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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,

Plaintiffs-Appellees-Cross-Appellants,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Defendants-Appellants-Cross-Appellees.

On Appeal From The United States District Court
For The Northern District Of California

SUPPLEMENTAL BRIEF FOR THE *GARCIA* AND *COUNTY OF SANTA CLARA* PLAINTIFFS

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INTRODUCTION

This Court's May 1, 2018 order directs the parties to submit supplemental briefs about reviewability – specifically, the effect of *Heckler v. Chaney*, 470 U.S. 821 (1985), and *Montana Air Chapter No. 29 v. FLRA*, 898 F.2d 753 (9th Cir. 1990), on the government's argument that the APA, 5 U.S.C. § 701(a)(2), bars judicial review of its decision to rescind DACA. The order directs the parties to "consider whether the rescission is judicially reviewable as a general enforcement policy, rather than as a single-shot non-enforcement decision," under *Crowley Caribbean Transportation, Inc. v. Pena*, 37 F.3d 671 (D.C. Cir. 1994), and *NAACP v. Trump*, 2018 WL 1920079 (D.D.C. Apr. 24, 2018).

Those opinions all support the conclusion that the decision to rescind the DACA program is subject to judicial review. The APA codifies the view that those who "suffe[r] legal wrong because of agency action" should be "entitled to judicial review thereof." 5 U.S.C. § 702. There is a "'strong presumption' favoring judicial review of administrative action," *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015), especially in the immigration context, *see INS v. St. Cyr*, 533 U.S. 289, 298 (2001). The burden therefore is on the government to establish that some exception to that general rule applies.

And there are only a few "very narrow" exceptions to that general rule. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated*

on other grounds by Califano v. Sanders, 430 U.S. 99 (1977). Section 701(a)(2) is one of them. It bars judicial review of agency decisions that have been "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This standard is met only in the "rare instances" where "there is no law to apply," *Overton Park*, 401 U.S. at 410 (quotation marks omitted), and so the court has "no meaningful standard against which to judge the agency's exercise of discretion," *Chaney*, 470 U.S. at 830.

This is not one of those cases. There is law to apply here. The government's stated reasons for rescinding DACA are (1) DACA is unlawful (the reason given at the time of rescission) and (2) there is litigation risk in keeping DACA (the reason the government gives now, in litigation). Courts are competent to assess the legal question of whether DACA is lawful and the litigation risk of taking that legal position. That is what courts do. Indeed, likelihood of success on the merits is an element of a preliminary injunction, and that is essentially the question in assessing litigation risk.

The government relies on *Chaney* to argue that the decision to rescind DACA is a matter committed to agency discretion by law. In *Chaney*, the Supreme Court held that "a decision of an administrative agency to exercise its 'discretion' not to undertake certain enforcement actions" is "presumptively unreviewable." 470 U.S. at 823, 832. But unlike *Chaney*, the decision to rescind DACA is not a classic

exercise of prosecutorial discretion. It is a programmatic decision that the agency and its enforcement officials *have no discretion to exercise* in this area.

That is precisely the point of the *Montana Air* and *Crowley* cases. They hold that the APA permits judicial review when the agency disclaims any discretion and makes a general policy decision based on a legal conclusion that its hands are tied. In those circumstances, the agency is not actually exercising its enforcement discretion. *See Crowley*, 37 F.3d at 676-77; *Mont. Air*, 898 F.2d at 756; *see also NAACP*, 2018 WL 1920079, at *15. *Montana Air* is binding Ninth Circuit precedent and it controls here. The rescission of DACA is a general policy decision based on the government's legal conclusion that DACA exceeds its authority.

The government likely will respond that, even if the decision to rescind DACA does not involve the exercise of prosecutorial discretion, it is still unreviewable because it falls within the general category of "enforcement decisions" that are historically unreviewable. *See Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). That is wrong, because the rescission is not a mere enforcement decision. It is a decision to stop a longstanding government program that provides vital benefits, such as work authorization. Put another way, DACA did not just remove the risk of removal, but it included affirmative benefits so that the Dreamers could build their lives in the United States. There is no tradition of withholding review in those circumstances and no persuasive reason to do so here.

