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' RESPONSE AND REPLY BRIEF

CHAD A. READLER
Acting Assistant Attorney General

ALEX G. TSE
Acting United States Attorney

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MARK B. STERN
ABBY C. WRIGHT
THOMAS PULHAM
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-2000

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY OF ARGUMENT..1

I. The Acting Secretary's Decision Is Not Subject to Judicial Review. 4

A. The decision to rescind the DACA policy was a nonreviewable discretionary enforcement decision. 4

B. The INA bars review of plaintiffs' claims. 14

II. On the Merits, the District Court Erred to the Extent That It Denied the Government's Motion to Dismiss and Entered a Preliminary Injunction. 19

A. The rescission of the DACA policy was not arbitrary and capricious..19

1. Plaintiffs fail to distinguish the *Texas* decisions' invalidation of DAPA. 21

2. Because the *Texas* decisions apply with equal force to DACA, the Acting Secretary reasonably rescinded DACA based on litigation risk...24

3. Because the *Texas* decisions apply with equal force to DACA, the Acting Secretary also reasonably rescinded DACA based on concerns about its legality. 27

4. Plaintiff's additional arbitrary-and-capricious arguments are without merit...30

B. The DACA rescission did not violate equal protection............................36

C. The implementation of the DACA rescission will not violate due process. 40

D. The district court's nationwide injunction is overbroad. 43

III. On Plaintiffs' Cross-Appeal, the District Court Should Be Affirmed to the Extent That It Granted the Government's Motion to Dismiss. 51

A. The DACA rescission did not require notice-and-comment rulemaking. 51

B. The denial of DACA renewals does not violate substantive due process. 57

CONCLUSION 61

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page(s)**

Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle,
829 F.2d 933 (9th Cir. 1987) 11

American Forest Res. Council v. Ashe,
946 F. Supp. 2d 1 (D.D.C. 2013) 56

Amerijet Int'l, Inc. v. Pistole,
753 F.3d 1343 (D.C. Cir. 2014) 21, 32

Arizona Dream Act Coal. v. Brewer,
855 F.3d 957 (9th Cir. 2017), *cert. denied*,
2018 WL 1369140 (Mar. 19, 2018) 29

Arpaio v. Obama,
797 F.3d 11 (D.C. Cir. 2015) 29

Arpin v. Santa Clara Valley Transp. Agency,
261 F.3d 912 (9th Cir. 2001) 51

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 40, 41

Barahona-Gomez v. Reno,
236 F.3d 1115 (9th Cir. 2001) 16

Batalla Vidal v. Nielsen,
No. 16-cv-4756, 2018 WL 1532370 (E.D.N.Y. Mar. 29, 2018) 42, 51, 55

Board of Regents v. Roth,
408 U.S. 564 (1972) 58

Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,
419 U.S. 281 (1974) 20, 25, 28

Bresgal v. Brock,
843 F.2d 1163 (9th Cir. 1987) 44, 45, 46, 47

Califano v. Yamasaki,
442 U.S. 682 (1979) 45

Casa de Maryland v. DHS,
No. 17-2942, 2018 WL 1156769 (D. Md. Mar. 5, 2018) 20, 47

Catholic Soc. Servs., Inc. v. INS,
232 F.3d 1139 (9th Cir. 2000) 16

Chaney v. Heckler,
718 F.2d 1174 (D.C. Cir. 1983) 10

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 52

Citizens to Pres. Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 32

Coalition on Sensible Transp., Inc. v. Dole,
826 F.2d 60 (D.C. Cir. 1987) 32

Consumer Energy Council of Am. v. FERC,
673 F.2d 425 (D.C. Cir. 1982) 56

Crane v. Johnson,
783 F.3d 244 (5th Cir. 2015) 29

Crowley Caribbean Transp., Inc. v. Pena,
37 F.3d 671 (D.C. Cir. 1994) 8, 9, 11

De Beers Consol. Mines v. United States,
325 U.S. 212 (1945) 46

Doran v. Houle,
721 F.2d 1182 (9th Cir. 1983) 42

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016) 30

Edison Elec. Inst. v. EPA,
996 F.2d 326 (D.C. Cir. 1993) 8

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 21, 30

Gerhart v. Lake County,
637 F.3d 1013 (9th Cir. 2011) 58

In re GGM, PC,
165 F.3d 1026 (5th Cir. 1999) 41

Gonzales-Caraveo v. Sessions,
882 F.3d 885 (9th Cir. 2018) 9

Heckler v. Chaney,
470 U.S. 821 (1985) 1, 4, 5, 6, 7, 10, 13

ICC v. Brotherhood of Locomotive Eng'rs,
482 U.S. 270 (1987) 2, 4, 7

International Longshoremen's & Warehousemen's Union v. Meese,
891 F.2d 1374 (9th Cir. 1989) 11

International Longshoremen's Ass'n v. National Mediation Bd.,
785 F.2d 1098 (D.C. Cir. 1986) 9

Jean v. Nelson,
711 F.2d 1455 (11th Cir. 1983) 37

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 17, 18

Kenney v. Glickman,
96 F.3d 1118 (8th Cir. 1996) 11

Kowalski v. Tesmer,
543 U.S. 125 (2004) 50

Kwai Fun Wong v. United States,
373 F.3d 952 (9th Cir. 2004) 37

Lamb-Weston, Inc. v. McCain Foods, Ltd.,
941 F.2d 970 (9th Cir. 1991) 46

Lincoln v. Vigil,
508 U.S. 182 (1993) 10, 51

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 48, 49

Los Angeles Haven Hospice, Inc. v. Sebelius,
638 F.3d 644 (9th Cir. 2011) 44, 46

Lujan v. National Wildlife Fed'n,
497 U.S. 871 (1990) 49

Mada-Luna v. Fitzpatrick,
813 F.2d 1006 (9th Cir. 1987) 3, 29, 52, 53, 55

Massachusetts v. EPA,
549 U.S. 497 (2007) 49

McFarlin v. Conseco Servs., LLC,
381 F.3d 1251 (11th Cir. 2004) 41

Meinhold v. Department of Def.,
34 F.3d 1469 (9th Cir. 1994) 44

Michigan v. EPA,
135 S. Ct. 2699 (2015) 31

Montana Air Chapter No. 29 v. FLRA,
898 F.2d 753 (9th Cir 1990) 8, 9

Morales de Soto v. Lynch,
824 F.3d 822 (9th Cir. 2016) 12, 14, 54

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 19, 20, 31, 32

Municipality of Anchorage v. United States,
980 F.2d 1320 (9th Cir. 1992) 54

National Treasury Emps. Union v. Cornelius,
617 F. Supp. 365 (D.D.C. 1985) 56

National Treasury Emps. Union v. Horner,
854 F.2d 490 (D.C. Cir. 1988) 11

National Wildlife Fed'n v. EPA,
980 F.2d 765 (D.C. Cir. 1992) 11

Noel v. Chapman,
508 F.2d 1023 (2d Cir. 1975) 11

Organized Village of Kake v. USDA,
795 F.3d 956 (9th Cir. 2015) 26

OSG Bulk Ships, Inc. v. United States,
132 F.3d 808 (D.C. Cir. 1998) 11

Pacific Gas & Elec. Co. v. FPC,
506 F.2d 33 (D.C. Cir. 1974) 51, 52

Pacific Shores Props., LLC v. City of Newport Beach,
730 F.3d 1142 (9th Cir. 2013) 38

Perez v. Mortgage Bankers Ass'n,
135 S. Ct. 1199 (2015) 52

Rajah v. Mukasey,
544 F.3d 427 (2d Cir. 2008) 39

Reno v. American-Arab Anti-Discrimination Comm.,
525 U.S. 471 (1999) 1, 6, 14, 15, 17, 18, 36, 37, 38

Robbins v. Reagan,
780 F.2d 37 (D.C. Cir. 1985) 14

Romeiro de Silva v. Smith,
773 F.2d 1021 (9th Cir. 1985) 53, 56, 59

San Luis & Delta-Mendota Water Auth. v. Locke,
776 F.3d 971 (9th Cir. 2014) 20

Serrato v. Clark,
486 F.3d 560 (9th Cir. 2007) 6

Syncor Int'l Corp. v. Shalala,
127 F.3d 90 (D.C. Cir. 1997) 52

Texas v. United States,
86 F. Supp. 3d 591 (S.D. Tex. 2015) 22
809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*,
136 S. Ct. 2271 (2016)..1, 22, 23, 29, 34, 55

Town of Castle Rock v. Gonzales,
545 U.S. 748 (2005) 57, 58

Town of Chester v. Laroe Estates, Inc.,
137 S. Ct. 1645 (2017)..43

Trizec Prop., Inc. v. U.S. Mineral Prods. Co.,
974 F.2d 602 (5th Cir. 1992)..25

Trump v. International Refugee Assistance Project,
137 S. Ct. 2080 (2017).. 25, 45

United States v. Armstrong,
517 U.S. 456 (1996) 36, 40

United States v. Carona,
660 F.3d 360 (9th Cir. 2011)..18

United States v. Hovsepian,
359 F.3d 1144 (9th Cir. 2004)..16

United States ex rel. Parco v. Morris,
426 F. Supp. 976 (E.D. Pa. 1977) 55

Villa-Anguiano v. Holder,
727 F.3d 873 (9th Cir. 2013)..13

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,
429 U.S. 252 (1977) 37

Virginia Soc'y for Human Life, Inc. v. FEC,
263 F.3d 379 (4th Cir. 2001)..46

Walters v. Reno,
145 F.3d 1032 (9th Cir. 1998) 16

Winter v. Natural Res. Def. Council,
555 U.S. 7 (2008) 25

Yamaha Motor Corp., U.S.A. v. Calhoun,
516 U.S. 199 (1996) 40

Zepeda v. U.S. INS,
753 F.2d 719 (9th Cir. 1983) 46

Statutes:

5 U.S.C. § 553(b)-(c) 51

5 U.S.C. § 553(b)(3)(A) 3, 51

5 U.S.C. § 701(a)(2) 1, 4

5 U.S.C. § 705 46

6 U.S.C. § 202(5) 24

8 U.S.C. § 1103(a)(1) 33

8 U.S.C. § 1252(b) 1

8 U.S.C. § 1252(b)(9) 15

8 U.S.C. § 1252(g) 15, 17

28 U.S.C. § 1292(b) 40

Rule:

Fed. R. App. P. 5(b)(1) 40

Other Authorities:

Remarks by the President on Immigration (June 15, 2012), https://go.usa.gov/xnZFY 30, 58

Statement from President Trump (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump 35

USCIS, DHS, *Frequently Asked Questions: Rejected DACA Requests* Q5 (Dec. 27, 2017), https://www.uscis.gov/daca2017/mail-faqs 42

U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 51

INTRODUCTION AND SUMMARY OF ARGUMENT

As the government's opening brief demonstrated, the Acting Secretary's decision to rescind the DACA policy is not subject to judicial review here. Under the Administrative Procedure Act (APA), the rescission is an enforcement decision that is traditionally committed to agency discretion, 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985), and the Immigration and Nationality Act (INA) further provides that any review can take place only from a final removal order, 8 U.S.C. § 1252(b), (g); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999) (*AADC*). Moreover, as the government's brief also demonstrated, the Acting Secretary's decision was not arbitrary and capricious under the APA. Given that the INA prescribes no legal or factual determinations that must be made or even considered in adopting this purely discretionary enforcement decision, the Acting Secretary acted entirely reasonably in winding down the DACA policy in light of (1) the nationwide preliminary injunction against the closely related policies of DAPA and expanded DACA, *see Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam), and (2) the Attorney General's opinion that DACA likely would and should be legally invalidated as well.

