therefore to "adopt[] a written policy stating that subsistence hunting in Alaska during the closed season would not be punished." *Id.* at 935. The Court held that a statutory grant of enforcement discretion "precludes . . . review of the [agency]'s failure to enforce" the law, *id.* at 938, notwithstanding the fact that the agency had adopted a broad non-enforcement policy. Conversely, individual enforcement decisions are regularly informed by general interpretations of the agency's substantive statute to determine "whether a violation has occurred." *Chaney*, 470 U.S. at 831; *see BLE*, 482 U.S. at 283 ("[A] common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction.").

Third, the district court reasoned that review of the Acting Secretary's decision was appropriate because DACA recipients had relied on collateral benefits obtained as a result of their deferred action. ER.20. The court noted that "work authorizations, for example, allow recipients to join in the mainstream economy" and suggested that "[i]n contrast to nonenforcement decisions, rescissions of commitments . . . exert much more direct influence on the individuals . . . to whom the repudiated commitments were made." *Id.* (quotation marks omitted). At the outset, the premise

of the district court's reasoning—that DHS had made a commitment to certain persons unlawfully in the country—is simply incorrect. Indeed, DHS made explicit when it adopted the DACA non-enforcement policy that "[t]his memorandum confers no substantive right." ER.130. More fundamentally, any reliance interests would not legitimate judicial review of otherwise nonreviewable acts of discretion. In *Lincoln*, for example, the Indian Health Service had operated its regional program for seven years, providing important medical treatment to disabled children on which the recipients had undoubtedly come to rely. *See* 508 U.S. at 185-88. Notwithstanding that reliance, the Supreme Court held that the Service's discretionary decision to discontinue the program by reallocating a lump-sum appropriation was non-reviewable. *Id.* at 193-94.

Nor does the availability of review turn on the significance of a plaintiff's asserted interest in an agency's discretionary enforcement decision. The Supreme Court made this clear in *Chaney*, where plaintiffs offered "evidence that use of the drugs [that FDA declined to regulate] could lead to a cruel and protracted death." 470 U.S. at 827. Holding that it could not properly review the agency's decision, the Supreme Court emphasized that "[t]he fact that the drugs involved in this case are ultimately to be used in imposing the death penalty must not lead this Court or other courts to import profound differences of opinion over the meaning of the Eighth Amendment . . . into the domain of administrative law." *Id.* at 838.

Fourth, the district court reasoned that review was possible because "there *is* law to apply" in this case, given that "[t]he main, if not exclusive, rationale for ending DACA was its supposed illegality" and "determining illegality is a quintessential role of the courts." ER.21. But it is both well established and common sense that an agency's discretionary decision whether to enforce a law is not made reviewable because it is based on an understanding of governing law. As the Supreme Court held in *BLE*, that an "agency gives a 'reviewable' reason for otherwise unreviewable action" does not mean that "the action becomes reviewable." 482 U.S. at 283. The Court noted, by way of example, "that a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction"; although "[t]hat is surely an eminently 'reviewable' proposition, in the sense that courts are well qualified to consider the point . . . it is entirely clear that the refusal to prosecute cannot be the subject of judicial review." *Id.* Thus, the fact that the Acting Secretary's exercise of enforcement discretion reasonably considered not only the litigation risk from a lawsuit by Texas but also the Attorney General's legal assessment of DACA does not meaningfully distinguish this case from countless instances where the enforcement decisions of prosecutors or agencies turn in part on legal analysis regarding the meaning of statutes, regulations, or the Constitution.

Rather, for an enforcement decision to be reviewable, the "law to apply" must depart from tradition by "circumscrib[ing] agency enforcement discretion" and

"provid[ing] meaningful standards for defining the limits of that discretion." *Chaney,* 470 U.S. at 834. Such limits might be found in the statute that provides the agency with enforcement discretion, if Congress has set "substantive priorities" or otherwise limited "an agency's power to discriminate among issues or cases it will pursue." *Id.* at 833; *see also Texas v. United States*, 809 F.3d 134, 168 (5th Cir. 2015) (holding that court could review whether DAPA ran afoul of alleged INA constraints on enforcement discretion). Or they might be found in the agency's own regulations having a similarly restrictive effect. *See Greater Los Angeles Council on Deafness, Inc. v. Baldrige*, 827 F.2d 1353, 1361 (9th Cir. 1987). But neither plaintiffs nor the district court have identified anything in the INA or immigration regulations that limited DHS's discretion in rescinding DACA.[6]

In sum, none of the district court's reasons, individually or collectively, justify applying APA review to the Acting Secretary's discretionary decision to rescind the DACA non-enforcement policy. And it warrants emphasis that those reasons, if accepted by this Court, would lead to a radical and untenable intrusion on agencies' enforcement discretion. Consider the following example of a quintessential exercise of prosecutorial discretion: one chief prosecutor adopts a general policy of not enforcing

[6] Constitutional constraints on enforcement discretion also are traditionally reviewable and provide meaningful standards to apply. *See Webster v. Doe*, 486 U.S. 592, 603-04 (1988). Review of plaintiffs' constitutional claims is therefore not precluded by § 701(a)(2), although those claims are separately barred here by 8 U.S.C. § 1252(g) and are meritless in any event. *See infra* Parts I.B, II.B-C.

drug laws against low-level, non-violent offenders because she views them as victims of circumstance who should receive treatment and support; but her successor then rescinds that non-enforcement policy based on her legal concerns that the policy would violate her duty to faithfully execute the laws and provide equal treatment to defendants. The district court's analysis in this case would allow drug offenders in that circumstance, who are concededly guilty, to nevertheless seek judicial review of the legal reasoning underlying the second prosecutor's discretionary decision to enforce the drug laws in a different manner than her predecessor. That is not, and cannot possibly be, the law.

B. 8 U.S.C. § 1252 bars pre-enforcement review of plaintiffs' claims.

1. Under 8 U.S.C. § 1252, judicial review of DHS enforcement decisions is generally available, if at all, only through the procedures for reviewing removal orders set forth in that section. As particularly relevant here, section 1252(g) states that "[e]xcept as provided in this section . . . 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 subchapter." As the Supreme Court explained in *AADC*, section 1252(g) is "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of

judicial intervention outside the streamlined process that Congress has designed." *See* 525 U.S. at 485 & n.9.

The Acting Secretary's rescission of DACA is such a "'no deferred action' decision[]," *AADC*, 525 U.S. at 485, and is an initial "action" in the agency's "commence[ment] [of] proceedings" against aliens who are unlawfully in the country, 8 U.S.C. § 1252(g). Thus, even assuming that the DACA rescission were reviewable, it would be reviewable only as otherwise "provided in [Section 1252]," *id.*—that is, through "[j]udicial review of a final order of removal," *id.* § 1252(a)(1). *See, e.g., Vasquez v. Aviles*, 639 F. App'x 898, 901 (3d Cir. 2016) (concluding that, under section 1252(g), "[t]he District Court therefore lacked jurisdiction to consider [plaintiff's] challenge to his denial of DACA relief"); *Botezatu v. INS*, 195 F.3d 311, 314 (7th Cir. 1999) ("Review of refusal to grant deferred action is . . . excluded from the jurisdiction of the district court."). That review of a final order of removal is the sole avenue for judicial review is underscored by 8 U.S.C. § 1252(b)(9), which channels into the review of final removal orders all questions of law or fact arising from any action taken to remove an alien. *See AADC*, 525 U.S. at 483 (characterizing section 1252(b)(9) as an "unmistakable 'zipper' clause"); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994).

