Nos. 18-1521 (L); 18-1522

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASA DE MARYLAND, Inc., et al.,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland, Case No. 8:17-cv-02942 (Hon. Roger W. Titus)

OPENING AND RESPONSE BRIEF FOR APPELLEES

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INTRODUCTION

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

In September 2017, in light of the prior litigation and a legal assessment by the Attorney General, the then-Acting Secretary of Homeland Security rescinded the DACA policy through an orderly wind-down. Plaintiffs in these and other suits challenged that enforcement decision on a variety of grounds under the Administrative Procedure Act (APA) and the Constitution.

As an initial matter, the Acting Secretary's decision is not subject to judicial review in this action. The rescission of DACA was an exercise of enforcement

discretion that is traditionally committed to agency discretion under the APA. 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985). And, assuming *arguendo* that judicial review of this deferred-action rescission were available, under the terms of the Immigration and Nationality Act (INA), review could take place only on review of a final removal decision. 8 U.S.C. § 1252(b), (g); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999) (*AADC*).

Although the district court erroneously concluded that it could review the Acting Secretary's decision, it properly recognized that any such review would be highly deferential. The court acknowledged that while there is significant room for disagreement over immigration enforcement generally and DACA in particular, such policy decisions belong in the hands of the political branches, and it declined to disturb the Acting Secretary's decision. The district court was correct.

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

Second, the district court's dismissal of plaintiffs' notice-and-comment challenge to the DACA rescission comports with both precedent and common sense. The APA

exempts "general statements of policy" from notice and comment, 5 U.S.C. § 553(b)(3)(A), and this type of reordering of deferred-action enforcement priorities readily qualifies. Moreover, if the rescission of DACA required notice-and-comment rulemaking, the promulgation of that policy surely did as well.

Third, the district court correctly rejected plaintiffs' claim that the Acting Secretary's decision violated the Constitution. There was no denial of equal protection because the rescission of DACA applies equally to all persons without regard to their ethnicity. This immigration enforcement policy is not subject to challenge based on the common circumstance that it has a greater impact on members of certain ethnicities than others, especially given the lack of any evidence that it was a significant factor in the Acting Secretary's rescission of a policy of such questionable legality that the aliens lacking lawful status who benefitted from the policy happened to be predominantly Latino. Nor was there any denial of due process. Plaintiffs have no protected liberty or property interest—DACA expressly conferred no substantive rights and was revocable at any time—and plaintiffs regardless have failed to demonstrate any government conduct rising to the level of a substantive-due-process violation.

Fourth, the district court correctly ruled in the government's favor on the basis of the administrative record before it. Plaintiffs come nowhere near demonstrating bad faith—or any other ground—for supplementing the administrative record or obtaining discovery in this record-review case.

The district court correctly rejected all of plaintiffs' challenges to the rescission of DACA, but erred in enjoining the government from modifying its policy regarding the sharing of DACA requestors' information. The court issued this injunction even though (as it acknowledged) plaintiffs had no evidence that the policy had changed, and the original policy expressly stated that it could "be modified, superseded, or rescinded at any time." JA.1532. In any event, there is no basis for an equitable estoppel claim against the government. The court's nationwide permanent injunction should be vacated.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. JA.47. On March 5, 2018, the district court granted in part and denied in part the government's motion to dismiss or in the alternative for summary judgment, and it granted plaintiffs permanent injunctive relief. JA.1519-20. On March 15, the district court modified the scope of its injunction. JA.1531. Plaintiffs filed a timely notice of appeal on April 27, 2018, and the government filed a timely notice of appeal on May 4, 2018. JA.1534-36; JA.1537-38. This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

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

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

3. Whether, assuming judicial review is available, the district court correctly held that the Acting Secretary's decision was not arbitrary and capricious on the basis of the administrative record.

4. Whether the district court correctly concluded that the rescission of a non-enforcement policy is not required to go through notice-and-comment rulemaking.

5. Whether the district court correctly rejected plaintiffs' contentions that the Acting Secretary's decision violated equal-protection and due-process requirements.

6. Whether the district court erred in entering a nationwide injunction barring the government from altering its information-sharing policy.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

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

1. The INA charges the Secretary of Homeland Security "with the administration and enforcement" of the INA and "all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1). Individuals are subject to removal if, *inter alia*, "they were inadmissible at the time of entry, have been

convicted of certain crimes, or meet other criteria set by federal law." *Arizona v. United States*, 567 U.S. 387, 396 (2012); *see* 8 U.S.C. §§ 1182(a), 1227(a).

As a practical matter, the federal government cannot remove every removable alien, and a "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396. The Secretary of Homeland Security is vested with authority to "[e]stablish[ ] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). In light of such policies and priorities, officials of the Department of Homeland Security (DHS) must first "decide whether it makes sense to pursue removal at all." *Arizona*, 567 U.S. at 396. "At each stage" of the process, moreover, "the Executive has discretion to abandon the endeavor." *AADC*, 525 U.S. at 483. Like other exercises of enforcement discretion, this may involve "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Chaney*, 470 U.S. at 831.

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

8 C.F.R. § 274a.12(c)(14). However, DHS retains the discretion to revoke deferred action unilaterally, and an individual with deferred action remains removable at any time. *See AADC*, 525 U.S. at 484-85.

On June 15, 2012, DHS announced the policy known as DACA, which makes deferred action available to "certain young people who were brought to this country as children." JA.129. Following successful completion of a background check and review, an alien who met certain age, residence, and other guidelines could receive deferred action for a period of two years, subject to renewal. JA.130-31. The DACA Memorandum stated that it "confer[red] no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights." JA.131. In implementing DACA, DHS stated that information provided in the DACA request process would be protected from disclosure for the purpose of immigration enforcement proceedings unless certain criteria related to national security or public safety were satisfied, or the individual met the requirements for a Notice to Appear. USCIS, *Deferred Action for Childhood Arrivals Frequently Asked Questions*, No. 19 (last updated Oct. 6, 2017; last visited July 31, 2018), https://go.usa.gov/xngCd (DHS DACA FAQ). The instructions also stated, however, that the information-sharing policy "may be modified, superseded or rescinded at any time without notice," and that it "may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." DHS DACA FAQ 19.

On November 20, 2014, DHS expanded DACA by broadening certain guidelines and extending the period of deferred action to three years. JA.167. It also created a new, similar policy known as DAPA for parents of American citizens and lawful permanent residents. JA.168-69.

The District Court for the Southern District of Texas entered a nationwide preliminary injunction against DAPA and the expansion of DACA. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015). The Fifth Circuit affirmed, concluding that the policy violated both the INA and the APA's notice-and-comment requirements. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). The Supreme Court affirmed the injunction by an equally divided Court. *United States v. Texas,* 136 S. Ct. 2271 (2016) (per curiam). In response, then-Secretary John Kelly rescinded DAPA and the DACA expansion in June 2017. JA.363. Shortly thereafter, Texas threatened to challenge the original DACA policy. JA.366-68.

3. On September 5, 2017, DHS issued a memorandum explaining its decision to wind down the remaining DACA policy in an orderly fashion. JA.380. As then-Acting Secretary Elaine Duke explained in the memorandum, "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and [a] September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." JA.383. Therefore, "[i]n the exercise of [her] authority in establishing national immigration policies and priorities," the Acting Secretary determined to begin an orderly wind-down of the policy. *Id.* The

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

Upon the rescission of DACA, DHS reiterated that "[g]enerally, information provided in DACA requests will not be proactively provided to other law enforcement entities . . . for the purpose of immigration enforcement proceedings" unless national security or public safety exceptions apply or the individual "meets the criteria for issuance of Notice to Appear." JA.1143. In December 2017, DHS further clarified that the "information-sharing policy has not changed in any way since it was first announced, including as a result of the Sept. 5, 2017" DACA rescission. USCIS, *Guidance on Rejected DACA Requests*, www.uscis.gov/daca2017/guidance-rejected-daca2017 (Q5).

4. On June 22, 2018, in response to an order from the United States District Court for the District of Columbia in *NAACP v. Trump*, No. 17-1907 (D.D.C.), the Secretary of Homeland Security issued a memorandum further explaining the decision to rescind DACA. The new memorandum agrees with the reasoning of the Duke

memorandum and declines to disturb it. Memorandum from Secretary Kirstjen M. Nielsen 2-3 (Nielsen Memo), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf. In particular, the Secretary confirms that, although she agrees that DACA is unlawful, the rescission is not predicated solely on that legal determination. The Nielsen Memo explains that, whether or not DACA is actually unlawful, "there are, at a minimum, serious doubts about [the policy's] legality" that warrant its discontinuation. *Id.* at 2. The Nielsen Memo also offers other enforcement policy reasons wholly independent of DACA's legality that support the policy's rescission, and explains why the asserted reliance interests of DACA recipients do not lead to a different result. *Id.* at 2-3.

B. Prior proceedings

1. Plaintiffs in this case are individual DACA recipients and nonprofit immigrant services and policy organizations. Their complaint seeks to invalidate the rescission of DACA on APA, constitutional, and equitable grounds. *See* JA.85-96. Plaintiffs also challenge DHS's authority to change its policy regarding how it may use information provided by DACA requesters. *See* JA.87-89, JA.94-95.

2. In March 2018, the district court issued an order granting in part and denying in part the government's motion to dismiss or in the alternative for summary judgment, and granting summary judgment in part for the plaintiffs and in part for the government. JA.1533. The district court first held that plaintiffs' claims were justiciable, rejecting the argument that 8 U.S.C. § 1252(g) precluded judicial review

and concluding that the APA's exception for decisions "committed to agency discretion" by law does not preclude *procedural* review of agency action, which it characterized plaintiffs' APA claims to be. JA.1501.

On the merits of the APA claims, the district court held that DACA and the DACA rescission are "akin to non-binding policy statements" and therefore are not subject to notice-and-comment requirements. JA.1505. The district court also concluded that the DACA rescission was not arbitrary and capricious because "the belief that it was unlawful and subject to serious legal challenge [was] completely rational," and the rescission "was a carefully crafted decision supported by the Administrative Record." JA.1505-06.