Accordingly, as the district court here (ER.19) and every court to consider the issue have concluded, "[t]he decision to rescind DACA is unlike the non-enforcement decision at issue in *Chaney*" and is judicially reviewable. *Batalla Vidal v. Duke*, 2017 WL 5201116, at *11 (E.D.N.Y. Nov. 9, 2017) (*Batalla Vidal I*); *see Casa de Md. v. DHS*, 284 F. Supp. 3d 758, 770 n.23 (D. Md. 2018); *NAACP*, 2018 WL 1920079, at *15. This Court should reach the same conclusion.

ARGUMENT

I. Courts May Review An Agency's General Policy That Rests On A Legal Conclusion That The Agency Lacks Discretion

As explained above and in our opening brief (at 19-23), an agency's decisions are presumptively reviewable under the APA, and the burden is on the government to prove otherwise, using one of the few recognized narrow categories where courts are precluded from reviewing the legality of an agency's actions. The government invokes both 5 U.S.C. § 701(a)(2)'s narrow exception for matters "committed to agency discretion by law" and *Heckler v. Chaney*, 470 U.S. 821 (1985). But *Chaney* considered a completely different situation.

In *Chaney*, inmates who had been sentenced to death filed a petition with the FDA, urging it to exercise its discretion to initiate enforcement proceedings against certain States' use of particular drugs for lethal injections. In denying the petition, the FDA invoked its "inherent discretion to decline to pursue certain enforcement matters." *Chaney*, 470 U.S. at 824. The Supreme Court held that the decision was

not reviewable in light of the "tradition" of affording "absolute" deference to "an agency's decision not to prosecute or enforce." *Id.* at 831. The Court emphasized that nonenforcement decisions involve "a complicated balancing of … factors," including the allocation of agency resources and the agency's likelihood of success. *Id.* The Court also reasoned that nonenforcement decisions generally lack any "focus for judicial review" because they do not involve the exercise of "*coercive* power over an individual's liberty or property rights." *Id.* at 832.

Chaney involved a "single-shot non-enforcement decision," *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) – a request to "undertake certain enforcement actions" against specific defendants (three States that used the lethal injection drugs). *Chaney,* 470 U.S. at 823. And the Court expressly reserved the question whether the APA permits judicial review of an agency's legal determination, namely, its "refusal … to institute proceedings based solely on the belief that it lacks jurisdiction." *Id.* at 833 n.4. The teaching of *Chaney*, therefore, is that an agency's decision not to exercise its discretion to enforce a statute in a specific case is unreviewable. The key is that the agency has "exercise[d] its 'discretion'" not to act. *Id.* at 823; *see Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996) ("*Chaney* applies to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards.").

In contrast to the situation in *Chaney,* general enforcement policies *are* judicially reviewable when they rest on a legal conclusion that the agency is bound to act in a particular way and the agency cannot exercise its discretion. That is the point of the decisions in *Montana Air* and *Crowley*. These cases both hold that the APA authorizes judicial review of an agency's enforcement policies that rest on a legal conclusion that the agency's hands are tied. *See Mont. Air Chapter No. 29 v. FLRA*, 898 F.2d 753, 756 (9th Cir. 1990); *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676-77 (D.C. Cir. 1994).