Plaintiffs primarily respond that the Acting Secretary's decision is both reviewable and reversible because she committed a legal error in concluding that DACA was invalid. This argument is fundamentally flawed. To begin, even assuming that plaintiffs were properly characterizing the rationale of the Acting Secretary's

discretionary enforcement decision, they fail to overcome the Supreme Court's square holding that 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*) (emphasis added). Moreover, plaintiffs mischaracterize the Acting Secretary's rationale. She did not rest on the judgment that DACA *must* be rescinded because it was *in fact* legally invalid, but rather explained her conclusion that DACA "should" be rescinded after considering both the *Texas* courts' invalidation of materially indistinguishable policies and also the Attorney General's opinion that DACA "likely" would and should be invalidated for the same reasons. ER.129-30. That rationale is a quintessential exercise of nonreviewable enforcement discretion, and it is eminently reasonable on the merits in any event. Plaintiffs' contrary position severely interferes with Executive Branch enforcement prerogatives, and improperly requires the Department of Homeland Security (DHS) to disregard judicial decisions and continue affirmatively sanctioning an ongoing violation of federal law by nearly 700,000 aliens without lawful status.

Plaintiffs fare no better on their other claims. *First*, plaintiffs' defense of the district court's refusal to dismiss their equal-protection challenge to the DACA rescission effectively ignores the Supreme Court's decision in *AADC*. Moreover, unable to identify the clear evidence of outrageous government conduct that is required (at a minimum) under *AADC*, plaintiffs instead primarily rely on comments that did not even concern DACA and were not even made by the Acting Secretary—

which is wholly inadequate even apart from *AADC*. *Second*, plaintiffs' cross-appeals of the district court's dismissal of their notice-and-comment challenge to the DACA rescission are foreclosed by both precedent and common sense. The APA exempts "general statements of policy" from notice and comment, 5 U.S.C. § 553(b)(A), and this type of reordering of deferred-action enforcement priorities readily qualifies, as this Court has already held in virtually identical circumstances, *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1016-17 (9th Cir. 1987). In any event, if DACA's rescission required notice and comment, then DACA was void from the outset because it necessarily would have so required also. *Third*, with respect to both the due-process claims that were dismissed and those that were not, plaintiffs have no protected liberty or property interest in either the retention of DACA or the government's information-sharing policy post-rescission. DACA expressly conferred no substantive rights and was revocable at any time, and plaintiffs regardless have failed to demonstrate any government conduct that would rise to the level of a substantive-due-process violation.

Finally, at a minimum, plaintiffs have failed to justify the gross overbreadth of the district court's nationwide injunction. Although that injunction should be reversed and the case dismissed in full, the injunction at least should be limited to the particular DACA recipients who are named plaintiffs or validly represented by the union plaintiff.

ARGUMENT

I. The Acting Secretary's Decision Is Not Subject to Judicial Review.

A. The decision to rescind the DACA policy was a nonreviewable discretionary enforcement decision.

The Acting Secretary's decision to wind down DACA is a classic example of an enforcement decision that is "committed to agency discretion by law" and thus not subject to judicial review under the APA. 5 U.S.C. § 701(a)(2). An agency's decision whether to retain a policy of selective non-enforcement (like the decision whether to adopt such a policy in the first place) is "peculiarly within its expertise," and, like "the decision of a prosecutor in the Executive Branch [whether or] not to indict," is properly "regarded as the special province of the Executive Branch." *See Chaney*, 470 U.S. at 832. Critically, such decisions "cannot be the subject of judicial review" even when the agency chooses to exercise its discretion based on legal analysis that would be "a 'reviewable' reason" in another context. *BLE*, 482 U.S. at 283. Plaintiffs' efforts to distinguish *Chaney* and *BLE* all fail.

1. The government's opening brief explained that the district court's various grounds for distinguishing *Chaney* and *BLE* cannot be correct because they would apply equally to enforcement decisions that are indisputably nonreviewable, such as a prosecutor's decision to rescind her predecessor's non-enforcement policy of seeking drug treatment rather than criminal incarceration for low-level, non-violent drug users, based on her legal concerns that the policy fails to faithfully execute the laws

and provide equal treatment to defendants. Br. 25. Notably, plaintiffs do not dispute the hypothetical: they do not contend that such a change in policy would be judicially reviewable on the ground that reliance on a categorical legal rationale would provide "law to apply," or on any other of the grounds advanced by the district court to distinguish *Chaney* and *BLE*.

Instead, plaintiffs try to distinguish the hypothetical on the distinct ground that "the enforcement of criminal statutes is fundamentally different from civil enforcement actions." Regents.Br. 41 n.7; *see* States.Br. 26-27. But the Supreme Court rejected such a distinction in *Chaney* and *AADC*. In *Chaney*, the Court repeatedly analogized to criminal enforcement discretion in support of its holding concerning civil enforcement discretion. *E.g.*, 470 U.S. at 831 ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, *whether through civil or criminal process*, is a decision generally committed to an agency's absolute discretion." (emphasis added)); *id.* at 832 (comparing "an agency's refusal to institute proceedings" with a prosecutor's decision "not to indict"). And the Court did so notwithstanding a concurring opinion that criticized equating civil and criminal enforcement discretion. *See id.* at 847-49 (Marshall, J., concurring in the judgment) (arguing that "reliance on prosecutorial discretion, itself a fading talisman, to justify the unreviewability of agency inaction is inappropriate"). In *AADC*, moreover, the Court instructed that challenges to civil enforcement discretion in the

immigration context are *more restricted* than challenges to prosecutorial discretion, because they seek to maintain an ongoing violation of federal law. 525 U.S. at 489-91.

2. Just as plaintiffs fail to distinguish the government's drug-prosecution hypothetical, they likewise fail to defend the various grounds the district court gave for why the Acting Secretary's decision is reviewable notwithstanding *Chaney* and *BLE*.

a. Plaintiffs primarily emphasize various sources of law that they claim could be used to analyze the merits of the Acting Secretary's rationale for rescinding DACA. States.Br. 19-20; Regents.Br. 35-36; Garcia.Br. 20. But in arguing there is "law to apply," plaintiffs ignore the government's explanation (Br. 23-25) of how *Chaney* and its progeny have articulated the test for overcoming the presumption against reviewability of enforcement discretion: namely, the alleged "law to apply" must "circumscribe agency enforcement discretion" and "provide[] meaningful standards for defining limits of that discretion." *Chaney*, 470 U.S. at 834. That test is not satisfied for plaintiffs' arbitrary-and-capricious claims, because it is undisputed that the INA did not restrict the Acting Secretary's authority to rescind DACA.[1]

Nothing in *Chaney* supports plaintiffs' suggestion that "legal sources that purportedly informed the agency's decision," Regents.Br. 35, provide a basis to review

[1] By contrast, as the government has noted, plaintiffs' constitutional claims are not precluded by § 701(a)(2). Br. 24 n.6. This Court has stated that notice-and-comment claims are also not precluded, *Serrato v. Clark*, 486 F.3d 560, 569 (9th Cir. 2007), though the government preserves its right to seek further review of that issue.

an enforcement decision that was *not limited* by those legal sources because the agency merely *chose to consider them* in the exercise of its unconstrained discretion. Indeed, *BLE* made clear that enforcement decisions are not subject to review merely because an agency (or prosecutor) has chosen to invoke various sources of law to explain the manner in which it has exercised its nonreviewable discretion. 482 U.S. at 283. Plaintiffs' sole response is to argue that *BLE* is limited to agency decisions that are traditionally unreviewable. States.Br. 25; Regents.Br. 42; Garcia.Br. 23-24. But as demonstrated in the government's opening brief and below, broad programmatic exercises of enforcement discretion, such as the DACA rescission, *are* traditionally unreviewable, in part because there typically is no "law to apply" governing how the agency may exercise such discretion.

Plaintiffs also assert that the DACA rescission is reviewable because the Acting Secretary's decision focused on legal considerations rather than a more general balancing of discretionary factors. States.Br. 24; Regents.Br. 38-39; Garcia.Br. 20. Contrary to plaintiffs' suggestion, the Acting Secretary's articulated rationale was not that she was legally *compelled* to rescind DACA, but rather that she should *exercise her discretion* to do so in light of significant concerns about litigation risk and legality. *Infra* p. 24; *see also Chaney*, 470 U.S. at 824-25 (noting that the FDA's non-enforcement decision was based on both a perceived lack of jurisdiction and policy factors). Moreover, even if the Acting Secretary had concluded that her enforcement decision was legally required, plaintiffs' argument that her decision would then be reviewable is

little more than a repackaging of the line of inquiry foreclosed by *BLE* and *Chaney*. Where the agency has engaged in an exercise of enforcement discretion that is not constrained by law, a court may not review the agency's decision under the APA, regardless of what factors the agency chooses to consider in making that decision, including embedded legal conclusions regarding its authority to act or not to act at all. As the D.C. Circuit has correctly recognized, *BLE* "squarely rejects" the proposition that "*Chaney*'s presumption of non-reviewability is inapplicable when the agency bases its refusal to enforce in an individual case solely on a legal interpretation without explicitly relying on its enforcement discretion." *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 675-76 (D.C. Cir. 1994).

None of the cases cited by plaintiffs establish that there is "law to apply" here within the meaning of *Chaney* and *BLE*. Plaintiffs' two primary cases involve the inapposite scenario of a nonreviewable enforcement decision that contains an embedded interpretation of the statute's substantive commands that is separately reviewable. *See Edison Elect. Inst. v. EPA*, 996 F.2d 326, 331, 333 (D.C. Cir. 1993) (reviewable interpretation of the lawfulness of certain waste storage practices included in a nonreviewable decision deprioritizing such violations); *Montana Air Chapter No. 29 v. FLRA*, 898 F.2d 753, 757-58 (9th Cir 1990) (reviewable interpretation of the scope of prohibited unfair labor practices included in a nonreviewable decision declining to issue a complaint). Here, by contrast, the Acting Secretary's decision to rescind DACA did not directly interpret the INA's provisions governing the primary conduct

of aliens or other parties (*e.g.*, which crimes render an alien removable). Rather, it addressed, at most, the INA's constraints on her enforcement discretion *to maintain* DACA.[2]

Even less apposite is *Gonzales-Caraveo v. Sessions*, 882 F.3d 885 (9th Cir. 2018). There, this Court merely held that it could review a certain type of procedural decision by the Board of Immigration Appeals both because such procedural rulings were different from "enforcement decisions" and because the Board itself had issued a binding opinion constraining its discretion in making such procedural rulings. *Id.* at 889, 891-92. Neither condition applies here.

b. Plaintiffs further urge that there is no tradition of nonreviewability for broad programmatic exercises of enforcement discretion that constitute major policy decisions. States.Br. 21-22; Regents.Br. 41, 43; Garcia.Br. 22-23. The government previously explained why the district court's attempted distinction between "broad enforcement policies" and "individual enforcement decision[s]," ER.20, is not viable (Br. 19-21), and plaintiffs have failed to resuscitate it.