The district court likewise rejected plaintiffs' constitutional claims. With respect to the equal protection claim, the court concluded that the administrative record "does not support the notion that [the government] was targeting a subset of the immigrant population" or that the decision was motivated by racial animus. JA.1508. The district court also held that plaintiffs were not deprived of a protected procedural due process interest because the DACA decision did not create any such interest. JA.1512-13. And the court further found no substantive due process violation because the DACA rescission did "not shock the conscience of th[e] Court." JA.1514. The district court also granted summary judgment for the government with respect to plaintiffs' claim that the government was estopped from rescinding DACA,

concluding that estoppel did not apply because DACA was expressly subject to revocation at any time and did not confer any rights. JA.1515.

The district court granted relief to plaintiffs, however, on their estoppel claim regarding the government's information-sharing policy. The district court concluded without analysis that the government "promised not to transfer or use the information gathered from Dreamers for immigration enforcement." JA.1515. Although the district court did not dispute the government's assurance that the information-sharing policy has not changed, it noted that "counsel for the Government was unable to provide any assurance that the Government would not make changes" in the future. JA.1516. Accordingly, the court entered a permanent injunction that, as amended, requires the government to comply with its 2012 policy, except that the government may no longer modify or rescind that policy. The injunction further requires "any requests for deviation to be submitted to the district court for *in camera* review." JA.1532-33.

SUMMARY OF ARGUMENT

The district court correctly declined to disturb Acting Secretary Duke's memorandum rescinding the discretionary DACA enforcement policy. The district court erred, however, in enjoining the government from modifying its information-sharing policy in the future.

I. As an initial matter, the district court should have dismissed plaintiffs' APA claims as non-justiciable. In rescinding the previous non-enforcement policy

embodied in DACA, the Acting Secretary reset the agency's enforcement priorities. A determination of general enforcement policy, like other enforcement decisions, is traditionally committed to agency discretion by law and thus not subject to APA claims. *See* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). That is particularly true in the immigration context, where the "broad discretion exercised by immigration officials" is a "principal feature of the removal system." *Arizona v. United States*, 567 U.S. 387, 396-97 (2012). That the Acting Secretary's discretionary enforcement decision was based on legal analysis is immaterial, because the fact that an "agency gives a 'reviewable' *reason* for otherwise unreviewable action" does not mean that "the *action* becomes reviewable." *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (*BLE*) (emphases added).

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

II. In any event, the district court correctly concluded that the decision plainly satisfies the APA's deferential standard. Regardless whether the original DACA policy was consistent with the INA, there is no claim that it was mandated by the statute or

that rescinding it violated the statute. And the Acting Secretary's discretionary rescission of DACA based on her clearly expressed concern that it would be enmeshed in litigation and likely enjoined nationwide was eminently reasonable, given the *Texas* litigation invalidating DAPA and expanded DACA, as well as the Attorney General's opinion that DACA would and should meet the same fate. Neither precedent nor the APA required the Secretary to spell out the subsidiary legal reasons why it is illusory to distinguish DACA from expanded DACA and DAPA, and there likewise is no basis for a court to set aside the Secretary's purely discretionary enforcement decision based on mere disagreement with her reasonable legal conclusion. All the more so now that Secretary Nielsen has issued a memorandum further explaining the rescission and agreeing with Acting Secretary Duke's decision.

Contrary to plaintiffs' contentions, the district court properly ruled based on the administrative record before it. "The APA specifically contemplates judicial review on the basis of the agency record," and "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Plaintiffs have wholly failed to make the strong showing of bad faith required to rebut the rule that discovery is not permitted in an APA suit. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

The district court also correctly concluded that plaintiffs' procedural APA claims fail. The rescission memorandum was plainly a general statement of policy, not

a substantive rule. *See Mada-Luna v. Fitzpatrick,* 813 F.2d 1006, 1016 (9th Cir.1987). It thus was not required to go through notice-and-comment rulemaking.

The district court was similarly correct that the Acting Secretary's decision in no way violates the Constitution. The DACA rescission applies equally to persons of all ethnicities, although, like virtually all immigration policies, it has a disproportionate effect on certain ethnicities—here, Latinos from Central and South America. A challenge to such a facially-neutral immigration enforcement policy based on allegations of discriminatory motive is not permitted under *AADC*. 525 U.S. at 488-92. And, even assuming such a challenge could proceed at all under *AADC*, plaintiffs have come nowhere near alleging the clear evidence of outrageous government conduct necessary to make out a claim of discriminatory enforcement in the immigration context. *Id.* The district court also correctly rejected plaintiffs' contentions that the rescission of DACA violated the protections of the Due Process Clause. DACA itself created no protected liberty or property interest, and its rescission does not shock the conscience.

III. Plaintiffs have failed to demonstrate entitlement to the injunction entered by the district court. Even assuming a freestanding equitable estoppel claim against the government were permissible, plaintiffs have failed to demonstrate *any* change in the government's information-sharing policy, which has always permitted modification. And, even assuming a change occurred, plaintiffs have not demonstrated the affirmative misconduct required to make out an equitable estoppel

claim. At a minimum, the district court erred in granting plaintiffs nationwide relief. Bedrock principles of standing and equitable discretion limit the scope of any injunction to plaintiffs in these cases.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Hill v. Lockheed Martin Logistics Mgmt., Inc.,* 354 F.3d 277, 283 (4th Cir. 2004) (en banc). Summary judgment may be granted where there are no disputes of "*material* fact," and "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris,* 550 U.S. 372, 380 (2007) (quoting Fed. R. Civ. P. 56(c)). The district court's grant of a permanent injunction is reviewed for abuse of discretion, but it is per se an abuse of discretion to commit an error of law, which is reviewed de novo. *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 939 (4th Cir. 1995).

ARGUMENT

I. The Acting Secretary's Rescission of the Discretionary DACA Enforcement Policy Is Not Subject to Judicial Review.

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

1. The APA precludes review of agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This provision applies to various types of agency decisions that "traditionally" have been regarded as unsuitable for judicial review, *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993), including the decision whether or not

to institute enforcement actions, *Chaney*, 470 U.S. at 831. Such decisions are similar in significant ways to a prosecutor's decision whether or not to indict—"a decision which has long been regarded as the special province of the Executive Branch." *Id.* at 832; *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[T]he decision *whether or not* to prosecute . . . generally rests entirely in [the prosecutor's] discretion." (emphasis added)). Such discretionary enforcement actions "cannot be the subject of judicial review" even when an agency (or a prosecutor) bases them on what would be "a 'reviewable' reason" in another context. *BLE*, 482 U.S. at 283.

The Acting Secretary's decision to discontinue a prior non-enforcement policy falls well within the types of enforcement decisions that traditionally have been understood as "committed to agency discretion." Like the decision to adopt a policy of selective non-enforcement, the decision whether to retain such a policy can "involve[] a complicated balancing" of factors that are "peculiarly within [the agency's] expertise," including determining how the agency's resources are best spent and how the non-enforcement policy fits with the agency's overall policies. *Chaney*, 470 U.S. at 831. Likewise, a decision to abandon an existing non-enforcement policy will not, in itself, affect "an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. Indeed, an agency's decision to reverse a prior policy of civil non-enforcement is akin to changes in policy as to criminal prosecutorial discretion, which regularly occur within the Department of Justice both during and across presidential administrations, and which,

as noted, are generally not amenable to judicial review. Judicial review is available if a decision to enforce results in an adverse final determination that deprives an individual of liberty or property, but that review is limited to the substance of the final determination; an individual cannot escape guilt of the criminal or civil offense by bringing an APA challenge to an agency's discretionary decision to enforce the law.

This presumption of non-reviewability applies with particular force in the context of immigration enforcement discretion. In general, the "broad discretion exercised by immigration officials" has become a "principal feature of the removal system." *Arizona*, 567 U.S. at 396; *see also, e.g.*, 6 U.S.C. § 202(5) (vesting authority in the Secretary of Homeland Security to "[e]stablish[] national immigration enforcement policies and priorities"). And more specifically, a suit challenging a discretionary decision to enforce the immigration laws would entail the extraordinary relief of ordering the government to allow a "continuing violation of United States law." *AADC*, 525 U.S. at 490. The revocation of a prior immigration non-enforcement policy is thus plainly a decision that is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and not subject to attack under the APA.

2. The district court did not engage with any of this precedent. Instead, the court held that "[p]laintiffs' APA claims are justiciable because they relate to *the procedures* followed by DHS—not to *the substance* of its policy" and a court "may review whether the repeal of DACA followed the correct APA procedures." JA 1501. Even on its own terms, this reasoning overlooks that plaintiffs' arbitrary-and-capricious

claim is *substantive*, not procedural. *See, e.g.*, *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1042 (D.C. Cir. 2012) (distinguishing "the APA's procedural dictates" from "its substantive command that agency decisionmaking not be 'arbitrary' or 'capricious'"). The district court then declared it "important to note" that the Acting Secretary had rescinded DACA based on her "belief that the program was unlawful and would face lengthy legal challenges." JA.1501. To the extent that the court found plaintiffs' arbitrary-and-capricious claim justiciable on that basis, it further erred.

In *BLE*, the Supreme Court expressly rejected the proposition that "if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." 482 U.S. at 283. By way of example, the Court observed that "a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction," yet "it is entirely clear that the refusal to prosecute cannot be the subject of judicial review" notwithstanding that the prosecutor's belief "is surely an eminently 'reviewable' proposition." *Id.* Thus, after *BLE*, a court cannot justify judicial review of an agency's discretionary enforcement decision (an "otherwise unreviewable action") simply on the ground that the decision was based on a general interpretation of law. *See Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 675-76 (D.C. Cir. 1994) (explaining that *BLE* settles the question whether "*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"). A legal rationale cannot provide a hook to support review of the underlying enforcement decision.