The limitation on review here is consistent with the review procedures for other kinds of discretionary DHS actions. For example, under 8 U.S.C.

§ 1252(a)(2)(B), "no court shall have jurisdiction to review" judgments regarding the grant or denial of specified forms of discretionary relief—including cancellation of removal, voluntary departure, certain waivers of inadmissibility, and adjustment of status. *See* 8 U.S.C. § 1252(a)(2)(B)(i) (citing 8 U.S.C. §§ 1182(h), 1182(i), 1229b, 1229c, 1255). Congress provided a limited exception to that jurisdictional bar for "review of constitutional claims or questions of law," *id.* § 1252(a)(2)(D), but it mandated that any such review occur only "upon a petition for review [of a final order of removal] filed with an appropriate court of appeals in accordance with this section," *id.*; *see*, *e.g.*, *Green v. Napolitano*, 627 F.3d 1341, 1347 (10th Cir. 2010).

2. The district court nevertheless held that Section 1252(g) did not affect its jurisdiction because plaintiffs challenged "the across-the-board cancellation of a nationwide program" rather than "already-commenced deportation proceedings." ER.22 (emphasis omitted). But Section 1252 does not permit parties to evade its jurisdictional-channeling provisions merely by initiating pre-enforcement challenges. Section 1252(g) bars review of any "action" to "commence proceedings" in order to protect "'no deferred action' decisions and similar discretionary determinations," which includes preventing the decision to wind down the DACA policy from being challenged in "separate rounds of judicial intervention" outside the process designed by Congress. *AADC*, 525 U.S. at 485. Plaintiffs cannot frustrate the INA's reticulated review scheme by filing suit before the agency has officially initiated an enforcement proceeding.

This Court's decision in *Kwai Fun Wong v. United States*, 373 F.3d 952 (9th Cir. 2004), cited by the district court, ER.22-23, is inapposite. That case involved a claim for damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on the ground that certain actions taken by agency officials were unconstitutional. The plaintiff expressly disclaimed a challenge to her removal, *Kwai Fun Wong*, 373 F.3d at 964, and this Court relied upon the fact that the challenge did "not pose the threat of obstruction of the institution of removal proceedings or the execution of removal orders about which *AADC* was concerned," *id.* at 970. Plainly, the same cannot be said concerning plaintiffs' challenge to the rescission of the DACA non-enforcement policy.

II. The Acting Secretary's Decision Was Lawful.

A. The DACA rescission was not arbitrary and capricious.

1. Even if the Acting Secretary's decision were reviewable under the APA, it was plainly not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That standard of review is "narrow," *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983): "[A] court is not to substitute its judgment" for the agency's reasonable judgment, and should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

It is uncontroverted that nothing in the INA requires any aspect of the DACA policy. The claim, instead, is that once an agency has adopted a purely discretionary non-enforcement policy, it must provide a robust explanation for a decision to pursue a different enforcement policy. Unsurprisingly, neither plaintiffs nor the district court have identified any authority for this proposition. Nor can they seriously dispute that it would have been reasonable for the Secretary to act based on the litigation risks presented by maintaining a policy (original DACA) that was materially indistinguishable to ones (expanded DACA and DAPA) that had been enjoined nationwide by the Fifth Circuit in a decision affirmed by an equally divided Supreme Court, especially in the face of a threat by Texas and other States to challenge DACA on the same grounds.

Yet that is precisely what the Secretary did, based on the evident risk that the existing DACA policy would at a minimum be the subject of protracted litigation, and very likely be enjoined nationwide. In *Texas v. United States*, the court concluded that DAPA and expanded DACA were unlawful on both procedural and substantive grounds. 809 F.3d at 178; *see id.* at 147 n.11 (including the "DACA expansions" within the opinion's references to "DAPA"). The entirety of the Fifth Circuit's reasoning applies equally to the original DACA policy.

With respect to procedure, the Fifth Circuit concluded that the memorandum expanding DACA and creating DAPA was not exempt from notice and comment as a statement of policy because of how the *original DACA policy* had been implemented.

Texas, 809 F.3d. at 171-78. The court found that, "[a]lthough the DAPA Memo facially purports to confer discretion," in fact it would operate as a binding statement of eligibility for deferred action because that is how the original DACA policy had been implemented. *Id.* at 171, 174 n.139.

With respect to substance, the Fifth Circuit held that DAPA and expanded DACA were contrary to the INA because (1) "[i]n specific and detailed provisions," the INA already "confers eligibility for 'discretionary relief,'" including "narrow classes of aliens eligible for deferred action," *Texas,* 809 F.3d at 179; (2) the INA's otherwise "broad grants of authority" could not reasonably be construed to assign to the Secretary the authority to create additional categories of aliens of "vast 'economic and political significance,'" *id.* at 182-83; (3) DAPA and expanded DACA were inconsistent with historical deferred-action policies because they neither were undertaken on a "country-specific basis . . . in response to war, civil unrest, or natural disasters," nor served as a "bridge[] from one legal status to another," *id.* at 184; and (4) "Congress ha[d] repeatedly declined to enact the Development, Relief, and Education for Alien Minors Act ('DREAM Act'), features of which closely resemble DACA and DAPA." *Id.* at 185 (footnote omitted). Every one of those factors likewise applies to the original DACA policy.

2. In declining to uphold the Acting Secretary's plainly reasonable rationale, the district court subjected her enforcement decision to review that would have been inappropriate even for decisions less inherently discretionary. The court posited

reasons that might (in its view) distinguish DACA from DAPA and expanded DACA, and faulted the Acting Secretary for failing to expressly address them. ER.37. But the district court provided no authority (because none exists) for the proposition that the APA required the Acting Secretary to provide the equivalent of a bench memo setting out the subsidiary legal arguments to be made by each side in the course of protracted litigation, with an accompanying evaluation of the likelihood of success in various district courts, the courts of appeals, and the Supreme Court. *Cf. San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 999 (9th Cir. 2014) (even very brief explanation was adequate); *Bowman*, 419 U.S. at 286 (rationale need only be reasonably discernable). So long as the ultimate litigation judgment was reasonable, the Acting Secretary's decision was not arbitrary and capricious. And the judgment was eminently reasonable, because even assuming that some courts might deem certain distinctions material, the prospect of litigation and a nationwide injunction in the Fifth Circuit were at a minimum substantial. The district court did not conclude otherwise or provide any support for the proposition that the Acting Secretary was required to maintain DACA's discretionary non-enforcement policy in the face of such a significant risk based on the mere possibility of a different outcome.