---

[2] To be sure, *Montana Air Chapter* further held, relying on a D.C. Circuit opinion, that an agency's nonenforcement decision itself became reviewable because it was "based solely on [the] belief that [the agency] lacks jurisdiction." 898 F.2d at 756 (citing *International Longshoremen's Ass'n v. National Mediation Bd.*, 785 F.2d 1098, 1100 (D.C. Cir. 1986)). But the D.C. Circuit has since recognized that its 1986 opinion was abrogated by the Supreme Court's later decision in *BLE* (which *Montana Air Chapter* failed to address). *Crowley*, 37 F.3d at 675-76. And in any event, the Acting Secretary here did not rely solely on a perceived lack of authority to retain DACA. *Infra* p. 24.

Most importantly, plaintiffs' argument is irreconcilable with *Chaney* itself. There, the D.C. Circuit had likewise tried to justify reviewing FDA's non-enforcement decision by emphasizing that it was a "refus[al] to take action with regard to an *entire category* of allegedly prohibited activity," *Chaney v. Heckler*, 718 F.2d 1174, 1191 n.45 (D.C. Cir. 1983). The Supreme Court nevertheless held that FDA's categorical refusal "to interfere with this particular aspect of state criminal justice systems" was unreviewable, *Chaney*, 470 U.S. at 824-25. Plaintiffs' suggestion that FDA had merely "declined to take action in response to petitions in individual cases," Garcia.Br. 23 n.3, ignores our showing that the individual petitions had requested *industry-wide* relief (Br. 19).

Likewise, in *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court held that judicial review was unavailable for the Indian Health Service's decision to discontinue a program that provided diagnostic and treatment services to disabled Indian children across the Southwest. *Id.* at 184, 188. Plaintiffs attempt to characterize the agency's decision "whether to continue funding for a specific region" as involving a "one-time decision[]" rather than a "broad policy determination[]," Regents.Br. 42 n.8, but that ignores the sweeping policy implications of the agency's decision to "reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide," *Lincoln*, 508 U.S. at 195.

Again, none of the cases cited by plaintiffs supports their position that discretionary enforcement decisions become reviewable if made at the wholesale

rather than retail level. Plaintiffs primarily rely on a line of cases where courts distinguished between "an agency's statement of *a general enforcement policy*" and a "*single-shot* non-enforcement decision," but that distinction was expressly based on the presumption that general policies are "more likely to be direct interpretations of the commands of the substantive statute." *Crowley*, 37 F.3d at 676-77; *see also OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998); *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996). As explained, the Acting Secretary's decision here did not contain such an embedded interpretive rule, and this Court has applied *Chaney* to similar broad non-enforcement policies. *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 935, 938 (9th Cir. 1987) (holding nonreviewable a general, "written policy" that stated game laws would not be enforced during the closed season but did not provide any interpretation of the substantive requirements of those laws).

Plaintiffs' remaining cases are even further afield. Most do not even involve challenges to enforcement discretion. *International Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374, 1377 (9th Cir. 1989) (classification of alien employees under the INA); *National Treasury Emps. Union v. Horner*, 854 F.2d 490, 494 (D.C. Cir. 1988) (classification of job categories within the civil service); *National Wildlife Fed'n v. EPA*, 980 F.2d 765, 773 & n.3 (D.C. Cir. 1992) (allocation of regulatory authority between state and federal agencies, and statute constrained the latter in any event). And the last pre-dates *Chaney*. *Noel v. Chapman*, 508 F.2d 1023, 1029 (2d Cir. 1975).

c. Plaintiffs also reprise the district court's distinction between exercises of discretion that permit enforcement and those that prevent it. States.Br. 23; Regents.Br. 39-40; Garcia.Br. 21. But as the government explained (Br. 18-19), that distinction is foreclosed by *Morales de Soto v. Lynch*, 824 F.3d 822 (9th Cir. 2016). To recap, this Court held that, under *Chaney*, it could not review the decision of Immigration and Customs Enforcement (ICE) to reinstate a prior order of removal rather than to exercise its "prosecutorial discretion to initiate a new removal proceeding before an immigration judge," even though that was a "decision *to* enforce" rather than a "decision *not* to enforce." *Id.* at 825, 827 & n.4. The Garcia plaintiffs are simply wrong (Br. 22 n.2) that the Court's discussion of *Chaney* was dicta, because it was an essential aspect of the Court's reasoning supporting its holding that changes in ICE enforcement policies neither required nor permitted a remand to the agency. *Morales de Soto*, 824 F.3d at 827.

Plaintiffs relatedly assert that the rescission of DACA is an enforcement decision that should be judicially reviewable now because it involves an exercise of "coercive power" separate and apart from the final decision to remove a former DACA recipient, given that such recipients would be immediately "expose[d] . . . to the possibility of proceedings" to remove them. States.Br. 23; Regents.Br. 39-40; Garcia.Br. 21-22. But this argument proves far too much, because *whenever* the government announces an intent to enforce the law, those violating the law must contend with the looming prospect of enforcement. That is clearly not what the

Supreme Court had in mind when it distinguished a nonenforcement decision's lack of "coercive power over an individual's liberty or property rights." *Chaney*, 470 U.S. at 832. Rather, the "action [that] provides a focus for judicial review" when agencies decide to enforce is the final agency action against the regulated party. *See id.*[3]

d. Plaintiffs finally argue that the Acting Secretary's rescission of DACA should be judicially reviewable because DACA provided recipients with collateral benefits upon which they have come to rely. States.Br. 22; Garcia.Br. 22. The government already identified the flaws in this argument. Br. 21-22. For one thing, reliance interests do not justify judicial review of unreviewable acts, as demonstrated by the Supreme Court's unanimous decision in *Lincoln*, which held that the decision to reallocate funds away from medical treatment services for disabled Indian children was not reviewable. For another, the potential consequences of lack of review do not alter the result, as demonstrated by *Chaney*, where prison inmates claimed that they would suffer a cruel and unusual death. Plaintiffs do not attempt to rebut either of these points based on controlling precedent.

Instead, plaintiffs rely on a statement in a D.C. Circuit case that courts can review "rescissions of commitments" by government actors because they "exert much more direct influence on the individuals or entities to whom the repudiated

[3] Contrary to Plaintiffs' suggestion (Garcia Br. 21), this Court did not hold otherwise in *Villa-Anguiano v. Holder*, 727 F.3d 873 (9th Cir. 2013). That case merely held that *Chaney* does not foreclose a due process claim that ICE exceeded its discretion in reinstating a final removal order. *Id.* at 881 n.9.

commitments were made." *Robbins v. Reagan*, 780 F.2d 37, 47 (D.C. Cir. 1985) (per curiam). But *Robbins* is doubly inapposite. To begin, DHS explicitly disavowed any commitment to retain DACA when it adopted the policy, emphasizing that it was conferring no substantive rights and could rescind the policy at any time. *Infra* p. 58; *see also Morales de Soto*, 824 F.3d at 827 (expressing doubt that memoranda containing similar language "can even be properly characterized as changes in agency policy" that might warrant remand for agency reconsideration). Moreover, the agency action at issue in *Robbins* was the alleged refusal to provide previously agreed-upon funding for renovations of a homeless shelter, which was not an exercise of enforcement discretion that triggered *Chaney*'s presumption of nonreviewability. 780 F.2d at 39-41, 46-49. As explained above, the Acting Secretary's decision to rescind DACA does fall within that presumption, and plaintiffs have failed to rebut its application by identifying any statutory or regulatory constraint that can be applied to her discretionary decision under the APA.

B. The INA bars review of plaintiffs' claims.

As the Supreme Court explained in *AADC*, the INA itself 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 INA affords such protection by channeling legal challenges to such decisions into review of

final removal orders, pursuant to two related provisions stripping district courts of jurisdiction: 8 U.S.C. § 1252(g) covers claims on behalf of aliens arising from an "action" "to commence proceedings" against them; and 8 U.S.C. § 1252(b)(9), an "unmistakable 'zipper' clause," covers all questions of law or fact arising from any "action taken . . . to remove an alien," see id.; AADC, 525 U.S. at 483. As the government has explained (Br. 25-26), the INA thus precludes the pre-removal challenge here to the Acting Secretary's rescission of DACA. The rescission is a "'no deferred action' decision[]" of the sort the INA intended to protect, AADC, 525 U.S. at 485; it is an initial "action" that is an ingredient "to commence proceedings" for removal, 8 U.S.C. § 1252(g); and it was "taken" to enable "remov[al]" of aliens who are unlawfully in the country, *id.* § 1252(b)(9).

In response, plaintiffs emphasize (States.Br. 29-30; Regents.Br. 31-32; Garcia.Br. 24) the Supreme Court's statement in *AADC* that section 1252(g) "applies only to three discrete actions," which are the commencement of proceedings, adjudication of cases, and execution of removal orders. 525 U.S. at 482. That is true, but plaintiffs' claims challenge one of those steps. Again, the decision to rescind a policy of *forbearance from removal* is itself an "action" that is an ingredient "to commence proceedings" for removal. 8 U.S.C. § 1252(g). To hold otherwise would undermine *AADC*'s explicit admonition that section 1252(g) bars review of "no deferred action" decisions. *See* 525 U.S. at 485 & n.9.

Plaintiffs also argue that jurisdiction is not precluded for "programmatic" challenges to the actions covered by section 1252(g). Regents.Br. 32 & n.4; Garcia.Br. 25. But the cases cited stand for a proposition that is less sweeping and is inapposite here. Namely, they hold that aliens may bring certain types of "collateral challenges" to actions distinct from the three discretionary steps covered by section 1252(g), even if part of the relief for such claims impedes the government's ability to remove the alien. *See, e.g.*, *Walters v. Reno*, 145 F.3d 1032, 1051-52 (9th Cir. 1998) (due-process challenge to procedures for finding an alien guilty of document fraud, which renders the alien removable).[4] Again, by contrast, plaintiffs' challenge to the Acting Secretary's discretionary rescission of forbearance from removal cannot fairly be characterized as "collateral" to a challenge to discretionary action to commence removal.

The State plaintiffs further assert that their suit is not "on behalf of any alien" and therefore does not fall within the scope of section 1252(g). Br. 28-29. But non-alien plaintiffs cannot end-run the INA's reticulated review scheme governing the removal of aliens. Suits by States to block the general rescission of a deferred action policy pose an even greater threat to "'no deferred action' decisions and similar

[4] *See also Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1141-42, 1145, 1150 (9th Cir. 2000) (en banc) (statutory challenge to interpretation of requirements for naturalization); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1117-21 (9th Cir. 2001) (various challenges to a directive restricting how immigration judges resolved cases after the decision had been made to adjudicate removal); *cf. United States v. Hovsepian*, 359 F.3d 1144, 1155-56 (9th Cir. 2004) (en banc) (allowing district court to "consider a purely legal question" concerning the alien's substantive removability that "does not challenge the [government's] discretionary authority" to commence removal).

discretionary determinations" than suits brought by individual aliens. *AADC*, 525 U.S. at 485. Moreover, given that the State plaintiffs' standing rests on the alleged harm imposed by the rescission on individual DACA recipients with whom they have employment relationships, *see infra* p. 48, the States' claims here are indisputably "on behalf of [those individual] alien[s]," 8 U.S.C. § 1252(g), especially since any relief should be limited to those particular aliens, *see infra* p. 48. As for the States' objection (Br. 31-32) that they themselves cannot obtain review of DACA's rescission by challenging final removal orders against former DACA recipients, that gets matters backwards: it is precisely because the States do not have a cognizable interest under the INA in challenging the removal of third-party aliens, *see infra* pp. 48-50, that the States cannot be allowed to challenge actions to commence removal that the aliens themselves cannot challenge due to section 1252(g).