In some circumstances, though, the legal rationale can be reviewable *on its own*, for example when an agency provides a definitive interpretation of a statute's substantive command in the course of announcing a general policy. *See Crowley*, 37 F.3d at 677 (explaining that there was no substantive interpretation in the single-shot enforcement action at issue, but that a reviewable embedded interpretation might be "more likely" to exist in a general enforcement policy). This distinction between the unreviewability of an enforcement decision and the possible reviewability of its legal rationale is well illustrated by *UAW v. Brock,* 783 F.2d 237 (D.C. Cir. 1986). In *Brock*, the D.C. Circuit explained that "there is no review available from [an] agency's specific nonenforcement decision . . . or its overall pattern of decisions not to pursue enforcement action in these areas." *Id.* at 245; *see also id.* ("If the Union had challenged only the Department's decision not to take enforcement action against [certain entities], *or even against this entire genus of practices*, our task would be completed." (emphasis added)). But the court went on to hold that "when a legal challenge focuses on an announcement of a substantive statutory interpretation," judicial review is available. *Id.*

These cases demonstrate (1) where an enforcement decision is otherwise unreviewable, a court may not use the fact that the decision rests on a general legal rationale as a hook to permit judicial review of the underlying enforcement decision;

and (2) where an unreviewable enforcement decision rests on a general legal interpretation of the statute's substantive commands, a court may in certain situations "carve out" that embedded interpretive rule for review and vacatur (assuming that other prerequisites to judicial review are met), but it may not set aside the underlying enforcement decision.

Applying these principles, plaintiffs' substantive APA claim is not subject to judicial review. Even assuming *arguendo* that the sole rationale for the Acting Secretary's decision was that DACA is unlawful, that legal rationale could not be used as a hook to review the otherwise unreviewable enforcement decision to rescind DACA. As explained, such review is directly contrary to *BLE*. Nor would review of the legal rationale alone, as an interpretive rule embedded in the underlying enforcement policy decision, justify setting aside the rescission of DACA itself. Any embedded legal interpretation here would concern, at most, the scope of the Acting Secretary's enforcement discretion. But that interpretation does not govern the behavior of the parties—no one disputes that DACA recipients are removable under the statute. Indeed, the decision at issue here rests on enforcement discretion all the way down.

3. Plaintiffs did not address this aspect of the district court's ruling in their opening brief on appeal, but they did advance several arguments below in support of their position that their substantive APA claim is justiciable. None has merit.

First, plaintiffs suggested that "the relevant substantive law that the government cited as the basis for the rescission" provided "judicially manageable standards by which a court can evaluate Plaintiffs' APA claims." JA.482. As explained above, it is both well established and common sense that an agency's discretionary decision whether to enforce a law is not made reviewable because it is based on an understanding of governing law. *See supra* pp. 18-21.

Rather, for an enforcement decision to be reviewable, the "law to apply" must depart from tradition by "circumscrib[ing] agency enforcement discretion" and "provid[ing] meaningful standards for defining the limits of that discretion." *Chaney,* 470 U.S. at 834. Such limits might be found in the statute that provides the agency with enforcement discretion, if Congress has set "substantive priorities" or otherwise limited "an agency's power to discriminate among issues or cases it will pursue." *Id.* at 833; *see also Texas v. United States*, 809 F.3d 134, 168 (5th Cir. 2015) (holding that court could review whether DAPA ran afoul of alleged INA constraints on enforcement discretion). But neither plaintiffs nor the district court have identified anything in the INA that limited DHS's discretion in rescinding DACA.[1]

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

Second, plaintiffs argued that *Chaney*'s presumption does not apply because that case is "based on the recognition that courts are not well placed to second-guess an agency's balancing of . . . factors which are particularly in within its expertise," and "the Government has not engaged in any 'balancing' of individualized factors." JA.484-85; *see also* JA.482-83. But this argument merely repackages the analysis foreclosed by *BLE* and *Chaney*. Where a discretionary enforcement decision is traditionally unreviewable because there is no statutory or regulatory constraint on the exercise of that discretion, a court may not review the agency's decision regardless of what factors the agency chooses to consider in making that decision, including even if the agency believes for legal reasons that it lacks any discretion at all. Notably, *Chaney* identified the balancing of discretionary factors as only one of "many" reasons for the "general unsuitability for judicial review" of agency enforcement decisions, and emphasized as well that enforcement decisions have "long been regarded as the special province of the Executive Branch." 470 U.S. at 831-32.

Indeed, this argument is in significant tension with the facts of *Chaney* itself. The FDA's decision not to take enforcement actions with respect to lethal injection drugs relied on both enforcement discretion policy and a perceived lack of jurisdiction. 470 U.S. at 824. The Supreme Court did not call into question the nature of the agency's policy decision despite the agency's alternative conclusion. And, in any event, the DACA rescission did involve discretionary balancing, because it rested in part on enforcement-discretion concerns about legality and litigation risk.

Third, plaintiffs argued that the DACA rescission is reviewable because it is "a broad agency enforcement policy." JA.483. This argument is also inconsistent with the facts of *Chaney*. The non-enforcement decision in that case was not an individualized decision by the FDA to forgo enforcement of the Federal Food, Drug, and Cosmetic Act against a single alleged violator. Rather, the plaintiffs in *Chaney* requested the FDA to enforce the statute's misbranding prohibition against the use of certain drugs for capital punishment, by taking "various investigatory and enforcement actions" against "drug manufacturers," "prison administrators," and "all [others] in the chain of distribution"; the FDA, however, *categorically* concluded that its enforcement discretion "should not be exercised to interfere with this particular aspect of state criminal justice systems." 470 U.S. at 824-25. In short, the question under Section 701(a)(2) is whether the type of agency decision at issue is inherently discretionary in nature, not the number of people to whom it applies.

Common sense would dictate this conclusion even if it were not already settled law. Individual enforcement decisions are regularly informed by general interpretations of the agency's substantive statute to determine "whether a violation has occurred." *Chaney*, 470 U.S. at 831; *see BLE*, 482 U.S. at 283 ("[A] common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction."). Similarly, agency decisions about how its "resources are best spent" or how certain enforcement activity "best fits the agency's overall policies," *Chaney*, 470 U.S. at 831,

are at least as susceptible to implementation through broad guidance as through case-by-case enforcement decisions. *See, e.g.*, *Alaska Fish & Wildlife Federation & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 935, 938 (9th Cir. 1987) (holding unreviewable "a written policy stating that subsistence hunting in Alaska during the closed season would not be punished" because "traditional methods of enforcing game laws are not effective in the vast reaches of rural Alaska").[2]

Fourth, plaintiffs argue that the Acting Secretary's decision was reviewable because, rather than adopting a non-enforcement policy, it rescinded one. Their suggestion that the *Chaney* presumption applies only to "attempt[s] to obtain judicial review of an agency decision *not* to act," JA.485, is foreclosed by this Court's decision in *Speed Mining, Inc. v. Federal Mine Safety & Health Review Commission*, 528 F.3d 310 (4th Cir. 2008). In that case, the owner-operator of a coal mine contended that the Secretary of Labor abused her discretion in issuing citations for safety violations. The Court held that the decision was unreviewable, explaining that an "agency's exercise of its enforcement discretion," even when that discretion is exercised *to enforce* the law, is "an area in which the courts have traditionally been most reluctant to interfere." *Id.* at 318.

[2] Plaintiffs below cited *Kenney v. Glickman*, 96 F.3d 1118, 1124 (8th Cir. 1996), but that case involved "policy decisions based on the [agency's] interpretation" of the substantive commands of a statute, not the scope of its enforcement discretion.

Fifth, plaintiffs further suggested that the Acting Secretary's "affirmative . . . action rescinding protected interests that have been granted to Dreamers provid[es] a clear focus for judicial review." JA.486. But the premise of this argument—that DHS made a commitment to certain persons unlawfully in the country—is incorrect. Indeed, DHS made explicit when it adopted the DACA non-enforcement policy that "[t]his memorandum confers no substantive right." JA.131.[3]

More fundamentally, any reliance interests would not justify judicial review of otherwise-non-reviewable acts of discretion. In *Lincoln*, for example, the Indian Health Service had operated its regional program for seven years, providing important medical treatment to disabled children on which the recipients had undoubtedly come to rely. *See* 508 U.S. at 185-88. Notwithstanding that reliance, the Supreme Court held that the Service's discretionary decision to discontinue the program by reallocating a lump-sum appropriation was non-reviewable. *Id.* at 193-94.

Nor does the availability of review turn on the significance of a plaintiff's asserted interest in an agency's discretionary enforcement decision. The Supreme Court made this clear in *Chaney*, where plaintiffs offered "evidence that use of the drugs [that FDA declined to regulate] could lead to a cruel and protracted death." 470

[3] *Robbins v. Regan*, 780 F.2d 37, 47 (D.C. Cir. 1985) (per curiam), which involved a "rescission of commitments," is therefore inapposite. That case also did not involve an exercise of enforcement discretion—the challenged agency action was the alleged refusal to provide previously agreed upon funding for renovations of a homeless shelter.

U.S. at 827. Holding that it could not properly review the agency's decision, the Supreme Court emphasized that "[t]he fact that the drugs involved in this case are ultimately to be used in imposing the death penalty must not lead this Court or other courts to import profound differences of opinion over the meaning of the Eighth Amendment . . . into the domain of administrative law." *Id.* at 838.

In sum, none of plaintiffs' reasons, individually or collectively, justify applying APA review to the Acting Secretary's discretionary decision to rescind the DACA non-enforcement policy. And it warrants emphasis that those reasons, if accepted by this Court, would lead to a radical and untenable intrusion on agencies' enforcement discretion. Consider the following example of a quintessential exercise of prosecutorial discretion: one chief prosecutor adopts a general policy of not enforcing drug laws against low-level, non-violent offenders because she views them as victims of circumstance who should receive treatment and support; but her successor then rescinds that non-enforcement policy based on her legal concerns that the policy would violate her duty to faithfully execute the laws and provide equal treatment to defendants. The district court's analysis in this case would allow drug offenders in that circumstance, who are concededly guilty, to nevertheless seek judicial review of the legal reasoning underlying the second prosecutor's discretionary decision to enforce the drug laws in a different manner than her predecessor. That is not, and cannot possibly be, the law.

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

1. Under 8 U.S.C. § 1252, judicial review of DHS enforcement decisions is generally available, if at all, only through the procedures for reviewing removal orders set forth in that section. As relevant here, section 1252(g) states that "[e]xcept as provided in this section . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this subchapter." As the Supreme Court explained in *AADC*, section 1252(g) is "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." *See* 525 U.S. at 485 & n.9.