In *Montana Air*, this Court held that "agency nonenforcement decisions are reviewable when they are based on a belief that the agency lacks jurisdiction." 898 F.2d at 756-57. In that case, the Court reviewed an agency's decision not to intervene in a labor dispute because the agency "believed [it] was prevented from issuing a complaint" – a legal determination that the agency was bound. *Id.*

In *Crowley*, the D.C. Circuit held that "single-shot non-enforcement decision[s]" are not reviewable, but "an agency's statement of a *general enforcement policy* may be reviewable for legal sufficiency where the agency has … articulated it in some form of universal policy statement." *Crowley*, 37 F.3d at 676; *see also Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993); *Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765, 773 (D.C. Cir. 1992). The court then applied that rule, concluding that the maritime administrator's decision to deny a waiver to a foreign-

flag vessel for cargo service was not reviewable because it was a typical single-shot enforcement decision, rather than a policy or legal determination that bound the agency to a particular rule. *Crowley*, 37 F.3d at 676.

Since that holding, the D.C. and Eighth Circuits have applied *Crowley* to permit judicial review of an agency's policy to not enforce shipping restrictions against certain vessels based on its legal determination that the restrictions did not apply, *OSG*, 132 F.3d at 812, and another agency's decision to reject a "zero tolerance" approach to enforcing poultry contamination restrictions because it interpreted the statute to permit some contamination, *Kenney*, 96 F.3d at 1123. *See NAACP v. Trump*, 2018 WL 1920079, at *15 (D.D.C. Apr. 24, 2018) (recognizing that *Crowley* permits review of "a legal interpretation phrased as a general enforcement policy, even if that interpretation concerns the scope of the agency's lawful enforcement authority"). This Court and two other courts of appeals, therefore, agree that general enforcement policies are reviewable when they rest on legal conclusions about the scope of an agency's authority.[1]

[1] The government argues that *Montana Air* is no longer good law because it cited a prior D.C. Circuit decision, *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Brock*, 783 F.2d 237 (D.C. Cir. 1986), that *Crowley* called into question. In *International Union*, the D.C. Circuit held that the APA allowed judicial review of a single-shot enforcement decision because it rested on a legal interpretation. 783 F.2d at 245-46. *Crowley* questioned *International Union*'s holding as to single-shot decisions, but held that general enforcement policies are reviewable when they rest on a legal interpretation. That is all we are saying

That approach makes sense. As the D.C. Circuit has explained, "broad enforcement policies are abstracted from the particular combinations of facts" that make "individual" enforcement decisions challenging to review. *Crowley*, 37 F.3d at 677. They are "more likely to be direct interpretations of … substantive statute[s] rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Id*. They are also more likely to be accompanied by a "clearer (and more easily reviewable) statement of [the agency's] reasons for acting." *Id.* An agency's legal conclusion about the scope of its authority provides a "meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830. Assessing the agency's legal premise falls squarely within the central competency of the judiciary: "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Judicial review of an agency's legal determination that it lacks authority to act is necessary to ensure that "federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). This review ensures that agencies cannot frustrate the APA's check on arbitrary action by "claim[ing] that the law ties [their] hands while at the same time

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here. There is no disagreement between this Court and the D.C. Circuit as to general enforcement policies (and of course, the Ninth Circuit's decision is binding in any event).

denying the courts' power to unbind [them]." *NAACP*, 2018 WL 1920079, at *28. An agency "may escape political accountability or judicial review, but not both." *Id.* "If an agency makes a decision on policy grounds, it must say so, not act as if courts have tied its hands." *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 421 (E.D.N.Y. 2018) (*Batalla Vidal II*).

The government points to no tradition of withholding review from agency enforcement policies in which the agency disclaims discretion and claims instead that the law binds its hands. Indeed, it has yet to cite a single case in which any court has declined review in these circumstances. Instead, it cites a variety of cases that are inapposite. It notes, for example, that this Court extended *Chaney* to an agency's general enforcement policy in *Alaska Fish & Wildlife Federation & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933 (9th Cir. 1987). But *Dunkle* involved a challenge to an agency's "failure to enforce" a statute against conduct it acknowledged was unlawful – a classic exercise of "prosecutorial discretion." *Id*. at 935, 938. Similarly, the government (at 21) cites dicta in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (*BLE*), suggesting that courts may not review a prosecutor's "failure to prosecute" in a specific case based on "the prosecutor's belief … that the law will not sustain a conviction." *Id.* at 283. But that statement says nothing about judicial review of broad enforcement policies,

which do not involve the same "mingled assessments of fact, policy, and law that drive an individual enforcement decision." *Crowley*, 37 F.3d at 677.