Finally, the Supreme Court's recent decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), does not counsel a different result. The plurality opinion there did describe *AADC* as having interpreted section 1252(g) not "to sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General," but instead as having "read the language to refer to just those three specific actions themselves." *Id.* at 841. But the opinion was merely emphasizing that the plaintiffs there fell outside of *AADC*'s interpretation of section 1252(g) because they were challenging only the conditions and length of detention ancillary to the removal process—in other words, "[they were] not asking for review of an order of removal;

they [were] not challenging the decision to detain them in the first place or to seek removal; and they [were] not even challenging any part of the process by which their removability will be determined." *Id.* Here, by contrast, the legal questions at issue arise from a challenge to an ingredient to commencement of removal—the rescission of deferred-action forbearance from removal—and review is therefore barred under section 1252(g) and *AADC*. *Id.* at 841 n.3.

Moreover, *Jennings* underscores the fact that plaintiffs have failed to explain why section 1252(b)(9), which channels all legal and factual questions "arising from any action taken or proceeding brought to remove an alien" into final removal orders, does not also bar their claims. Under both the plurality's and concurrence's interpretation of section 1252(b)(9), *see* 138 S. Ct. at 841 (plurality op.); *id.* at 852 (Thomas, J., concurring in the judgment), plaintiffs' claims in this case "aris[e] from" an "action taken" in the removal process. Contrary to plaintiffs' suggestion (Garcia.Br. 26), it is not impermissibly redundant that sections 1252(g) and 1252(b)(9) both bar their claims, given that the latter is an "unmistakable 'zipper' clause." *AADC*, 525 U.S. at 483. Plaintiffs fail to demonstrate that either provision would be "entirely redundant" under the government's interpretation, *see id.*, and the canon against superfluity "does not prevent more than one provision of a statute from applying in a particular instance," *United States v. Carona*, 660 F.3d 360, 368 (9th Cir. 2011).

II. On the Merits, the District Court Erred to the Extent That It Denied the Government's Motion to Dismiss and Entered a Preliminary Injunction.

As the government's opening brief demonstrated, the district court erred in denying the motion to dismiss with respect to plaintiffs' claims that the rescission of DACA was arbitrary and capricious as well as an equal-protection violation, and that the implementation of the rescission violates substantive due process based on an alleged change in the government's information-sharing policy. And because the preliminary injunction against the rescission rests on the arbitrary-and-capricious claim that fails as a matter of law, the injunction must be vacated. At a minimum, though, the injunction must be vacated given its gross overbreadth. Plaintiffs fail to refute any of these points.

A. The rescission of the DACA policy was not arbitrary and capricious.

As a threshold matter, plaintiffs' articulation of the APA standard of review (States.Br. 36-37; Regents.Br. 44-46) fails to grapple with the nature of the DACA rescission decision, which was not subject to any statutory or regulatory constraints and thus did not require any particular legal, factual, or evidentiary basis. For such a decision, the fundamental principle that the arbitrary-and-capricious standard is "narrow" and does not permit a court "to substitute its judgment" for the agency's "rational" decision, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983), applies with particular force. Likewise, it would be especially

improper to require the Acting Secretary to spell out her subsidiary legal reasoning, so long as her "path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974); *see San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 999 (9th Cir. 2014) (even very brief explanation is adequate). And the Acting Secretary necessarily had wide latitude to determine what the "important aspect[s] of the problem" were that she needed to consider. *State Farm*, 463 U.S. at 43.

To overcome the Acting Secretary's broad discretion, plaintiffs portray her decision as resting solely on a conclusion that DACA had to be rescinded because it was illegal. *E.g.*, States.Br. 15; Regents.Br. 26; Garcia.Br. 16-17; *see also* ER.39 (district court's similar holding). But that is a mischaracterization of the Acting Secretary's memorandum, which instead explained her conclusion that DACA "should" be rescinded after "[t]aking into consideration" the *Texas* litigation invalidating DAPA and expanded DACA, as well as the Attorney General's opinion that DACA "likely" would and should meet the same fate. ER.129-30. As explained in our opening brief, and further detailed below, the memorandum thus did not rely solely on illegality *per se*, but rather principally on litigation risk and legality concerns. As a Maryland district court recently held, that was an eminently reasonable basis to rescind DACA, *Casa de Maryland v. DHS*, No. 17-2942, 2018 WL 1156769, at *9 (D. Md. Mar. 5, 2018), and plaintiffs fail to show otherwise.

1. Plaintiffs fail to distinguish the *Texas* decisions' invalidation of DAPA.

At the outset, in criticizing the Acting Secretary's reliance on the *Texas* decisions, plaintiffs repeatedly attempt to increase her burden under the APA review standard, by urging that she was required both to spell out in detail why she concluded that DAPA and DACA were sufficiently similar, and to anticipatorily rebut all the reasons plaintiffs now assert the facial similarities are illusory. States.Br. 42-45, 48-49, 54-55; Regents.Br. 48, 53; Garcia.Br. 32-33, 40. But plaintiffs have pointed to no law supporting their premise that the arbitrary-and-capricious standard requires an agency to spell out subsidiary legal grounds supporting an ultimate legal conclusion that is reasonable on its face. Although plaintiffs emphasize a case holding that "conclusory statements" that "explain[] nothing about *why* the agency" reached its decision are insufficient, that same case also reaffirmed that an agency need "not explicitly connect the dots" where its "path may reasonably be discerned." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350-51 (D.C. Cir. 2014). Indeed, the memorandum that originally adopted DACA contained *no* analysis of its legality, ER.141-43, yet plaintiffs obviously do not contend that the DACA policy itself was arbitrary and capricious. Nor did the APA require the Acting Secretary to conduct a more detailed analysis of DACA's legality before rescinding that policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009).

Turning to the merits of whether DACA is distinguishable from DAPA under the *Texas* decisions, an insurmountable obstacle to plaintiffs' position is that the district court's injunction affirmed by the Fifth Circuit covered both DAPA and *expanded DACA*. *Texas v. United States*, 86 F. Supp. 3d 591, 677-78 (S.D. Tex. 2015); *Texas*, 809 F.3d at 147 n.11, 178. Although plaintiffs note that the DACA expansion was distinct from the original policy, States.Br. 45 n.15; Regents.Br. 48 n.9, they do not and cannot explain why the distinctions—which merely concerned the length of the deferred-action period and the age and residence guidelines—would have been legally material to the rationale of the *Texas* courts. Indeed, the very fact that the Fifth Circuit did not separately analyze expanded DACA underscores it viewed that policy (and thus DACA itself) to be materially indistinguishable from DAPA, as the district court had held.

As to the Fifth Circuit's substantive holding, plaintiffs reprise the distinction proposed by the district court here—namely, that because the INA contains a pathway to lawful status for DAPA beneficiaries, but not for DACA recipients, DAPA was somehow more suspect. States.Br. 45-46 & n.16; Regents.Br. 48-49 & n.10; Garcia.Br. 35 & n.5. As we have explained, however, this gets matters backward: because the INA does not provide a pathway to lawful status for individuals eligible for DACA, that policy is an even greater affront to Congress's legislative judgment. Br. 32. Plaintiffs' rejoinder that the Fifth Circuit would have viewed this as mere congressional "silence" conflicts with that court's determination that the INA is a

comprehensive, reticulated scheme. *See Texas,* 809 F.3d at 179 ("[T]he INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present."). Relying on its understanding of the INA, the Fifth Circuit distinguished historical examples of deferred action, which it viewed as involving true gaps in the INA in emergency or interim situations. *See id.* at 184.

Plaintiffs also repeat the district court's suggestion that the somewhat smaller number of people affected by DACA somehow distinguishes it from DAPA. States.Br. 46; Regents.Br. 49; Garcia.Br. 36. But plaintiffs have no response to our showing (Br. 33) that the relatively modest size difference between these two major policies is legally immaterial under the Fifth Circuit's rationale. Conversely, plaintiffs' reliance on the relatively large size of the Family Fairness program fails to further their argument. Garcia.Br. 30; States.Br. 46. That program was of an entirely different nature, in the Fifth Circuit's view, because it was "interstitial to a statutory legalization scheme." *Texas*, 809 F.3d at 185.

Finally, as to the Fifth Circuit's procedural holding, plaintiffs do not even attempt to refute our showing (Br. 29-30) that DACA cannot be distinguished from DAPA and expanded DACA because the court based its holding as to the latter policies on a comparison to the former policy. Rather, plaintiffs' only response is to argue that the Fifth Circuit's holding was incorrect. States.Br. 46-47; Regents.Br. 49-51; Garcia.Br. 36-37. But whether or not the Fifth Circuit was correct, it does not

change the fact that in renewed litigation *in the Fifth Circuit*, DACA would have been enjoined as violating the APA's notice-and-comment requirements.

2. Because the *Texas* decisions apply with equal force to DACA, the Acting Secretary reasonably rescinded DACA based on litigation risk.

Plaintiffs also proffer several reasons why, even accepting that DACA is indistinguishable from DAPA on the merits under the *Texas* decisions, litigation risk nevertheless cannot justify the Acting Secretary's rescission decision. Those reasons are all unavailing.

Plaintiffs' primary contention is that this litigation-risk rationale is "post-hoc." States.Br. 53-54; Regents.Br. 52; Garcia.Br. 38-39. But plaintiffs continue to ignore the text of the Acting Secretary's memorandum, which does not say that DACA *must* be rescinded because it *is* illegal, but rather that it "should" be rescinded, "[t]aking into consideration" the *Texas* decisions as well as the Attorney General's letter, and "[i]n the exercise of [her] authority in establishing national immigration policies and priorities" under 6 U.S.C. § 202(5). ER.129-30. Moreover, prior to that conclusion, the memorandum detailed the *Texas* litigation resulting in the invalidation of DAPA and expanded DACA, acknowledged the subsequent letter from Texas and other States stating their intention to amend the existing lawsuit to challenge the original DACA policy, and quoted the Attorney General's qualified statement that "it is *likely* that potentially imminent litigation would yield similar results with respect to DACA."

ER.126-29. Plaintiffs' blinkered reading of the Acting Secretary's rationale is therefore plainly not the only one that "may reasonably be discerned." *Bowman*, 419 U.S. at 286.

Plaintiffs further contend that the Acting Secretary failed to consider that a subsequent Fifth Circuit panel or the Supreme Court might have disagreed with the *Texas* decisions on the merits. States.Br. 44-45. But a subsequent panel would have been bound by the prior panel's analysis, at least at the preliminary-injunction stage. *Trizec Prop., Inc. v. U.S. Mineral Prods. Co.,* 974 F.2d 602, 604 n. 9 (5th Cir. 1992) (recognizing that the court is "bound to prior panel opinions absent *en banc* reconsideration or a superseding contrary Supreme Court case"). And contrary to plaintiffs' suggestion, the four Justices who voted in *Texas* to affirm the preliminary injunction necessarily determined there was a likelihood of success on the merits. *Compare Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (when *affirming* a preliminary injunction, court is required to find a likelihood of success on the merits), *with Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) (when *denying a stay* of a preliminary injunction, court may rely on equitable factors rather than the merits).