The Acting Secretary's rescission of DACA is such a "'no deferred action' decision[]," *AADC*, 525 U.S. at 485, and is an initial "action" in the agency's "commence[ment] [of] proceedings" against aliens who are unlawfully in the country, 8 U.S.C. § 1252(g). Thus, even assuming that the DACA rescission were reviewable, it would be reviewable only as otherwise "provided in [Section 1252]," *id.*—that is, through "[j]udicial review of a final order of removal," *id.* § 1252(a)(1). *See, e.g.*, *Vasquez v. Aviles*, 639 F. App'x 898, 901 (3d Cir. 2016); *Botezatu v. INS*, 195 F.3d 311, 314 (7th Cir. 1999). That review of a final order of removal is the sole avenue for

judicial review is underscored by 8 U.S.C. § 1252(b)(9), which channels into the review of final removal orders all questions of law or fact arising from any action taken to remove an alien. *See AADC*, 525 U.S. at 483 (characterizing section 1252(b)(9) as an "unmistakable 'zipper' clause"); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994).

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

2. The district court failed to grapple with the government's argument that review here is barred by the INA, stating only that "the notion that 8 U.S.C. § 1252(g) precludes judicial review has been rejected repeatedly" and citing *AADC*. JA.1501.

But *AADC supports* the government's position in this case. As explained, in *AADC*, the Supreme Court recognized the INA 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 8 U.S.C. § 1252(g) and 8 U.S.C. § 1252(b)(9). Plaintiffs cannot frustrate the INA's reticulated review scheme by filing suit before the agency has officially initiated an enforcement proceeding.

The Supreme Court's recent decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), does not counsel a different result. The plurality opinion described *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 rather "to refer to just those three specific actions themselves." *Id.* at 841. But the opinion merely emphasized that the plaintiffs there fell outside of *AADC*'s interpretation of section 1252(g) because they were challenging 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.

If anything, *Jennings* underscores the fact that 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, also bars plaintiffs' claims. Under both the plurality's and concurrence's interpretation of section 1252(b)(9), *see* 138 S. Ct. at 839-41 (plurality op.); *id.* at 852-53 (Thomas, J., concurring in the judgment), plaintiffs' claims in this case "aris[e] from" an "action taken" in the removal process.

II. The District Court Correctly Held That the Rescission of DACA Was Lawful.

A. The district court correctly held that the DACA rescission was not arbitrary and capricious.

Even if the Acting Secretary's decision were reviewable under the APA, it was plainly not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). As the district court correctly emphasized in so holding, JA.1505, the APA standard of review is "narrow," *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983): "[A] court is not to substitute its judgment" for the agency's reasonable judgment, *id.*, and should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

1. The district court correctly concluded that it was not arbitrary and capricious to rescind DACA because it was subject to serious legal challenge.

a. It is uncontroverted that nothing in the INA requires any aspect of the DACA policy. Plaintiffs' claim, instead, is that once an agency has adopted a purely discretionary non-enforcement policy, it must provide a robust explanation for a decision to pursue a different enforcement policy. Unsurprisingly, plaintiffs have not identified any authority for this proposition. Nor can they seriously dispute the district court's conclusion that it was reasonable for the Secretary to act based on the significant legal risks presented by maintaining a policy (original DACA) that was materially indistinguishable to ones (expanded DACA and DAPA) that had been enjoined nationwide by the Fifth Circuit in a decision affirmed by an equally divided Supreme Court. This is especially so in the face of a threat by Texas and other States to challenge DACA on the same grounds. As the district court explained, "[r]egardless of whether DACA is, in fact, lawful or unlawful, the belief that it was unlawful and subject to serious legal challenge is completely rational." JA.1506. "DAPA—an analogous program, promulgated by analogous means," the court explained "had been defeated less than a year prior" and "[t]he same plaintiffs who defeated DAPA threatened to challenge DACA imminently." *Id.* "[I]nstead of the chaotic possibility of an immediate termination," the Acting Secretary "opted for a six-month wind-down period." *Id.*

The district court was correct. In *Texas v. United States*, the Fifth Circuit had concluded that DAPA and expanded DACA were unlawful on both procedural and substantive grounds. 809 F.3d at 178; *see id.* at 147 n.11 (including the "DACA expansions" within the opinion's references to "DAPA"). The entirety of the Fifth Circuit's reasoning applies equally to the original DACA policy.

With respect to procedure, the Fifth Circuit concluded that the memorandum expanding DACA and creating DAPA was not exempt from notice and comment as a statement of policy because of how the *original DACA policy* had been implemented. *Texas*, 809 F.3d. at 171-78. The court found that, "[a]lthough the DAPA Memo facially purports to confer discretion," in fact it would operate as a binding statement of eligibility for deferred action because that is how the original DACA policy had been implemented. *Id.* at 171, 174 n.139.

With respect to substance, the Fifth Circuit held that DAPA and expanded DACA were contrary to the INA because (1) "[i]n specific and detailed provisions," the INA already "confers eligibility for 'discretionary relief,'" including "narrow classes of aliens eligible for deferred action," *Texas,* 809 F.3d at 179; (2) the INA's otherwise "broad grants of authority" could not reasonably be construed to assign to the Secretary the authority to create additional categories of aliens of "vast 'economic and political significance,'" *id.* at 182-83; (3) DAPA and expanded DACA were inconsistent with historical deferred-action policies because they neither were

undertaken on a "country-specific basis . . . in response to war, civil unrest, or natural disasters," nor served as a "bridge[] from one legal status to another," *id.* at 184; and (4) "Congress ha[d] repeatedly declined to enact the Development, Relief, and Education for Alien Minors Act ('DREAM Act'), features of which closely resemble DACA and DAPA," *id.* at 185 (footnote omitted). Every one of those factors likewise applies to the original DACA policy.

b. Plaintiffs posit various reasons they believe distinguish DACA from DAPA and expanded DACA, and fault the Acting Secretary for failing to expressly address them. Pl. Br. 30. But plaintiffs provide no authority (because none exists) for the proposition that the APA required the Acting Secretary to provide the equivalent of a bench memo setting out the subsidiary legal arguments to be made by each side in the course of protracted litigation, with an accompanying evaluation of the likelihood of success in various district courts, the courts of appeals, and the Supreme Court. Indeed, as this Court has explained, an agency "explanation need not be a 'model of analytic precision'" to satisfy the APA's requirements. *Downey v. U.S. Dep't of Army*, 685 F. App'x 184, 190 (4th Cir. 2017) *(quoting Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 350 (4th Cir. 2001)); *see also Bowman*, 419 U.S. at 286 (rationale need only be reasonably discernable). So long as the ultimate litigation judgment was reasonable, the Acting Secretary's decision is not arbitrary and capricious. All of plaintiffs' arguments to the contrary fail.

First, plaintiffs urge that DAPA might have been more vulnerable to challenge because "unlike DAPA, DACA has no analogue in the INA." Pl. Br. 32 (quoting *NAACP*, 298 F. Supp. 3d. 239). The basis of the Fifth Circuit's *Texas* decision was not, however, the existence of a particular statutory pathway to lawful presence, but rather the "specific and intricate provisions" of the INA as a whole addressing discretionary relief (which, of course, no more include DACA recipients than DAPA recipients). 809 F.3d at 186. Indeed, a pathway to lawful presence could not have been decisive to the Fifth Circuit's rationale, because, as that court itself noted, *some* DAPA recipients (*i.e.*, the parents of lawful permanent residents) had no such pathway to citizenship, *id.* at 179-80, and neither did expanded DACA recipients (who differed from DACA recipients only with respect to age and length of residence). Given all this, plaintiffs' proposed distinction is entirely backward. If anything, the fact that Congress had legislated only for certain individuals similarly situated to DAPA recipients—and not DACA recipients—would make DACA *more* inconsistent with the INA.

Second, plaintiffs contend that the district erred in failing to consider whether a defense like laches might apply to a suit seeking to enjoin DACA. Pl. Br. 32. But laches requires a showing of prejudice, *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967), and plaintiffs do not explain how the government (or, indeed, anyone else) was prejudiced by Texas's failure to bring suit earlier, which simply would have caused DACA *to end sooner*.

Third, plaintiffs contend that the Acting Secretary failed to consider the "injunction prerequisites, such as how any plaintiff challenging DACA could claim immediate or irreparable harm." Pl. Br. 33. This argument ignores the fact that the Fifth Circuit already *affirmed the DAPA injunction*, and, as explained, there are no material differences between the two policies.

Fourth, 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. Pl. Br. 31. 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. JA.383. 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" the courts adopted in support of his own view that DACA was "unconstitutional." JA.379. 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.

Fifth, plaintiffs err in contending that *Organized Village of Kake v. USDA*, 795 F.3d 956 (9th Cir. 2015) (en banc), held that reliance on litigation risk renders agency action arbitrary and capricious. Pl. Br. 31. *Kake* held no such thing. 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. The Ninth Circuit 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 thus 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.

c. Nor is there any basis to reject the Acting Secretary's litigation-risk concern as a "post hoc rationalization." The memorandum focuses from beginning to end principally on litigation concerns, not the legality of DACA per se. The memorandum

recounted in significant detail the litigation surrounding the DAPA and expanded DACA policies. JA.381-82. It noted that the agency's prior June 2017 decision to discontinue DAPA and expanded DACA was made after "considering the [government's] likelihood of success on the merits of th[at] ongoing litigation." JA.382. It described the subsequent letter from Texas and other States to the Attorney General notifying him of those States' intention to amend the existing lawsuit to challenge the original DACA policy. *Id.* It quoted the Attorney General's qualified statement that "it is *likely* that potentially imminent litigation would yield similar results with respect to DACA." *Id.* (emphasis added). And it concluded that, in light of the foregoing, and "[i]n the exercise of [her] authority in establishing national immigration policies and priorities" under 6 U.S.C. § 202(5), the Acting Secretary had decided merely that the DACA policy "should" be terminated and wound down in "an efficient and orderly fashion," *not* that it "must" be.

