Appeal 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, and Cross-Appellants,

v.

United States Department of Homeland Security, et al.,
Defendants, Appellants, and Cross-Appellees.

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

BRIEF OF TWENTY-FOUR LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

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INTEREST OF THE *AMICI*

Amici are professors of administrative law and related public law subjects at institutions across the United States. In their scholarship and their teaching, they have carefully considered legal doctrines implicated by this case. They submit this brief to bring to the Court's attention arguments and precedents that are relevant to the central question presented by this appeal: whether an agency action can be sustained when the action is based on an erroneous legal premise regarding the scope of the agency's discretionary authority.

Amici join this brief solely on their own behalf and not as representatives of their universities. A full list of *amici* appears in Appendix A.[1]

SUMMARY OF THE ARGUMENT

This case presents a fact pattern familiar to scholars and practitioners of administrative law. An agency—here, the Department of Homeland Security—has reached a decision based on the erroneous belief that it lacks statutory authority to act otherwise. The ultimate decision

[1] *Amici* certify that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person—other than the *amici* and their counsel—contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this *amici* brief.

might be one that the agency *could* have arrived at if it had exercised its discretion. Yet the agency incorrectly concluded that only one course was available under the relevant statutes and precedents, and it therefore failed to consider any alternative regulatory actions. Under these circumstances, this Court has regularly and rightly set aside the agency action and remanded the matter so that the agency could exercise its discretion free from any misapprehension as to its own powers. *See, e.g.*, *Lozano-Arredondo v. Sessions*, 866 F.3d 1082, 1089, 1093 (9th Cir. 2017); *Bonilla v. Lynch*, 840 F.3d 575, 588-92 (9th Cir. 2016); *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1149 & n.11 (9th Cir. 2013); *Montana Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. Fed. Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990).

This principle—that agency action based on the agency's misapprehension of its own authority should result in a remand—is sometimes called the "*Negusie* doctrine," after the Supreme Court case, *Negusie v. Holder*, 555 U.S. 511 (2009), that articulates it most clearly and most recently.[2] But its roots run deep. *See, e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("*Chenery I*") ("[I]f the action is based upon a determination of law . . . , an order may not stand if the agency has misconceived the law."); *FCC v. RCA Comm'cns, Inc.*, 346 U.S. 86, 96

[2] *See, e.g.*, Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. Chi. L. Rev. 757, 760-61 (2017).

(1953) (remanding where Commission's "conclusion was not based on the Commission's own judgment but rather on the unjustified assumption that it was Congress' judgment"). And the approach adopted by courts in these and countless other cases—remanding to the agency so that it can arrive at a policy judgment of its own—vindicates fundamental administrative-law values. In particular, it ensures that the Executive Branch exercises the policy discretion vested in it by the Legislature and accepts accountability for the decisions that it has reached on its own accord. *Cf. Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941) ("All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.").

The principle applies four-square here. The Acting Secretary of Homeland Security rescinded the Deferred Action for Childhood Arrivals (DACA) policy based on an erroneous belief that federal law required her to do so. But nothing in statutory law or judicial precedent required rescission of DACA. To the contrary, the immigration statutes vest the Secretary with broad discretion to defer action against immigrants whose removal ranks low in the order of enforcement priorities. *See* 6 U.S.C. § 202(3), (5); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (noting with approval the Immigration and

Naturalization Service's "regular practice" of "'deferred action'"); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017) ("[I]t is well settled that the Secretary can exercise deferred action . . . ."). Because the Acting Secretary erroneously concluded that the law required her to rescind DACA, the matter should be remanded so the Secretary can make an informed policy judgment as to whether childhood arrivals should remain eligible for deferred action. The plaintiffs are therefore likely to succeed on the merits of their Administrative Procedure Act claim under 5 U.S.C. § 706(2)(A), and the district court's preliminary injunction should be affirmed on that basis. *Cf.* 5 U.S.C. § 706(2)(A) (reviewing court shall hold unlawful and set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").[3]

[3] The government does not dispute that plaintiffs have met the other criteria for injunctive relief: that the plaintiffs are "likely to suffer irreparable harm in the absence of preliminary relief"; that "the balance of equities tips in [their] favor"; and that "an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *Amici* express no position with respect to the notice-and-comment, equal-protection, and due-process claims in this case.