Plaintiffs likewise fail to identify non-merits defenses that the government could have raised if DACA had been challenged under the *Texas* decisions. Contrary to plaintiffs' argument, a laches defense would not have been successful. States.Br. 55; Regents.Br. 53-54; Garcia.Br. 36. Plaintiffs do not suggest that the suit's delay would have prejudiced the government in the litigation or otherwise, and their suggestion of

prejudice to DACA recipients—even assuming it were relevant—is implausible. There is no basis to speculate that DACA would have been less likely to be invalidated if the challenge had been filed earlier, and an earlier invalidation of DACA would have deprived DACA recipients of the benefits from the policy that plaintiffs themselves now emphasize. Similarly, plaintiffs err in asserting that equitable factors (such as DACA's existence for several years) would have justified distinguishing DAPA's invalidation in *Texas*. States.Br. 55; Regents.Br. 56-57; Garcia.Br. 36. To the contrary, allowing *further* implementation of a policy affirmatively sanctioning unlawful presence would simply have compounded the difficulties in reversing the policy.

Finally, plaintiffs err in contending that *Organized Village of Kake v. USDA*, 795 F.3d 956 (9th Cir. 2015) (en banc), categorically rejected litigation risk as a basis for rescinding prior agency action. States.Br. 54; Regents.Br. 53; Garcia.Br. 40. There, USDA initially had determined not to exempt a particular forest from a rule prohibiting roads in certain areas of national parks, but then reversed course two years later on the identical factual record. *Kake*, 795 F.3d at 959. As a tertiary rationale for its changed position, USDA suggested that granting the exemption would "reduce[ ] the potential for conflicts" in light of "litigation over the last two years" concerning its rule. *Id.* at 970. This Court rejected that rationale because the "other lawsuits involved forests other than the [one exempted]," and thus it was "impossible to discern how [the] exemption . . . would affect them," and USDA "[a]t most . . . [had] deliberately traded one lawsuit for another." *Id. Kake* is entirely inapposite. It involved the scope

of a substantive rule rather than a purely discretionary enforcement policy, and it involved speculative litigation benefits rather than the significant litigation benefit of mooting a near-certain injunction. In short, the government's position here is not that it may "trade[] one lawsuit for another," but instead that it may choose an orderly wind-down of a purely discretionary non-enforcement policy rather than litigate to the bitter end in the face of adverse precedent.

3. Because the *Texas* decisions apply with equal force to DACA, the Acting Secretary also reasonably rescinded DACA based on concerns about its legality.

Even apart from the litigation-risk rationale, it was eminently reasonable for the Acting Secretary to rescind DACA based on the significant concerns about its legality in light of the *Texas* decisions and the Attorney General's opinion. Plaintiffs' contrary arguments are mistaken.

Plaintiffs' primary response is that the *Texas* decisions are incorrect and thus reliance on their conclusions was legally erroneous. States.Br. 39-41, 43-44, 46-48; Regents.Br. 47-51; Garcia.Br. 29-31. Even setting aside that the Supreme Court affirmed the *Texas* injunction by an equally divided Court, there is a fundamental flaw in plaintiffs' argument: the reasonableness of the Acting Secretary's decision to rescind this purely discretionary non-enforcement policy because of significant legality concerns does not turn on whether DACA was in fact illegal. Again, it warrants emphasis that the Acting Secretary's memorandum explains that she concluded she "should" rescind DACA after "[t]aking into consideration" the legal conclusions of

the *Texas* courts and the Attorney General's letter, *not* that she *must* rescind DACA solely because she had determined those conclusions are legally correct. ER.129-30. At a minimum, that reading is a "reasonably . . . discern[ible]" interpretation of the Acting Secretary's memorandum. *Bowman*, 419 U.S. at 286. That reading supports the Acting Secretary's decision to end this purely discretionary non-enforcement policy (*whether or not* those legal conclusions were correct), and it renders inapposite the cases cited by plaintiffs for the proposition that reviewable agency action must be set aside where it rests on an error of law. *See* States.Br. 49-50; Regents.Br. 51; Garcia.Br. 33.

Likewise, plaintiffs cannot undermine the reasonableness of the Acting Secretary's decision by arguing that the Attorney General erroneously stated that the Fifth Circuit had found "constitutional" defects in DAPA and expanded DACA. States.Br. 42; Regents.Br. 46; Garcia.Br. 40-41. The Acting Secretary made her decision after "[t]aking into consideration" the Attorney General's letter and the Fifth Circuit's ruling, but nothing in her memorandum suggests that she misunderstood the nature of that ruling, which she herself described in purely statutory terms. ER.130. Moreover, even the Attorney General's letter in its entirety should not be read to attribute "constitutional" holdings to the *Texas* courts, but rather to invoke the "legal grounds" they adopted in support of his own view that DACA was "unconstitutional." ER.176. And in any event, any error in attributing a finding of unconstitutionality to the *Texas* courts was plainly harmless because the Attorney General did not rescind DACA. Rather, the Acting Secretary did, and it is clear from

her memorandum that her decision did not depend in any way on whether DACA was unconstitutional, rather than "merely" contrary to statute and likely to be enjoined regardless.[5]

Finally, plaintiffs erroneously suggest that even if the Acting Secretary's legality concerns were otherwise valid, they must be set aside because they represent a marked and unexplained change in position. States.Br. 39-43, 48-50; Regents.Br. 47-48, 57-58; Garcia.Br. 37-39. It is of course true that the prior Administration defended DACA's legality in court, though plaintiffs neglect to mention that none of the resulting appellate decisions (other than the Fifth Circuit's *Texas* decision) reached the merits of the DACA policy.[6] Nevertheless, the Acting Secretary's memorandum makes clear that DHS changed its position because the *Texas* injunction against DAPA and expanded DACA was affirmed by an equally divided Supreme Court; the Attorney General has disavowed the prior position; and Texas and other States were

---

[5] Plaintiffs are also wrong to suggest (Garcia.Br. 34, 37) that the government itself has conceded in this litigation that the Fifth Circuit erred in its procedural holding that DACA was required to go through notice and comment. Although the government noted that "controlling Ninth Circuit precedent"—*Mada-Luna, supra*—*generally* "constru[es] INS deferred-action directives as policy statements exempt from notice and comment," Dkt. 204, at 26-27, *Mada-Luna* recognized *the same exception* that the Fifth Circuit did: a categorical deferred-action directive that deprives officials of individual discretion is a substantive rule. *Compare Mada-Luna*, 813 F.2d at 1014, *with Texas*, 809 F.3d at 171-78.

[6] *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 975 (9th Cir. 2017) (declining to rule on the constitutionality of DACA), *cert. denied*, 2018 WL 1369140 (Mar. 19, 2018); *Arpaio v. Obama*, 797 F.3d 11, 14-15 (D.C. Cir. 2015) (suit dismissed for lack of standing); *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015) (same).

threatening to challenge DACA. That is more than sufficient to satisfy the APA's requirement to acknowledge and explain a changed position. *Fox*, 556 U.S. at 514-15.

4. Plaintiff's additional arbitrary-and-capricious arguments are without merit.

a. Like the district court, plaintiffs err in asserting that the Acting Secretary's decision is invalid because it did not expressly consider DACA recipients' reliance interests. They emphasize the ways in which DACA recipients have benefited from the policy. States.Br. 50-53; Regents.Br. 57-60; Garcia.Br. 41-42. But those benefits do not transform a temporary non-enforcement policy that was revocable at will into one that created 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. And when President Obama announced DACA in 2012, he emphasized 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. Thus, the reason that DACA recipients' reliance interests are less substantial than the reliance interests at issue in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), is not, of course, because the adverse effects on DACA recipients are less substantial than the impact on car dealers from the changed interpretation of the overtime exemption. Rather, it is because DACA recipients could not justifiably rely on the policy's continued existence, given the particularly ephemeral nature of the agency action at issue: namely, DACA was not just a discretionary policy, but one that was

expressly temporary as well as expressly revocable at will, without any statutory constraints. ER.151.

Indeed, for a change to a purely discretionary enforcement policy, there simply is no requirement that an agency expressly consider whatever benefits of the prior policy may later be posited by challengers. Contrary to plaintiffs' suggestion (Garcia.Br. 41), this is unlike *Michigan v. EPA*, 135 S. Ct. 2699 (2015), where cost-benefit consideration flows from a statutory requirement that regulation must be "appropriate and necessary." *Id.* at 2707. There are no standards governing whether to end a deferred-action enforcement policy, and thus no metric for determining what factors must be weighed. The Acting Secretary could quite properly conclude that she would pursue a different enforcement policy based on her own view of her statutory responsibilities and priorities. Indeed, the memorandum originally adopting DACA did not contain *any* discussion of the economic and other costs of adopting the policy, ER.140-43, yet plaintiffs obviously do not contend that the DACA policy itself was arbitrary and capricious.

Notably, although the district court correctly recognized that the Acting Secretary's memorandum was a general statement of policy exempt from notice-and-comment rulemaking, *infra* p. 53, the court overlooked the significance of that procedural posture when assessing whether the Acting Secretary had failed to consider an "important aspect" of the decision. *State Farm*, 463 U.S. at 43. In setting forth a general statement of policy governing enforcement discretion—*i.e.*, a decision

that is not constrained by any statutory or regulatory factors and not subject to public comment from potential objectors—the Acting Secretary must be afforded reasonable deference in her determination of what aspects of the problem were "important," and she cannot have been required to engage in unreasonable speculation as to what interests a court may later deem important based on post hoc objections. Otherwise a court has improperly "substitute[d] its judgment" for her "rational" decision. *Id.*

In all events, the Acting Secretary's reason for not giving greater weight to plaintiffs' alleged reliance interests is self-evident from the face of her decision: there were significant litigation-risk and legality concerns with DACA, which were quite likely to overtake whatever questionable reliance interests existed if she had not rescinded the policy. Accordingly, she had no need to "explicitly connect the dots" because her "path may reasonably be discerned." *Amerijet*, 753 F.3d at 1351-52.

b. Finally, one set of plaintiffs asserts that the Acting Secretary's articulated rationale was pretextual. Regents.Br. 62-65. It is noteworthy that the other plaintiffs do not join in this contention and that the district court did not make any such finding. For good reason, because the pretext allegation is baseless.

Plaintiffs fall far short of making the "strong showing of bad faith or improper behavior" necessary to overcome the presumption of regularity. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). To do so, they must proffer "serious, nonconclusory allegation[s]." *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 72 (D.C. Cir. 1987).

Plaintiffs fail to meet this high burden, as none of the alleged "flaws" and "inconsistencies" they rely upon (Regents.Br. 62) come close to raising any inference of bad faith. Indeed, none of the statements that supposedly indicate an alternative rationale are from the Acting Secretary herself—the only official vested with authority under the INA, 8 U.S.C. § 1103(a)(1), to make the decision at issue. *See* Regents.Br. 62-63 (relying on statements of the President, the Attorney General, and a Senior Counselor to the Acting Secretary).

Unable to point to any express statements by the Acting Secretary, plaintiffs instead try to infer pretext on her part based on alleged defects in her decision. But it is plaintiffs who err.

For starters, plaintiffs contend that "[i]n rescinding DACA, the Acting Secretary relied on the false claim that DAPA had been adjudged unconstitutional." Regents.Br. 62. But that contention is itself false, because the Acting Secretary's memorandum clearly and accurately described the statutory grounds upon which the Fifth Circuit had ruled in *Texas*. *Supra* pp. 28-29.