The Nielsen Memo reaffirms this understanding of the *Texas* litigation and the risk it posed. It spells out why "[a]ny arguable distinctions between the DAPA and DACA policies" were not "sufficiently material" to resolve the agency's doubts over DACA's legality, and explains that, whether or not courts ultimately would uphold DACA, "[t]here are sound reasons for a law enforcement agency to avoid discretionary policies that are legally questionable." Nielsen Memo 2. Indeed, regardless of whether the Duke Memo adequately explained this legal-doubt rationale,

the Nielsen Memo's further explanation provides sufficient basis to affirm the district court's rejection of plaintiffs' challenge to DHS's rescission of the DACA policy.

d. In any event, Acting Secretary Duke's decision is independently supported by her reasonable conclusion, informed by the Attorney General's advice, that indefinitely continuing the DACA policy would itself have been unlawful. As detailed above, the Fifth Circuit had already concluded that DAPA and expanded DACA were procedurally and substantively invalid, in a decision that four Justices of the Supreme Court voted to affirm. *See supra* pp.33-34. The Attorney General expressed his agreement with the conclusion reached by the Fifth Circuit in a decision that applies equally to the original DACA policy. *See* JA.379 (concluding that DACA was "effectuated . . . without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result"). The Acting Secretary's decision to rescind the purely discretionary DACA non-enforcement policy on the basis of the Fifth Circuit's decision, the Supreme Court's equally divided affirmance, and the Attorney General's opinion was not the type of "clear error of judgment," *State Farm*, 463 U.S. at 43, that would make it arbitrary and capricious under the APA. As the district court put it, "[H]ow could trying to avoid unlawful action possibly be arbitrary and capricious?" JA.1506.

2. Plaintiffs' additional arguments that the rescission memorandum was arbitrary and capricious are meritless.

a. Plaintiffs are equally mistaken in arguing that the Acting Secretary's decision was arbitrary and capricious in failing to consider the reliance interests at stake. Pl. Br. 27-29. Because of the nature of the decision to rescind DACA, reliance interests are not a sufficiently "important aspect" of the question to require express consideration. *State Farm*, 463 U.S. at 43. On its face, DACA confers no legitimate reliance interests. DACA made deferred action available for only two-year periods, which could "be terminated at any time" at the agency's discretion. JA.1013. When he announced DACA in 2012, President Obama explained that it was a "temporary stopgap measure," not a "permanent fix." *Remarks by the President on Immigration* (June 15, 2012), https://go.usa.gov/xnZFY. And he urged Congress to act "because these kids deserve to plan their lives in more than two-year increments." *Id.* A purely discretionary policy that can be revoked at any time cannot create legally cognizable reliance interests—and certainly not beyond the stated duration (generally two years) of existing deferred-action grants, which the Acting Secretary left untouched. Nothing in the INA prevents the Secretary of Homeland Security from changing her "national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). And any reliance was even less justified, of course, to the extent that DACA was unlawful.

At a minimum, the asserted reliance interests plainly failed to overcome the substantial change in circumstances resulting from the Supreme Court's affirmance of

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

In any event, the Acting Secretary's decision suitably respected the interests of existing DACA recipients. Based on her reasonable evaluation of the litigation risk posed by the imminent lawsuit against the DACA policy, the choice she faced was between a gradual, orderly, administrative wind-down of the policy, and the risk of an immediate, disruptive, court-imposed one. Her decision to phase out the policy over a two-and-a-half-year period—permitting a period of additional renewals and permitting renewed and existing grants of deferred action to expire by their terms—was, by far, the more humane choice.

Again, the Nielsen Memo underscores this conclusion. Although not required,

Secretary Nielsen addressed whether any claimed reliance justified the continuation of the DACA policy. As the Secretary explained, she is "keenly aware that DACA recipients have availed themselves of the policy in continuing their presence in this country and pursuing their lives." Nielsen Memo 3. "Nevertheless," she concluded that "in considering DHS enforcement policy" she "d[id] not believe that the asserted reliance interests outweigh the questionable legality of the DACA policy" and the other discretionary enforcement policy considerations that she articulated, especially in light of DACA's temporary nature. *Id.* Instead, the Secretary determined that "issues of reliance would best be considered by Congress, which can assess and weigh a range of options." *Id.* Ultimately, "[i]n [her] judgment, neither any individual's reliance on the expected continuation of the DACA policy nor the sympathetic circumstances of DACA recipients as a class overcomes the legal and institutional concerns with sanctioning the continued presence of hundreds of thousands of aliens who are illegally present in violation of the laws passed by Congress." *Id.* All that said, she also emphasized that any reliance concerns were further mitigated by the important fact that Acting Secretary Duke's "rescission of the DACA policy does not preclude the exercise of deferred action in individual cases if circumstances warrant." *Id.*

b. Plaintiffs similarly err by arguing that the rescission memorandum is arbitrary and capricious because it does not "cite[] any facts or changed circumstances that supported the change." Pl. Br. 28. 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 threatening to challenge DACA. That is more than sufficient to satisfy the APA's requirement to acknowledge and explain a changed position. *FCC v. Fox*, 556 U.S. 502, 514-15 (2009).

c. Plaintiffs also miss the mark in speculating that "animus" motivated the rescission of DACA. Pl. Br. 29-30. Plaintiffs point to no evidence in the administrative record, or anywhere else, to support their contention that Acting Secretary Duke acted with animus in rescinding the DACA policy. *See also infra* Part II.C.1 (explaining the correctness of district court's rejection of plaintiffs' equal protection claims).

3. The administrative record provided an adequate basis on which to sustain the Acting Secretary's decision.

As a final matter, plaintiffs err in asserting that the district court could not uphold the Acting Secretary's decision based on the record before it. The district court correctly relied on the administrative record submitted by the agency and held that it supported the agency's decision.

In agency review cases, "[t]he APA specifically contemplates judicial review on the basis of the agency record." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). In so doing, "[t]he focal point for judicial review should be the administrative

record already in existence, not some new record made initially in the reviewing court." *Id.* at 743-44. Rather than permit wide-ranging discovery, "the task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Id.*. If the agency's action "is not sustainable on the administrative record made," then the administrative "decision must be vacated and the matter remanded to [the agency] for further consideration." *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam).

Plaintiffs argue both that the district court should have ordered the government to "complete" the record and that the district court should have granted discovery in order to consider extra-record materials. Pl. Br. 20-23. Both arguments are in error.

First, the record was not incomplete. In formal administrative proceedings, the APA provides that the "exclusive record for decision" consists of "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding." 5 U.S.C. § 556(e). The administrative record is composed "exclusive[ly]" of the materials affirmatively admitted by the agency in the course of the proceeding. Materials that are not "filed in the proceeding" pursuant to the agency's own procedures, such as internal agency documents memorializing the agency's own deliberations, are categorically outside the scope of the administrative record under section 556(e)—just like deliberative materials in the Judicial Branch such as draft opinions, bench memoranda, and communications among judges are not part of the

record in a case in court. *See also* 28 U.S.C. § 2112; Fed. R. App. P. 16 & note (imposing the same rule). Although the APA does not contain a parallel provision prescribing the scope of the administrative record for informal agency actions (such as the statement of agency policy here), there is no reason why materials should be treated any differently than when they are created in a formal proceeding. Indeed, the APA's lack of instruction and the informal character of the action give the agency more, rather than less, latitude in deciding what is material to its decision and thus belongs in the record. *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) (court may "not stray beyond the judicial province . . . to impose upon the agency its own notion of which procedures are 'best'").

In arguing that the record here is incomplete, plaintiffs wholly ignore the nature of the decision at issue. It is common sense that "[w]hat will constitute an adequate record for meaningful review may vary with the nature of the administrative action to be reviewed." *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 249 (2d Cir. 1977). Here the challenged agency act is the formulation of a policy concerning prosecutorial discretion; the agency record permitted review of that policy (assuming review were available at all). Because that discretionary enforcement decision did not require the development of any particular evidentiary basis and turned instead on legal and policy assessment, there is no risk that the government could try to insulate its decisions by "withhold[ing] evidence unfavorable to its case." Pl. Br. 22.

Plaintiffs further allege that the administrative record is facially suspect because it did not include documents from subordinates. Pl. Br. 21-22. In making this argument, plaintiffs disregard the "presumption of regularity" that attaches to the agency's action in designating the record. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993). In any event, plaintiffs recognize that the reason it may be appropriate to include materials from subordinates is that an agency decisionmaker may have based her decision on facts and evidence gathered and provided by subordinates. Pl. Br. 21. But the fact that materials in the possession of subordinates may, *in certain circumstances*, be indirectly considered by a decisionmaker does not mean that the absence of such materials renders an administrative record suspect and subject to "completion" in every case. The administrative record in this case included all non-deliberative materials considered by the Acting Secretary in reaching her decision.

In arguing (incorrectly) that the administrative record was incomplete because it "contained no materials explaining prior decisions to maintain the DACA program or the Government's departure from its prior view that DACA was legal," plaintiffs reveal their goal to uncover the deliberative processes of the agency in reaching its conclusion. Pl. Br. 22. But deliberative materials have no place in an administrative record. "[A]gency officials should be judged by what they decided, not for matters they considered before making up their minds." *National Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014). Indeed, deliberative materials are not merely protected

from disclosure—they do not form part of the administrative record at all. *See San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (plurality opinion) (explaining that "[j]udicial examination of [internal agency] transcripts would represent an extraordinary intrusion into the realm of the agency," and that the petitioners must make a "'strong showing of bad faith or improper behavior'" *before* the court would be "warranted in examining the deliberative proceedings of the agency"); *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 312-13 (S.D.N.Y. 2012) ("[C]ourts have consistently recognized that, for the purpose of judicial review of agency action, deliberative materials antecedent to the agency's decision fall outside the administrative record.").

Plaintiffs' reliance on *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982), is misplaced. Pl. Br. 20. Plaintiffs there alleged that a federal agency had improperly funded projects. But the state plans that were being funded—"the very basis for federal decision-making" and documents that were required by regulation—were not included in the administrative record, thus creating a "strong suggestion that the record before the Court was not complete." *Dopico,* 687 F.2d at 654. The agency action at issue here does not involve consideration of documents submitted to the government from the outside, and plaintiffs have not identified a comparable document that is missing from the record. Rather, this case involves the formulation of a policy with respect to enforcement discretion, and plaintiffs have not identified

any non-deliberative materials outside the administrative record relevant to that legal policy decision that the Acting Secretary necessarily considered.

Second, plaintiffs are not entitled to extra-record evidence. The general rule is that discovery is not appropriate in an APA suit absent a "strong showing of bad faith or improper behavior." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Air Transp. Ass'n of Am., Inc. v. National Mediation Board*, 663 F.3d 476, 487 (D.C. Cir. 2011). Here the Acting Secretary explained the reasons for her action in a memorandum that was both publicly released and included in the administrative record. If the administrative record were insufficient for review (which it was not, *see supra* pp. 44-47), the proper remedy would be for the district court to remand the case to the agency, *not* to order discovery. *Florida Power*, 470 U.S. at 744.