Moreover, even on its own terms, the district court's litigation-risk analysis does not withstand scrutiny. The court emphasized the Fifth Circuit's observation that "any extrapolation from DACA [to DAPA] must be done carefully." *Texas*, 809 F.3d at 173. The Fifth Circuit's point, however, was that DAPA might be lawful even if

DACA were not, rather than the other way around. *See id.* at 174 (noting that the "DAPA Memo contain[ed] additional discretionary criteria"). And regardless, the Fifth Circuit went on to affirm, "under any standard of review," the comparison of the policies undertaken by the district court in that case. *Id.* at 174 n.139.

The district court here speculated, however, that DAPA might have been more vulnerable to challenge because "Congress had already established a pathway to lawful presence for alien parents of citizens," while "no such analogue" exists for DACA recipients. ER.37. That reasoning gets matters entirely backward. Insofar as the creation of pathways to lawful presence was relevant, the fact that Congress had legislated only for certain individuals similarly situated to DAPA beneficiaries—and not DACA recipients—would make DACA *more* inconsistent with the INA than DAPA. In any event, the basis of the Fifth Circuit's *Texas* decision was not the existence of a particular statutory pathway to lawful presence, but the "specific and intricate provisions" of the INA as a whole addressing discretionary relief. 809 F.3d at 186. Those provisions no more include DACA recipients than DAPA beneficiaries. Confirming the point, the Fifth Circuit also affirmed the injunction with respect to expanded DACA, which differed from the original DACA policy only in legally immaterial ways: the length of the deferred-action period, and the modified age and duration-of-residence guidelines.

The district court also reasoned that DACA might be distinguishable from DAPA because 689,800 aliens are recipients of DACA, whereas 4.3 million aliens

potentially qualified for DAPA. ER. 37. But whatever the ultimate number of individuals that might be affected, there can be no debate that DACA is, like DAPA and expanded DACA, a policy of "vast 'economic and political significance,'" to which the Fifth Circuit's reasoning would apply. *Texas*, 809 F.3d at 183. By contrast, the type of historical deferred-action practices that the Fifth Circuit suggested are permissible were much more "limited in time and extent, affecting only a few thousand aliens for months or, at most, a few years." *Id.* at 185 n.197. The Acting Secretary did not act arbitrarily in failing to credit a distinction between DACA and DAPA that the Fifth Circuit expressly rejected.

The district court further erred in suggesting that, whether or not the original DACA policy was unlawful as it had been implemented, it could have been fixed "by simply insisting on exercise of discretion" in individual cases. ER.37. The Fifth Circuit relied on the lack of individual discretion only for its conclusion that the DAPA Memorandum was procedurally unlawful, not substantively so. *Texas*, 809 F.3d at 171-78. Thus, even if the Acting Secretary could have altered the DACA policy sufficiently to overcome the procedural objection, it would not have affected the Fifth Circuit's substantive conclusion—at least unless the change were so drastic as to return to a

practice of "single, ad hoc grants of deferred action made on a genuinely case-by-case basis," *id.* at 186 n.202, which is precisely what the DACA rescission achieves.[7]

Lastly, the district court erroneously concluded that the litigation-risk rationale was arbitrary and capricious because the Acting Secretary "should have—but did not—weigh DACA's programmatic objectives as well as the reliance interests of DACA recipients." ER.40. In these circumstances, reliance interests are not "an important aspect" of the decision whether to retain DACA. *State Farm*, 463 U.S. at 43. On its face, DACA confers no legitimate reliance interests. DACA made deferred action available for only two-year periods, which could "be terminated at any time" at the agency's discretion. ER.151. When he announced DACA in 2012, President Obama explained that it was a "temporary stopgap measure," not a "permanent fix." *Remarks by the President on Immigration* (June 15, 2012), https://go.usa.gov/xnZFY. And he urged Congress to act "because these kids deserve to plan their lives in more than two-year increments." *Id.* A purely discretionary policy that can be revoked at any time cannot create legally cognizable reliance interests—and certainly not beyond the stated duration (generally two years) of deferred-action grants. Nothing in the INA

[7] Nor did the Acting Secretary "fail[] to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, by not discussing the possibility of defending DACA on the procedural ground of laches. ER.40. That doctrine may provide a defense where a plaintiff's unreasonable delay in bringing suit prejudiced the government. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967). The district court did not explain what prejudice the government might have established from Texas's failure to bring suit earlier.

prevents the Secretary of Homeland Security from changing her "national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). And any reliance was even less justified, of course, to the extent that DACA was unlawful.

At a minimum, the asserted reliance interests were too insubstantial to necessitate express consideration, because they plainly fail to overcome the substantial change in circumstances that arose as a result of the Supreme Court's affirmance of the Fifth Circuit's decision, which significantly increased the risk that DACA would be enjoined nationwide and thus drastically reduced the degree to which DACA recipients could rely on the continuation of what was already a purely discretionary non-enforcement policy. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), on which the district court relied, is entirely inapposite. That case involved the Department of Labor's interpretation of whether automotive service advisors were covered by a statutory exemption from the overtime provisions of the Fair Labor Standards Act. Unlike the policy at issue here, the one in *Encino Motorcars* concerned private parties' substantive statutory rights, had been in place for thirty-three years, and was not subject to a significant risk of imminent judicial invalidation. *Id.* at 2126-27. The relevant industry stakeholders had therefore developed a strong and justified reliance interest that necessitated consideration under the APA.

In any event, the Acting Secretary's decision was suitably respectful of the interests of existing DACA recipients. Based on her reasonable evaluation of the litigation risk posed by the imminent lawsuit against the DACA policy, the choice she

faced was between a gradual, orderly, administrative wind-down of the policy, and the risk of an immediate, disruptive, court-imposed one. Her decision to phase out the policy over a two-and-a-half-year period—permitting a period of additional renewals and permitting renewed and existing grants of deferred action to expire by their terms—was, by far, the more humane choice.

3. The district court was on no firmer ground in rejecting the litigation-risk concern as a "post hoc rationalization" for the Acting Secretary's decision. ER.43. In the court's view, "[t]he Attorney General's letter and the Acting Secretary's memorandum can only be reasonably read as stating DACA was illegal and that, *given that DACA must, therefore, be ended,* the best course was 'an orderly and efficient wind-down process,' rather than a potentially harsh shutdown in the Fifth Circuit." ER.39.

But the court's narrow reading of the Acting Secretary's rationale is hardly the only one that "may reasonably be discerned" from the Acting Secretary's memorandum. *Bowman*, 419 U.S. at 286. Indeed, that memorandum focused from beginning to end principally on litigation concerns, not the legality of DACA *per se*. The memorandum recounted in significant detail the litigation surrounding the DAPA and expanded DACA policies. ER. 125. It noted that the agency's prior June 2017 decision to discontinue DAPA and expanded DACA was made after "considering the [government's] likelihood of success on the merits of th[at] ongoing litigation." ER.129. It described the subsequent letter from Texas and other States to the Attorney General notifying him of those States' intention to amend the existing

lawsuit to challenge the original DACA policy. *Id.* It quoted the Attorney General's qualified statement that "it is *likely* that potentially imminent litigation would yield similar results with respect to DACA." *Id.* (emphasis added). And it concluded that, in light of the foregoing, and "[i]n the exercise of [her] authority in establishing national immigration policies and priorities" under 6 U.S.C. § 202(5), the Acting Secretary had decided merely that the DACA policy "should" be terminated and wound down in "an efficient and orderly fashion," *not* that it "must" be, as the district court erroneously asserted. ER.129-30. Given all that, the district court indisputably erred in holding that the memorandum was not, at the very least, reasonably susceptible to the interpretation that the Acting Secretary's decision was based on the risk that the government was not likely to succeed on the merits of the "imminent litigation." ER.129.