Likewise, plaintiffs contend that "[t]he government has asserted a series of defenses in this litigation that, if successful, would have equally applied to eliminate litigation risk from a lawsuit in Texas." Regents.Br. 63. But that is a non sequitur, because the postures of the two cases are completely different. The fact that the government has raised certain defenses in the Ninth Circuit in support of the *rescission* of DACA does not mean that the government believed that such defenses also would

have proved successful if raised in the Fifth Circuit in support of the *continuation* of DACA—especially since the Fifth Circuit had *already rejected* those defenses when raised in support of the continuation of DAPA and expanded DACA. For example, the court held that the adoption of DAPA was not committed to agency discretion by law because it could "be reviewed to determine whether the agency exceeded its statutory powers," and the court held that the States' challenge to the adoption of DAPA was not barred by section 1252(g) because it neither involved an action "to commence proceedings" nor was brought "by or on behalf of any alien." *Texas*, 809 F.3d at 164, 168. Of course, *all* of those rationales for allowing review in *Texas* would have equally applied to a challenge to the continuation of DACA, yet *none* of them is applicable to the challenge here to the rescission of DACA. *Supra* at pp. 21-24. Simply put, the alleged inconsistency is illusory.

Plaintiffs' reliance on statements by officials other than the Acting Secretary is even further afield. Regents.Br. 62-63. That other officials might have different views regarding the rescission of DACA does not indicate that the reasons given by the actual decisionmaker—the Acting Secretary—were pretextual. And besides, plaintiffs mischaracterize the views of the other officials.

For instance, plaintiffs suggest (Regents.Br. 63) that the Acting Secretary's assessment of DACA litigation risk was a pretense because one of her advisors, when asked at a deposition, "Does DHS have a policy on how to deal with litigation risk?", responded: "[T]hat sounds like the craziest policy you could ever have" because

"[y]ou could never do anything if you were always worried about being sued." SER.1377-78. But the advisor's disavowal of a *generalized* policy to avoid "litigation risk" says nothing about how DHS chose to address the *particular* litigation risk from DACA.

Plaintiffs also rely (Regents.Br. 62) on a tweet from President Trump indicating that, if Congress "can't" pass a legislative fix for DACA recipients, he "will revisit the issue!" SER.1382. But that comment is fully consistent with the President's clearly stated view that "the program is unlawful and unconstitutional and cannot be successfully defended in court." Statement from President Trump (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump. The tweet simply expressed the President's intention to revisit Administration policies on childhood arrivals—not the legality and defensibility of the DACA policy—if Congress did not timely act.

Plaintiffs further rely (Regents.Br. 63) on certain statements made by the Attorney General to the effect that DACA could be legal under the *Texas* decisions if it had been implemented on an individualized basis. But as we previously explained (Br. 33-34), that is precisely what the DACA rescission did.

Finally, the mere fact that plaintiffs can hypothesize alternative rationales for the DACA rescission—*e.g.*, to influence immigration negotiations with Congress, *see* Regents.Br. 63-65—is obviously insufficient to render the Acting Secretary's articulated rationales pretextual. Moreover, even if the Acting Secretary had as an

additional reasonable consideration that Congress should address the status of DACA recipients as part of a larger package of immigration reform, that still would not undermine the validity of the reasonable rationales upon which the Acting Secretary rested her decision to rescind DACA.

B. The DACA rescission did not violate equal protection.

1. Plaintiffs have failed to state a claim that the DACA rescission violated equal protection. Their claims are foreclosed by the Supreme Court's decision in *AADC*, which imposed a general bar on discriminatory-motive claims in the immigration-enforcement context. Such claims, the Court explained, "invade a special province of the Executive—its prosecutorial discretion." 525 U.S. at 489; *see also United States v. Armstrong*, 517 U.S. 456, 463-65 (1996). And in the immigration context, this concern is "greatly magnified" because such claims "permit and prolong a continuing violation of United States law," and also potentially implicate foreign policy concerns. *AADC*, 525 U.S. at 490-91.

Like the district court, plaintiffs attempt to evade *AADC* and *Armstrong* by describing those cases as limited to claims challenging "selective enforcement" of "individual[s]," as opposed to claims challenging "programmatic decisions" to enforce for "discriminatory reasons." Garcia.Br. 52. But plaintiffs likewise fail to provide any basis in precedent or logic for such a distinction.

Where, as here, the "entire government program" at issue (Garcia.Br. 52) concerns the exercise of immigration-enforcement discretion, *AADC*'s rationale

applies, not just fully but even more strongly, to claims that the policy's rescission was motivated by discrimination: such claims "invade" the Executive Branch's "special province" over enforcement discretion, and they enable aliens without lawful status "to permit and prolong a continuing violation of United States law." *AADC*, 525 U.S. at 489-90. Although plaintiffs here insist that they "are not seeking a defense to deportation but are challenging a policy as a whole," Garcia.Br. 52, that is nonsense: they have sought and obtained an injunction requiring maintenance of a deferred action policy of *forbearance from removal*, and that relief has the purpose and effect of interfering with the government's discretion to remove the covered aliens.

The few cases cited by plaintiffs (Garcia.Br. 52-53) to support their position are facially inapposite. Unlike *AADC*, none of them involves the exercise of *enforcement discretion*, let alone *immigration*-enforcement discretion. Rather, they all involved claims concerning plaintiffs' substantive treatment. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 970 (9th Cir. 2004) (challenge to adjustment of status and parole revocation decisions); *Jean v. Nelson*, 711 F.2d 1455, 1462-63 (11th Cir. 1983) (challenge to decision whether to detain or parole illegal aliens pending a determination of their right to enter the country); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 256-58 (1977) (challenge to a municipal zoning decision).

2. Notably, plaintiffs do not attempt to argue that this case qualifies for *AADC*'s sole potential exception, reserved for "a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be

overcome." 525 U.S. at 491. Plaintiffs have therefore forfeited any such contention, and their claim must be dismissed under *AADC*.

In any event, to the extent plaintiffs could somehow bring their claim despite *AADC*'s general bar on immigration-enforcement challenges, they at least must produce the type of "clear evidence" of discriminatory motive that would be required in a criminal-enforcement challenge. *AADC*, 525 U.S. at 489. Plaintiffs have not come close to satisfying that burden.

First, plaintiffs essentially concede (Garcia.Br. 49) that they have *no* evidence of discriminatory intent on the part of the Acting Secretary, who, to repeat, was the sole official authorized to rescind DACA. Plaintiffs instead contend that the President's allegedly discriminatory motive can be imputed to the Acting Secretary simply because she "reported to the President." Garcia.Br. 49. But the sole authority they cite for that breathtaking proposition—*Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013)—is completely inapposite. There, after detailing evidence that a city council member had expressly admitted a discriminatory motive during a public meeting, this Court observed in a footnote that there was further evidence of that motive based on comments by the public during the meeting and the council members' responsiveness to those views. *See id.* at 1163 & n.26. It should go without saying that this case does not remotely support the proposition that plaintiffs can impute alleged discriminatory animus of the President to a Cabinet Secretary whose motives have never been questioned, simply because she reports to the President.

Second, plaintiffs suggest (Garcia.Br. 49-50) that statements of the President concerning "nationality" are merely a different "kind of animus," but that is legally incorrect. Unlike race, ethnicity, or national-*origin* discrimination, distinctions based on *nationality per se* are not invidious but rather commonplace under federal immigration law—as plaintiffs do not and cannot dispute. *Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008).

Third, plaintiffs do not deny (Garcia.Br. 50-51) that they are unable to identify any statements regarding the DACA policy that are based on race, ethnicity, or national origin. It therefore makes no sense for them to characterize the President's pro-DACA statements as "camouflage," Garcia.Br. 50, as plaintiffs have identified no discriminatory animus concerning DACA that needed to be disguised.

Fourth, as for plaintiffs' suggestion (Garcia.Br. 48) that the government's reversal of course and alleged "irregularities" in the decisionmaking process are evidence of pretext, that is far too thin a reed on which to rest a claim of discriminatory animus on the part of government officials. Indeed, plaintiffs fail to articulate any rational connection between the speed with which DACA was reversed and the likelihood of its being racially motivated. This failure is all the more apparent given the intervening threat by Texas and other States to challenge the DACA policy within the Fifth Circuit. ER.125-29, 274-76.

Finally, and most fundamentally, plaintiffs have no response to the basic implausibility of their claim: that the Acting Secretary's decision to stop affirmatively

sanctioning an ongoing violation of federal law by roughly 700,000 aliens without lawful status, in the face of significant questions about the legality of that policy, was instead motivated in any respect by the particular race of the aliens at issue. Such a bald assertion, devoid of plausible supporting factual content, does not even satisfy the ordinary pleading requirements of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), much less the heightened requirements for a selective enforcement claim under *AADC* and *Armstrong*.

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

1. At the outset, plaintiffs erroneously suggest (States.Br. 62-63) that this Court should not review the question whether they have failed to state a due-process claim challenging an alleged change in the government's policy of sharing information provided by DACA recipients. Plaintiffs observe that the government did not separately enumerate that question in its petition for permission to appeal. This procedural objection is meritless.

When Federal Rule of Appellate Procedure 5(b)(1) states that "the question presented" must be included in the petition for permission to appeal, it is referring to the "controlling question of law" that has been certified for interlocutory appeal under 28 U.S.C. § 1292(b). The government did include those questions in its petition, *see* Pet. 1, and this Court granted the petition. Once appeal has been authorized under section 1292(b), this Court then may "exercise jurisdiction over any question that," as

here, "is included within the order that contains the controlling question of law identified by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204 (1996). Plaintiffs' cases are not to the contrary. *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1263 (11th Cir. 2004) (declining to consider a new issue raised for the first time during oral argument); *In re GGM, PC*, 165 F.3d 1026, 1032 (5th Cir. 1999) (applying waiver principles to a bankruptcy rule, not a petition under section 1292(b)). In any event, plaintiffs provide no explanation why this Court should decline to review this question, given that deciding it would prejudice no one, whereas not deciding it would result in the very sort of piecemeal appellate proceedings that this Court's acceptance of all the certified interlocutory appeals was presumably intended to prevent.

2. As the government previously explained (Br. 45-47), plaintiffs have not alleged any facts giving rise to a plausible inference that DHS 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. To the contrary, it is clear that DHS's policy—although always subject to change—has not changed at all.

Plaintiffs' contention that DHS has in fact changed its policy is a conclusory assertion not entitled to the presumption of truth. *Iqbal*, 556 U.S. at 678-79. They merely emphasize that the words "generally" and "proactively" were added in a Q&A document about the policy. States.Br. 63-64; Garcia.Br. 55-57. But neither adverb

represents that "special" or "non-proactive" releases will be made when they otherwise would not have been previously, and plaintiffs provide no plausible factual allegation to the contrary.

Moreover, DHS has consistently reassured the public that its information-sharing policy "has not changed in any way." USCIS, DHS, *Frequently Asked Questions: Rejected DACA Requests* Q5 (Dec. 27, 2017), https://www.uscis.gov/daca2017/mail-faqs; *see also* ER.136. Indeed, for this reason, the district court in the parallel New York lawsuit recently dismissed this claim. *Batalla Vidal v. Nielsen*, No. 16-cv-4756, 2018 WL 1532370, at *10 (E.D.N.Y. Mar. 29, 2018).

3. Plaintiffs further argue that the alleged policy change was an improper deprivation of a protected interest in the use of their information because it is "ambiguous" whether the reservation of rights clause to change the policy applied to existing recipients rather than new requestors. States.Br. 64-65; Garcia.Br. 54-55. But there are myriad flaws with that argument.

