UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,	.	CA No. 17-1907 (JDB)
Plaintiffs,	.	
v.	.	
DONALD TRUMP, et al.,	.	
Defendants.	.	
THE TRUSTEES OF PRINCETON UNIVERSITY, et al.,	.	CA No. 17-2325 (JDB)
Plaintiffs,	.	
v.	.	
UNITED STATES OF AMERICA, et al.,	.	Washington, D.C.
	.	Wednesday, March 14, 2018
Defendants.	.	10:08 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JOHN D. BATES
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, we have Civil Action 17-2325, Trustees of Princeton University, et al. versus United States of America, et al. And we also have Civil Action 17-1907, National Association for the Advancement of Colored People et al. versus Donald Trump et al. I would ask that all lead counsel please approach the lectern, identify yourself and those at your respective tables, starting with the plaintiff's side, please. And thank you.

MR. PERRELLI: Good morning, Your Honor. Tom Perrelli from Jenner & Block representing Princeton University, Microsoft Corporation, and Maria Perales Sanchez, one of the plaintiffs here. I'd like to introduce Ms. Perales Sanchez, who's sitting in the courtroom today. Also with me is Lindsay Harrison, Alex Trepp, Kendall Turner and Ben Eidelson from Jenner & Block. And then we have Joe Sellers and Julie Selesnick representing NAACP and the other plaintiffs.

THE COURT: Who will be presenting argument this morning?

MR. PERRELLI: So for the plaintiffs' side, I will be presenting argument primarily on the motion to dismiss set of issues. Ms. Harrison will be presenting argument on the substantive and procedural APA issues raised by our motion for summary judgment, or alternatively, preliminary injunction. And Mr. Sellers will focus on remedial issues, information sharing,

as well as any questions you might have about the standing of his clients.

THE COURT: Thank you, Mr. Perrelli.

MS. DAVIS: Good morning, Your Honor. Kathryn Davis from the Department of Justice on behalf of defendants. With me at counsel table today is Brinton Lucas, Stephen Pezzi, Brad Rosenberg, Brett Shumate, and John Tyler, all of the Department of Justice on behalf of defendants.

THE COURT: Good morning to all of you.

MS. DAVIS: Good morning. And today we will have two speakers, Your Honor. Mr. Lucas will be presenting on the justiciability issues, and I will be discussing the remainder of the issues between the parties' motions.

THE COURT: Now, there are different ways to organize this argument. I thought maybe the right way to do this, the most efficient way to do it, would be to hear first from the government on their motion to dismiss, then hear from plaintiffs to respond both to the motion to dismiss but also speak to their -- I'll just call it motion for partial summary judgment, then let the government reply and respond and then give plaintiffs a final word. Is there any problem with proceeding in that fashion?

MS. DAVIS: No, Your Honor. That's actually something that we discussed before the argument, and that's the exact arrangement that we came to as well.

THE COURT: All right. And that means that I will hear first from Mr. Lucas.

MR. LUCAS: Good morning, Your Honor. May it please the Court, Brinton Lucas for the United States. I would like to start today by discussing the central reason for why plaintiffs' challenge to the Acting Secretary's decision is not reviewable. Specifically, all that the Acting Secretary did here was end a nonenforcement policy, and that is a classic decision committed to agency discretion by law under the APA.

Now, plaintiffs offer several ways of trying to evade this problem, but none of them are persuasive. To start, plaintiffs try to draw a distinction between criminal enforcement policies and civil enforcement policy. So as I understand their position taken in their reply, plaintiffs think the following scenario would be unreviewable: If a chief prosecutor decided to end his predecessor's categorical nonenforcement policy of placing certain drug offenders into drug courts rather than in jail, and then that prosecutor decided to go back to a case-by-case analysis of treating those drug offenders, I think plaintiffs would agree that is not reviewable.

They think, however, that in this context, because it involves a civil enforcement decision, that is reviewable under the APA, but we think there are two problems with that.

First, *Chaney* itself, the Supreme Court's seminal case on this issue, expressly analogized civil enforcement actions to

criminal prosecutorial discretion. In fact, Justice Marshall, concurring in the judgment, objected to the majority's treatment and analogy of these two issues, but he did not prevail.

In addition, Your Honor, we think --

THE COURT: I understand this issue, but isn't the more fundamental issue the general enforcement policy versus the specific enforcement action?

MR. LUCAS: Your Honor, I'd like to respond to that in several points on why we don't think that distinction works either. First, we think that *Chaney* cannot be fairly characterized as a single-shot enforcement action. To start, that decision by the FDA involved a categorical decision not to exercise its jurisdiction over lethal injection drugs, which were just starting to be used at the time.

THE COURT: The D.C. Circuit hasn't seen *Chaney* as covering the field. It's spoken in subsequent cases to general enforcement policies and to the reviewability of general enforcement decisions. Hasn't it?

MR. LUCAS: Yes, Your Honor.

THE COURT: Cases like *Crowley* and *OSG*?

MR. LUCAS: Yes. Cases like *Crowley* and *OSG*. I'd like to address those. We think those cases need to be read in the light of *Chaney*, and that while *Crowley* and *OSG* do have language and reasoning suggesting why some general enforcement policies would not be reviewable, we don't think that applies to

all general enforcement policies. For one thing, just to go back to my criminal hypothetical, we don't think that *Crowley* or *OSG* would necessarily make those decisions reviewable. And I think plaintiffs are not even willing to go that far.

But returning to *Chaney*, we think *Crowley* and *OSG* need to be read in light of *Chaney* and harmonized with that decision. And we think that that case can't be squarely characterized as involving just a single-shot enforcement decision. Because in that --

THE COURT: Are you saying that the D.C. Circuit cases are wrong?

MR. LUCAS: No, Your Honor, not at all. We're just saying they have to be read more narrowly than as plaintiffs advance.

THE COURT: How would you like to read them?

MR. LUCAS: Certainly, Your Honor. We think that *Crowley* and *OSG* address a different issue and a particular problem. And so we think they essentially address the flip side of what the Supreme Court was talking about in *BLE*. And so *BLE* was discussing the context of and the problem just because an agency gives a reviewable answer or a reviewable reason for a nonreviewable policy or nonreviewable decision, that doesn't make that decision reviewable.

Now, so the hypo that the Supreme Court gave, of course, is say a prosecutor says I'm not going to prosecute this person

because I don't think I have a case under the law. Now, what *Crowley* and *OSG* addressed is essentially the flip side of *BLE*. They say an agency, if it has a reviewable interpretation of a statute, can't say oh, this interpretation is simply unreviewable by characterizing it as a nonenforcement policy.

So in *OSG*, what happened there was the agency had an interpretation of a substantive provision of the statute, and then the intervenors involved, they tried to characterize it as a nonenforcement policy. The agency didn't even make that argument. And the Court said no, we're going to look at the actual substantive interpretation of the statute.

But that, Your Honor, is not what we have going on here. Plaintiffs nowhere point to any provision in the INA that would substantively constrain the Secretary's decision to adopt or abandon DACA -- excuse me, to rescind or discontinue DACA. So we think that distinction is critical here, that nothing in *Crowley* or *OSG* or any of the other D.C. Circuit cases address the particular situation at issue here.

THE COURT: The situation we have here is basically a legal interpretation that the agency engaged in relying on the Attorney General? Is that correct?

MR. LUCAS: Your Honor, we of course think there are multiple reasons given for the --

THE COURT: What are the multiple reasons?

MR. LUCAS: Well, there are two reasons that we set

forth. One was the litigation risk, and the other is the interpretation of the INA.

THE COURT: But even the little litigation risk is dependent upon that legal interpretation, isn't it?

MR. LUCAS: Certainly, Your Honor. That -- it's of course cabined to that, an agency's -- you know, all sorts of litigation risk calculations.

THE COURT: So is it your position that if you have a situation where the agency is basically engaged in a legal interpretation in the context of a general enforcement decision it's made, that that's unreviewable by the courts?

MR. LUCAS: I would not state that so broadly, Your Honor.

THE COURT: Why is that not the situation we have here?

MR. LUCAS: Sure. Just to be clear, in this context -- so let me give you some examples that might help distinguish between these two cases.

THE COURT: Which two cases are you distinguishing between?

MR. LUCAS: Well, our case and the sort of hypothetical you've given with the *Crowley* cases. So in the context, let's say that if an agency interprets a substantive statute in a way that could be challenged by -- so sort of in the *OSG* situation where they're stating okay, we conclude that

this statute covers certain conduct and doesn't cover other conduct, and somebody has standing to challenge that, the agency can't say oh, well, I'm -- you know, this is an enforcement discretion, it's not reviewable. Here, by contrast --

THE COURT: So if the agency says there's no statutory authority, isn't that the same thing?

MR. LUCAS: Well, no, Your Honor, and here's why. Because plaintiffs have not pointed to any particular provision in the INA that cabins the Acting Secretary's discretion. The Secretary's discretion in her interpretation of the INA and to the extent she made legal conclusions, all of that is a matter of nonreviewable prosecutorial discretion. So she's looking at her own authority under the Act.

So this is the kind of situation where we're in *BLE* where a prosecutor is dealing with a nonreviewable decision, and he gives a legal reason for his nonreviewable decision, and that doesn't make that reviewable. And so that I think is the precise issue here. Just to be clear, Your Honor, nowhere do plaintiffs suggest that there's any provision in the INA that precludes the Secretary from discontinuing DACA. Their argument is that she needs to give more reasoning in her decision to do so.

THE COURT: That's what the APA is all about in many contexts, isn't it?

MR. LUCAS: Correct, Your Honor, but in this context

we think that this is an unreviewable decision. So if Your Honor does conclude that this is not a reviewable decision, then of course the fact that she -- that this is a reviewable decision, then of course the fact that she gave legal answers is relevant.

But in this context we think this is an unreviewable decision and thus it's analogous to the same situation where you have a prosecutor that says I don't think I can prosecute this particular conduct because I don't think it's covered by the statute. Nobody would think that, even though that analysis is purely legal and purely reviewable, that that sort of conduct could be reviewed -- or that decision could be reviewed.

THE COURT: But the example you just gave is not a general enforcement decision; it's a decision with respect to a particular enforcement.

MR. LUCAS: Your Honor, we think that same analogy would apply if it was in the case of a general prosecutorial policy. So let me sort of go back to my original hypothetical, and let's say we have the chief prosecutor who says I don't want any of these drug offenders put into jail. I want them to go to drug courts for this particular crime. I think they're low level offenders. And let's say he gives a general reason for doing so. Let's say he's concerned that doing this will violate the Equal Protection Clause. Or let's just say he doesn't give a reason for doing that. And his successor comes in and says

well, I'm concerned that by only going after certain -- or giving only certain drug offenders this treatment, I might be violating the Equal Protection Clause because I'm not treating similar defendants similarly.

Now, people may disagree about the Equal Protection Clause analysis, and it might be completely wrong as a matter of law, but that wouldn't necessarily mean his policy, his decision to discontinue that prosecutorial enforcement policy, is necessarily reviewable. We don't think at that point that the previous --

THE COURT: I'm having a little trouble where your limiting propositions are with respect to this kind of situation. Are you saying that any enforcement determination made by an agency, general or specific, is unreviewable under *Chaney*?

MR. LUCAS: No, Your Honor. *Chaney* is very clear, and so is this Court's and the D.C. Circuit's case law that if there are substantive constraints on the agency's enforcement discretion, obviously those can be reviewable. So in this context, let's say the INA had a provision --

THE COURT: If there are substantive constraints. What do you mean by substantive constraints?