The district court also posited that litigation risk could not have been a rationale for the Acting Secretary's decision because, "once the Attorney General had determined that DACA was illegal, the Acting Secretary had to accept his ruling as 'controlling.'" ER.39 (citing 8 U.S.C. § 1103(a)(1)). But even if the Acting Secretary were bound by the Attorney General's legal determination as to DACA's unlawfulness, she could and did conclude that an independent basis for winding down DACA is that the policy would be enmeshed in litigation and subject to a likely injunction even if courts ultimately rejected the Attorney General's view. Indeed, the

FDA's non-enforcement policy in *Chaney* similarly relied on both enforcement discretion and a perceived lack of jurisdiction. 470 U.S. at 824.

4. In any event, the Acting Secretary's decision is independently supported by her reasonable conclusion, informed by the Attorney General's advice, that indefinitely continuing the DACA policy would itself have been unlawful. As detailed above, the Fifth Circuit had already concluded that DAPA and expanded DACA were procedurally and substantively invalid, in a decision that four Justices of the Supreme Court voted to affirm. *See supra* pp. 29-30. The Attorney General expressed his agreement with the conclusion reached by the Fifth Circuit in a decision that applies equally to the original DACA policy. *See* ER.176 (concluding that the DACA policy was "effectuated . . . without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result"). It cannot be that the Acting Secretary's decision to rescind the purely discretionary DACA non-enforcement policy on the basis of the Fifth Circuit's decision, the Supreme Court's equally divided affirmance, and the Attorney General's opinion was the type of "clear error of judgment," *State Farm*, 463 U.S. at 43, that would make it arbitrary and capricious under the APA.

The district court concluded that the Acting Secretary could not rely on an assessment of DACA's legality unless it was correct as a matter of law. *See* ER.29 ("When agency action is based on a flawed legal premise, it may be set aside as 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law.'") (citing *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007)). Citing the Secretary's broad discretion in "[e]stablishing national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and DHS's "long and recognized practice" of granting deferred action (along with work authorization and other benefits) on a programmatic basis, the court concluded that, in its view, DACA was lawful. ER.31. But the Fifth Circuit rejected those precise considerations when offered in support of DAPA and expanded DACA. *See Texas*, 809 F.3d at 183.

More fundamentally, the district court was wrong to conclude that the Acting Secretary's discretionary decision to end a particular enforcement policy of doubtful legality must automatically be set aside if a court subsequently decides that the policy was lawful. ER.37-38. The court relied on the Supreme Court's decision in *Massachusetts* v. *EPA*, *supra*, for that proposition. But in that case a provision of the Clean Air Act spoke directly to the agency decision at issue, and *required* EPA to regulate any air pollutant which the agency concluded endangered public health or welfare. *See* 42 U.S.C. § 7521(a)(1) (mandating that the EPA Administrator "shall" prescribe standards). The agency had "refused to comply with this clear statutory command" in part because it misunderstood its authority. 549 U.S. at 533. By contrast here, no one contends that the INA requires DHS to continue the DACA policy of deferred action. Rather, the DACA policy was created as a matter of DHS's broad discretion to set enforcement priorities. After careful review, the Acting Secretary determined to rescind that discretionary policy based on concerns about its legality,

and nothing in either the APA or INA authorizes setting aside her reasonable determination.

B. The DACA rescission did not violate equal protection.

Plaintiffs have failed to state a claim that the DACA rescission violated equal protection. Their claim that the Acting Secretary's enforcement decision was motivated by racial animus is foreclosed by the Supreme Court's decision in *AADC*.

1. In *AADC*, the Supreme Court rejected a group of aliens' attempt to defend against removal by asserting that the Government was discriminating against them based on their First Amendment activity. 525 U.S. at 488-92. Relying on its decisions in *Armstrong*, 517 U.S. at 463-65, and *Wayte v. United States,* 470 U.S. 598, 607-08 (1985), the Court began with the principle that "[e]ven in the criminal-law field, a selective prosecution claim is a *rara avis." AADC*, 525 U.S. at 489. As the Court reaffirmed, "[b]ecause such claims invade a special province of the Executive—its prosecutorial discretion—we have emphasized that the standard for proving them is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully." *Id.*

The Supreme Court in *AADC* then held that an even more restrictive rule than *Armstrong*'s clear-evidence standard was required when the claim of selective enforcement arises in the immigration context, because the concerns raised by such claims are "greatly magnified." *AADC*, 525 U.S. at 489-90. The Court observed that the "delay" associated with challenges to immigration enforcement decisions is more

harmful because it "permit[s] and prolong[s] a continuing violation of United States law," especially given that "[p]ostponing justifiable deportation (in the hope that the alien's status will change . . . or simply with the object of extending the alien's unlawful stay) is often the principal object of resistance to a deportation proceeding." *Id.* at 490. The Court also recognized that heightened separation-of-powers concerns arise in this context because inquiring into the motives behind immigration enforcement entails "not merely the disclosure of normal domestic law enforcement priorities and techniques," but also "the disclosure of foreign-policy objectives and [in some cases, like *AADC* itself,] foreign-intelligence products and techniques." *Id.* at 490-91. Given all this, the Court dismissed "[t]he contention that a violation [of federal law] must be allowed to continue because it has been improperly selected" as "not powerfully appealing." *Id.* at 491.

Accordingly, the Court held that, "as a general matter," "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *AADC*, 525 U.S. at 488. Although the Court did "not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the . . . considerations [against discriminatory-enforcement claims] can be overcome," it also did not decide "[w]hether or not there be such exceptions." *Id.* at 491.

2. A claim that a facially-neutral policy like the DACA rescission was motivated by racial animus is insufficient to overcome *AADC*'s general bar on

discriminatory-motive challenges to immigration-enforcement decisions. *See* 525 U.S. at 491-92 (holding that even selectively targeting particular aliens on the basis of their First Amendment activity did not rise to the level of the possible exception for "outrageous" discrimination). Virtually any immigration policy is likely to have a disparate impact on aliens of some ethnicity, and thus would be vulnerable to a discriminatory-motive allegation from aliens merely seeking to continue their unlawful presence in this country. Even if all such claims were ultimately proven baseless, the very act of adjudicating them leads precisely to the delay and foreign policy concerns the Court described in *AADC*. *See id.* at 490.