First, plaintiffs do not and cannot allege any ambiguity in the separate clause that the policy "may not be relied upon to create any right or benefit, substantive or procedural." ER.149. That alone defeats plaintiffs' claim to having a protected due process interest. *Doran v. Houle*, 721 F.2d 1182, 1185 (9th Cir. 1983) ("Where the government, as the source of the interest in question, retains unrestricted discretion over future enjoyment of the interest, the interest is not a protected entitlement."). Plaintiffs cite nothing to the contrary. *Second*, especially in light of the preceding

language, the reservation of rights to change the policy does unambiguously cover existing recipients. After all, it covered rescission "at any time without notice": "at any time" includes post-request, and it would be meaningless if focused only on new requestors. Plaintiffs fail to provide any explanation for this language. *Third*, at a minimum, plaintiffs' claim fails with respect to information contained in *renewal* requests after September 5, 2017. Even plaintiffs' own reading of the reservation of rights would include those requests.

In plaintiffs' final effort to create a protected interest where none exists, they cite a December 30, 2016, letter by the outgoing Secretary of Homeland Security to a member of Congress, in which he advocates for the incoming administration to maintain the same policy regarding information-sharing. States.Br. 63; Garcia.Br. 54-55. But this letter does not address DHS's legal authority to change the policy, and it of course cannot create a protected interest that did not otherwise exist.

D. The district court's nationwide injunction is overbroad.

1. As the government demonstrated (Br. 49-54), both Article III and equitable principles require that injunctions be no broader than necessary to redress named plaintiffs' injuries. All of plaintiffs' counterarguments fail.

First, plaintiffs' reliance on the fact that some of them have demonstrated an Article III injury misses the mark. States.Br. 59; Garcia.Br. 46 n.8. "[S]tanding is not dispensed in gross," and a plaintiff must establish standing "separately for each form of relief sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017).

Accordingly, the relief provided in this case must be tailored specifically to redressing any cognizable injuries of plaintiffs.

Second, plaintiffs also argue that courts of equity need not limit their injunctions to the plaintiffs' own injuries. But their analysis of the case law is mistaken.

Plaintiffs try (States.Br. 61) to distinguish *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011), and *Meinhold v. Department of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994), on the ground that those cases involved only a single plaintiff. The reasoning of those cases, however, did not turn on the number of the plaintiffs there, but on whether the injunction went beyond what was necessary for those plaintiffs.

Plaintiffs next affirmatively invoke (States.Br. 61; Garcia.Br. 43) a quotation from *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987), that there "is no general requirement that an injunction affect only the parties in the suit." But this Court simply meant that non-parties can incidentally benefit from injunctions necessary to redress a plaintiff's injuries. *Id.* 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*."). Indeed, in *Bresgal* this Court made clear that "[w]here relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown." *Id.* at 1170. It is only where such relief is

unworkable that a court should consider whether broader relief is necessary to provide the parties themselves with adequate relief.

Plaintiffs likewise rely (States.Br. 59-60; Garcia.Br. 43) on *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), for the proposition that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." But the Supreme Court was merely rejecting the argument that certifying a nationwide *class action* was improper, not that relief to *non-parties* was somehow proper. *Id.* To the contrary, as this Court recognized in *Bresgal*, *Yamasaki*'s "primary concern" was that "the relief granted is not 'more burdensome than necessary to redress the complaining parties.'" *Bresgal*, 843 F.2d at 1170 (quoting *Yamasaki*, 442 U.S. at 702).

Plaintiffs also rely (States.Br. 60) on the Supreme Court's stay opinion in *International Refugee Assistance Project*, 137 S. Ct. at 2087. But that partial denial of a stay was not a decision on the merits, and as we previously explained (Br. 53), the lower courts in the cases concerning the President's travel orders have tried to justify nationwide injunctions based on a particular need for uniformity in enforcing immigration laws. But whatever the merits of that justification, it cuts in the opposite

way here, as expansion of deferred action exacerbates the departure from vigorous and uniform enforcement of the immigration laws.[7]

Third, plaintiffs argue that nationwide injunctions are permissible in an APA suit because the APA authorizes a court to "set aside" unlawful agency action. Regents.Br. 70; Garcia.Br. 43-44. This argument is incorrect even as to permanent relief under the APA, *see, e.g.*, *Los Angeles Haven Hospice*, 638 F.3d at 664; *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 394 (4th Cir. 2001), but it is especially flawed as to *preliminary* injunctive relief under the APA.

The APA itself expressly provides that "to the extent necessary to prevent irreparable injury, the reviewing court" in an APA action "may issue all necessary and appropriate process . . . to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705 ("Relief pending review"). In allowing preliminary injunctions only "to the extent necessary to prevent irreparable injury," the APA thus codifies the principle that preliminary injunctions are not designed to "enjoin all possible breaches of the law," but rather to "remedy the specific harms" allegedly suffered by plaintiffs themselves, *Zepeda v. U.S. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983); *see also Bresgal*, 843 F.2d at 1169 (recognizing this "rule" for "preliminary

[7] Plaintiffs also rely (Regents Br. 69) on some additional cases that are facially inapposite. *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991), involved the question of the geographic scope of relief to protect the plaintiffs' *own trade secrets*, and *De Beers Consolidated Mines v. United States*, 325 U.S. 212, 219, 221 (1945), concerned the validity of an injunction sought *by the United States* to restrain certain property.

injunction[s]" in the APA context). Indeed, even assuming that permanent relief could go beyond plaintiffs, it is particularly sensible to limit preliminary relief to plaintiffs properly before the court, given the tentative nature of the ruling. *See Bresgal*, 843 F.2d at 1169.

Finally, plaintiffs insist that nationwide injunctions have no adverse effect on parallel litigation. States.Br. 62. But that is plainly not true. Here, for example, a Maryland district court has held on summary judgment that the Acting Secretary's decision to rescind DACA was lawful. *Casa de Maryland*, 2018 WL 1156769, at *15. Nonetheless, all named plaintiffs in that case, including the individual DACA-recipient members of Casa de Maryland, are currently benefitting from the nationwide preliminary injunction here (and the one entered in the New York litigation), despite losing a *final judgment* in their own lawsuit. This vividly illustrates how nationwide injunctions improperly function as *de facto* one-way class actions. Plaintiffs thus are fundamentally mistaken (Garcia.Br. 44) in objecting to a "flood of duplicative litigation": in individual litigation, plaintiffs would be bound by their wins *and* losses, and the Supreme Court is able to await percolation rather than being forced to take the first case where a court has ruled against the government and imposed a nationwide injunction. At a minimum, a properly certified class action would avoid or minimize duplicative litigation while still ensuring that *both* sides are equally bound by the judgment.

2. As the government further demonstrated (Br. 54-56), this nationwide injunction goes well beyond redressing plaintiffs' cognizable injuries. (Indeed, it has subsequently become especially erroneous because it provides relief to the DACA recipients represented in the Maryland case even though they are barred from obtaining relief here due to the *res judicata* effect of their own loss.) Again, the non-individual plaintiffs' arguments to the contrary fail.

First, plaintiffs suggest that a geographically limited injunction would be unworkable and create a patchwork of regulation. States.Br. 60-61; Regents.Br. 71. But this argument is doubly wrong. The district court held that the non-individual plaintiffs only satisfied Article III *and* the zone-of-interests test because of their status as *employers*, ER.27-28, and plaintiffs have failed to explain why it would not be workable to limit the injunction to their identifiable DACA-recipient employees. More fundamentally, as discussed below, the district court erred in holding that the non-individual plaintiffs have a cognizable claim based on their employees, and plaintiffs do not dispute that it would be possible to limit the injunction to the named plaintiffs and union members.

Second, plaintiffs dispute (States.Br. 33) the import of the Article III analysis in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), by arguing that the case relied solely on a lack of traceable harm. But the Supreme Court's statement that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another" was central to its holding. *Id.* at 619. Indeed, under plaintiffs' reading of *Linda R.S.*, if a

third party could merely show sufficiently direct causation, that third party could sue to enjoin the allegedly unlawful impending prosecution of a criminal defendant. For example, under plaintiffs' theory, employers who would have to hire a new employee to replace an existing employee who was convicted of a felony could bring suit to stop a criminal prosecution. But that would be a radical departure from "American jurisprudence," as *Linda R.S.* emphasized. *Id.* Nor is there any basis (States.Br. 33) for limiting the reasoning of *Linda R.S.* to criminal enforcement. Plaintiffs have identified nothing that supports refusing to apply this general principle of American jurisprudence to immigration enforcement, and *AADC* expressly extends (and indeed strengthens) criminal-enforcement protections in the immigration-enforcement context. *See supra* p. 36. For similar reasons, any "special solicitude" for States under *Massachusetts v. EPA*, 549 U.S. 497, 536 (2007), does not counsel a different result here, as the State plaintiffs lack a cognizable interest at all.

Third, plaintiffs' zone-of-interest arguments are similarly unpersuasive. Repeating the district court's error, plaintiffs contend that they fall within the zone of interests of the INA because the INA contains provisions regarding work authorizations. States.Br. 34; Regents.Br. 74-75; Garcia.Br. 46 n.8. But those provisions are not the basis of their claims, which is fatal because a plaintiff must demonstrate that its claim "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for [its] complaint." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990). Even more mistaken is

plaintiffs' contention that the zone-of-interests test can be satisfied by alleged educational injuries. States.Br. 34-35; Regents.Br. 72-74. The district court itself rejected this argument, holding that even if INA provisions concerning student visas supported a zone-of-interests analysis in some cases, plaintiffs had not alleged here "that their DACA-recipient students or employees qualify for such visas. Nor do plaintiffs point to any provisions of the INA which indicate a protected interest in enrolling students with deferred action in their schools or universities." ER.27.

Likewise, plaintiffs err in asserting that their direct injuries obviate the need for this Court to consider third-party standing objections to their asserted constitutional claims. States.Br. 33 n.11; Regents.Br. 73. The fact that they may have an injury in fact does not eliminate the need for them to either assert their *own* constitutional rights or satisfy the additional requirements for asserting third-party rights. *See Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004). The non-individual plaintiffs' own rights under the Fifth Amendment are not at issue in this case. Nor can they satisfy third-party standing requirements because, unlike in the cases they cite, there is no impediment to DACA recipients suing on their own behalf, as happened both in this very case and in multiple other cases throughout the country.

Fundamentally, plaintiffs have done nothing to dispute that, on their capacious theory of cognizable injury under Article III and zone of interests under the INA, any employer in this country would have standing to challenge the removal of any of their alien employees. That is not, and cannot be, the law.

III. On Plaintiffs' Cross-Appeal, the District Court Should Be Affirmed to the Extent That It Granted the Government's Motion to Dismiss.

The district court correctly dismissed three of plaintiffs' claims challenging the rescission of DACA based on: (1) failure to use notice-and-comment rulemaking, ER.53; (2) the Due Process Clause, ER.55; and (3) equitable estoppel principles, ER.58. *See also Batalla Vidal*, 2018 WL 1532370, at *3-6. In their cross-appeal opening brief, plaintiffs raise only the first two claims, so the third is waived. *Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 919 (9th Cir. 2001).

A. The DACA rescission did not require notice-and-comment rulemaking.

1. The APA generally requires that agencies give notice of proposed rules to the public and provide interested persons with an opportunity to comment on the proposal. 5 U.S.C. § 553(b)-(c). These requirements do not apply, however, to "general statements of policy." *Id.* § 553(b)(3)(A).