MR. LUCAS: Let's say provisions in the statute that actually constrain the prosecutor's or agency's enforcement discretion. So if there were a provision in the INA stating you

must maintain deferred action programs once you adopt them, or you must maintain certain deferred action programs, then you might have a case where this would be reviewable.

But here, there's no provision in the INA -- and plaintiffs don't contend there is one -- that would say the Acting Secretary, having adopted a particular policy of deferred action, must continue that action indefinitely. So there's nothing in the INA that actually constrains her discretion. So in the context where the statute does impose constraints on an agency's discretion --

THE COURT: You're trying to turn this into a solely discretionary determination by the acting head of the agency. But in fact, it was primarily a legal assessment based on the Texas case and the Attorney General's one-page memorandum, not a discretionary decision. Perhaps discretionary as you move into your second rationale, the litigation risk, but certainly not discretionary in terms of that assessment of the law.

MR. LUCAS: Your Honor, but I think this is the sort of precise problem that the Court was dealing with in *BLE*.

THE COURT: You keep referring to *BLE*. You want to rely on *BLE*. *BLE* isn't really a case that speaks to the reviewability of enforcement decisions, is it?

MR. LUCAS: No, Your Honor. But it does draw an express analogy between the issue in that case, which was a refusal to reconsider an agency determination, and a

prosecutor's decision. So the critical point in *BLE* for our purposes is the hypothetical that the Court gives to explain its reasoning, which is that --

THE COURT: That's what you want me to rely on, the hypothetical in *BLE*, which is a case that doesn't deal with this situation?

MR. LUCAS: Well, Your Honor, I would also point you to *Crowley* itself, which takes the *BLE* point and explains why this is a controlling rule of law for the APA context.

THE COURT: But *Crowley* and *OSG* -- returning to that for a moment -- do together reflect a view in the D.C. Circuit that these general enforcement determinations, and particularly here, let's say, where it's based primarily, perhaps exclusively on this legal interpretation, that those are reviewable.

MR. LUCAS: Your Honor, I think in *Crowley* it makes it pretty clear that in the context, and it discusses *BLE* and says that if a prosecutor gives a purely legal analysis for a decision -- and that was the case in *BLE*. I mean, it wasn't a prosecutor's decision but it was an agency's decision that was otherwise unreviewable. And the agency's reason for why it denied review or denied reconsideration in that context was a purely legal situation. And of course it was reviewable, at least in the sense that courts were well equipped to consider that.

In fact, Justice Stevens in his concurrence in the

judgment, rejected the majority's jurisdictional analysis and went on to consider it on the merits and reviewed and applied the law in that particular context. But his view did not prevail.

And I think what *Crowley* does is it says yes, we're going to take this as a rule of law in addressing APA claims, including enforcement claims, and then it addresses the situation of general enforcement policies that happen to involve a substantive interpretation of a statute that actually would have an effect on a party where a party would otherwise have to challenge the -- excuse me -- standing to challenge that and could do so even if the agency tried to characterize that as a nonenforcement decision.

So we think, Your Honor, it's especially important to read *Crowley* and *OSG* and similar cases like that --

THE COURT: I'll do so.

MR. LUCAS: No, no. To read them not so broadly as plaintiff suggests, especially since we think that *Chaney* itself is hard to characterize as sort of a single-shot enforcement decision. I would even point you to the D.C. Circuit's analysis in *Chaney* that got reversed. And they pointed out in specific language that FDA refused to take action "to a general entire category of prohibited activity," and that courts are especially willing to review this analysis. And Justice Marshall in his concurrence in the judgment in *Chaney* also pointed out that this

policy of not going after lethal injection drugs affected around 200 inmates on death row at that point. So it was not sort of a single-shot individual nonprosecutorial discretion decision; it was in fact based on the FDA's view that it lacked jurisdiction.

THE COURT: And there were actually two rationales from the agency in *Chaney*, a legal one and a discretionary one. Right?

MR. LUCAS: Yes, Your Honor.

THE COURT: So does it matter whether, as happened in *Chaney*, the agency says that it would take the same action for discretionary reasons?

MR. LUCAS: No, Your Honor. I would point you to *Crowley's* --

THE COURT: That didn't happen here; right?

MR. LUCAS: Your Honor, I think the agency -- we would say that what the Acting Secretary did here was she gave multiple reasons for her analysis, and that even if she -- even setting aside her legal analysis, the litigation risk alone and the consideration of her enforcement policies --

THE COURT: Except to the extent it is totally dependent upon a legal analysis.

MR. LUCAS: Even accepting --

THE COURT: There's no policy reason given by the Acting Secretary here. This isn't a situation where as a matter of discretion there's a policy reason that has been applied for

enforcing or not enforcing or rescinding or not rescinding. There's no policy reason. It's just these two reasons of the legal interpretation coming from the Texas case and The attorney general's letter, and then the litigation risk caused primarily as a result of that legal assessment.

MR. LUCAS: Your Honor, I would -- I don't think we would necessarily agree to that. The Acting Secretary does invoke her authority to establish immigration policies. But even setting that aside, even assuming that those are the only two reasons --

THE COURT: She doesn't give any policy reason for it, does she, other than the two things we've just been discussing?

MR. LUCAS: We think you could fairly read a policy and concern that these sort of decisions should be left up to Congress within -- it's similar along the lines of legal analysis. But even setting that aside, Your Honor, even accepting your premise that this was a purely legal decision, we still think it would be covered by 701(a)(2). And part of that is *Crowley* itself addresses and says look, in *Chaney* the Supreme Court was faced with a situation where the agency gave two reasons, one was a jurisdictional legal one, one was prosecutorial discretion.

THE COURT: What's the best case you have that actually has decided that a legal interpretation in the context of a general enforcement policy is not reviewable?

MR. LUCAS: I would point you to *BLE*, Your Honor, both the hypothetical --

THE COURT: It didn't actually decide that; right? It wasn't dealing with that question. You point me to the hypothetical in *BLE*.

MR. LUCAS: I would also point you to the actual holding in *BLE*, which involved an agency refusal to reopen a proceeding, and the Court analogized that, said it was equally unreviewable as prosecutorial discretion decisions. We don't see any basis at least, Your Honor, in *BLE* to distinguish between a prosecutorial discretion decision and another otherwise unreviewable agency discretion determination.

And I think again, I would return you to *Crowley*, which said, look, in *Chaney*, they had these two rationales given; right? One was the jurisdictional one, one was a purely discretionary one. And they left the question open in *Chaney* whether you could -- what would happen if the agency only gave a purely legal analysis.

And then *Crowley* went on and said well, the Supreme Court answered that question in *BLE* precisely, and said that if an agency gives only a legal analysis and it's an unreviewable action, it's still unreviewable. An otherwise unreviewable action doesn't become reviewable just because a prosecutor or an agency or anyone else gives a reviewable reason in the sense that courts are eminently qualified to review it for that

particular action.

So that's why we think that if you read *BLE*, *Chaney*, and *Crowley*, they all point in favor of foreclosing review of the APA claims here.

THE COURT: You've been unsuccessful in three other courts with this argument. Right?

MR. LUCAS: Yes, Your Honor. But I'd also like to address plaintiff's sort of subsidiary point that, setting aside *Crowley*, they also argue that even if *Crowley*'s, what they characterize as rule, does not apply, this policy should be reviewable because it affects collateral benefits. And we don't think this distinction really works either.

I would point you again to the Supreme Court's decision in *Lincoln v. Vigil* where there were clearly reliance on benefits provided to disabled children over a course of seven years, and they were taken away. And the Supreme Court, the fact that that happened, that they clearly could have relied on those benefits did not affect the reviewability analysis. And I mean -- so I think in those contexts that the fact that benefits are either triggered or lost by a particular prosecutorial discretion policy shouldn't make a difference for purposes of 701(a)(2).

THE COURT: All right.

MR. LUCAS: Unless this Court has any further questions?

THE COURT: Let's move on.

MR. LUCAS: Thank you.

THE COURT: Thank you, Mr. Lucas. Mr. Perrelli?

MR. PERRELLI: May it please the Court. Thank you, Your Honor. I would like to start with *Crowley*, but first, as the Court is aware, there's a strong presumption in favor of reviewability here, and so whatever the scope of the "committed to agency discretion" by law exception is, we know it is very narrow and only applicable in rare instances. And we think that's why several courts already have rejected the arguments that the government is putting forth here.

I start with the idea that I think I read a very different *Crowley* case than the government has put forth here. In *Crowley*, the government looked at *Chaney* and treated *Chaney* as a single-shot case. Sorry, D.C. Circuit looked at *Chaney* and treated *Chaney* as a single-shot case. It looked at the exact language that the government quotes about not having a reviewable reason turns something that was otherwise unreviewable into a reviewable decision; looked at that precise language from *BLE*, and following that, drew this line between single-shot enforcement decisions and general broad enforcement policies.

So we think that viewing the recision of DACA and DACA itself as an exercise of enforcement discretion that *Chaney* and *OSG* and that line of cases control, and that's particularly true, as the Court's questions indicated, because the rationale

that the government has indicated here for its recision decision is a purely legal rationale. Whether one looks at it as a we are 100 percent sure that DACA is unlawful or maybe we're 80 percent sure, and you call that litigation risk, either way that is a legal judgment and we think that the United States --

THE COURT: So is your position that all general enforcement determinations are reviewable?

MR. PERRELLI: I think our position is that when you have a general enforcement policy, the presumption of reviewability, the strong presumption in favor of reviewability applies.

THE COURT: And what case leads you to that conclusion?

MR. PERRELLI: I think the strong presumption in favor of reviewability comes out of *Chaney*, and the presumption structure comes out of *Chaney* itself and *Citizens of Overton Park* before that. If you have such a general enforcement policy, the government can still come forward and say there is no law to apply here, that there is no -- judicial review is somehow impossible. But obviously they've ceded that ground in this case. They can't do that. Because the Attorney General has purported to make a legal assessment here. And I know we'll get into --

THE COURT: Do you dispute -- I know that you're relying on how *Chaney* was characterized by the D.C. Circuit, but

do you dispute the fact that it did involve a general enforcement policy?

MR. PERRELLI: I do dispute that. I don't think that's the way the D.C. Circuit read it and I don't think cases in the D.C. Circuit --

THE COURT: I asked for your view, not the D.C. Circuit's.

MR. PERRELLI: My view, I don't think that's the best way to read *Chaney*. And again, I don't think that's the D.C. Circuit's view either, nor do I think has it been the view of district courts in this circuit applying that view.

So I think there is a distinction. And the reasons are because of the policy rationales, among other things that are discussed in *Chaney*, really aren't applicable. *Chaney* talks about, well, a specific nonenforcement decision is not coercive. Here I think, we think the decision made here obviously is coercive. The recision of DACA has life-altering and drastic effects for the recipients involved. So we think that is quite different here.

We also think that again -- and this was what the D.C. Circuit talked about in *Crowley* -- that in the context of an individual enforcement decision, there may be interpretations of law or considerations bound up in a host of other things, allocation of resources that might be considered in an individual decision. In the context of a broad enforcement

policy you have a focused, clear action that a court can review.

So we think that's the best interpretation of *Chaney*. We think that's the controlling interpretation of *Chaney* in this Court. And we think that sort of dispenses with the government's arguments on their own terms.