Notably, neither plaintiffs nor the district court identified a single case holding that *AADC*'s possible exception for "outrageous" discrimination exists and was satisfied (and the government is not aware of such of a case). Instead, the district court, in a footnote, ignored *AADC* and distinguished *Armstrong* on the ground that "[p]laintiffs' claims cannot fairly be characterized as selective-prosecution claims" because they do not "implicate the [Acting Secretary's] prosecutorial discretion" to remove "one person rather than another," as they instead concern her "decision to end a nationwide deferred-action program [allegedly] motivated by racial animus." ER.59 n.3. That, however, is a distinction without a difference, because *AADC*'s rationale applies at least equally (if not more) to broad immigration enforcement policies as it does to individual enforcement decisions.

3. At a minimum, if racial discriminatory-motive claims are cognizable in the immigration-enforcement context at all under *AADC*, they must meet the "particularly demanding" standard applicable in the criminal-enforcement context: plaintiffs must plausibly allege the existence of "'clear evidence'" of "outrageous" discrimination, thus "displacing the presumption that a [federal enforcement official] has acted lawfully," before the claim may proceed past the pleadings. *AADC*, 525 U.S. at 489, 491 (citing *Armstrong*, 517 U.S. at 463-65). This standard is extremely demanding, and plaintiffs have identified no case where a court has held it to be satisfied. Indeed, several courts of appeals rejected equal-protection challenges to a registration requirement for male immigrants from certain (predominantly Muslim) countries—which led to removal for those without lawful status—on the ground that "outrageous" discrimination had not been sufficiently demonstrated. *See, e.g.*, *Kandamar v. Gonzales*, 464 F.3d 65, 73-74 (1st Cir. 2006); *Hadayat v. Gonzalez*, 458 F.3d 659, 664-65 (7th Cir 2006).

Rather than applying the *AADC* standard, the district court held that plaintiffs had stated a claim that the DACA rescission violated equal protection based on a much lesser showing. It concluded merely that their allegations regarding candidate Trump's "campaign rhetoric" raised a "plausible inference that racial animus towards Mexicans and Latinos," who "account for 93 percent of DACA recipients," "was a motivating factor in the decision to end DACA." ER.59, ER.61. The court believed

that a "fact-intensive inquiry [was] needed to determine whether defendants acted with discriminatory intent." *Id.* The court's holding is flawed in myriad respects.

In relying on "campaign rhetoric," the court disregarded the absence of *any* statement by the actual decisionmaker in this case—Acting Secretary Duke—that could give rise to any inference of animus. Acting Secretary Duke was the only government official with the legal authority to rescind a DHS policy that DHS had operated for the previous five years, 8 U.S.C. § 1103(a)—regardless of the (undisputed) involvement by the White House. For plaintiffs to succeed, it is the Acting Secretary's decision that must be infected by discriminatory animus. Yet plaintiffs' contention that the Acting Secretary's decision was tainted by the President's alleged bias does not even satisfy the ordinary pleading standards of *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681 (2009), much less the "clear evidence" standard of *AADC* and *Armstrong*. Contrary to the district court's understanding, there are no factual issues to resolve.

Moreover, even taking the President's statements on their own terms, such statements are insufficient. First, nationality, as opposed to ethnicity, is not an invidious classification for purposes of federal immigration law. *Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008). And second, most of the statements did not refer to DACA, or indeed any official policy, since they occurred on the campaign trail and preceded the President's inauguration and oath of office. *See Washington v. Trump*, 858 F.3d 1168, 1173 & n.4 (9th Cir. 2017) (Kozinski, J., dissenting from denial of

rehearing en banc). Indeed, as the district court recognized, the few cited statements referring directly to DACA are, in fact, favorable to DACA recipients. ER.61.

Simply put, the statements relied on by the district court do not come close to plausibly alleging clear evidence of discriminatory motive. Indeed, it is utterly implausible that Acting Secretary Duke would have retained DACA if the nearly 700,000 aliens without lawful status were not predominantly Latino, especially given the questions about DACA's legality. The equal-protection claim should be dismissed.

C. The implementation of the DACA rescission will not violate due process.

Plaintiffs failed to state a substantive due-process claim based on their assertion that the government has changed its policy regarding whether information provided by DACA recipients to USCIS will be shared with other DHS components for purposes of immigration enforcement proceedings. Plaintiffs did not allege any facts giving rise to a plausible inference that such a policy change has actually occurred—and DHS has made clear that its policy in fact has not changed. Nor have plaintiffs identified an improper deprivation of a protected interest, as required to state a substantive due-process claim.

1. The district court credited plaintiffs' assertions that DHS has changed its information policy. ER.56. But those conclusory assertions are unsupported—and in fact contradicted—by documents referenced by plaintiffs, as well as other publicly

available materials. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

When DACA was initially implemented, DHS published a "frequently asked questions" web page that included guidance covering DHS's policy regarding the sharing of information provided to USCIS by DACA requestors. *See* ER.145. The guidance stated that information would be "protected from disclosure to ICE and [Customs and Border Protection (CBP)] for the purpose of immigration enforcement proceedings," subject to exceptions where the criteria for issuance of a Notice to Appear are satisfied (for example, where national security, public safety, or significant criminal activity interests are implicated), and subject to the caveat that it "may be modified, superseded, or rescinded at any time." ER.149; *see also id.* (explaining that information may be used for certain purposes other than removal); USCIS, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs)* (Nov. 7, 2011), https://go.usa.gov/xncPK (last visited Feb 13, 2018).

Nothing in the Acting Secretary's Rescission Memorandum changes that approach—in fact, the memorandum makes no reference to information sharing at all. Plaintiffs point only to a questions-and-answers document issued with the memorandum, but that document simply confirms that DACA information "generally" "will not be proactively provided to ICE and CPB for the purpose of immigration enforcement proceedings." ER.136. Far from demonstrating a change in policy, this document is entirely consistent with DHS's existing information-sharing

policy—which DHS reiterated in guidance it issued thereafter. DHS, USCIS, *Frequently Asked Questions: Rejected DACA Requests* Q5 (Dec. 27, 2017), https://www.uscis.gov/daca2017/mail-faqs ("This information-sharing policy has not changed in any way since it was first announced, including as a result of the Sept. 5, 2017 memo starting a wind-down of the DACA policy."). Plaintiffs' conclusory assertion that the government has changed its information-sharing policy is therefore unsupported—and in fact contradicted—by their factual allegations and publicly available documents.

2. In any event, plaintiffs' allegations do not state a substantive due process violation. When a plaintiff alleges a substantive due process violation based on principles of "fundamental fairness," the alleged conduct must effect a "government deprivation of life, liberty, or property," *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006) (quotation omitted), and must be "so egregious" and "outrageous" as to "shock the contemporary conscience," *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8, 850 (1998).

The district court held that the plaintiffs had alleged a "mutually explicit understanding, giving rise to a protected interest in the confidentiality of DACA recipients' personal information," ER.56, but the information-sharing policy does not give rise to such an interest. The DACA guidance could not have been clearer that the policy was entirely non-binding: it states that it does not confer any substantive entitlement and could be altered or rescinded at any time. ER.149 (stating that

information-sharing policy may be "modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural"). In the face of this clear language, a subjective belief to the contrary cannot create a protected due process interest. "A person's belief of entitlement to a government benefit, no matter how sincerely or reasonably held, does not create a property right if that belief is not mutually held by the government." *Gerhart v. Lake County*, 637 F.3d 1013, 1020-21 (9th Cir. 2011).