A general statement of policy "serves several beneficial functions." *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (*PGE*). First, it "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln*, 508 U.S. at 197 (quoting U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947)). "[L]ike a press release," a general statement of policy "encourages public dissemination of the agency's policies prior to their actual application in particular situations," such as by

announcing "the course which the agency intends to follow in future adjudications." *PGE*, 506 F.2d at 38. But it also serves purposes internal to the agency. General statements of policy "'educate' and provide direction to the agency's personnel in the field, who are required to implement . . . policies and exercise . . . discretionary power in specific cases." *Mada-Luna*, 813 F.2d at 1013. They thereby "promote[] uniformity in areas of national concern." *PGE*, 506 F.2d at 38. Significantly, however, policy statements "are binding on neither the public nor the agency," and the agency "retains the discretion and the authority to change its position . . . in any specific case." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (citations omitted).

By contrast, a "substantive rule" subject to requirements for notice-and-comment rulemaking is one that is "finally determinative of the issues or rights to which it is addressed." *PGE*, 506 F.2d at 38. These rules are "binding" and have the "force of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *see also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) ("Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'").

This Court's decision in *Mada-Luna* recognizes that prosecutorial discretion policies that leave officials with discretion to make individualized determinations are general statements of policy rather than substantive rules. In that case, the INS repealed a "generous" deferred-action policy that limited officials' discretion to deny relief, and replaced it with a policy that was less favorable to aliens because it

"emphasize[d] the broad and unfettered discretion" to deny relief. 813 F.2d at 1009 & n.2, 1017. This Court held that both policies were general statements of policy because they were prospective in operation and did not establish a binding norm that precluded the exercise of discretion. *Id.* at 1017. The Court specifically rejected the contention that the new policy was a substantive rule merely because it "diminishe[d] the likelihood that . . . aliens will be granted deferred action status." *Id.* at 1016. Rather, the Court concluded that where a policy leaves officials "free to consider the individual facts" in each case, it will not be considered a substantive rule simply because it has a "substantial impact." *Id.* at 1016-17.

2. As the district court correctly recognized, *Mada-Luna* controls here. The Rescission Memo was issued as an "exercise of [the Secretary's] authority in establishing national immigration policies and priorities," ER.130, and explains how the agency intends to exercise its enforcement authority on a prospective basis. The decision "does not . . . create any right or benefit, substantive or procedural, enforceable at law by any party," ER.131, and does not affect anyone's current immigration status. Rather, the Acting Secretary's memo describes how pending and future deferred action requests will be "adjudicate[d]—on an individual, case-by-case basis." ER.130. *See also Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) ("Proposed regulations require publication because they normally involve substantive rights and have the force of law. INS operations instructions fall within section 553(b)(3)(A)'s exception because the instructions are internal directives not having the

force and effect of law.").

The Rescission Memo does not categorically forbid DHS from continuing to defer enforcement action against particular DACA recipients in the future, but instead acknowledges the background principle that deferred action is "an act of prosecutorial discretion" that may be exercised "on an individualized case-by-case basis," ER.127, and that places "no limitations" on the agency's exercise of such "otherwise lawful enforcement . . . prerogatives," ER.131. Nothing in the Rescission Memo evidences an "inten[t] to be bound." *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1325 (9th Cir. 1992); *see id.* (explaining that where "one cannot state without reservation" whether the agency intends to be bound, "the better course is to withhold court review"); *see also Morales de Soto*, 824 F.3d at 827 (noting that memoranda that "speak only to the exercise of prosecutorial discretion . . . do not create or modify the law to be applied by this or any other court").

3. Plaintiffs contend that the DACA rescission is a substantive rule because it withdrew officials' discretion to deny deferred action *under DACA*. States.Br. 67-68; Regents.Br. 76-77; Garcia.Br. 66-67. But that is not the relevant question. In *Mada-Luna*, this Court did not hold that the new deferred action policy was a substantive rule because it precluded the petitioner from obtaining relief under the prior policy. Rather, this Court recognized that the new policy was a general statement of policy because officials retained discretion "to consider the individual facts in each case" when deciding whether to grant deferred action under it. 813 F.2d at 1017 (quotation

marks omitted). So, too, here. ER.130 (explaining that deferred action could be granted on an individual, case-by-case basis). The essence of plaintiffs' argument is that they might be less likely to receive deferred action based on a totality of the circumstances inquiry than under the DACA policy's eligibility criteria, but as this Court explained in *Mada-Luna*, a reduced likelihood of relief does not transform a general statement of policy into a substantive rule. 813 F.2d at 1016.[8]

Indeed, if the Acting Secretary's memorandum requiring a return to fully individualized discretion for deferred action is a substantive rule, then *a fortiori* the restriction on discretion imposed by DACA itself was a substantive rule, as the Fifth Circuit held. *Texas*, 809 F.3d at 171-78. And that provides an independent and sufficient basis to reject the plaintiffs' claim. It would offend both law and equity for this Court to set aside the DACA rescission for failure to follow notice-and-comment procedures when that rationale necessarily implies that DACA itself was invalid for the same reason. *Cf. Batalla Vidal*, 2018 WL 1532370, at *5. Not only would this Court be effectively ordering the maintenance of an illegally enacted legislative rule,

---

[8] *United States ex rel. Parco v. Morris*, 426 F. Supp. 976 (E.D. Pa. 1977), upon which the plaintiffs rely, bears no resemblance to this case. As the district court explained there, "[t]he legal posture of th[e] case [was] radically affected by the government's factual concession" that the INS official "did not exercise independent discretion on the facts of th[e] case, but rather purported to follow a legal rule" when denying the plaintiff's request for extended voluntary departure. *Id.* at 979. By contrast, as the district court correctly noted, the plaintiffs in this case "do not [and cannot] allege that all deferred action applications under DACA were approved but now, after the rescission, all requests for deferred action will be denied." ER.52.

but any relief it provides to plaintiffs would necessarily be short-lived, as such a decision would create binding precedent under which opponents of DACA could immediately obtain an injunction against it.

Plaintiffs respond that, even where a substantive rule is invalid, agencies must go through notice-and-comment before repealing it. States.Br. 68-69; Regents.Br. 80-81; Garcia.Br. 68-69. But their argument rests on inapposite cases involving substantive rules that were promulgated through notice-and-comment rulemaking and were either claimed to be defective for some other reason, *see Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 438 (D.C. Cir. 1982) (agency had not sufficiently evaluated the original rule); *National Treasury Emps. Union v. Cornelius*, 617 F. Supp. 365, 371 (D.D.C. 1985) (exceeded agency's statutory authority), or were vacated by consent decree, *see American Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 26-27 (D.D.C. 2013). By contrast, it would make no sense to permit an agency official to violate notice-and-comment requirements in adopting a rule and then require her successors to go through the very hurdle of those requirements to undo the prior violation. *Cf. Romeiro de Silva*, 773 F.2d at 1025 (rejecting the argument that a prior decision holding that an agency policy "granted aliens substantive rights . . . somehow prevents the INS from amending the old instruction in the same way it was originally promulgated," *i.e.*, without notice and comment).

B. The denial of DACA renewals does not violate substantive due process.

The district court correctly dismissed plaintiffs' substantive due process claims against the DACA rescission. Plaintiffs concede that they had no protected interest in the initial grant of deferred action under the DACA policy, Garcia.Br. 64-65, and the wind-down meant that no currently effective two-year period of deferred action would be revoked due to the policy's rescission. Plaintiffs instead argue that they possess a protected interest in *continued renewal* of deferred action because, in their view, "[t]hough the DACA memorandum itself grants no rights, each discretionary decision to grant deferred action under DACA conveyed constitutionally protected liberty and property interests.'" Garcia.Br. 59.

The district court correctly rejected the contention that the government's grant of deferred action created a protected interest in a renewal of deferred action in perpetuity. As the court explained, "a benefit is not a 'protected entitlement' where 'government officials may grant or deny it in their discretion.'" ER.54 (quoting *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005)). Although the court noted that plaintiffs may have subjectively come to rely on DACA, the court recognized that "a person's belief of entitlement to a government benefit, no matter how sincerely or reasonably held, does not create a protected right if that belief if not mutually held by the government." ER.55. Rather, "'[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral

expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" *Castle Rock*, 545 U.S. at 756 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

Plaintiffs miss the mark in contending that the expectation of renewal while the DACA policy was in place, Garcia.Br. 60, created a "legitimate claim of entitlement" to continuation of the DACA policy itself. *Castle Rock*, 545 U.S. at 577. Any such expectation was wholly subjective, and plaintiffs have not plausibly alleged that such a belief was mutually held by the government. *Gerhart v. Lake County*, 637 F.3d 1013, 1020-21 (9th Cir. 2011) ("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."). This is especially true given that deferred action under DACA was subject to two-year renewal periods and has always been conceived of as a "temporary stopgap measure," not a "permanent fix," *Remarks by the President on Immigration* (June 15, 2012), https://go.usa.gov/xnZFY, which could "be terminated at any time" at the agency's discretion, ER.151. The original memorandum also made clear that DACA "confer[ed] no substantive right, immigration status or pathway to citizenship." ER.143. "Only the Congress, acting through its legislative authority, can confer these rights." *Id.*; *see also* ER.151 ("DACA is an exercise of prosecutorial discretion and deferred action may be terminated at any time."). In short, there is "no protectable liberty interest in deferred action," *Romeiro de Silva*, 773 F.2d at 1024, and one was not created because deferred action was granted for two-

year periods under a temporary policy that expressly conferred no rights and was revocable at will.

It therefore fails to advance plaintiffs' claim to note that "99 percent of adjudicated DACA renewal applications were approved." Garcia.Br. 63-64. As an initial matter, this argument is in direct tension with plaintiffs' claim that the DACA policy was sufficiently individualized that it was not a substantive rule under *Mada-Luna*. *See supra* p. 54. More fundamentally, as explained, this argument misconceives the question before this Court, which is not whether renewals would continue to occur while the policy existed; the question is whether plaintiffs gained a protected interest in continuation of the policy itself, even though they concede it did not create an entitlement to deferred action in the first place. Garcia.Br. 64. The question answers itself.

The same reasoning demonstrates that the cases upon which plaintiffs rely do not support their claim to a protected entitlement. Plaintiffs cite cases concerning various government programs, such as housing benefits, business licenses, and government employment. *See* Garcia.Br. 60, 62. But none of those cases holds, for example, that the government may never end the Section 8 housing benefit program. Nor do they involve policies like DACA where recipients were notified from the outset that the policy did not create any substantive rights or legal status. Plaintiffs cannot use due process to obtain from the courts substantive immigration rights that the Executive Branch (not to mention Congress) expressly refused to provide.

As a final matter, even if plaintiffs had demonstrated a protected interest, substantive due process would not guarantee a lifetime interest in renewals of two-year grants of deferred action to roughly 700,000 aliens without lawful status under a discretionary policy that was expressly framed as temporary and revocable at will. Such a conclusion would erect a serious barrier to ever adopting any such policies in the first place; it is thus unsurprising that plaintiffs have pointed to no cases holding that once the government temporary provides discretionary relief or benefits it must continue to do so indefinitely.

CONCLUSION

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

Respectfully submitted,

CHAD A. READLER.
Acting Assistant Attorney General

ALEX G. TSE
Acting United States Attorney

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

S/MARK B. STERN
ABBY C. WRIGHT
THOMAS PULHAM
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-2000

April 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B), and 9th Circuit Local Rule 32-2(b) because it contains 15,163 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

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 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