THE COURT: Well, the government seems to put a great deal of reliance on *BLE*. Why is that not a fair point?

MR. PERRELLI: I think in *BLE*, as the Court indicated, obviously not a case about enforcement, and the hypo that they provide is again about an individual enforcement decision. But I go back to *Crowley*.

Crowley looked at exactly this question in drawing this distinction between single-shot enforcement and a broad enforcement policy. And so the D.C. Circuit had the benefit of all that, looked at the precise language that the government quotes, and that's how they read *BLE* and that's how we read *BLE*.

THE COURT: So do I need to go so far as to decide that general enforcement policies are reviewable, or is there a narrower ground that you succeed on?

MR. PERRELLI: I certainly think there are several grounds I think on which we can succeed. I think that ruling which I think comes out of *Crowley* I think is the correct ruling. And I will draw the distinction between civil and criminal in a minute, Your Honor, because I do think there are distinctions to be had there.

Obviously, to the extent that there's a narrower holding which is that, look, to the extent that this is a general enforcement policy premised on a legal judgment, that unquestionably should be reviewable as *Edison Electric*, *National Wildlife Federation* and a set of cases similar to *Crowley.*

And here we would say -- and again, we'll get into this when we get into the substantive APA claims -- that, Your Honor, discretion has to be exercised by one who knows that they have it. And if the Attorney General is incorrect -- you know, we heard a lot about the broad discretion that the United States has in the immigration context, and we've heard that in this case and other cases.

It appears to be the one thing that they say they don't have discretion to do, is this practical program that addresses the plight of individuals who they concede are their lowest enforcement priorities. So we think on that ground as well.

Lastly, Your Honor, on the reviewability question, I think we also think that -- and this is something that the government cites repeatedly in their brief, although always putting it on the Fifth Circuit, DACA is more than an enforcement program. And it's not just more than an enforcement program because it is a gateway to benefits which are life-altering and which we think is incredibly important here, but it's also quite different from the Sessions memorandum or other memoranda of that sort.

Under the DACA program, you had to come in, you had to pay

money, you had to provide the government with all kinds of information about yourself and your family. You had to provide them fingerprints. If the DEA had a civil enforcement memo that said, okay, if you want these otherwise unlawful controlled substances, come in, pay us some money, we'll come and inspect your facility and take a look at that, and then we won't enforce against you, that looks quite a bit different from a traditional prosecutorial discretion --

THE COURT: Why does that make it reviewable?

MR. PERRELLI: Because I think that the nature of that interaction is different from simply saying to prosecutors, here are the five factors you have to consider, or saying to -- or saying as a general matter, here are a few factors for you to consider in exercising your discretion.

Of course then, DACA is also the gateway to -- and again, this is something that the Fifth Circuit very much focused on, more than an enforcement program. It is the gateway opening eligibility for Social Security numbers, for work authorization, for a host of other things that are critically important benefits for DACA recipients.

So we think this doesn't look at all like *Heckler*. We think, like I said, even if one viewed it in that way, *Crowley* would dispose of the government's arguments, but we think there are these other steps that again take this out of that paradigm and we think are quite different.

Counsel for government talked a little bit about criminal versus civil. We do think there is a distinction. The executive's power, particularly under Article II, is at its zenith in the context of criminal prosecution. Congress cannot tell the executive who they have to prosecute. And I think that's D.C. Circuit in *Aiken County*, and I think there's a long history of cases before that. But it is unexceptional in the regulatory context, and including in immigration, for Congress to set forth either enforcement priorities or to define --

THE COURT: What case would you rely on that draws that distinction between civil and criminal in the reviewability context?

MR. PERRELLI: I don't think there is a case that I'm aware of where the court has said gee, do we apply *Crowley* to criminal or not. I do think that when I look at *Heckler*, they looked at it, and the D.C. Circuit cases have followed, they treat the criminal prosecution context as an analogy, not as directly identical or similar. But again, I think all of the cases that talk about enforcement discretion are cases where there's a question about well what discretion did Congress give to regulatory authority in terms of setting enforcement policy. So all of those cases have that --

THE COURT: You used the term at its zenith earlier. Why in the immigration setting isn't that discretion over enforcement at its zenith for the executive branch?

MR. PERRELLI: Certainly it hasn't been treated that way in the courts. Even in highly discretionary decisions related to discretionary benefits, the Congress defines those with great specificity and great clarity in many cases, or gives the government broad discretion which it says it doesn't have in this context.

I would point the Court to the Supreme Court decision in *Judulang*, which was a 9-0 decision and a case about whether or not -- or the policy to be applied to give highly discretionary benefits, relief from deportation for resident aliens. And there the Supreme Court said look, that's reviewable under the APA. You know, even though this is highly discretionary, even though nobody has a right to this particular relief, the policy is so -- sufficiently irrational and sufficiently poorly explained that it fails.

And nine justices of the Supreme Court said, you know, we cannot -- you know, it's inconsistent with the INA, and it appears to be -- to leave these people with no more than a coin flip by individual immigration officials in the field.

So we think that I think is consistent with I think the larger body of law that treats those kind of enforcement decisions, whether they're discretionary or not, as reviewable and have to be consistent with the APA.

Your Honor, if you have no other questions, we're happy to rest on the other issues that the government did not raise.

THE COURT: All right.

MR. PERRELLI: Thank you.

THE COURT: Good morning.

MS. HARRISON: Good morning, Your Honor. Lindsay Harrison on behalf of plaintiffs. The recision of DACA violates the APA in at least three ways, each of which provides an independent ground for vacating the rule: First, recision is a substantive rule that was advanced without notice and comment. Second, the government's explanation for recision wholly fails the heightened explanatory burden to rescind an existing rule. And third, what explanation the government has provided is arbitrary and capricious.

The latter two claims received most of the focus in the Eastern District of New York and Northern District of California, so I would actually like to start today with our procedural APA claim, which is independent of the government's justiciability arguments.

Our procedural APA claim boils down to two basic questions. First, is the recision of DACA a substantive rule; and second, is this claim at all affected if DACA itself was a substantive rule. The answer to the first question is yes. The answer to the second is no. And that is enough to send this back to the agency to follow the APA's procedural mandates.

THE COURT: Basically, notice and comment.

MS. HARRISON: Exactly, Your Honor. First, the

recision of DACA is a substantive rule --

THE COURT: You've been unsuccessful with that argument. Just to turn the tables a little bit, you've been unsuccessful with that argument --

MS. HARRISON: Absolutely, that's true. That's not the basis for --

THE COURT: I mean for you, your side of the --

MS. HARRISON: Yes. The plaintiffs in Judge Alsup and in Judge Garaufis's courts were not successful in this claim but I think this claim should be the basis on which Your Honor rules, and I think clearly the recision of DACA is a substantive rule and I think perhaps it's because the D.C. Circuit precedent is so much clearer than the Ninth Circuit or Second Circuit precedent --

THE COURT: So isn't there a little bit of a troubling point that DACA itself was issued and implemented without notice and comment?

MS. HARRISON: That is true, but I don't think that affects our claim.

THE COURT: So if there's something that was issued without notice and comment, the agency has to go through notice and comment to rescind it?

MS. HARRISON: That's correct, Your Honor, and that's what --

THE COURT: What case stands for that proposition?

MS. HARRISON: So *Consumer Energy Council* is one case that stands for that proposition. In footnote 79 of that opinion, the D.C. Circuit -- well, just some background. So that was a case in which FERC issued a rule related to pricing of natural gas. And the Act had afforded either house of Congress essentially a one-house veto.

THE COURT: I'll have to look at this closely, but just the fact that you're relying on footnote 79 in a FERC opinion for this authority --

MS. HARRISON: A little bit --

THE COURT: -- leaves me a little doubtful.

MS. HARRISON: I know. No, no, but -- so there's more than just *Consumer Energy Council*. That footnote has actually been cited in a number of other D.C. Circuit cases. What the Court said in that footnote is that if you allow an exception to notice and comment for a rule that's been defectively promulgated -- so for example because there was no notice and comment to begin with -- it would permit an agency to circumvent the requirements of Section 553 merely by confessing that the regulations were defective in some respect, and asserting that modification or repeal without notice and comment was necessary to fix that defect.

And what the D.C. Circuit said is: "Such a holding would ignore the fact that the question whether the regulations are indeed defective is one worthy of notice and comment to begin

with." So that's *Consumer Energy Council*.

And then *American Wild Horse Preservation Campaign* is another case that stands for the same proposition, where the Forest Service tried to justify a change in the maps governing wild horse territory based on the agency's failure to follow the APA when the map was changed previously. And the D.C. Circuit said no, that a failure to follow the APA would not render the change to the territory void from inception.

And that's what the government is essentially arguing, is that if there was no notice and comment when DACA was implemented, and that it was a substantive rule to begin with, that would render it void *ab initio*. They don't cite a case for that proposition, and it's just not correct.

And this *American Wild Horse Preservation Campaign* says so. What the D.C. Circuit said is, whatever the Forest Service's past transgressions in putting the map into place, we, quote "cannot condone the correction of one error by the commitment of another."

And Your Honor even cited these cases, or this proposition, in the *Douglas Timber* case, in which the Secretary of Interior, without notice and comment, withdrew a record of decision that was adopting plan revisions for certain BLM districts. When the timber companies sued, the agency said it withdrew it because the original ROD had been approved in error. And what Your Honor said is that the possibility that a rule might be unlawful

is not in the same ballpark as a clear Supreme Court decision saying that or legislation saying that and that it wasn't enough. Essentially, two wrongs don't make a right.

THE COURT: Let me move you to another of your three arguments. In the Supreme Court cases, *Encino Motors*, *State Farm*, etc., those cases for the most part deal with the requirement that an agency provide an adequate explanation for a change in policy. Are there cases you can point me to that require an adequate explanation in the same context for a change in the agency's view of the law?

MS. HARRISON: Yes, Your Honor. The *International Union* case, which is the United Mine Workers International Union case cited in our reply brief, is that case. So in that case, the agency withdrew a proposed air quality rule because of intervening Eleventh Circuit precedent that said basically that you have to do phased rulemaking. So the agency thought that that Eleventh Circuit intervening precedent applied and would render invalid the proposed rule that they had advanced, so they withdrew it, and said it's based on this Eleventh Circuit precedent. And the D.C. Circuit said that's not an adequate explanation. You can't just cite this Eleventh Circuit case and withdraw the rule. You need to say why --

So the Eleventh Circuit precedent, there was no explanation about why the Eleventh Circuit precedent applied to this proposed rule and invalidated it. And the D.C. Circuit said you

need to give an explanation. You can't just say there's this other case and we've reached this conclusion. You've got to show not just where you got the path and how you got there. And that's this case.

So here the agency says there's this DAPA litigation, and based on the DAPA litigation, we recommend the recision of DACA. But there's a whole host of things that aren't explained in the decision.

So, among them, number one, there's no articulation of the legal theory on which DACA is illegal. And we're left to guess, is it because there was no notice and comment? Is it because there was something substantively unlawful about DACA? And if so, what was that? Because the government argues that deferred action is lawful when it's applied to individuals, when it's applied to groups. There's no line being drawn that tells anyone evaluating the agency's policy why it was illegal.

Second, there's a failure to explain why the government was so certain that DACA would be enjoined. It's completely unclear why they think a preliminary injunction would have been issued against a policy that had been in place for more than five years and that was relied upon by more than 800,000 people, their employers, their families, educational institutions, and everyone else in the country.