Finally, even if a due process interest did exist, plaintiffs have failed to show that DHS's alleged change to its information-sharing policy shocks the conscience. *Lewis,* 523 U.S. at 847 n.8, 850. The information-sharing policy has always been subject to a number of exceptions providing for use in certain immigration-enforcement and non-removal contexts, and any hypothetical expansion of those uses would not be conscience-shocking, especially given that plaintiffs were given clear notice that the policy conferred no rights and could change. For this reason as well, plaintiffs fail to state a substantive due process claim with respect to DHS's information-sharing policy.

III. The District Court's Nationwide Injunction Is Overbroad.

Even assuming the district court correctly concluded that plaintiffs' substantive APA claim is reviewable and that the DACA rescission was likely arbitrary and capricious, the court still erred in enjoining the rescission of DACA on a "nationwide basis." ER.46. The court's injunction contravenes bedrock principles of Article III

and equitable discretion by sweeping far more broadly than necessary to redress the plaintiffs' cognizable injuries.

A. Injunctive relief must be limited to redressing plaintiffs' cognizable injuries.

1. To establish Article III standing, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). "[S]tanding is not dispensed in gross," and the plaintiff must establish standing "separately for each form of relief sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). As this Court has recognized, "our legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated." *Zepeda v. U.S. Immigration & Naturalization Serv.*, 753 F.2d 719, 730 n.1 (9th Cir. 1983).

The same principles inform the Supreme Court's repeated admonition that the standing requirements of Article III preclude a court from granting relief that is not directed to remedying the injury asserted by the plaintiff. Thus, for example, in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), the Court held that the plaintiffs lacked standing to challenge regulations after the parties had resolved the controversy regarding the regulations' application to the project that had caused the plaintiffs' injury. Noting that the plaintiffs' "injury in fact with regard to that project ha[d] been remedied," the Court held that to allow the plaintiffs to challenge the regulations

"apart from any concrete application that threatens imminent harm to [their] interests" would "fly in the face of Article III's injury-in-fact requirement." *Id.* at 494; *see also Lewis v. Casey*, 518 U.S. 343, 357-59 (1996) (rejecting proposition that "once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court w[as] authorized to remedy *all* inadequacies in that administration," because "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established").

This Court likewise has recognized the "elementary principle" that, absent class certification, plaintiffs are "not entitled to relief for people whom they do not represent." *Zepeda*, 753 F.2d at 730 n.1. Were it otherwise, any individual plaintiff "could merely file an individual suit as a pseudo-private attorney general and enjoin the government in all cases." *Id.* The Seventh Circuit also has squarely held that a district court may not "grant relief to non-parties" where an injunction limited to the party would provide complete relief because a broader injunction "exceed[s] the district judge's powers under Article III of the Constitution." *McKenzie v. City of Chi.*, 118 F.3d 552, 555 & n.* (7th Cir. 1997).

2. Even apart from Article III's requirements, fundamental principles of equity support the same rule. The "Supreme Court has cautioned that 'injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs' before the court." *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979));

see also Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994). Thus, "[i]njunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification." *Haven Hospice*, 638 F.3d at 664; *see also Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994).

In *Los Angeles Haven Hospice*, this Court agreed with the district court that a regulation was facially invalid, but nonetheless vacated an injunction insofar as it barred the government from enforcing the regulation against entities other than the plaintiff. 638 F.3d at 665. The Court recognized that relief extending to parties not before the Court is authorized only "if such broad relief is necessary to give prevailing parties the relief to which they are entitled." *Id.* at 664 (citing *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987)).

As this Court has also recognized, "nationwide injunctions 'have a detrimental effect by foreclosing adjudication by a number of different courts and judges.'" *Los Angeles Haven Hospice*, 638 F.3d at 664 (quoting *Califano*, 442 U.S. at 702). Here, the same legal issues are currently pending in (among other cases) litigation that may soon be before the Second Circuit. *See Nielsen v. Vidal*, Order of Jan. 31, 2018, Case Nos. 18-122, 18-123 (holding petition for interlocutory appeal under 1292(b) in abeyance pending district court's resolution of pending preliminary injunction motion); *Vidal v. Nielsen*, Case Nos. 16-4756, 17-5228, Dkt.No.254 (Feb. 13, 2018) (granting preliminary injunction for essentially the same reasons as the district court in this case). If this Court were to leave the nationwide injunction in place, then the plaintiffs

in that case and all other DACA recipients within the Second Circuit would be covered by this injunction, even if that court were to hold that the DACA rescission is lawful.

Nationwide injunctions are further problematic for a related reason. They provide plaintiffs all the benefits of a class action without any of the burdens or obligations. Once a single plaintiff prevails, the district court issues the relief that might have been appropriate if it had certified a class of all affected parties. But insofar as the federal government prevails, it gains none of the benefits of prevailing in a class action and, in particular, cannot preclude other plaintiffs from filing suit to relitigate the same issues. Indeed, in this very case, the district court dismissed two State plaintiffs for lack of standing, ER.28, yet the resident DACA recipients those States sought to protect will still benefit from the injunction, essentially nullifying the court's own standing holding.

3. The district court grappled with none of these Article III or equitable issues. Rather than analyzing the scope of relief necessary to address the injury alleged by plaintiffs before it, the court summarily stated that "Plaintiffs have established injury that reaches beyond the geographical bounds of the Northern District of California" because "[t]he problem affects every state and territory of the United States." ER.47. But that rationale would hold true for any national policy subject to a facial challenge, leading to the improper and unfair results described above.

This Court's decision in *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), is not to the contrary. There, recognizing that "[i]njunctive relief must be tailored to remedy the specific harms shown by the plaintiffs," this Court upheld a nationwide injunction only because it deemed that necessary to give plaintiffs full relief based on its view that "the immigration laws of the United States should be enforced vigorously and *uniformly*." *Id.* at 701. That rationale cuts the exact opposite way here. Deferred action is itself a departure from vigorous and uniform enforcement of the immigration laws. Accordingly, enjoining the rescission of DACA on a nationwide basis, rather than as limited to particular DACA recipients whose loss of DACA would cognizably injure plaintiffs, increases rather than lessens that departure.

Even more inapposite is *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam). There, this Court merely declined to stay a nationwide temporary restraining order, emphasizing both that it need not conclusively resolve the TRO's proper geographic scope and that "the Government has not proposed a workable alternative form of the TRO that . . . that would protect the proprietary interests of the [plaintiff] States at issue here while nevertheless applying only within the States' borders." *Id.* at 1166-67. That case thus represents, at most, a tentative application of the principle that injunctive relief extending to third parties can be awarded when such relief is necessary to provide complete relief to the plaintiffs. *See Bresgal*, 843 F.2d at 1170-71 ("[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a

class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled*.").