In their attempt to evade the general rule forbidding discovery in APA cases, plaintiffs attempt to demonstrate that agency officials acted in bad faith. In making this argument, plaintiffs rely on statements made by "Government officials" that purportedly demonstrate racial animus and the reversal of the government's previous support of the DACA policy. Pl. Br. 22-23. But neither of these grounds could support a finding of bad faith. *First*, plaintiffs have made no showing whatsoever that Acting Secretary Duke, the decisionmaker here, acted on the basis of animus. *See infra* Part II.C.1 (explaining that the district court correctly rejected plaintiffs' equal protection claims). *Second*, the administrative record adequately explains the government's change in position. *See supra* p. 43.

B. The district court correctly held that the rescission of DACA 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). Accordingly, the rescission of the DACA policy did not require notice-and-comment rulemaking, as the district court correctly recognized (joining all the other courts to have considered the issue). *See* JA.1504-05.

A general statement of policy "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." *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). 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 or legislative rule, pursuant to properly delegated

authority, has the force of law, and creates new law or imposes new rights or duties." *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 207 (4th Cir. 1989); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *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.'").

The rescission memo was issued as an "exercise of [the Secretary's] authority in establishing national immigration policies and priorities," JA.383, 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," JA.384, and does not affect anyone's immigration status. As the district court explained, "[a]lthough a substantial paradigm shift, the DACA Rescission Memo neither curtails DHS's discretion regarding individual immigration reviews, nor does it prevent the agency from granting . . . deferred action status in the future." JA.1505. It simply returns to the prior status quo, reflecting the background principle that deferred action is "an act of prosecutorial discretion" that may be exercised "on an individualized case-by-case basis," JA.381, and places "no limitations" on the agency's exercise of such "otherwise lawful enforcement . . . prerogatives," JA.384. Nothing in the rescission memo evidences an intent to be bound.

2. Plaintiffs contend that the DACA rescission is a substantive rule because it

withdrew officials' discretion to grant deferred action *under DACA*. Pl. Br. 36-37. But that cannot be the test, because a change in policy *always* withdraws discretion to act under the repudiated policy. Setting aside that truism, the essence of plaintiffs' argument is that they are less likely to receive deferred action based on a totality of the circumstances inquiry than under the DACA policy's guidelines. But a reduced likelihood of relief does not transform a general statement of policy into a substantive rule. *See Mada–Luna v. Fitzpatrick,* 813 F.2d 1006, 1016 (9th Cir. 1987).

This Court's decision in *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340-41 (4th Cir. 1995), relied on by plaintiffs, only underscores the correctness of the district court's holding. Contrary to plaintiffs' contention, this Court in *Chen Zhou Chai* did not hold that a general statement of policy is required to undergo notice-and-comment rulemaking if it "substantively impacts" individuals. Pl. Br. 38. Indeed, the Court held that an interim asylum policy was a general statement of policy, 48 F.3d at 1341 (citing *Mada–Luna,* 813 F.2d at 1015), even though it undoubtedly substantively impacted a number of individuals and the likelihood of their being granted asylum.

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. *See Chen Zhou Chai*, 48 F.3d at 1341 n.8. 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. Not only would such a ruling effectively order the maintenance of an illegally enacted legislative rule, but any relief it provides 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. Pl. Br. 34 n.4. But that argument rests on an inapposite case involving a substantive rule promulgated through notice-and-comment rulemaking and 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) (holding that agency had not sufficiently evaluated the original rule). 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 invalid rule.

C. The district court correctly held that the rescission of DACA did not violate the Constitution.

1. The DACA rescission did not violate equal protection.

a. In *AADC*, the Supreme Court rejected an attempt by a group of aliens to defend against removal by asserting that the Government was discriminating against them based on their First Amendment activity. 525 U.S. at 488-92. The Court began with the principle that "[e]ven in the criminal-law field, a selective prosecution claim is

a *rara avis." AADC*, 525 U.S. at 489 (citing, *inter alia*, *Armstrong*, 517 U.S. at 463-65). As the Court reaffirmed, "[b]ecause such claims invade a special province of the Executive—its prosecutorial discretion—we have emphasized that the standard for proving them is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully." *Id.*

The Supreme Court in *AADC* then held that an even more restrictive rule than *Armstrong*'s clear-evidence standard was required when the claim of selective enforcement arises in the immigration context, because the concerns raised by such claims are "greatly magnified." 525 U.S. at 489-90. The Court observed that the "delay" associated with challenges to immigration enforcement decisions is more harmful because it "permit[s] and prolong[s] a continuing violation of United States law," especially given that "[p]ostponing justifiable deportation (in the hope that the alien's status will change . . . or simply with the object of extending the alien's unlawful stay) is often the principal object of resistance to a deportation proceeding." *Id.* at 490. The Court also recognized that heightened separation-of-powers concerns arise in this context because inquiring into the motives behind immigration enforcement entails "not merely the disclosure of normal domestic law enforcement priorities and techniques," but also "the disclosure of foreign-policy objectives and [in some cases, like *AADC* itself,] foreign-intelligence products and techniques." *Id.* at 490-91. Given all this, the Court dismissed "[t]he contention that a violation [of federal law] must be allowed to continue because it has been improperly selected" as

"not powerfully appealing." *Id.* at 491.

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

b. Although it reached the right result, the district court disagreed with the government on the framework under which to analyze plaintiffs' equal protection claims. The court stated that even though "DACA was promulgated under a theory of prosecutorial discretion, its rescission was not based on an exercise of that discretion." JA.1508. As already explained, the DACA policy itself was as an act of prosecutorial discretion (whether or not the exercise of that discretion was lawful) and the rescission of that policy reset the agency's enforcement policies to no longer provide a categorical grant of deferred action to certain individuals. The rescission is thus precisely the kind of selective enforcement decision to which *AADC* applies, because plaintiffs do not dispute the government's authority to enforce the immigration laws against them but instead argue that the government has a discriminatory reason for enforcing those laws against them (by declining to renew their deferred action).

Plaintiffs contend (Br. 41) that the district court erred in applying the standard derived from *Kleindienst v. Mandel*, 408 U.S. 753 (1972). It is, however, not clear that the court applied *Mandel* in the sense asserted by plaintiffs. The district court discussed a number of cases for the proposition that courts should be wary of looking behind facially neutral statutes in a variety of contexts, *see* JA.1509-10, and then came to the reasonable conclusion that plaintiffs here had made nothing like the showing made in *International Refugee Assistance Project (IRAP) v. Trump*, 883 F.3d 233 (4th Cir.), *cert. granted, and judgment vacated Trump v. IRAP*, No. 17-1270, 2018 WL 1256938 (U.S. 2018), a showing which the Supreme Court has now deemed insufficient. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

In *Trump v. Hawaii* the Supreme Court rejected statutory and constitutional challenges to the President's Proclamation imposing entry restrictions on certain nationals of eight foreign countries. In vacating a preliminary injunction against the Proclamation, the Court reaffirmed that facially neutral immigration policies are subject to only limited, deferential review. 138 S. Ct. at 2419-20. Although the proclamation under review in *Trump v. Hawaii* specifically concerned the admission of aliens abroad, and thus was reviewed at most for rational basis, the Supreme Court recognized that deferential review may apply "across different contexts and constitutional claims." *Id.* at 2419 (citing, among other cases, *Rajah v. Mukasey*, 544 F.3d 427, 433, 438-39 (2d. Cir. 2008), which concerned a special registration policy for

aliens from certain countries who were already in the country). The district court correctly applied such deferential review.

Plaintiffs' reliance on this Court's decision in *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, 829 (4th Cir. 1995), fails to advance their claim. That case—which found no constitutional violation—involved a claim that a zoning law had been applied discriminatorily, not a claim of selective enforcement of immigration law.

c. Analyzed under the proper framework, it is clear that the district court reached the correct result in rejecting plaintiffs' equal protection claim. A claim that a facially neutral policy like the DACA rescission was motivated by racial animus is insufficient to overcome *AADC*'s general bar on discriminatory-motive challenges to immigration-enforcement decisions. *See* 525 U.S. at 491-92 (holding that even selectively targeting particular aliens on the basis of their First Amendment activity did not rise to the level of the possible exception for "outrageous" discrimination). Virtually any immigration policy is likely to have a disparate impact on aliens of some ethnicity, and thus would be vulnerable to a discriminatory-motive allegation from aliens merely seeking to continue their unlawful presence in this country. Even if all such claims were ultimately proven baseless, the very act of adjudicating them leads precisely to the delay and foreign policy concerns the Court described in *AADC*. *See id.* at 490. The district court correctly recognized that with respect to the facially neutral rescission of an immigration-enforcement discretion policy, plaintiffs' claim of animus—unsupported by anything in the administrative record—was insufficient to

support an equal protection claim. JA.1508. As the court explained, "[t]he rescission of the DACA program merely fulfills the duty of the executive branch to faithfully enforce the laws passed by Congress." JA.1511.

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

Plaintiffs' allegations supporting their equal protection claim (Pl. Br.40-41) consist of statements made by government officials other than the Acting Secretary of Homeland Security, JA.46, 69-72, 76-79, 474; and certain events that plaintiffs

characterize as "procedural irregularities." None of these allegations is sufficient to establish an equal protection claim.

As an initial matter, plaintiffs disregard the absence of *any* statement by the actual decisionmaker—Acting Secretary Duke—that could give rise to an inference of animus. Acting Secretary Duke was the only government official with the legal authority to rescind a DHS policy that DHS had operated for the previous five years, 8 U.S.C. § 1103(a)—regardless of the (undisputed) involvement by the White House. For plaintiffs to succeed, it is the Acting Secretary's decision that must be infected by discriminatory animus, and the mere fact that her decision was preceded by certain statements of the President cannot ipso facto taint her decision given her independent oath and duty to obey the Constitution.