ARGUMENT

I. Remand Is Appropriate When an Agency Acts Based on an Erroneous Legal Premise

It is blackletter law that agency action based on an erroneous legal premise cannot be sustained. *See, e.g.*, *Chenery I*, 318 U.S. at 94; *RCA Comm'cns*, 346 U.S. at 96; *Jacoby v. NLRB*, 233 F.3d 611, 617 (D.C. Cir. 2000) ("An agency action, however permissible as an exercise of discretion, cannot be sustained where it is based not on the agency's own judgment but on an erroneous view of the law." (internal quotation marks omitted)). This rule follows straightforwardly from two foundational tenets of administrative law. First, federal courts must yield to the Executive Branch when it lawfully exercises the discretion that Congress has afforded it. "Judges are not experts in the field, and are not part of either political branch of the Government." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). Courts therefore defer when Executive Branch officials, who enjoy advantages of subject-matter knowledge and electoral accountability, act appropriately within their bailiwick to reach informed policy judgments.

Second, and as a corollary to the first tenet, federal courts must ensure that the Executive Branch acts consistently with the law. Judges, after all, *are* experts on the law—on what the Constitution, the acts of Congress, and the past decisions of the courts require. When an agency

bases its decision not on a policy determination but instead upon a mistaken view as to what a statute mandates or what a precedent means, it has not exercised the discretion Congress has delegated to it. In that case, courts must correct the legal error so that the agency can appropriately form and carry out a considered policy judgment.

The Supreme Court applied this decades-old doctrine of administrative law in *Negusie*, a case whose facts resemble those here in several significant respects. That case, like this one, involved an immigration agency's misunderstanding as to the scope of its own deferral authority. There, an asylum-seeker applied for temporary deferral of removal under the Convention Against Torture, but the Board of Immigration Appeals denied the application because it erroneously believed that a Supreme Court case called *Fedorenko v. United States*, 449 U.S. 490 (1981), required it to do so. The *Negusie* Court found *Fedorenko* distinguishable because that case addressed a statutory framework that differed in important ways from the framework governing Negusie's application. Since the Board of Immigration Appeals had not yet exercised its discretion to determine Negusie's eligibility for deferral, the Court ordered that the matter be remanded so that the Board could "bring its expertise to bear upon the matter," "evaluate the evidence," and arrive at its own "initial determination" unclouded by any

misunderstanding of the law. *Negusie*, 555 U.S. at 522-24 (internal quotation marks omitted).

As the Court in *Negusie* recognized, the requirement that the Executive Branch exercise its own judgment on questions of policy applies with particular force in the immigration area. "Judicial deference in the immigration context is of special importance," the Court said, "for executive officials exercise especially sensitive political functions that implicate questions of foreign relations." 555 U.S. at 517 (internal quotation marks omitted). The Court acknowledged that the Judiciary "is not well positioned to shoulder primary responsibility" for making the policy determinations that the immigration statutes elicit. *Id.* When immigration authorities incorrectly conclude that the courts have cabined their discretion, "'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Id.* at 523 (quoting *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam)).

Remanding when an agency erroneously concludes its hands are tied ensures that courts do not encroach upon the Executive Branch's policy domain. *See Negusie*, 555 U.S. at 523 (noting that the "remand rule exists, in part, because . . . 'agencies are better equipped . . . than courts'" to make "'difficult policy choices'"). Under such circumstances, a remand

guarantees that an agency is not blocked from pursuing its preferred course of action based on a mistaken view as to what the law requires. This concern is especially salient here. The President has said that he "do[es] not favor punishing children . . . for the actions of their parents" but that he decided to discontinue DACA because he was advised by his Attorney General and "other top legal experts" that "the program is unlawful and unconstitutional and cannot be successfully defended in court."[4] It is incumbent upon the courts to correct that legal error so that the Executive Branch can exercise the policy discretion vested in it by the Legislature and the electorate.