Third --

THE COURT: This is leading into the litigation risk

articulation.

MS. HARRISON: That's correct, Your Honor. And we think there's not an adequate explanation of either the legal basis or the litigation risk theory. And related to that --

THE COURT: Do you still contend that they can't be raising the litigation risk argument here?

MS. HARRISON: I think our contention is not that an agency can't defend a policy based on litigation risk, but rather that there was not a sufficiently articulated litigation risk basis to rescind this policy.

THE COURT: Well, "sufficiently articulated," do you mean not an adequate explanation or do you mean not raised and therefore waived?

MS. HARRISON: Well, we do argue that it was not -- essentially not adequately raised to be affirmed on that basis under *Chenery*. That if the agency didn't provide an adequate explanation and that has to be provided post hoc by the attorneys in defending the recision, that that is itself a post hoc rationalization, and under *Chenery* can't be the basis on which it's affirmed. We also argue that it's not adequately articulated under *Encino Motorcars* and the related precedent.

THE COURT: All right.

MS. HARRISON: So the next reason why the explanation is inadequate is there's a total failure to weigh the facts and circumstances that were engendered by DACA. This is the

language from *Encino Motorcars* and from the *Fox* case. That you can't just ignore the reality that you're rescinding a policy that's been in place, that's been relied upon by hundreds of thousands, millions even of individuals, without discussing those interests.

And so if it is a litigation risk assessment that was the basis, that -- litigation risk has to be balanced against something, and the agency didn't balance it against anything. There's no consideration of that. In fact, the agency tells the story that they were concerned there would be an immediate injunction nationwide. But if you look at the actual Sessions letter and at the Acting Attorney General's recision memo, the concern about that is for the agency. The language is that it would be disruptive for the agency. There's no concern given to how that might affect individuals.

Next, there's a failure to consider any reasonable alternatives to recision. So among those might include ways to mitigate whatever legal flaws the Attorney General believed existed. So if it was a failure to go through notice and comment, reasonable alternative might be to promulgate DACA as a proposed rule and have notice and comment.

Likewise, if the legal flaw was a failure to allow for adequate consideration of individual applications, there are lots of ways it could have been modified to do that. One is that you could have had applications reviewed at service

locations -- at service offices, field offices rather than the service center, and that was one of the reasons discussed with respect to DAPA why --

THE COURT: So you don't think it would have been enough if, instead of the recision memo that was issued, a recision memo contained two or three additional paragraphs that said: And we agree with the Attorney General's assessment and believe that the OLC memo was wrong for the following reasons, and then had explained those reasons in two paragraphs. That wouldn't have been good enough here?

MS. HARRISON: First of all, it still would not have gone through notice and comment and so there would be the procedural --

THE COURT: Setting aside the notice and comment.

MS. HARRISON: Right. But yes, that's -- so if it was a legal judgment and there was more rationale given, the Court would review that judgment *de novo* under *Prill* and that line of cases, *Teva Pharmaceuticals*, and we think it would be reversible on substantive APA grounds.

THE COURT: But that's not on the failure of a reasonable explanation ground.

MS. HARRISON: That's right, although --

THE COURT: It's an assessment of the law.

MS. HARRISON: Right. Although still, under *State Farm*, the agency would be required to analyze all important

aspects of the problem and evaluate whether there were any reasonable alternatives to recision. And so even if there was an explanation of why DACA as applied had been considered unlawful and concluded to be unlawful, if there were alternatives to recision available that might have mitigated that unlawfulness -- and this of course, it's hard to say because we don't know the reason that the agency found it was unlawful -- but for almost every theory about why it might have been unlawful, there's a reasonable alternative to recision.

So even a more fully articulated legal theory of why DACA might be illegal wouldn't be sustainable under the APA without a consideration of whether there was some lesser alternative to recision that might have accounted for all of the various reliance interests of individuals who had taken advantage of the program over the five-plus years it had been in place.

And then the last thing that is completely unexplained in the recision memo is why the government chose to wind the program down in the manner that it did. We're not saying that deadlines are never arbitrary, but there was no explanation given as to why six months, as to why they would accept applications for people whose status expired then but not now, why there wasn't consideration given to perhaps letting students finish their degrees when they had enrolled in school in reliance on the existence of this program. Allowing employees to finish working on important projects or -- you know, there

were all sorts of ways that it could have been theoretically wound down, and there was no explanation as to why this one was the manner chosen. So we think under *Encino Motorcars* and under *State Farm*, the government has failed in its explanatory burden.

Now, as for the government's contention today that --

THE COURT: What's the standard of review that I'm applying to the rationales that have been articulated here, the illegality rationale and the litigation risk rationale?

MS. HARRISON: So the illegality rationale is reviewed *de novo* under *Prill*, and we think that the litigation risk rationale is also reviewed *de novo* today because there is nothing about this litigation risk assessment apart from the legal judgment that DACA was unlawful.

THE COURT: Doesn't that sort of put me in the business of telling agencies what they should or shouldn't litigate?

MS. HARRISON: No, Your Honor. I think it might be a different answer if the agency had provided something other than just a legal judgment as the basis for the litigation risk assessment, but the two really have merged because the only thing that makes up the litigation risk assessment here is the legal judgment. And if an agency could just say essentially, instead of saying we think this is illegal, say we think there's a risk -- a very high risk, nearly 100 percent that we're going to lose a challenge because it's illegal, it would render --

THE COURT: Because one case has led us to that conclusion?

MS. HARRISON: That's right. But what that would do -- I mean, that's *International Union*. But what that would do is it would render *Prill* a dead letter, and *Prill* says that courts should evaluate *de novo* and should ask themselves whether the legal assessments of the agency are correct or incorrect. So if the agency could just transform every incorrect legal judgment into a litigation risk assessment, *Prill* would be a dead letter, and we think that's not what the D.C. Circuit would want and not what the D.C. Circuit has intended.

If I could turn back actually to my procedural APA claim, I just want to discuss the reasons why we think the recision of DACA is substantive. And I want to point the Court to the *Pickus* case by the D.C. Circuit because I think that's extraordinarily analogous.

In that case, the Bureau of Prisons published guidelines specifying the factors to be considered when paroling federal employees [sic]. So the agency argued there, again, this is discretionary, these are parole guidelines, and argued that they didn't have to be implemented with notice and comment. And the D.C. Circuit disagreed and said although they were guidelines, they were calculated to have a substantial effect on parole decisions, they narrowed the agency's field of vision, and although there was a theoretical ability to depart from the

guidelines in any individual case, they controlled and limited how the agency would exercise its discretion.

And so what the D.C. Circuit asked in *Pickus* was if the regulation is likely to produce a different outcome than some other guidelines would, that that is substantive and it has to go through notice and comment.

And that's what the recision of DACA does. It speaks in mandatory language. You will not grant deferred action applications to DACA beneficiaries when they seek to renew, you will not grant any new ones --

THE COURT: So if the agency promulgates something that says here are our enforcement policies, our first priority is such-and-such, our second priority is such-and-such, a lower priority is this other thing, that has to be done through notice and comment?

MS. HARRISON: Well, I think what the D.C. Circuit would say is first you look at the language of the guidelines and the priorities, and if it speaks in mandatory language, using words like "will," that suggests the rigor of a rule and not the pliancy of a policy. And therefore, yes, it does have to go through notice and comment, but you also look at is it outcome determinative. And that's what the Court asked in *Pickus*. And I think in this case undoubtedly it's outcome determinative because there is no alternative way in which these 800,000 people are going to be able to get deferred action.

Now, the government says well, we have this residual authority to grant deferred action in individual cases, but first, the government admits in its brief that that sort of deferred action is offered on a, quote, "more limited basis." And so at a minimum, the government has conceded that it's more limited, and that means that the outcomes will be different in this kind of ad hoc residual deferred action as opposed to the program that's been eliminated, which guided discretion and which ensured that individuals who met the criteria would at least be entitled to a presumption that they were to receive deferred action unless there was some sort of special circumstances present.

And if you just contrast the world before DACA existed with the world of DACA, you know, what deferred action was used for before outside of a program for people from a specific country or people seeking U visas or V visas was basically medical emergencies only. This was not something available to 800,000 people, it was not something sought by 800,000 people, and it would not have been granted.

And also, even if the agency retains some sort of residual authority to grant deferred action, that ignores the extremely significant programmatic elements of the DACA program, including the prohibition on sharing information by individuals who gave their information to the government in exchange for the opportunity --

THE COURT: Mr. Sellers is going to address that; right?

MS. HARRISON: That's correct, Your Honor.

THE COURT: I think I've heard enough on the notice and comment.

MS. HARRISON: Okay. So let me then turn to the substantive unreasonableness of the agency's decision. So I'll take litigation risk first. Litigation risk, assuming it was the agency's rationale, was not articulated in a way that could be sustained by the Court. So there's at least six important aspects of litigation risk that weren't taken into account. I'll just tick through them and then I can address any that Your Honor would like to hear more argument on.

One, there was no consideration given to the idea that DACA had been in place for more than five years. Two, there was no consideration or discussion of the substantive differences between DAPA and DACA. Three, there was no explanation for why the agency assumed that a ninth vote in the Supreme Court would be against DACA. The 4-4 decision rendered in *U.S. v. Texas* was nonprecedential, so you would expect at least some explanation for why this case would turn out differently.

Four, there was no balancing at all of the risk of an injunction against the consequences of recision. And if this isn't a legal judgment and instead it is a risk assessment, you have to balance the risk of one against the consequences. Five,

there was no consideration given to the litigation risk associated with recision. And as Your Honor's recognized, we're not the only case being litigated on this issue. So it didn't exactly eliminate the litigation, nor litigation risk. And sixth, as I've stated earlier, there was no consideration given to alternatives that might have mitigated that litigation risk. So each of those should have been in part -- in the agency's decision. None of them were. And that renders --

THE COURT: Are those all part of the legal assessment that lies at the core of the litigation risk, or are they something beyond?

MS. HARRISON: So I think they are relevant to both the legal assessment and also to the litigation risk. I would say maybe if one of them is not relevant to the legal judgment, it would be the consequences of recision, because if there's a conclusion that it's unlawful, then maybe you don't need to go through what the consequences would be because you're sort of assuming how the case would turn out.

But if the agency's assessment is what they say it was, which is we're balancing, you know, we're sort of assessing the likelihood of success, then you would have to balance that against the costs of recision, and that just wasn't done.

Instead what was done is there was a recitation of the procedural history of the *Texas* case, and then there was an assertion in a sentence, maybe two, within one small paragraph

of a one-page letter, that DACA would be held unlawful. And under *International Union* and also under *Prill* we think it can't stand.

I'll turn now to the legality of DACA and the substantive unreasonableness of the agency's conclusion that DACA was illegal. So the agency does have discretion, as the agency has asserted in the context of reviewability.

THE COURT: Illegal meaning without statutory authority?

MS. HARRISON: That's correct, Your Honor, assuming that was the theory. And it's a little hard to discern because the agency contends it does have statutory authority to grant deferred action to individuals, and it does have statutory authority to grant deferred action to groups of individuals, so it's a little unclear what the Attorney General thought there wasn't authority to do.

But assuming that it had been adequately explained, we think it can't be sustained under *Prill* upon *de novo* review. And that's because the INA provides the AG -- I'm sorry, provides the agency with discretion to establish regulations and instructions to carry out her authority, and also establish national immigration enforcement priorities and policies. And since 1960 the executive has established more than 20 policies for according deferred action or similar types of relief to large groups of undocumented persons living in the country based

on the recognition that Congress has not ever given enough resources to the agency to deport all undocumented persons that are here, so the agency is supposed to be prioritizing.