Moreover, even if the President's statements are taken on their own terms, they are insufficient. First, nationality, as opposed to ethnicity, is not an invidious classification for purposes of federal immigration law. *Rajah*, 544 F.3d at 435. And second, most of the statements did not refer to DACA, or indeed any official policy, since they occurred on the campaign trail and preceded the President's inauguration and oath of office. *See* JA.69-72. Indeed, as the district court recognized, the

statements directly related to DACA have largely been favorable to that policy. JA.1510-11.[4]

Simply put, the statements relied on by plaintiffs do not come close to plausibly alleging clear evidence of discriminatory motive. Indeed, it is utterly implausible that, in deciding whether to retain a policy that affirmatively sanctions the ongoing violation of federal law by nearly 700,000 aliens without lawful status, it was a significant factor that those aliens are predominantly Latino, especially given the serious questions about whether the policy itself was illegal.

Nor do plaintiffs advance their claim by invoking "procedural irregularities." Plaintiffs entirely fail to draw any causal connection between these supposed irregularities (which were not irregular at all, *see, e.g.*, *infra* pp. 66-67 (information-sharing policy)) and racial animus. *See* Pl. Br. 41.

d. Lacking sufficient evidence to carry their burden, Plaintiffs argue that the district court could not properly grant summary judgment on their equal protection claim without permitting them to take discovery. Pl. Br. 18-19.

For the reasons explained above, plaintiffs failed to state a claim that the rescission of DACA violated equal protection, and the district court could therefore

[4] The statements by the Attorney General and a White House policy advisor cited in the complaint are also insufficient, *see* JA.72, as is plaintiffs' reliance on a general increase in immigration enforcement, JA.76-79. Statements and actions indicating an increase in immigration enforcement simply underscore that the motivation of the agency action challenged here was not racial or ethnic animus, but rather the resetting of agency enforcement priorities.

properly grant the government's motion to dismiss. No discovery was warranted for this reason alone, and this Court may affirm on that basis.

Even if this Court were to evaluate the appropriateness of granting summary judgment on this claim, the district court correctly recognized that plaintiffs' constitutional claims could be decided on the basis of the administrative record. JA.1508. The APA expressly provides that agency action may be set aside as contrary to "constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). Accordingly, the APA's "comprehensive remedial scheme," *Western Radio Servs. Co. v. United States Forest Serv.*, 578 F.3d 1116, 1122-23 (9th Cir. 2009), for a "person 'adversely affected' . . . by agency action," 5 U.S.C. § 702, including its provisions governing record review, applies to constitutional claims for non-monetary relief against federal agencies and officials. *See also Wilkie v. Robbins*, 551 U.S. 537, 551-554 (2007) (describing the APA as the remedial scheme for vindicating complaints against "unfavorable agency actions").

The Supreme Court's decision in *Webster v. Doe*, 486 U.S. 592 (1988) (cited at Pl. Br. 44), is not to the contrary. The Court's reference in that case to "any discovery process which may be instituted" after remand is hardly a holding that the APA's requirement of record review has no application to constitutional claims. Id. at 604.

Plaintiffs further err in relying on this Court's statement in *Ray Communications, Inc. v. Clear Channel Communications, Inc.*, 673 F.3d 294, 299 (4th Cir. 2012), that "where the movant fails to fulfill its initial burden of providing admissible evidence of the

material facts entitling it to summary judgment, summary judgment must be denied, even if no opposing evidentiary matter is presented, for the non-movant is not required to rebut an insufficient showing." *Ray Communications* did not involve an APA claim, and here the government met its burden by submitting the administrative record.

Even assuming some discovery might be permitted for constitutional claims under the APA, the district court did not err in granting judgment for the government without discovery in this case. The Supreme Court has addressed when discovery is appropriate in selective enforcement contexts. Indeed, the whole point of *Armstrong*'s holding that there must be "clear evidence" of discrimination *before* prosecutorial discretion can be challenged, *supra* p. 53, was to *limit discovery* in selective prosecution claims. 517 U.S. at 463-65; *see also AADC*, 525 U.S. at 489-90 (relying on *Armstrong* in holding that aliens defending against removal by alleging selective enforcement need not be given access to district court fact-finding procedures). As explained, plaintiffs have not put forth any evidence that DACA was motivated by animus, let alone the kind of "clear evidence" of discriminatory intent required under *Armstrong* and *AADC*. The inappropriateness of discovery in this case is further underscored by the breadth of plaintiffs' discovery requests, *see, e.g.*, JA.1117-22 (asking for *all* documents and communications *within and between* DHS, DOJ, "the executive branch," and "the Trump administration" on a variety of topics). Instead of "clear evidence" of discriminatory intent, plaintiffs asked the district court to permit them to go on a

highly intrusive fishing expedition of precisely the sort that *Armstrong* and *AADC* forbid. The district court quite properly denied the request.

As a final matter, the district court did not, as plaintiffs contend, fail to view the facts in the light most favorable to plaintiffs' claim. *See* Pl. Br. 46. In so arguing, plaintiffs confuse factual findings with their legal relevance. For example, plaintiffs set forth as "disputed" the fact that 93% of DACA recipients were Latino. Pl. Br. 17. The government disputed the legal relevance of that fact, to be sure, but the government has never disputed that DACA recipients were predominantly Latino (whatever the precise figure). The same is true of the various statements made by the President that plaintiffs cited in their complaint. *See* Pl. Br. 46. The district court did not proceed as though the statements were not made, but rather recognized that the statements were legally insufficient to support plaintiffs' equal protection claim.

2. The DACA rescission did not violate due process.

The district court also correctly rejected plaintiffs' due process challenges to the rescission of DACA. JA.1512-14.

a. The DACA guidance could not have been clearer that it did not create any "substantive right, immigration status or pathway to citizenship." JA.131. As then-Secretary Napolitano explained, "[o]nly the Congress, acting through its legislative authority, can confer these rights." *Id.* In the face of this clear language, a subjective "belief of entitlement to a government benefit, no matter how sincerely or reasonably held, does not create a property right." *Gerhart v. Lake County*, 637 F.3d 1013, 1020-21

(9th Cir. 2011) (citing *Connecticut Bd. of Pardons v. Dumschat,* 452 U.S. 458, 465 (1981)). Plaintiffs try in vain to identify any express commitment on the part of the government to indefinitely maintain the DACA policy. *See* Pl. Br. 50, 51. But as the district court correctly held, DACA simply created no protected liberty or property interest. JA.1512-13. That alone disposes of plaintiffs' due process claims.

b. Even assuming a protected interest, the procedural due process claim would still fail. Plaintiffs' theory is not that individual DACA requests were adjudicated incorrectly (for example, due to factual error) and that notice and a hearing could correct those errors. Instead, plaintiffs claim that DHS cannot alter the DACA policy, even on a prospective basis, without providing individualized notice and hearings to nearly 800,000 recipients. As the district court recognized, however, JA.1512, where a government policy "applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption," and thus due process does not require individualized pre-deprivation notice. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); *see also Yassini v. Crosland*, 618 F.2d 1356, 1359, 1363 (9th Cir. 1980) (per curiam) (rejecting procedural due process challenge to rescission of deferred action policy).

In response to this clear precedent, plaintiffs argue that their complaint contained "specific allegations by specific individuals of the benefits they had lost." Pl. Br. 51, 52. But due process obviously does not prohibit the rescission of a general policy on a categorical rather than individualized basis, and thus notice and an

opportunity to be heard on these specific allegations is neither necessary nor appropriate. Plaintiffs further miss the mark in relying on *Kapps v. Wing*, 404 F.3d 105, 118 (2d Cir. 2005) (cited at Pl. Br. 53), to argue that individualized process may be required even for large numbers of individuals. The fact that notice and a hearing for individual decisions, where otherwise required, cannot be dispensed with merely because of the number of individuals affected does not mean that notice and a hearing are required for the rescission of generally applicable policies.

Plaintiffs' argument that *Bi-Metallic* is limited to legislative actions, Pl. Br. 52, finds no support in law or logic. Although the Supreme Court there noted that individuals subject to a general policy may have recourse to political processes, the decision did not require a showing of any particular process. Any time a rule of conduct applies generally, an individual's "rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic*, 239 U.S. at 445. The ongoing Congressional and public debates over DACA vividly illustrate this principle.

c. Plaintiffs' substantive due process claim likewise fails. As the district court correctly held, "[t]he rescission of a policy relating to prosecutorial discretion does not shock the conscience." JA.1514. "[T]he only thing that has changed," the court observed "is that deferred status will expire . . . in the absence of action by Congress." *Id.* "There is nothing surprising or unfair about policies, laws, or enforcement thereof changing with an election cycle." *Id.* Because plaintiffs' only attempt to demonstrate

conscience-shocking behavior hinges on their allegations of animus, *see* Pl. Br. 54 (citing cases not involving substantive due process), their substantive due process challenge collapses into their flawed equal protection claim, *supra* Part II.C.1.

d. Although the district court did not separately address plaintiffs' due process claims with respect to the DACA information-sharing policy, *see* Pl. Br. 54-55, those claims are no more successful than plaintiffs' claims challenging the rescission of DACA. The DACA information-sharing policy created no protected property or liberty interest, as it was always expressly subject to change, *see infra* pp. 66. And plaintiffs have failed to show that any alleged change to the information-sharing policy shocks the conscience or that individualized process was due. The information-sharing policy has not changed, *see infra* pp. 67, and has, in any event, always been subject to a number of exceptions.

III. The District Court Erred in Enjoining the Government from Changing the Information-Sharing Policy.

No other court has accepted the theory advanced by plaintiffs and adopted by the district court that the doctrine of equitable estoppel prevents the government from modifying an information-sharing policy that has been expressly subject to modification since the inception of DACA. This Court should not either, and at a minimum it should vacate the nationwide injunction insofar as it extends beyond the plaintiffs in this case.

A. The district court erred in holding that the government was subject to equitable estoppel.

1. When the DACA policy was implemented in 2012, DHS published a "frequently asked questions" webpage that included guidance regarding DHS's policy on the sharing of information provided in connection with DACA requests. The guidance stated that information would be "protected from disclosure to ICE and [Customs and Border Protection (CBP)] for the purpose of immigration enforcement proceedings," subject to exceptions where the criteria for issuance of a Notice to Appear are satisfied (for example, where national security, public safety, or significant criminal activity interests are implicated), and subject to the caveat that the policy "may be modified, superseded, or rescinded at any time." DHS DACA FAQ 19; *see also id.* (explaining that information may be used for certain purposes other than removal); USCIS, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs)* (Nov. 7, 2011), https://go.usa.gov/xncPK (last visited July 30, 2018).