The *Negusie* doctrine, moreover, serves an important function even if the agency on remand hews to its prior position based upon its own policy judgment rather than its earlier erroneous legal conclusion. Under those circumstances, remand forces the agency to clarify for the public just exactly where the buck stops. Otherwise, the Executive Branch could disclaim responsibility for unpopular policy decisions by attributing the

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[4] Statement from President Donald J. Trump, The White House (Sept. 5, 2017), https://perma.cc/GB7Y-EWY5; *see also* Remarks by President Trump in Meeting with Bipartisan Members of Congress on Immigration, The White House (Jan. 9, 2018), https://perma.cc/5QHA-97S6 (agreeing with members of Congress that DACA should be extended but adding that the President "doesn't have the right to do this" without additional legislation).

outcome to Congress or the courts.[5] The *Negusie* doctrine compels the Executive Branch to take ownership over its policy judgments and to face whatever electoral consequences might follow.

II. Rescission of DACA Was Based on an Erroneous Legal Premise.

A. Rescission of DACA was based on the premise that the Executive Branch lacked legal authority to maintain the policy

In September 2017, the Acting Secretary of Homeland Security announced her decision to end DACA in a cursory memorandum with scant legal analysis and no evaluation of immigration enforcement priorities. *See* Elaine C. Duke, Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), https://perma.cc/5D2G-KUN8 ("Duke Memo"). After a brief background section that recounted the evolution of DACA and that of a different deferred action policy, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), the Acting Secretary offered a single sentence of justification for her decision: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the

[5] *Cf.* Allison De Jong, *Americans Back DACA by a Huge Margin*, ABC News (Sept. 25, 2017), https://perma.cc/BS9J-HBNR (reporting that "86 percent of Americans support a right to residency for undocumented immigrants who arrived in the United States as children").

ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." *Id.* That sentence is at best enigmatic, as neither the Supreme Court nor the Fifth Circuit has ruled on DACA's validity. Yet this Court's review of the Acting Secretary's action is necessarily limited to the thin reed that the agency itself has supplied. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery II*") ("[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").

The government now pursues two lines of argument in an attempt to bolster the meager basis for DACA's rescission. First, the government submits that the Acting Secretary's rescission of DACA followed from a "discretionary" judgment that her agency "would be enmeshed in litigation" if it left the program in place. Gov't Br. 13-14; *see also id.* at 29 (Acting Secretary acted "based on the evident risk that the existing DACA policy would at a minimum be the subject of protracted litigation"). Second, and sometimes in the same breath, the government suggests that rescission was based on a "reasonable legal conclusion" as to the DACA

program's validity. *Id.* at 14. Neither argument can carry the weight that the government wants it to bear.

Start with the litigation-risk rationale. As an initial matter, the Acting Secretary never stated that her own assessment of litigation risk led her to rescind the DACA policy, and so this rationale—whatever its merits—cannot be a basis for upholding her decision. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . . ."); *Chenery II*, 332 U.S. at 196-97 ("[T]he basis upon which [agency action] purports to rest . . . must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action . . . ."). To be sure, the rescission memorandum does cite and quote the Attorney General's statement that "because DACA 'has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA.'" Duke Memo (quoting Letter from Attorney Gen. Jefferson B. Sessions III to Acting Sec'y of Homeland Sec. Elaine C. Duke (Sept. 4, 2017), https://perma.cc/6HT7-VSGA ("Sessions Letter")). But it is the Secretary

of Homeland Security, not the Attorney General, who is responsible for "[e]stablishing national immigration enforcement policies and priorities"—and thus, the Secretary who must weigh the policy arguments in favor of DACA against any "litigation risk" that maintaining the policy might entail. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178 (transferring responsibility for "[e]stablishing national immigration enforcement policies and priorities" from Attorney General to Secretary of Homeland Security); *cf. Gonzales v. Oregon*, 546 U.S. 243, 259 (2006) (no deference to Attorney General where "Congress did not delegate to the Attorney General authority to carry out or effect" relevant statutory provisions). The administrative record discloses no evidence that the Acting Secretary—as opposed to the Attorney General—engaged in the evaluative exercise that Congress has required her and her agency to undertake. *See Judulang v. Holder*, 565 U.S. 42, 45 (2011) ("When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one.").