B. The injunction goes well beyond redressing plaintiffs' cognizable injuries.

1. The district court's nationwide injunction violates the requirements of Article III and equity. The injunction grants relief to thousands of DACA recipients who are not parties before the court and who do not need to be covered to provide plaintiffs here with complete relief. In particular, a proper injunction would be limited to DACA recipients who are named plaintiffs or validly represented by the union plaintiff, as well as any additional DACA recipients whose loss of DACA would impose cognizable injuries on the various entity plaintiffs.

2. Properly limiting the injunction in this manner would be particularly significant because the district court further erred in holding that the entity plaintiffs will suffer a cognizable injury from the DACA rescission. In particular, the court held that those plaintiffs will be injured in their capacities as employers of DACA recipients. ER.23-24. But that is not a judicially cognizable interest for purposes of challenging the DACA rescission.

To begin, the entity plaintiffs' interests as employers do not even satisfy Article III. The decision to rescind the DACA policy does not directly regulate these parties by requiring them to do (or refrain from doing) anything. Instead, these plaintiffs complain of indirect injury flowing from the government's enforcement decision

concerning their employees. But it is settled law that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). The district court rejected the government's reliance on *Linda R.S.*, reasoning that the causal relationship between the non-prosecution decision and the asserted injury in *Linda R.S.* had been "speculative," whereas the alleged harm here to the entity plaintiffs' "proprietary interests" would be the "direct result" of the DACA rescission. ER.26. But in addition to the particular causation holding in *Linda R.S.*, the Supreme Court relied on the more general proposition that, "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619. The entity plaintiffs thus simply do not have a judicially cognizable interest in the nonprosecution of their employees.

The entity plaintiffs' interests as employers also fall outside the INA's zone of interests. The APA does not "allow suit by every person suffering injury in fact." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395 (1987). Rather, it provides a cause of action only to a plaintiff "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. To be "aggrieved" in this sense, "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Clarke*, 479 U.S. at 396. Here, no provision of the INA even arguably protects the entity plaintiffs from bearing any incidental employment effects from their employees' loss of

deferred action. *Cf. Federation for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 899 (D.C. Cir. 1996) (dismissing under zone-of-interests a suit challenging parole of aliens into this country, where plaintiffs relied on incidental effects of that policy on workers). To the contrary, DHS's discretionary decision to grant deferred-action recipients the collateral benefit of employment authorization is a matter of regulatory grace rather than statutory mandate, 8 C.F.R. § 274a.12(c)(14), which underscores that employers lack a cognizable interest in challenging the INA's purely discretionary decision whether to grant or rescind deferred action at all. By the district court's contrary logic, every employer in the country would have standing to directly challenge any removal proceeding against any one of its employees. Although the zone-of-interests test may not "be especially demanding," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012), it cannot be stretched beyond the bounds of reason.[8]

[8] Similarly, the entity plaintiffs lack third-party standing, as employers or otherwise, to bring constitutional claims on behalf of DACA recipients. *See Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004).

CONCLUSION

For the foregoing reasons, the district court's preliminary injunction should be vacated and its order denying in part the government's motion to dismiss should be reversed.

Respectfully submitted,

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February 2018

STATEMENT OF RELATED CASES

A petition for writ of certiorari before judgment is currently pending in the Supreme Court. *See Department of Homeland Security v. Regents of the University of California*, Case No. 17-1003.

Counsel for appellants are not aware of any related cases, not consolidated here, pending in this Court as defined in Ninth Circuit Rule 28-2.6.

CER.TIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,975 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Mark B. Stern
MARK B. STERN

CER.TIFICATE OF SER.VICE

I hereby certify that on February 13, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/Mark B. Stern
MARK B. STERN

ADDENDUM

TABLE OF CONTENTS

5 U.S.C. § 701

(a) This chapter applies, according to the provisions thereof, except to the extent that--
(1) statutes preclude judicial review; or
(2) agency action is committed to agency discretion by law.
(b) For the purpose of this chapter--
(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--
(A) the Congress;
(B) the courts of the United States;
(C) the governments of the territories or possessions of the United States;
(D) the government of the District of Columbia;
(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
(F) courts martial and military commissions;
(G) military authority exercised in the field in time of war or in occupied territory; or
(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;[1] and
(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

6 U.S.C. § 202

The Secretary shall be responsible for the following:

(1) Preventing the entry of terrorists and the instruments of terrorism into the United States.

(2) Securing the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States, including managing and coordinating those functions transferred to the Department at ports of entry.

(3) Carrying out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the date on which the transfer of functions specified under section 251 of this title takes effect.

(4) Establishing and administering rules, in accordance with section 236 of this title, governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States.

(5) Establishing national immigration enforcement policies and priorities.

(6) Except as provided in part C of this subchapter, administering the customs laws of the United States.

(7) Conducting the inspection and related administrative functions of the Department of Agriculture transferred to the Secretary of Homeland Security under section 231 of this title.

(8) In carrying out the foregoing responsibilities, ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce.

8 U.S.C. § 1252

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that--

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection--

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 or any other habeas corpus provision, by section 1361

or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal--

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of--

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner--

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was

issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 C.F.R. § 274a.12

(c) Aliens who must apply for employment authorization. An alien within a class of aliens described in this section must apply for work authorization. If authorized, such an alien may accept employment subject to any restrictions stated in the regulations or cited on the employment authorization document. USCIS, in its discretion, may establish a specific validity period for an employment authorization document, which may include any period when an administrative appeal or judicial review of an application or petition is pending.
(1) An alien spouse or unmarried dependent child; son or daughter of a foreign government official (A–1 or A–2) pursuant to 8 CFR 214.2(a)(2) and who presents an endorsement from an authorized representative of the Department of State;
(2) An alien spouse or unmarried dependent son or daughter of an alien employee of the Coordination Council for North American Affairs (E–1) pursuant to § 214.2(e) of this chapter;
(3) A nonimmigrant (F–1) student who:
(i)(A) Is seeking pre-completion practical training pursuant to 8 CFR 214.2(f)(10)(ii)(A)(1) and (2);
(B) Is seeking authorization to engage in up to 12 months of post-completion Optional Practical Training (OPT) pursuant to 8 CFR 214.2(f)(10)(ii)(A)(3); or
(C) Is seeking a 24–month OPT extension pursuant to 8 CFR 214.2(f)(10)(ii)(C);
(ii) Has been offered employment under the sponsorship of an international organization within the meaning of the International Organization Immunities Act (59 Stat. 669) and who presents a written certification from the international organization that the proposed employment is within the scope of the organization's sponsorship. The F–1 student must also present a Form I–20 ID or SEVIS Form I–20 with employment page completed by DSO certifying eligibility for employment; or
(iii) Is seeking employment because of severe economic hardship pursuant to 8 CFR 214.2(f)(9)(ii)(C) and has filed the Form I–20 ID and Form I–538 (for non–SEVIS schools), or SEVIS Form I–20 with employment page completed by the DSO certifying eligibility, and any other supporting materials such as affidavits which further detail the unforeseen economic circumstances that require the student to seek employment authorization.
(4) An alien spouse or unmarried dependent child; son or daughter of a foreign government official (G–1, G–3 or G–4) pursuant to 8 CFR 214.2(g) and who presents an endorsement from an authorized representative of the Department of State;