Nothing in the Acting Secretary's memorandum changes that approach—in fact, the memorandum makes no reference to information sharing at all, a point the district court recognized, JA.1505 n.24. And DHS made clear in guidance issued after the rescission that "[t]his information-sharing policy *has not changed in any way* since it was first announced, including as a result of the Sept. 5, 2017 memo starting a wind-down of the DACA policy." USCIS, *Guidance on Rejected DACA Requests* Q5 (Dec. 27, 2017), www.uscis.gov/daca2017/guidance-rejected-daca2017 (emphasis added) (last

visited July 30, 2018). In fact, even the district court did not conclude that the policy had changed; rather it faulted the government for being "unable to provide any assurance the Government would not make changes" in the future. JA.1516.

2.a. The district court erred in holding that plaintiffs were entitled to a permanent injunction on equitable estoppel grounds. The Supreme Court has repeatedly indicated that estoppel against the government "may only be justified, if ever, in the presence of affirmative misconduct by government agents." *Dawkins v. Witt*, 318 F.3d 606, 611 (4th Cir. 2003) (collecting cases). But the district court did not find any affirmative misconduct, or even that the policy had changed in any way. Instead, the court speculated that "it is possible that the government, having induced these immigrants to share personal information under the guise of immigration protections, could now use that same information to track and remove them," which "potentially would be 'affirmative misconduct.'" JA.1516.

The district court's speculation fails to satisfy the requirement of "affirmative misconduct" for two independent reasons. *First*, and most obviously, the policy has not changed, and the court did not find that it had. Unquantified "*potential*[]" for *future* action cannot establish the current "*presence*" of *actual* misconduct. JA.1516; *see Dawkins*, 318 F.3d at 611. Indeed, given the lack of a finding concerning any *current* or *even imminent* change of policy, this claim fails to satisfy the requirements of both standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992), and irreparable harm, *eBay Inc. v. MercExchange, LLC,* 547 U.S. 388, 391 (2006).

Second, the government did not "promise" that information obtained through DACA requests would never, under any circumstances, be used for immigration enforcement or that the policy would not change. Rather, DHS explained that information would be "protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings," subject to exceptions where the criteria for issuance of a Notice to Appear are satisfied. JA.1011. And this was subject to the caveat that the policy "may be modified, superseded, or rescinded at any time without notice," *id.*, a fact the district court acknowledged yet failed to address in its analysis, JA.1532-33. Thus, even if the government changed its policy at a future date, DHS's statements regarding the prior policy would not be converted into "misrepresentation[s]" for purposes of equitable estoppel, *Chawla v. Transamerica Occidental Life Ins. Co.*, 440 F.3d 639, 646 (4th Cir. 2006), let alone "affirmative misconduct," *Dawkins*, 318 F.3d at 611-12.

b. As a more fundamental matter, the district court erred because an equitable estoppel claim is not available against the government, even assuming the typical elements of such a claim might be demonstrated.

Only Congress can create a "private right[] of action to enforce federal law." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Yet Congress has created no applicable right of action for a freestanding equitable estoppel cause of action against the government. The Supreme Court has acknowledged that the arguments in favor of barring equitable estoppel against the government are "substantial," while declining to

rule on the issue. *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *OPM v. Richmond*, 496 U.S. 414, 423 (1990). Courts of appeals have similarly recognized the strong reasons for reticence in applying estoppel against the government, particularly in its exercise of policymaking discretion. *See United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995) ("[T]he government should not be unduly hindered from changing its position if that shift is the result of a change in public policy."). And, at most, application of the doctrine of estoppel could be "justified only where 'it does not interfere with underlying government policies.'" *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984). The district court's injunction here does just that—it constrains DHS's enforcement and policymaking discretion with respect to whether and how to use information it possesses in connection with immigration proceedings. The injunction should be vacated.

B. The district court erred in granting injunctive relief that was nationwide in scope.

The district court's injunction must be vacated for an additional reason: in granting nationwide relief, the district court violated the requirements of Article III and equity. The injunction prohibits the changing of an information policy as it applies to hundreds of thousands of DACA recipients who are not parties before the court and who do not need to be covered to provide plaintiffs here with complete relief.

1. To establish Article III standing, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). "[S]tanding is not dispensed in gross," and the plaintiff must establish standing "separately for each form of relief sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017).

The Supreme Court recently reaffirmed these principles in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), concluding that a set of voters had not demonstrated standing to challenge alleged statewide partisan gerrymandering of Wisconsin legislative districts. The plaintiffs alleged that voters who shared their political views were disadvantaged by the way district lines were drawn statewide, and that they were therefore entitled to challenge the entire state map. *Id.* at 1924-25. But the Court concluded that a "plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in fact,'" and that a voter's "harm [from] the dilution of [his] vote[] . . . is district specific" because it "results from the boundaries of the particular district in which he resides." *Id.* at 1930 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Accordingly, the Court held that "the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district," not the broader remedy of "restructuring all of the State's legislative districts." *Id.* at 1930-31. And the Court "caution[ed]" that, on remand, any "remedy must be tailored to redress the plaintiff's particular injury."

Id. at 1934; *accord id.* at 1933 ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."). Other courts have recognized the same. *See, e.g.*, *McKenzie v. City of Chicago*, 118 F.3d 552, 555 & n.* (7th Cir. 1997).

2. Even apart from Article III's requirements, fundamental principles of equity support the same rule. The Supreme Court has cautioned that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs" before the court. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 428-37 (2017) (explaining the lack of historical basis for nationwide injunctions).

This Court applied that teaching to vacate a nationwide injunction in *Virginia Society for Human Life, Inc. v. FEC,* 263 F.3d 379 (4th Cir. 2001). There, the district court had issued a nationwide injunction preventing the Federal Election Commission from enforcing a challenged regulation "against any party anywhere in the United States." *Id.* at 393. This Court explained that an injunction covering the plaintiff alone would "adequately protec[t] it," and that preventing the Commission from enforcing the regulation "against other parties in other circuits does not provide any additional relief" to the prevailing plaintiff. *Id.* The Court also rejected the argument that a nationwide injunction was necessary to set aside unlawful agency action, noting that

"[n]othing in the language of the APA" requires the exercise of "such far-reaching power." *Id.* at 394.

Moreover, nationwide injunctions "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring); *see also Virginia Soc'y for Life*, 263 F.3d at 393. They also create an inequitable "one-way-ratchet" under which any prevailing plaintiff obtains relief on behalf of all others, but a victory by the government would not preclude other potential plaintiffs from "run[ning] off to the 93 other districts for more bites at the apple." *City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., dissenting in part), *reh'g en banc granted*, Order of June 4, 2018 (No. 17-05270) (vacating panel judgment "insofar as it sustained the district court's decision to extend preliminary relief nationwide"); *cf. United States v. Mendoza*, 464 U.S. 154, 158-62 (1984) (holding that non-parties to an adverse decision against the federal government may not invoke the decision to preclude the government from continuing to defend the issue in subsequent litigation). Here, there are multiple cases across the country challenging the rescission of the DACA policy and the alleged change to the information-sharing policy. Each court should adjudicate the claims of the plaintiffs before it, and the plaintiffs in other cases should not benefit from the government's loss in this case on the information-

sharing policy, just as they are not bound by the government's win here on the DACA rescission.

CONCLUSION

The district court's permanent injunction should be vacated, and its grant of summary judgment to the government should be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

This case concerns important questions regarding the exercise of the government's enforcement discretion prerogatives and the scope of judicial review. Moreover, the district court entered a nationwide injunction permanently barring the Department of Homeland Security from altering its information-sharing policy. The government believes that oral argument could assist the court in resolving these cross-appeals and respectfully requests oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 17,999 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 August 1, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Mark B. Stern
Mark B. Stern

ADDENDUM

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5 U.S.C. § 701

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;[1] and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

6 U.S.C. § 202

The Secretary shall be responsible for the following:
(1) Preventing the entry of terrorists and the instruments of terrorism into the United States.
(2) Securing the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States, including managing and coordinating those functions transferred to the Department at ports of entry.
(3) Carrying out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the date on which the transfer of functions specified under section 251 of this title takes effect.
(4) Establishing and administering rules, in accordance with section 236 of this title, governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States.
(5) Establishing national immigration enforcement policies and priorities.
(6) Except as provided in part C of this subchapter, administering the customs laws of the United States.
(7) Conducting the inspection and related administrative functions of the Department of Agriculture transferred to the Secretary of Homeland Security under section 231 of this title.
(8) In carrying out the foregoing responsibilities, ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce.

8 U.S.C. § 1252

(a) Applicable provisions

(1) General orders of removal

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

(2) Matters not subject to judicial review

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

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

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

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

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

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

(B) Denials of discretionary relief

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

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

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

(C) Orders against criminal aliens

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

(D) Judicial review of certain legal claims

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

(3) Treatment of certain decisions

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

(4) Claims under the United Nations Convention

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

(5) Exclusive means of review

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

(b) Requirements for review of orders of removal

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

(1) Deadline

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

(2) Venue and forms

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

(3) Service

(A) In general

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

(B) Stay of order

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

(C) Alien's brief

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

(4) Scope and standard for review

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

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

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

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

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

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

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

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

(B) Transfer if issue of fact

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

(C) Limitation on determination

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

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

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

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

(A) In general

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

(B) Claims of United States nationality

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

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

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

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

(C) Consequence of invalidation

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

(D) Limitation on filing petitions for review

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

(8) Construction

This subsection--

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

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

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

(9) Consolidation of questions for judicial review

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

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

(c) Requirements for petition

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

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

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

(d) Review of final orders

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

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

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

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

(1) Limitations on relief

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

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

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

(2) Habeas corpus proceedings

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

(A) whether the petitioner is an alien,

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

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

(3) Challenges on validity of the system

(A) In general

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

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

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

(B) Deadlines for bringing actions

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

(C) Notice of appeal

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

(D) Expeditious consideration of cases

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

(4) Decision

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

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

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

(5) Scope of inquiry

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

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

(f) Limit on injunctive relief

(1) In general

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

(2) Particular cases

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

(g) Exclusive jurisdiction

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

8 C.F.R. § 274a.12

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

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

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

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

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