More fundamentally, the litigation-risk rationale makes no sense on its own terms. As this very case illustrates, rescission of DACA did not spare the Administration from litigation. *See also Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018) (granting preliminary

injunction to stop rescission of DACA); *Casa de Maryland v. U.S. Dep't of Homeland Sec.*, No. RWT-17-2942, 2018 U.S. Dist. LEXIS 35373 (D. Md. Mar. 5, 2018) (declining to block rescission of DACA but enjoining government from using information gathered through DACA for enforcement purposes). And prior to the Acting Secretary's announcement, officials in multiple states vowed publicly and emphatically that they would sue the Administration if it rescinded the DACA policy.[6] The Acting Secretary no doubt knew before she announced her decision in September 2017 that her agency "would be enmeshed in litigation" regardless of whether she rescinded DACA or left the program in place.

In any case, this Court has directly addressed the question of whether an agency can rely on litigation avoidance as a reason for changing a regulatory policy when the change will lead to lawsuits just as surely as if the policy is maintained. *See Organized Vill. of Kake v.*

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[6] *See* Press Release, New York State, Governor Cuomo and Attorney General Schneiderman Announce that New York Will Sue if President Trump Ends Deferred Action for Childhood Arrivals Policy (Sept. 4, 2017), https://perma.cc/5AUR-44NA; Press Release, Washington State Office of the Attorney General, AG Ferguson Vows To Take Legal Action If Trump Cancels DACA (Sept. 4, 2017), https://perma.cc/Z4SF-YSML; *see also* Letter from Xavier Becerra, California Attorney General, et al., to Donald J. Trump (July 21, 2017), https://perma.cc/3DL2-3CGH (letter from Attorneys General of 19 states and the District of Columbia pledging "to defend DACA by all appropriate means").

U.S. Dep't of Agriculture, 795 F.3d 956, 970 (9th Cir. 2015). This Court's answer to that question is clear: the litigation-risk rationale cannot "withstand[] even the forgiving general requirement that the proffered reason for agency action not be 'implausible'" where "[a]t most, the Department deliberately traded one lawsuit for another." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).[7] Because either course of action would have resulted in vigorous litigation, it would have been entirely arbitrary—and thus unlawful—for the agency to rescind DACA based on a rationale that could just as easily support the opposite outcome.

With the litigation-risk rationale a nonstarter, the government falls back on the argument that the Acting Secretary's rescission rested on a "reasonable legal conclusion." Gov't Br. 14, 38. But that, too, is not enough to sustain the decision to discontinue DACA, for what matters at this stage in this case is not whether the Acting Secretary's legal

[7] And insofar as the Department traded one lawsuit for another, it made a bad trade. Any potential challengers to DACA would have to explain why they waited *five years* to assert their claim for injunctive relief. *See Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005) ("Under long-established principles, [a plaintiff]'s lack of diligence precludes equity's operation."); *McQuiddy v. Ware*, 87 U.S. (20 Wall.) 14, 19 (1874) ("Equity always refuses to interfere where there has been gross laches in the prosecution of rights."); *Garcia* Br. 36; Regents of the Univ. of California Br. 53-54.

conclusion was "reasonable"; what matters is whether it was correct. The rule that "an order may not stand if the agency has misconceived the law" brooks no exception for "reasonable" misconceptions of the law. *See Chenery I*, 318 U.S. at 94. Courts will defer to an agency's "reasonable policy choice," but such deference "'is only appropriate when the agency has exercised its *own* judgment,' not when it believes that its interpretation is compelled by Congress." *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (quoting *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169 (D.C. Cir. 1986)); *see also Safe Air for Everyone v. U.S. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007) (holding that remand is required where a "legally erroneous . . . premise is fundamental to [the agency]'s determination").[8]

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[8] Courts will—when applying the *Chevron* framework—defer to an agency's reasonable interpretation of an ambiguous statutory provision when the agency's "choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care" by the relevant statute. *See Chevron*, 467 U.S. at 844-45 (internal quotation marks omitted); *see also United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (*Chevron* deference is applicable "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"). But such deference "'is not appropriate when the agency wrongly 'believes that interpretation is compelled by Congress.'" *Gila River Indian Cmty.*, 729 F.3d at 1149 (quoting *PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*,

Thus, the Acting Secretary's decision must rise or fall based on whether the underlying legal premise—that "the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA"—proves to be right. And the claim of "constitutional defects that the courts recognized as to DAPA" clearly holds no water, as no court has ever held DAPA to be unconstitutional.[9] As a result, the Acting Secretary's decision can stand if—and only if—the statutory arguments against DACA are sound.