(5) An alien spouse or minor child of an exchange visitor (J–2) pursuant to § 214.2(j) of this chapter;
(6) A nonimmigrant (M–1) student seeking employment for practical training pursuant to 8 CFR 214.2(m) following completion of studies. The alien may be employed only in an occupation or vocation directly related to his or her course of study as recommended by the endorsement of the designated school official on the I–20 ID;
(7) A dependent of an alien classified as NATO–1 through NATO–7 pursuant to § 214.2(n) of this chapter;
(8) An alien who has filed a complete application for asylum or withholding of deportation or removal pursuant to 8 CFR part 208, whose application:
(i) Has not been decided, and who is eligible to apply for employment authorization under § 208.7 of this chapter because the 150-day period set forth in that section has expired. Employment authorization may be granted according to the provisions of § 208.7 of this chapter in increments to be determined by the Commissioner and shall expire on a specified date; or
(ii) Has been recommended for approval, but who has not yet received a grant of asylum or withholding or deportation or removal;
(9) An alien who has filed an application for adjustment of status to lawful permanent resident pursuant to part 245 of this chapter. For purposes of section 245(c)(8) of the Act, an alien will not be deemed to be an "unauthorized alien" as defined in section 274A(h)(3) of the Act while his or her properly filed Form I–485 application is pending final adjudication, if the alien has otherwise obtained permission from the Service pursuant to 8 CFR 274a.12 to engage in employment, or if the alien had been granted employment authorization prior to the filing of the adjustment application and such authorization does not expire during the pendency of the adjustment application. Upon meeting these conditions, the adjustment applicant need not file an application for employment authorization to continue employment during the period described in the preceding sentence;
(10) An alien who has filed an application for suspension of deportation under section 244 of the Act (as it existed prior to April 1, 1997), cancellation of removal pursuant to section 240A of the Act, or special rule cancellation of removal under section 309(f)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Pub.L. 104–208 (110 Stat. 3009–625) (as amended by the Nicaraguan Adjustment and Central American Relief Act (NACARA)), title II of Pub.L. 105–100

(111 Stat. 2160, 2193) and whose properly filed application has been accepted by the Service or EOIR;
<Text of subsection (c)(11) effective until March 14, 2018.>
(11) An alien paroled into the United States temporarily for emergency reasons or reasons deemed strictly in the public interest pursuant to § 212.5 of this chapter;
<Text of subsection (c)(11) effective March 14, 2018.>
(11) Except as provided in paragraphs (b)(37) and (c)(34) of this section and § 212.19(h)(4) of this chapter, an alien paroled into the United States temporarily for urgent humanitarian reasons or significant public benefit pursuant to section 212(d)(5) of the Act.
(12) An alien spouse of a long-term investor in the Commonwealth of the Northern Mariana Islands (E–2 CNMI Investor) other than an E–2 CNMI investor who obtained such status based upon a Foreign Retiree Investment Certificate, pursuant to 8 CFR 214.2(e)(23). An alien spouse of an E–2 CNMI Investor is eligible for employment in the CNMI only;
(13) [Reserved]
(14) An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment;
(15) [Reserved]
(16) Any alien who has filed an application for creation of record of lawful admission for permanent residence pursuant to part 249 of this chapter;
(17) A nonimmigrant visitor for business (B–1) who:
(i) Is a personal or domestic servant who is accompanying or following to join an employer who seeks admission into, or is already in, the United States as a nonimmigrant defined under sections 101(a)(15)(B), (E), (F), (H), (I), (J), (L) or section 214(e) of the Act. The personal or domestic servant shall have a residence abroad which he or she has no intention of abandoning and shall demonstrate at least one year's experience as a personal or domestic servant. The nonimmigrant's employer shall demonstrate that the employer/employee relationship has existed for at least one year prior to the employer's admission to the United States; or, if the employer/employee relationship existed for less than one year, that the employer has regularly employed (either year-round or seasonally) personal or domestic servants over a period of several years preceding the employer's admission to the United States;

(ii) Is a domestic servant of a United States citizen accompanying or following to join his or her United States citizen employer who has a permanent home or is stationed in a foreign country, and who is visiting temporarily in the United States. The employer/employee relationship shall have existed prior to the commencement of the employer's visit to the United States; or
(iii) Is an employee of a foreign airline engaged in international transportation of passengers freight, whose position with the foreign airline would otherwise entitle the employee to classification under section 101(a)(15)(E)(i) of the Immigration and Nationality Act, and who is precluded from such classification solely because the employee is not a national of the country of the airline's nationality or because there is no treaty of commerce and navigation in effect between the United States and the country of the airline's nationality.
(18) An alien against whom a final order of deportation or removal exists and who is released on an order of supervision under the authority contained in section 241(a)(3) of the Act may be granted employment authorization in the discretion of the district director only if the alien cannot be removed due to the refusal of all countries designated by the alien or under section 241 of the Act to receive the alien, or because the removal of the alien is otherwise impracticable or contrary to the public interest. Additional factors which may be considered by the district director in adjudicating the application for employment authorization include, but are not limited to, the following:
(i) The existence of economic necessity to be employed;
(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support; and
(iii) The anticipated length of time before the alien can be removed from the United States.
(19) An alien applying for Temporary Protected Status pursuant to section 244 of the Act shall apply for employment authorization only in accordance with the procedures set forth in part 244 of this chapter.
(20) Any alien who has filed a completed legalization application pursuant to section 210 of the Act (and part 210 of this chapter).
(21) A principal nonimmigrant witness or informant in S classification, and qualified dependent family members.
(22) Any alien who has filed a completed legalization application pursuant to section 245A of the Act (and part 245a of this chapter). Employment authorization shall be granted in increments not exceeding 1 year during the period the application is

pending (including any period when an administrative appeal is pending) and shall expire on a specified date.
(23) [Reserved by 76 FR 53796]
(24) An alien who has filed an application for adjustment pursuant to section 1104 of the LIFE Act, Public Law 106–553, and the provisions of 8 CFR part 245a, Subpart B of this chapter.
(25) Any alien in T–2, T–3, T–4, T–5, or T–6 nonimmigrant status, pursuant to 8 CFR 214.11, for the period in that status, as evidenced by an employment authorization document issued by USCIS to the alien.
(26) An H–4 nonimmigrant spouse of an H–1B nonimmigrant described as eligible for employment authorization in 8 CFR 214.2(h)(9)(iv).
(27) to (33) [Reserved]
<Text of subsection (c)(34) added by 82 FR 5289, effective March 14, 2018, as amended by 82 FR 31887.>
(34) A spouse of an entrepreneur parolee described as eligible for employment authorization in § 212.19(h)(3) of this chapter.
(35) An alien who is the principal beneficiary of a valid immigrant petition under section 203(b)(1), 203(b)(2) or 203(b)(3) of the Act described as eligible for employment authorization in 8 CFR 204.5(p).
(36) A spouse or child of a principal beneficiary of a valid immigrant petition under section 203(b)(1), 203(b)(2) or 203(b)(3) of the Act described as eligible for employment authorization in 8 CFR 204.5(p).