And Congress has said you should prioritize criminal aliens and you should prioritize people detained at the border. What that leaves is this whole category of individuals, like childhood arrivals, who are particularly inculpable. And so what DACA did was essentially recognize, these people are going to be here, let's give them an opportunity to go to school, and to work, and to be productive members of our society. And that is something that the executive has always had authority to do.

THE COURT: Is this an argument that, rather than being an argument that they didn't explain things, is this an argument that they couldn't reach this conclusion as a matter of policy?

MS. HARRISON: As a matter of law, Your Honor. It's an argument --

THE COURT: Law or policy.

MS. HARRISON: Well, right. It's an argument that as a matter of law they are incorrect that DACA was unlawful. DACA was lawful. And I know that counsel today has said that this could easily -- just as easily have been voiced as a policy conclusion that it should be left to Congress, but that's not what the agency said. The agency said this was, quote, unconstitutional and that there was no statutory authority. And

that's a legal judgment, not a policy one.

If it had been a policy judgment, you know, we would be arguing that there wasn't sufficient consideration given to the countervailing policy interests associated with keeping DACA, which were of course the very interests voiced by the government in the *U.S. v. Texas* litigation with respect to DAPA.

THE COURT: Do I have to reach this issue of substantive legality, as you put it?

MS. HARRISON: No, you don't, Your Honor. You could rule first on the basis of our procedural APA claim and send it back for notice and comment.

THE COURT: Even if I decide that it's not subject to notice and comment, do I have to reach it?

MS. HARRISON: No, Your Honor. You can rule solely on the basis that there was an inadequately articulated rationale, that the agency didn't consider all important aspects of the problem, under *State Farm*, and failed to consider the reliance interests of individuals under *Encino Motorcars* and send it back to the agency to provide a reasoned explanation for the decision under those decisions, without reaching the question of whether DACA itself was legal or illegal.

I mean, it might come back, and then you'd have to reach it then, but I don't think you have to reach it today. And if Your Honor has no further questions.

THE COURT: All right. And I guess in the way I've

set this up, we turn to Mr. Sellers now to get that out on the table so that it can be responded to by the government in one swell foop.

MR. SELLERS: Good morning, Your Honor. Thank you. Joseph Sellers.

THE COURT: Good morning.

MR. SELLERS: The record is very clear with respect to the information sharing provision of DACA, that in 2012, even in the application for DACA, that the government assured applicants that their information would be protected from disclosure to any of the enforcement agencies absent evidence of some national security risk. And in 2016 Secretary Johnson reaffirmed that position exactly the unequivocal way it was set out in 2012. But in 2017 in connection with the recision notice, the government took a different position and said that it would not proactively provide that information to the enforcement agencies.

THE COURT: What am I dealing with here? Motion for summary judgment on that, or a motion for preliminary injunction?

MR. SELLERS: Well, I think we're seeking final judgment on this. And let me explain why.

THE COURT: In reviewing some of the briefing, I thought you were seeking a preliminary injunction.

MR. SELLERS: Fair enough. Let me explain why, and --

we're seeking injunctive relief, there's no question about it. But it's not clear to us that there is any further action, any further factual development that needs to be taken absent hearing from the government as to what its position it.

But its position so far has been something other than the unequivocal assurance that this information would not be provided to the enforcement authorities. And to compound the problem --

THE COURT: The reason it matters to me is because if it's a preliminary injunction inquiry, then harm matters. And I do have some questions with respect to what the immediate irreparable harm would be.

MR. SELLERS: In order to provide you with both options, let me address that so that it's -- as I said, I think we --

THE COURT: Given the fact that there are existing preliminary injunctions in place.

MR. SELLERS: I understand. So fair enough. There are existing preliminary injunctions that, in other circuits, were they not changed or modified or overturned, would provide --

THE COURT: You say in other circuits, but they're nationwide injunctions.

MR. SELLERS: I understand that, but they don't enjoin this Court from issuing its own ruling.

THE COURT: Well, I hope they don't enjoin this Court.
(Laughter.)
That's not what injunctions normally do.
MR. SELLERS: I understand, and as a result I think this Court is fully in a position to render its own decision pursuant to the precedent in this circuit.
THE COURT: But the question with respect to harms and a preliminary injunction is whether I need to render a decision.
MR. SELLERS: I understand. And -- well, I would submit that at any time those injunctions may be modified, they may be dissolved.
THE COURT: That doesn't usually cut it for the immediacy of the threat of irreparable harm.
MR. SELLERS: Well, the record speaks for itself. I submit to you that the government has taken the position that it can change its position at any time with respect to information sharing. I recognize that the Court in California and the Court in Maryland at least have both directed maintenance of the status quo as to this position. The decision in California is up on review in the Ninth Circuit. I understand the decision in Maryland is maybe subject to further review. It was just issued I think two weeks ago. And so we may be back here soon. And if that's the way the Court wishes to proceed, we will do so.
THE COURT: Well, so set aside the preliminary injunction for a second, and tell me why it is you think this

case procedurally is in the posture that I should rule on the information sharing dispute, and then why you should succeed on it.

MR. SELLERS: All right. So I think we should succeed because the government provided an unequivocal policy that assured applicants, to their detriment, that they would provide confidential information that -- in order to apply for the DACA program, and it appears to have since reneged on that promise, having induced the applicants to act to their detriment in providing this information.

THE COURT: And your legal basis for proceeding is due process?

MR. SELLERS: Due process, yes. And we believe the *Cox* decision, the *Raley* decision, among others from the Supreme Court, both set forth the basic principle that the government may not induce persons to rely on a promise to their detriment and then change the promise and prosecute or take action adverse to them afterwards as a result of that.

So we think this is a due process violation, and we think -- and the government has given no assurances that it will maintain this position. And unlike the arguments that you've heard so far about whether there needs to be some further action returned to the agency to issue any recision policy that it wishes to do so properly, there is no do-over here, because the government is in possession of this information. Unless it's

going to somehow destroy the information it's collected, it possesses the information that it reserves the right to use to assist in the deportation of these people. There is no way of going back with respect to this one.

And so, therefore, we think that the Court -- we ask the Court to enjoin the government both with respect to not using the information in a way inconsistent with the way it was originally promised, and not to modify that position without notice in any respect.

THE COURT: All right. Now let's shift to remedy were your side to succeed on the APA summary judgment claims. I assume you're the one to address that as well?

MR. SELLERS: Well, I'm addressing the scope of the injunctive relief, if that's what you're asking.

THE COURT: Let's talk about it in slightly different terms. If I decide, if I were to decide, as I've been urged to, that there's some APA-related flaw, either notice and comment requirement, or a lack of a sufficient explanation, to use that broad term, isn't what normally would happen in this kind of a case that it would be remanded to the agency? Is that right?

MR. SELLERS: I think it could be remanded to the agency to follow the proper procedure.

THE COURT: So remanded to the agency, and if they have a better explanation, they could come up with it. If they need to do notice and comment, they could do it. The parallel

question then with that would be in the meantime should there be vacatur, because that's normally the APA-related assessment that needs to be undertaken: is there a need to vacate along with the remand.

It's not usually termed and thought of in an APA case as nationwide injunction; it's thought of more in terms of, okay, what's the proper administrative law relief? Remand and either vacate or don't vacate. What would you be arguing for, vacation or --

MR. SELLERS: We are seeking a vacatur.

THE COURT: And why?

MR. SELLERS: Our position is they have offered no independent policy reason to support their position.

THE COURT: But if I decided they hadn't sufficiently explained, I would be remanding for them to take a crack at explaining.

MR. SELLERS: Well, certainly, that's an alternative, but I think the point is that they've offered no independent policy reason to justify this, and having offered no such reason, the action they've taken is outside the scope of the authority they have under the APA, and --

THE COURT: So I'm basically deciding that even though I'm remanding it, I don't think there's much of a chance they can come up with a reasonable explanation.

MR. SELLERS: Well, I don't think you'd have to go

that far. I think the point is that I don't think the judgment we're seeking requires a finding that there is no scenario in which they could issue a recision. What we're saying is on this record they have utterly failed to do so.

THE COURT: The two-pronged assessment really involves what's the possibility that they can come up with a reasoned explanation. That's one part of the assessment. The other part of the assessment is what's the chaos that would be created either by vacating or not vacating.

MR. SELLERS: Well, so the maintaining the status quo, which we maintain a vacatur would achieve because it would return the status quo to where it was in early September.

THE COURT: Right now, today, the status quo is influenced by existing preliminary injunctions, at least with respect to existing DACA applications, not new applications. If I vacated, I would then be taking into that category of the new applications as well.

MR. SELLERS: Well, new applications and also the ability to apply for advanced parole. Those are both very significant deficiencies in the injunctions that have been issued to date. I'm not faulting either of the courts, but they do not restore the rights fully to the position they were before. And as some of the evidence we supplied in the record here indicates, some of the individuals who provided sworn statements describe the profound ways in which the present

injunctive relief has limited -- has really altered the ability for them to pursue their educational opportunities and other things. And so we think that the Court -- the proper --

THE COURT: Vacatur would somehow relieve them of that uncertainty? Why would it do so any more than the existing preliminary injunctions?

MR. SELLERS: Well, vacatur, first of all, would restore us to the status quo. I think we all would agree that would be the effect of vacatur.

THE COURT: The status quo meaning before the recision memo?

MR. SELLERS: Sorry. Forgive me. Yes, before September of 2017, where they had the full panoply of rights that were available under DACA. At that point, if the government wishes to issue pursuant to an appropriate rule-making proceeding compliant with the APA that reflects its consideration of the varied interests and the impact of a recision on the lives and the careers and the life of the people who are registrants in DACA, it can do so and solicit notice and comment. That process will ensure that any rule that ensues has -- and may be subject to further judicial review, but will have taken into account the effects of this, any recision on the varied circumstances that it would have on the DACA recipients. And that is -- that's the reason why it's important to restore this to the status quo --

THE COURT: Is there some reason under the law that you think I need to grapple with this question of nationwide injunction as opposed to just, if your side succeeds -- and this is all hypothetical --

MR. SELLERS: I understand.

THE COURT: -- if your side succeeds. That I would need to grapple with this question of nationwide injunction as opposed to just looking at what is traditionally APA-related relief? And it is beyond question, I think, remand and either vacating or not vacating, and why isn't that the assessment I would undertake?

MR. SELLERS: So first of all, as I understand it, under the APA, vacatur vacates the rule, which in this case would be the recision, and restores the status quo ante to before the decision was announced. So it would restore DACA in its full range of opportunities and rights that it provided.

THE COURT: I know what it does. My question is, is there some reason that looking at it through that prism is not adequate and that I have to look at it more in terms of a nationwide injunction?

MR. SELLERS: I think if the Court were prepared to vacate as we've discussed it, I don't know that the Court has to issue an injunction as well. If by vacatur --

THE COURT: If I don't vacate, you think I do have to issue an injunction? Doesn't make a lot of sense, but go ahead.

MR. SELLERS: Sorry. I think if you don't vacate, we're asking for an injunction to ensure that the recision doesn't go forward, that the information sharing doesn't change, those kinds of things. The vacatur would in its most simple form I think achieve the purpose of restoring the status quo ante in all respects.

THE COURT: All right. Anything else, Mr. Sellers?