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362 F.3d 786, 798 (D.C. Cir. 2004)). Thus, even where the *Chevron* framework otherwise would apply, an agency's erroneous legal conclusion regarding the scope of its own authority requires remand. *See United States v. Ross*, 848 F.3d 1129, 1134 (D.C. Cir. 2017) ("Where a statute grants an agency discretion but the agency erroneously believes it is bound to a specific decision, we can't uphold the result as an exercise of the discretion that the agency disavows."); *see also Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1045 n.17 (N.D. Cal. 2018) (decision below) (noting that government has not argued for *Chevron* deference in this case).

[9] More fundamentally, neither DACA nor DAPA was or is constitutionally defective. The Administration's exercise of enforcement discretion is entirely consistent with its constitutional obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3, cl. 5; *see Arizona Dream Act Coal.*, 855 F.3d at 976 ("'The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws.'" (quoting *Cmty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986))).

In its 2015 decision affirming a preliminary injunction against DAPA, the Fifth Circuit identified two arguments upon which DAPA's challengers showed a "substantial likelihood of success": (1) that DAPA is a "substantive rule" that must be promulgated through notice and comment under 5 U.S.C. § 553; and (2) that DAPA is "manifestly contrary" to the Immigration and Nationality Act (INA). *See Texas v. United States*, 809 F.3d 134, 170-86 (5th Cir. 2015). The Attorney General was apparently alluding to those arguments when he referenced DAPA's "legal . . . defects," and the Acting Secretary specifically cites the Fifth Circuit's decision in her memorandum announcing DACA's end. Duke Memo at nn.3-4. If neither of these arguments necessitates the rescission of DACA, then the Acting Secretary's decision must fall.

The government does not defend the proposition that DACA is a substantive rule that must go through notice and comment. Indeed, it eschewed that proposition in proceedings below. *See* Dkt. 204 at 31 (stating that "binding Ninth Circuit precedent" has "squarely rejected" the contention that a deferred action directive must "abide by notice-and-comment requirements" (citing *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1009 (9th Cir. 1987))). And even if the government had argued that DACA were procedurally invalid, that conclusion would not explain the decision to rescind DACA rather than to re-promulgate it through the

notice-and-comment process. *See Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) (agency must consider "'significant and viable' and 'obvious' alternatives" (quoting *Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987))).

So the sole remaining justification for the rescission of DACA is the premise that the Executive Branch lacked statutory authority under the INA to maintain the policy. Only if that premise passes muster can the rescission be sustained. Yet as explained below, DACA lies comfortably within the Department of Homeland Security's legal authority. While the agency might choose to rescind DACA based on policy considerations, it cannot base its rescission on an erroneous legal conclusion.

B. The premise that the Executive Branch lacks authority to maintain DACA is legally erroneous

The Secretary of Homeland Security is, as noted above, responsible for "[c]arrying out . . . immigration enforcement functions" and for "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(3), (5). Consistent with these responsibilities, the Department of Homeland Security under the last Administration decided to prioritize removal of criminals, terrorists, and undocumented

immigrants apprehended at the border.[10] Meanwhile, the then-Secretary instructed officials within her Department to identify "certain young people who were brought to this country as children and know only this country as home" as "low priority cases," to defer action with respect to those low-priority individuals for two years "on a case by case basis," and to determine whether those individuals qualify for work authorization during the period of deferred action. *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012), https://perma.cc/N4AA-GTA9.[11] These decisions lie within the "broad

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[10] *See* Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees (Mar. 2, 2011), https://perma.cc/778D-JLDB; Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, et al. (Nov. 20, 2014), https://perma.cc/FFA9-TT89.