The government also argues that an unreviewable agency action does not become reviewable because the government provides a "reviewable" reason. U.S. Br. 23. But "[t]hat argument simply begs the question … of whether the decision to rescind DACA" – or any other general enforcement policy – "is actually unreviewable." *Batalla Vidal v. Duke*, 2017 WL 5201116, at *10 (E.D.N.Y. Nov. 9, 2017) (*Batalla Vidal I*). The government relies on *BLE*, but that decision merely holds that for certain categories of "presumptively unreviewable decision[s]" – such as the decision not to reconsider a prior agency decision – the APA bars review even when the agency gives a reviewable reason for its decision. *Id.* It does not answer the question whether this case falls into one of those categories.

Outside of traditionally unreviewable categories like the one at issue in *BLE*, "determination of whether agency actions … are reviewable … must be made on a case-by-case basis." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1015 (9th Cir. 1987). So long as "in a given case there is … law to apply," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), the agency's action is judicially reviewable under the APA. That is plainly true here.

II. The Decision To End DACA Is Reviewable Because It Is A General Policy Based On A Legal Conclusion That The Government Is Bound

The decision to rescind DACA falls squarely within the settled, binding precedent holding that courts may review an agency's general policy that rests on a legal determination that the agency is bound. Here, the Acting Secretary did not "decline enforcement in the context of an individual case." *Crowley*, 37 F.3d at 676. Rather, she made an across-the-board determination applicable to all of the nearly 700,000 Dreamers, based either on the view that DACA was unlawful (the Acting Secretary's stated rationale) or that courts would soon hold DACA to be unlawful (the government's current rationale). Either way, the statement is a general policy determination that is based on the agency's legal assessment. *See* SER.260-64. It is reviewable under *Montana Air* and *Crowley*.

The Acting Secretary said that she rescinded DACA because she believed that continuing the program would be unlawful. ER.129-30. The lawfulness of DACA is a purely legal question. There is ample authority to apply to the question, including provisions of the Immigration and Nationality Act (*see*, *e.g.*, 6 U.S.C. § 202(5); 8 U.S.C. § 1227(d)(2)), the Executive's long history of using deferred action (*see* SER.265-66); the Office of Legal Counsel's 2014 opinion recognizing the lawfulness of deferred action programs (SER.226-58); and judicial precedent acknowledging that such programs are a regular feature of the immigration system (*e.g.*, *Arizona v. United States*, 567 U.S. 387, 396 (2012); *Reno v. AADC*, 525 U.S.

471, 484 (1999); *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 968 (9th Cir. 2017)). Similarly, there is law to apply in reviewing the government's post hoc "litigation risk" rationale, which rests on the same premise that DACA is unlawful and that a legal challenge to the program likely would succeed. Courts are regularly called upon to assess the likelihood that a lawsuit will succeed – indeed, that is the central question in this appeal of the district court's preliminary injunction. Both purported rationales reflect legal conclusions that the government had no choice but to end DACA.

The government argues that *Montana Air* and *Crowley* apply only where the agency interprets a statute's "substantive commands," rather than "constraints on [the agency's] enforcement discretion." U.S. Br. 20 n.5. But, as the *NAACP* court recognized, this is "a distinction without a difference," because "[t]o say that a particular agency action is 'without statutory authority' is simply to say that no statutory provision authorizes that action." 2018 WL 1920079, at *14. It is, therefore, "a determination of the substantive content of each statutory provision that might plausibly apply." *Id.* If anything, an agency's belief that its "enforcement discretion" is "constrain[ed]" is more like the jurisdictional question reserved by *Chaney* and answered by *Montana Air* than the government's "substantive commands" alternative. *See Mont. Air*, 898 F.2d at 757.