MR. SELLERS: I think otherwise we'll rest on our papers.

THE COURT: All right. Thank you. Ms. Davis? Or if you all have to share the responsibility here, please feel free to do so.

MS. DAVIS: My understanding of the order I think has been a little confused at this point. So I think if Mr. Lucas could make some rebuttal points to the justiciability.

THE COURT: We have all their arguments on the table. You now have a chance to reply with respect to the points that Mr. Lucas made originally. And by "you" I mean your side. And to oppose with respect to the merits points and relief points that they've raised. And you and Mr. Lucas can share it as you see fit.

MS. DAVIS: That sounds good. So Mr. Lucas will make a few rebuttal points, and then I'll make my presentation.

THE COURT: All right.

MR. LUCAS: Thank you, Your Honor. A few quick

points. As my understanding is that plaintiffs here do not solely argue that *Crowley* alone disposes of this issue. They seem to suggest in both their reply and today that perhaps there's some general nonenforcement policies or general enforcement policy changes that would be unreviewable under 701(a)(2).

Instead, they offer, from what I can tell, two distinctions of why this case should be different. One is that this program involved applicants coming forward and talking to the government and disclosing their status in exchange for deferred action. But we don't think that distinction is material. I point you to page 26 of the administrative record which discusses a number of other similar programs that DOJ has in the criminal prosecutorial discretion context, where violators are encouraged to come forward in exchange for leniency.

THE COURT: And what do you think their second point is?

MR. LUCAS: And their second point, Your Honor, I think, and what they essentially hang their hat on, is that there's a distinction between criminal and civil enforcement.

THE COURT: But it seems to me there's also the narrower reading of *Crowley* that where an enforcement decision is at issue but it's based on a purely legal interpretation.

MR. LUCAS: Your Honor, again, we think that reading both *Chaney* and *BLE* together forecloses that, except in the

context we would say of where there's an interpretation of a substantive provision of the statute. So let's say the Secretary here had interpreted a criminal provision of the INA and set forth a policy saying, well, this particular crime I think constitutes a crime of moral turpitude, but these other crimes do not, and I'm setting this forward in a prosecutorial discretion document. Assuming you would have a plaintiff that would have standing to challenge that underlying legal interpretation, sure, that would be reviewable.

THE COURT: But the Secretary did make a legal determination, albeit relying on the Attorney General, who thinks he relied on the *Texas* decision. Legal determination was that there's no statutory authority. A purely legal determination, isn't it?

MR. LUCAS: Right, Your Honor, but --

THE COURT: You're saying that's insulated from review.

MR. LUCAS: Yes, Your Honor, because it's in the same context of in this situation there's no statutory constraints on the Secretary's authority.

THE COURT: You want to turn it to the other side, saying they haven't pointed out any statutory restraints, as opposed to the fact that the agency said there was no statutory authority but didn't explain why, gave no explanation as to why. Correct?

MR. LUCAS: Your Honor, if you walk through all the *Texas* court's reasoning and then said --

THE COURT: What was the *Texas* court's reasoning with respect to no statutory authority?

MR. LUCAS: Certainly, Your Honor. The *Texas* court walked through and said that the INA had contained many different provisions and that it set forth --

THE COURT: Well, you say it walked through the reasoning. I don't see where the recision memo or the Attorney General's letter actually walks through the reasoning. And the only decision that the *Texas* court reached was that notice and comment was required. Right?

MR. LUCAS: The District Court, Your Honor, the Fifth Circuit reached both, and I believe that --

THE COURT: Both what?

MR. LUCAS: Both the substantive and procedural APA problems in its decision. It addressed both notice and comment, and then it talked about why DAPA and expanded DACA fell outside the authority of the government under the provisions of the INA.

But just to take you back, the key distinction here is that there's no provision in the INA that actually cabins the Secretary's authority in this respect. So there's nothing here to review. So the fact that she gave an answer --

THE COURT: You mean nothing to apply in the review. No law --

MR. LUCAS: There's no law that constrains her authority to rescind DACA, and plaintiffs don't point to anything in the INA. All they say is that it should have gone through either notice and comment, or that she should have given a more fulsome explanation. But they don't say that the INA actually constrains her authority with respect to rescinding the DACA program. And that point I think is --

THE COURT: I mean, the thing that bothers me a little bit -- well, I'll save this for Ms. Davis. Go ahead. I don't want to have nothing to talk to her about.

(Laughter.)

MR. LUCAS: I want to make sure she has a lot of time to address your concerns. But we think that is the critical distinction here, and that this is simply akin to a prosecutorial decision to discontinue or change nonenforcement policy and return to prosecutions on a case-by-case basis.

And even if that was based on a purely legal analysis, whether that was -- let's say *Chaney* didn't give any sort of enforcement discretion reasoning and just said we don't think we have jurisdiction to go after lethal injection drugs, or in the context of the hypothetical where the prosecutor is worried about going after certain offenders but not others, he's at risk of violating the equal protection clause, we don't think those reasons, even if courts are eminently qualified to review them, turn a nonreviewable decision into a reviewable one. Thank you.

THE COURT: All right. Thank you, Mr. Lucas.

All right. Finally, your chance, Ms. Davis.

MS. DAVIS: Yes. Saving the best for last, as I like to think of it.

All right. Good morning, Your Honor. I'm going to address first the APA claims in this case. Now, substantively plaintiffs argue that the recision violated the APA because the reasons that the Acting Secretary provided for it, namely the imminent litigation risk that was posed in the *Texas* proceedings, and her concerns about the lawfulness of DACA were arbitrary and capricious. And they throw an array of attacks at the decision itself, but at bottom these arguments boil down to the fact that they simply disagree with the judgment that the Acting Secretary exercised. And in their judgment, they --

THE COURT: I think they boil down -- I mean, perhaps my major concern there is that there isn't much to boil down, that the reasoning given by the Secretary, which relies to some extent on the Attorney General, there isn't much there.

MS. DAVIS: Well, Your Honor, if you look at the recision memo itself, it provides two reasons for the recision of DACA. The first was the imminent litigation risk in *Texas*, and the second was the concerns about lawfulness. The memo itself spends the better part of two pages describing in detail the history of the *Texas* litigation, the threat that was received by the plaintiffs in that case to amend their complaint

to challenge DACA.

THE COURT: But most of it is just a procedural recitation. This is a substantive discussion of the legal principles.

MS. DAVIS: Sure. But going through the factors that she considered in coming to the conclusion that it was better for the agency for this policy to wind it down rather than to subject it to potential -- a potential nationwide injunction in the *Texas* court was a rational decision. So here she discussed, as the administrative record demonstrates, the threat. The rulings in the Fifth Circuit with respect to DACA, or DAPA, which is a materially indistinguishable deferred action policy, as well as expanded DACA.

THE COURT: Point me to a sentence that you think is particularly important with respect to explaining the legal rationale.

MS. DAVIS: The legal rationale or the litigation risk rationale?

THE COURT: Legal rationale.

MS. DAVIS: Well, with respect to her concerns about the unlawfulness of the program, that was supported by the Fifth Circuit's decision in *Texas* as well as the Attorney General's opinion --

THE COURT: So point me to something that you want me to rely on and look at that you think is a good explanation of

the unlawfulness.

MS. DAVIS: Well, I think she pointed to the Fifth Circuit decision because that decision goes through the defects that were found with respect to DAPA, and DAPA is a materially indistinguishable deferred action policy. So while she didn't specify, you know, which parts of that reasoning applied, when you look at those decisions themselves, all of the reasoning equally applies to problems with the DACA policy as well because they are indistinguishable -- or materially indistinguishable policies. And the Fifth Circuit decision also included a striking down expanded DACA, which there are really no legally principled distinctions between expanded DACA and DACA.

So in going through this history of the *Texas* rulings and in considering the threat from the *Texas* plaintiffs, in noting the fact that the agency had made a decision to rescind DAPA and expanded DAPA based on what they had perceived to be an unlikelihood of success in the *Texas* proceeding, and in relying on the Attorney General's assessment that potential imminent litigation would likely lead to the same result for DACA, she came to this litigation risk rationale.

THE COURT: Let me make sure I ask you the same question, Ms. Davis, with respect to the Attorney General's letter. Do you want to point me to any particular place in that that you think is a good, reasoned discussion of the unlawfulness or the legal issue?

MS. DAVIS: Well, the Attorney General in his letter provided advice about what he perceived to be the problems with DACA, and those are the fact that it was implemented without proper statutory authority --

THE COURT: And is that explained anywhere, what that means?

MS. DAVIS: That is in the second paragraph. It doesn't go into more detail than what is actually in the letter itself, but I think he identifies the concerns that he had about the lawfulness of DACA, and he certainly identified that there was a potential imminent litigation risk that would likely result in the same outcome as it did for DAPA.

THE COURT: But the concern that I have, again, that I was about to ask Mr. Lucas about, is that the two documents, the Attorney General's letter and then the recision memo, don't contain much analysis of the legal issue. The Attorney General simply says without proper statutory authority, without ever referring to any statutory provision. It's just a conclusion.

And the reliance on the *Texas* case, I think we have to be careful about because the *Texas* case fundamentally is a notice and comment case. It doesn't deal with unconstitutionality, and it can't be stretched to that point. So when the Attorney General says that DACA was an unconstitutional exercise of authority by the executive branch, he nowhere explains that.

The only thing that I have in the record with respect to

that assessment is a 33-page memorandum by the Office of Legal Counsel, the entity charged with that responsibility in the executive branch, reaching the opposite conclusion. There's no discussion of that memo, why it's not correct, why the statutory authorities really lead to an opposite conclusion than the Office of Legal Counsel reached. It's not there.

Shouldn't that give a court concern when I'm assessing whether there's a reasonable explanation for the legal conclusion that was reached?

MS. DAVIS: No, Your Honor. I think the administrative record as a whole creates a basis for the Acting Secretary's conclusion that she had concerns about the lawfulness of DACA. And that includes the Attorney General's opinion, which it is what it is. He explained his concerns about the constitutionality of it, he explained that it suffered from the same defects as DAPA did, and the outcome that was likely to occur --

THE COURT: But there's no assessment of the fact that DAPA and DACA are in two different situations. DAPA, when examined by the Texas courts, was not in place yet. DACA has been in place for over five years.

MS. DAVIS: Correct. But that would not impact the substantive issues that the Fifth Circuit identified with respect to DAPA.

Now, also in the administrative record is the Fifth

Circuit's decision which didn't just address primarily a notice and comment issue. It addressed both a procedural and substantive APA violations with respect to DAPA and expanded DACA. And this isn't a situation where the parties, as Ms. Harrison suggested, or where the Acting Secretary simply said we are rescinding this policy, see Fifth Circuit's decision in the *Texas* case.

In the *International Union* case that they cite, the court was unaware of how or why that particular case that was cited by the agency sort of mandated or compelled the result that the agency believed it did, because that decision, while it made it harder for them to try and go through the regulation creation process, wasn't exactly fatal.

And in this case what we have is a Fifth Circuit decision about an analogous deferred action policy, and about the expansion of that same policy, in which the Fifth Circuit itself explained the similarities between DAPA and DACA, and in fact called DACA an apt comparator. It relied on specific findings about DACA itself in coming to the conclusion that DAPA, which was supposed to be implemented in the same process and the same manner that DACA was, made that finding to hold that DAPA was procedurally invalid.