[11] Specifically, to be eligible for DACA, an immigrant must (1) have come to the United States before age sixteen, (2) have continuously resided in the United States for the past five years, (3) be enrolled in high school, have completed high school, or have been honorably discharged from the Armed Forces or Coast Guard, (4) not have been convicted of a felony, significant misdemeanor, or series of misdemeanors, and (5) not be above age thirty. *See* Napolitano Memo at 1. Applicants who meet these criteria then must pass a background check, and the final decision regarding deferral is made "on an individual basis" by the Citizenship

discretion exercised by immigration officials" that is—and must remain—a "principal feature of the removal system." *Arizona v. United States*, 567 U.S. 387, 396 (2012); *see also id.* at 396-97 (noting that "[d]iscretion in the enforcement of immigration law embraces immediate human concerns" and allows "the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy").

Congress has ratified this exercise of discretion over and over again. It has instructed the Secretary of Homeland Security to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime."[12] This legislative command to prioritize the removal of criminals logically entails a de-prioritization of the removal of immigrants such as DACA recipients who have abided by our laws. Congress also has authorized states participating in the Real ID Act of 2005 to issue driver's licenses to immigrants with "approved deferred action status"—an indication that Congress recognizes and endorses the deferral practice. Pub. L. No. 109-13, Div. B, 119 Stat. 313, 49 U.S.C. § 30301 note. It has authorized the Secretary to grant work

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and Immigration Services component of the Department of Homeland Security. *Id.* at 2.

[12] Consolidated Appropriations Act 2016, Pub. L. No. 114-113, Div. F, Tit. II, 129 Stat. 2497 (2016); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, Div. D, Tit. II, 122 Stat. 3659 (2008).

authorizations to immigrants such as deferred action beneficiaries who are not lawfully admitted for permanent residence. 8 U.S.C. § 1324a(h)(3). And it has authorized the Secretary to allow deferred action beneficiaries to participate in the Old-Age, Survivors, and Disability Insurance program (Social Security), Medicare, and the federal railroad worker retirement and unemployment insurance programs. *See* 8 U.S.C. § 1611(b)(2)-(4).[13]

Not only has Congress ratified the practice of deferred action, but the Supreme Court has condoned it as well. In *Reno v. American-Arab Anti-Discrimination Committee*, the Court described "deferred action" as "a regular practice" pursued for "humanitarian reasons" as well as administrative "convenience." 525 U.S. at 483-84. The Court approvingly quoted a treatise that characterizes deferred action as a "'commendable exercise in administrative discretion'" that "'ameliorate[s] . . . harsh and unjust outcome[s].'" *Id.* at 484 (quoting 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03[2][h] (1998)). Although the Acting Secretary averred in her rescission memorandum that she took account of Supreme Court case law, she apparently ignored

[13] These functions, initially vested in the Attorney General, were transferred to the Secretary of Homeland Security by the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

the *only* Supreme Court decision up to that point that addressed deferred action directly.[14]

This Court too has recognized the regular practice of deferred action. It has explained that "[t]he INA expressly provides for deferred action as a form of relief that can be granted at the Executive's discretion." *Arizona Dream Act Coal.*, 855 F.3d at 967. And it has noted that the Justice Department and the Department of Homeland Security have granted deferrals of various forms to hundreds of thousands of immigrants over several decades. *See id.* at 967 n.2 (recounting that the Attorney General deferred removal of 250,000 nationals of certain countries in 1977, that the Immigration and Naturalization Service within the Justice Department granted wide-scale deferrals to family members of newly legalized immigrants in 1990, and that President Bush ordered deferral for 190,000 Salvadorans in 1992). Although the Attorney General's letter described DACA as "an open-ended circumvention of

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[14] The only Supreme Court opinions that have addressed the immigration authorities' practice of deferred action even obliquely since the Acting Secretary's decision are those in this case. *See In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam) (addressing discovery-related issues in this case but emphasizing that "[t]his order does not suggest any view on the merits of [plaintiffs]' claims or the Government's defenses"); *In re United States*, 138 S. Ct. 371, 371 (2017) (Breyer, J., dissenting) (also addressing discovery-related issues and adding that the "merits" of the DACA challenge "are not before us").

immigration laws," *see* Sessions Letter at 1, it is in fact part and parcel of a discretionary approach to immigration enforcement that has been pursued by multiple Administrations and sanctioned by Congress and the courts.