In any event, the agency *has* interpreted a statute's substantive commands here. On September 4, 2017, the Attorney General determined that "DACA was effectuated by the previous administration through executive action, *without proper statutory authority*" and that DACA "has the same legal and constitutional defects that the courts recognized as to DAPA." SER.259 (emphasis added). In rescinding DACA the next day, the Acting Secretary "[took] into consideration … the September 4, 2017 letter from the Attorney General." SER.263. Thus, the government's assertion (U.S. Br. 20 n.5) that "this case involves no interpretation of the INA's substantive commands" is plainly untrue. The agency made a legal determination, and it cannot now evade judicial oversight.

III. The Decision To End DACA Is Also Reviewable Because It Goes Beyond Addressing Enforcement And Reverses A Longstanding Policy

The decision to end DACA is also far afield from the non-enforcement decisions that *Chaney* found presumptively unreviewable for two additional, independent reasons.

First, the government's attempt to cast the rescission as a run-of-the-mill enforcement decision ignores the crucial legal benefits that DACA provides for its recipients. Although DACA is rooted in the government's authority to defer action against persons not lawfully present in the United States, Congress (by statute) and DHS (by regulation) have added significant benefits on top of mere deferred action – including work authorization, non-accrual of unlawful presence, travel, and the

right to obtain a driver's license. That makes DACA far more consequential than a decision not to initiate a single civil enforcement action.

Second, in ending DACA, DHS took affirmative action to reverse a five-year-old policy. Affirmative agency action "provides a focus for judicial review," *Chaney*, 470 U.S. at 832; *Robbins v. Reagan*, 780 F.2d 37, 47 (D.C. Cir. 1985) ("[W]hen there is a specific affirmative action to be reviewed, the reviewing court can adequately focus on the limited issue at hand."). Courts have recognized that a policy reversal is such an affirmative act. *Robbins*, 780 F.2d at 47-48. "Rescissions of prior obligations clearly fall into the 'focused action' category" that courts can and should review to "ensure that the agency's change of course is not based on impermissible or irrelevant factors." *Id*. Because *Chaney*'s presumption of unreviewability does not apply "where there is affirmative agency action," courts "are fully capable of adjudicating" disputes over "the Secretary's decision to change the immigration classification of [immigrants] on a class-wide basis." *Casa de Md. v. DHS*, 284 F. Supp. 3d 758, 770 n.23 (D. Md. 2018) (quoting *Texas v. United States*, 809 F.3d 134, 165 (5th Cir. 2015)). This is all the more true when significant reliance interests hang in the balance. *See Robbins*, 780 F.2d at 48 (basing review, in part, on "the effect of the agency's original commitment of funds").

Here, courts need not abstain from reviewing DHS's rationale because (unlike in *BLE*) the determination that DACA is unlawful is not wrapped in a "tradition of

nonreviewability." 482 U.S. at 282. Rather, it is subject to review in light of the INA, the Executive's history of deferred action, the 2014 OLC opinion, and considerable judicial precedent. In sum, courts have meaningful standards to apply in this case, and there is neither a tradition of withholding review for decisions like DACA nor any reason to do so. And the rescission's vast consequences make judicial review and agency accountability particularly important here.

CONCLUSION

The government's decision to end DACA is subject to judicial review because it is not "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

Dated: May 11, 2018

Respectfully submitted,

s/ Theodore J. Boutrous, Jr.

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CERTIFICATE OF COMPLIANCE

I hereby certify that: (1) this brief complies with the length limit authorized by this Court's order dated May 1, 2018 because it is no more than 15 double-spaced pages, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f); and (2) this brief's type size and type face comply with Federal Rules of Appellate Procedure 32(a)(5) and (6).

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 11, 2018.

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