So this is simply not a case where the Court is left to wonder why did the Acting Secretary discuss this Fifth Circuit case, why is it relevant, and what impact does it have --

THE COURT: Even with the discussion that you think is sufficiently fulsome and that I think may not be, even granting that, doesn't a reasoned explanation obligation under the APA, placed on the agency, mean that there should be some assessment of a detailed assessment of the legal issues by the executive branch through a 33-page memorandum by the Office of Legal Counsel? Isn't that something that a court should expect would be addressed as part of a reasoned explanation?

MS. DAVIS: Well, what the APA standard requires is that the agency provide rational connection between the reasons for its decision and the decision itself.

THE COURT: So your answer is no, that shouldn't --

MS. DAVIS: Well, I think -- obviously, we think that the Acting Secretary's decision is sufficient, and she provided a reasonable explanation. She acknowledged that they were repealing a policy, she provided good reasons for it, namely, the litigation risk and her concerns about the lawfulness. She did not ignore prior government positions like the OLC opinion. In fact, the OLC opinion is part of the administrative record. And she didn't ignore prior positions in litigation, which are themselves summarized in the Fifth Circuit case.

The point is those positions were positions that were made in defense of DAPA, which is analogous to the policy at issue here, and they were unsuccessful. So this isn't a case where we have an agency who's just ignoring what was said before and is

proceeding without explaining why they're doing what they're doing and what prompted the change. That information is all in the administrative record, and that meets the APA standard of review.

THE COURT: I'm curious as to the standard of review here and what deference you think the Court owes to the agency with respect to its interpretation of the law, the correctness of its decision.

MS. DAVIS: Sure. I think that the proper review here is whether the agency considered the relevant factors and whether the decision was a clear error of judgment. So basically the same --

THE COURT: Where does that standard of review come from, whether the error was a clear error of judgment?

MS. DAVIS: That comes from the *State Farm* case. And that's true even when the agency reverses policy, and that's true in this particular case with respect to the agency's concerns about lawfulness.

Now, whether or not plaintiff disagrees with the conclusion that DACA is lawful, unlawful, is irrelevant to the question before the Court. That's not the question. The question isn't whether this Court agrees or whether plaintiff agrees with the lawfulness of DACA.

THE COURT: I guess my question that I'm not sufficiently articulating for you is -- first of all, is the

view that the Department has reached with respect to the legality of DACA an interpretation of the relevant statutory authorities?

MS. DAVIS: I think it represents her concerns about the lawfulness based on the advice that was provided --

THE COURT: I don't think that really answers my question, though. My question is, is it an interpretation of the relevant statutory authorities in the INA?

MS. DAVIS: It doesn't include an explicit --

THE COURT: I know it's not there, but does it constitute an interpretation? I'm trying to search out whether I owe some deference to the agency in determining whether DACA is within its statutory authority.

MS. DAVIS: Sure. I think in either case, whether we look at the concerns that she gave or whether we consider it as an interpretation of their statutory authority deference is appropriate here because the question really is whether or not her interpretation, her conclusion was within the permissible range of interpretations. I mean, again, the question is not was DACA legal or not, it's was her conclusion rational and was it based on facts that are supported by the administrative record.

THE COURT: And do I owe her some *Chevron* deference in reaching that conclusion, in assessing that? Because it's the statute that the agency is charged with implementing and

applying.

MS. DAVIS: Correct.

THE COURT: Is there some *Chevron* deference that's appropriate here?

MS. DAVIS: I think in this particular context, nothing in the INA requires that the agency provide DACA, and there's nothing in the INA that precludes the agency from rescinding deferred action.

THE COURT: Okay. Let's assume that she reached that conclusion rather than you just articulating it. Do I owe her some deference?

MS. DAVIS: I would say because that is clear and there's nothing ambiguous --

THE COURT: And is it *Chevron* deference?

MS. DAVIS: What's that?

THE COURT: And is it *Chevron* deference? Or is it something else?

MS. DAVIS: I don't even think we would have to get to a step 2 *Chevron* analysis because there's nothing in the statute that requires DACA nor prohibits the agency from rescinding it. And nobody is arguing that in this case. Not even plaintiffs are saying that this is required or that she doesn't have the authority to rescind a policy.

THE COURT: There is something in one of the cases, I think it's in a footnote in the latest New York decision, about

the level of deference. And it triggered some thinking on my part as to whether we would be dealing with *Chevron* deference here at all, given the fact that we have a memorandum, the recision memorandum, that didn't -- isn't the result of notice and comment.

It's more in the nature of an enforcement guideline or interpretation. And the courts then look more to *Skidmore* deference, which is a much lower form of deference than *Chevron* deference, and it's only deference that depends on the persuasive value and the persuasiveness of the agency decision. And then again, we wind up in a situation that, as we've discussed already, that at least on some levels, there isn't that much in the agency decision in terms of explaining why there's no statutory authority. And you juxtapose that with a fairly lengthy discussion in the OLC memo as to why there is statutory authority.

MS. DAVIS: Correct. And as the Acting Secretary noted in the recision memo in the history of the Fifth Circuit decision, the arguments that were made in that OLC memo were litigated in defense of DAPA, and the courts found those to be unpersuasive, and four justices of the Supreme Court agreed with that decision in a split affirmance. So I think she's not --

THE COURT: The Supreme Court did what?

MS. DAVIS: There are four justices of the Supreme Court --

THE COURT: Four justices agreed, yes. There's no precedential value, by the way, from that decision.

MS. DAVIS: Correct.

THE COURT: And to the extent that the Acting Secretary says, "Taking into consideration the Supreme Court's rulings," it's not precedent to be taken into consideration.

MS. DAVIS: It's not precedential but it means that that Fifth Circuit decision stands. It was affirmed.

THE COURT: That's certainly true.

MS. DAVIS: And four justices of the Supreme Court agreed that it should be affirmed in a split decision.

THE COURT: That's certainly true.

MS. DAVIS: Now getting back to what exactly is the question before the Court. Recently in the District of Maryland in a case called *Casa de Maryland v. DHS*, and the opinion is available at 2018 WL 1156769.

THE COURT: I've read the decision.

MS. DAVIS: Then you know that Judge Titus in that case granted summary judgment in favor of defendants basically on that same -- applying that same scrutiny, which is whether or not the court believes DACA is in fact unlawful isn't the question. If the Acting Secretary reasonably believed it was unlawful, and that was supported in the administrative record, then he found that decision to be completely rational. And that's the same lens that we would ask this Court to look at the

decision through.

The recision memo explains that she had concerns about the lawfulness in light of the *Texas* litigation, in light of the Attorney General's letter.

THE COURT: But to the extent that this is a decision based on a legal assessment, would you disagree that that's a *de novo* review by the Court?

MS. DAVIS: I don't think that the Court has to determine whether or not the Attorney General, in providing advice, or the Acting Secretary in coming to a decision in this case, was right or wrong. That's not the question at issue. And this isn't a case where there's been a clear legal error, as plaintiffs would allege. And we can contrast the two cases -- or the case that they cite, *Teva Pharmaceuticals*, with this case here.

In *Teva* the FDA interpreted a statutory provision in a certain way solely because they thought the D.C. Circuit in prior opinions required that interpretation. And the D.C. Circuit said, no, our decision didn't require that interpretation, and in fact, it required the opposite. It required you to come up with an interpretation in the first instance.

So the legal error was that FDA attributed a holding to a case that did not exist. And this isn't the same kind of situation. The Court in *Teva* didn't say, here was your

interpretation and we disagree with it. And the same is true here. We're not dealing with a legal error; we're dealing with a judgment that was made based on facts supported in the record, what happened in the Fifth Circuit litigation, and the advice of the Attorney General. And based on those facts, it simply cannot be that her conclusion was a clear error of judgment.

THE COURT: To the extent that there's reliance on the Attorney General's letter, the Attorney General's letter says that DACA policy "has the same legal and constitutional defects that the courts recognized as to DAPA." Which is a reference to the Texas cases. But there was no recognition of constitutional defects.

MS. DAVIS: There was not.

THE COURT: They didn't reach the constitutional issues.

MS. DAVIS: No, they did not reach the --

THE COURT: So the Attorney General is not correct in saying that constitutional defects were recognized with respect to DAPA, is he?

MS. DAVIS: I think it was an error to assert that they had reached a constitutional issue in the Fifth Circuit. But the decision-maker in this case is the Acting Secretary, not the Attorney General, and when you look at her memo, there's no question that she understood correctly the Fifth Circuit holdings.

THE COURT: Although she relied on the Attorney General's letter.

MS. DAVIS: She did. But she also understood the Fifth Circuit's decision, which she described purely in statutory terms. But aside from the decision that -- or the basis for her decision that had to do with her concerns about the lawfulness, there is an independent reason that she provided for the recision, and that was the litigation risk that was posed in the *Texas* case.

THE COURT: I understand that an agency has to be able to make such assessments. But here that assessment is indistinguishable from the legal assessment. It's totally reliant on the legal assessment.

MS. DAVIS: I disagree. Litigation risk assessments are not necessarily legal determinations. An attorney who's going into a case and is advising their client on what they should do in that case looks to the law that's going to be binding in that particular case. You may not agree with what the law is in that particular district or in that particular circuit. It doesn't matter whether you agree with it or not; it's binding on the parties.

Here there is overlap in that the agency's decision is also supported by those cases, so there's not necessarily a disagreement, but one is not dependent on the other. They're two independent determinations.

THE COURT: So you think the litigation risk assessment is totally independent of the assessment of the lawfulness.

MS. DAVIS: Yes. The litigation risk was looking at the threat that was being posed in an ongoing case in the Southern District of Texas, and what decisions were going to be binding on both the parties and the court.

THE COURT: And a large part of the --

MS. DAVIS: And DACA had been amended into the complaint.

THE COURT: You done?

MS. DAVIS: Yes.

THE COURT: A large part of the litigation risk assessment was dependent upon this belief that a nationwide injunction would be entered with respect to DACA. Right?

MS. DAVIS: Yes.

THE COURT: Why is that a rational belief, that a court, faced with a program that had been underway for several years, that had serious impact on many hundreds of thousands of people, would be immediately and completely enjoined by a federal judge? Why is that a reasonable assessment? I understand what happened with DAPA, but DAPA was in an entirely different circumstance than DACA. DACA's an ongoing program with respect to hundreds of thousands of people that had real impacts. DAPA hadn't been put into effect yet.

MS. DAVIS: Correct. In the Southern District of Texas, the parties and the court would have both been bound by the Fifth Circuit's decision, and I think it's clear that the Fifth Circuit's reasoning would equally apply to DACA as well. So at the very least, the writing was on the wall for DACA if plaintiffs had made good on their threat in Texas. Now, the judge --

THE COURT: You say it's clear that the Fifth Circuit's reasoning would apply. I -- we'll leave that open.

MS. DAVIS: Okay. I'm happy to answer any questions on that, but to go back, the judge in the Texas litigation had entered a preliminary injunction on a nationwide basis against DAPA. So I think that it would be likely and a potential outcome that he would do the same thing in the -- in a case where DACA were before him as well.

THE COURT: Why? Why is that likely, given the impact and effect that it would have? Why wouldn't a court, at least as much as the Secretary, be looking for some orderly wind-down and some reasonable way of dealing with the circumstances presented?