The Fifth Circuit's 2015 decision in *Texas v. United States*, though cited by the Attorney General and Acting Secretary in support of their conclusion regarding DACA's illegality, did not address DACA in particular or the validity of the regular practice of deferred action more broadly. The *Texas* decision, which is not binding on this Court, specifically addressed the validity of only a single exercise of deferred action (DAPA) and relied on a rationale that does not apply to DACA or to other instances of deferral. The Fifth Circuit found that "Congress has enacted an intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status," and that DAPA—which applied to the parents of citizens and lawful permanent residents—circumvented that process. *See Texas*, 809 F.3d at 179-180; *see also id.* at 186 (stating that "the INA's specific and intricate provisions . . . prescribe[] how parents may derive an immigration classification on the basis of their child's status" and thus that "DAPA is

foreclosed by Congress's careful plan").[15] Because Congress has enacted no such "intricate process" for childhood arrivals, the Fifth Circuit's reasoning cannot be extended to DACA. Indeed, the Fifth Circuit itself has recognized as much. *See id.* at 173-74 (noting that "DACA and DAPA are not identical," and emphasizing that "any extrapolation from DACA must be done carefully"). The Administration ignored that cautionary note when it blithely concluded that DAPA and DACA must share the same fate.

The fact that the Acting Secretary's decision was based on a misunderstanding of her own statutory authority also disposes of the government's claim that the rescission of DACA is unreviewable under 5 U.S.C. § 701(a)(2) of the Administrative Procedure Act. *Cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (noting that § 701(a)(2) carves out a "very narrow" exception to the presumption in favor of judicial review "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply'" (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945))). To be sure, "an agency's

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[15] Specifically, parents seeking visas based on their children's lawful immigration status must have a child over 21 years old who is a U.S. citizen, must leave the United States for 10 years before seeking readmission, and then must apply for a family preference visa at a U.S. consulate. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a); *Texas*, 809 F.3d at 179-180 & n.167.

decision not to take enforcement action"—or here, not to *defer* enforcement action—generally is "presumed immune from judicial review under § 701(a)(2)." *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985). But that presumption does not apply when the agency has declined to exercise its discretionary authority based on an "incorrect legal premise." *Bonilla*, 840 F.3d at 588; *see also Montana Air Chapter No. 29*, 898 F.2d at 756 (agency's nonenforcement decision is reviewable when agency's statements "strongly indicate" that its decision "was based solely on the belief" that it lacked discretion to act otherwise). Here, where the Acting Secretary's statements reveal that the rescission of DACA was based on a mistaken belief that the Department lacked authority to continue the program, the Administrative Procedure Act presents no bar to review.

In sum, the Acting Secretary of Homeland Security discontinued the DACA program based on her apparent belief that the immigration laws—as interpreted by the Supreme Court and the Fifth Circuit—required that result. That error requires remand. Congress has repeatedly ratified the practice of deferred action in federal immigration-related statutes; the only Supreme Court decision to address the issue up to that date had endorsed the practice; and the Fifth Circuit decision cited by the Acting Secretary explicitly distinguished DACA from the

DAPA program that it held to be invalid. The Acting Secretary made a mistake of law in concluding that the immigration statutes and the judicial precedents construing them required DACA's rescission. The proper course is thus to send the matter back to the agency so that the Secretary—in consultation with other Executive Branch officials—can consider the administrative, humanitarian, economic, and other factors that appropriately bear on whether the DACA policy should be maintained.

CONCLUSION

The district court's order granting a preliminary injunction should be affirmed.

Respectfully Submitted,

Date: March 20, 2018

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CERTIFICATE OF COMPLIANCE

Counsel for *Amici* Law Professors certifies:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B). This brief contains 5,877 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on March 20, 2018. All participants in the case are registered CM/ECF users and so will be served by the CM/ECF system, which constitutes service pursuance to Federal Rule of Appellate Procedure 25(c)(2) and Ninth Circuit Rule 25-5.

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