MS. DAVIS: Well, even if the Court had determined that it would wind down the policy or impose an injunction that winded down the policy, that doesn't make the Acting Secretary's decision any less rational. There are many times in cases where parties decide that if they know what the likely outcome is

going to be, and one way or the other, whether the injunction was permanent or the injunction was preliminary, the writing was certainly on the wall. And parties in litigation oftentimes take voluntary actions so they have the ability to control the process, so that they can wind down a policy on their terms, under the timetable that they choose, rather than being subjected to court-imposed standards over which they do not have a lot of control. That's a completely reasonable rational decision to make in litigation and one that is made all the time.

THE COURT: Let me ask two questions that are sort of -- I did some of this with your opponents -- that are based on an assumption, not indicating how I'm going to rule, but based on the assumption that I were to grant the plaintiffs' partial summary judgment motion, decide for them on the APA issues, what do I do then with your motion to dismiss the constitutional claims?

MS. DAVIS: Oh, I think that you should grant our motion to dismiss the constitutional claims. But if you granted summary judgment in their favor, it would largely I think take care of the issues because you would be remanding the decision to the agency.

THE COURT: Well, that's what I'm getting at. If I were to do that on the APA claims and remand, wouldn't there be at least the possibility, I would think a realistic possibility,

of some further articulation of explanation from the Secretary? And wouldn't that potentially impact the constitutional claims?

What I'm indicating and asking you about, is whether, again assuming that I were to rule in their favor on the APA claims and remand, doesn't that mean in that circumstance that I should be hesitant to rule in your favor on the constitutional claims because -- or against you on the constitutional claims, because there could be some further explanation that would be relevant to that constitutional assessment?

MS. DAVIS: I agree. And if the decision were remanded, then I think that would in a way moot the constitutional claims because we would be coming back to the Court potentially with --

THE COURT: Whatever the right terminology is.

MS. DAVIS: Sure.

THE COURT: So the other question I have, again on the same hypothetical basis, is if I were to rule in favor of the plaintiffs on their motion for summary judgment on the APA claims, what should I do? What's the remedy? What's the relief in your view? Is it an APA-type relief where I should remand? And if so, and if remand is appropriate, what about vacatur?

MS. DAVIS: I think this is an APA case like any other APA case. And the proper remedy, if the Court finds an inadequate explanation or some other procedural defect, is that it should remand to the agency for further proceedings. I do

not believe that in this case the Court should vacate the ruling.

Basically what we have here is the recision of a policy. So vacatur of a recision would in effect be a mandatory injunction that the agency should go back to implementing the DACA policy.

THE COURT: Let's not call it a mandatory injunction. I don't think the courts normally call that a mandatory injunction in APA cases. APA cases are a dime a dozen in this court and in this circuit. And I don't think that the decision whether to remand and then the decision whether to vacate is usually termed in mandatory injunction terminology.

MS. DAVIS: It's not, but in this particular case what we're dealing with is the recision of a policy. So if the recision policy is remanded, that would essentially mean that the agency would have to continue operating the policy that it had just rescinded, and in that sense, is an injunction to continue operating the DACA policy. And that just can't be. This isn't like a normal case where it's a positive policy, some positive policy has been announced, and if the Court vacates --

THE COURT: I don't see why it's any different than the mine run of rules, regulations, orders, et cetera, that come for APA-based review in the courts and the decision is always, you know -- if the plaintiffs win, is always just, okay, does it get remanded? Yes. And then is the challenged policy, rule,

regulation, whatever it may be, subject to being vacated?

MS. DAVIS: Correct. And under the two-prong standard that the Court discussed earlier, the government's position would be that it should not be vacated.

THE COURT: And why is that?

MS. DAVIS: Because, if there is something that the Court has identified as defective in the agency's decision, I believe that it would be something that could be corrected on remand that wouldn't warrant the Court vacating the recision.

THE COURT: That's the first part of the test. The second part of the test is basically what the chaos or burdens would be from vacating or not vacating.

MS. DAVIS: In this particular context, the chaos would be significant. It would essentially be --

THE COURT: Why? You've already got preliminary injunctions out there.

MS. DAVIS: That's true. Well, I mean, that's another reason why vacatur isn't necessary in this case. There's two other --

THE COURT: But it also is a reason why there wouldn't be chaos, because there's already preliminary injunctions.

MS. DAVIS: Well, the preliminary injunctions were limited. They didn't enjoin the recision policy in total and just returned to the state of play when DACA was --

THE COURT: Because right now, new applications are

not being accepted and reviewed by the agency. Correct?

MS. DAVIS: Correct.

THE COURT: And if I vacated, you think the agency would be under an obligation to then consider new applications?

MS. DAVIS: If you vacated the policy --

THE COURT: The recision.

MS. DAVIS: -- the recision policy in its entirety, then essentially the Court would be ordering the agency to return to the policy that was in place before, and that --

THE COURT: So your interpretation would be that vacatur would require the agency to then accept new applications.

MS. DAVIS: Exactly. And I think that would be overbroad because in this case there are no plaintiffs or parties that are represented by the plaintiffs in this case who are new applicants -- or new requesters who have never received DACA before, so this Court would actually be going a step further in granting relief to parties that are not even before the Court.

THE COURT: So what if I decided to -- I think this plays into what you just said and perhaps makes my question nonsense, but I'll ask it anyway. And that is, if I decided to vacate -- in other words, still on this hypothetical ruling that is in the plaintiffs' favor on the APA claims with remand and then I decided to vacate, should there be a limitation to the

breadth of that vacatur? Vacate only as to the plaintiffs in this case? Or is something like that appropriate?

MS. DAVIS: Yes. We think that whatever relief that this Court grants, that that needs to be tailored to the particular parties in this case and the particular injuries that have been pled.

THE COURT: But the problem with that -- and again, I'm not venturing in this conversation into the general concept of nationwide injunction -- but I think the D.C. Circuit has said -- it's rejected the agency's suggestion that named plaintiffs alone should be protected, and that when a reviewing court determines that regulations in that instance are unlawful, the result is that the rules are vacated, not that their application just to the specific individual petitioners is proscribed. And that's the *Harmon v. Thornburgh* case.

So it seems to me that in that context there's a little bit of problem that you have with D.C. Circuit law with suggesting that a limited vacatur only as to the parties in this case would be appropriate.

MS. DAVIS: Well, I mean, depending on the relief that's granted, whether it's vacatur or injunctive relief, and especially so in the case of injunctive relief, and preliminary injunctive relief especially, there are important constitutional and equitable principles that are at play that require parties when they come to court to prove standing for each relief that

is requested; for the remedy that's provided to be no more than is needed to correct the injury that has been alleged; and especially in injunctive relief, that the injunction is no more burdensome than necessary to correct the harm.

And I think that there are important limitations that have been noted in the other preliminary injunctions, and while they, I believe, are overbroad to begin with, there were important limitations. And one of them was that no -- the agency didn't have to process new requests from DACA recipients who had never requested DACA before.

THE COURT: I have two final questions. I've kept you up there a long time, and I want to give the plaintiffs a chance for just a couple of minutes to respond. Do you -- not you personally, but does your side take the position in this litigation at this time that DACA was unconstitutional?

MS. DAVIS: I believe that the Attorney General's letter -- and the Attorney General speaks for the Department of Justice -- noted the constitutional defects with respect to DACA.

THE COURT: It said that it was unconstitutional? What's the basis for that conclusion?

MS. DAVIS: I believe the basis that is inferred from the Attorney General's letter is that there is an issue with the separation of powers, that the executive branch is prescribed by the Constitution to enforce the laws, and that the Congress is,

you know, in charge of making the laws. And when Congress has repeatedly refused to provide in the form of legislation a type of relief to a particular group of individuals, that the executive branch cannot then go and essentially legislate a solution to that problem.

THE COURT: Do I owe any deference to the Attorney General in that assessment of constitutionality?

MS. DAVIS: I believe in the context of this case, again, the lens is whether or not the Acting Secretary's decision was rational.

THE COURT: Do I owe any deference to the Acting Secretary with respect to that decision? I don't think she reached a decision that DACA was unconstitutional. Or do you think she did?

MS. DAVIS: I think she relied on the advice that was provided by the Attorney General and that included concerns about --

THE COURT: All right. So let's assume that she did reach that conclusion. Do I owe deference to that? To a conclusion that a prior act by the agency was unconstitutional? I owe deference to the agency on that?

MS. DAVIS: I think in this case the question is not whether or not this Court believes that DACA was in fact lawful. It's whether or not the agency's decision was rational based on the factual record and the administrative record.

THE COURT: So in a sentence or two, can you tell me what is the argument that DACA was implemented without statutory authority? That is stated in the Attorney General's memorandum. But of course we've all seen that Section 202(5) of Title VI does authorize the agency, the Department of Homeland Security, to establish national immigration enforcement policies and priorities.

So is DACA somehow outside of that statutory authority? What's the basis for the argument that DACA was implemented without statutory authority?

MS. DAVIS: It's the reasoning that would be articulated in the Fifth Circuit's decision with respect to DAPA, which was an analogous deferred action program that was granted to a large group of individuals that allowed for incremental deferred action to be granted in DAPA on a three-year basis.

THE COURT: But there there's a statutory provision that's actually in conflict.

MS. DAVIS: Correct.

THE COURT: Here there's not.

MS. DAVIS: There's not, but I think that fact makes DACA on shakier ground than firmer ground.

THE COURT: Really? I don't think that's normally the assessment either in a separation of powers context or otherwise. If Congress has spoken and there's something

inconsistent with what the executive branch is doing, that makes the executive branch's action more questionable, not less questionable.

MS. DAVIS: Well, what the Fifth Circuit found was, under the broad delegation of authority to the Secretary of the Department of Homeland Security, that that broad delegation cannot be characterized as including the ability to make decisions on deferred action that had vast social and political and economic outcomes. And that was exactly what happened in DAPA because, you know, it applied to a large group of individuals and provided work authorization. And the same reasoning applies equally to DACA.

Now, there, with DAPA, there was a pathway for individuals to gain a lawful presence here in the United States, and there's not one for DACA. But courts have said where there are explicit remedies that are set forth in a statute, for certain individuals, that the court should be wary of reading in other remedies that are not there.

When Congress was determining who should by statute get discretionary relief, it did not include those individuals who would be eligible for DACA. In fact, it has, on multiple occasions, considered whether or not there should be a statutory pathway for those individuals, and it has decided not to legislate for them.

THE COURT: I think it's an overstatement to say that

Congress has decided anything on that question. But thank you, Ms. Davis.

MS. DAVIS: Your Honor, do you have any questions about the notice and comment?

THE COURT: No, I don't think so. I think that that's been covered in your briefing, and I don't think I need to hear anything further.

MS. DAVIS: May I speak very briefly on the information sharing policy claims and the request for injunctive relief?

THE COURT: You may take one minute.

MS. DAVIS: Okay, one minute. I can do them in one minute because it's very simple. The information sharing policy has not changed. Mr. Sellers came up here and he described to you why he thinks it has changed because there was a slight modification in some language in an FAQ that came out with the recision that restated the information sharing policy.

To the extent there was any confusion, that language certainly was not intended to make a change and in fact has not. To the extent there was any confusion, the Department of Homeland Security has issued publicly on its website subsequent FAQs that make very clear that the information sharing policy has not changed, it remains the same as it was in June of 2012 when DACA was rolled out, and therefore, there simply is no basis for this due process claim.

Second, there was no --

THE COURT: Is everything that I need that you've referred to already in the record?

MS. DAVIS: That I just referred to?

THE COURT: Yes.

MS. DAVIS: Yes. We've cited the FAQ that recently came out that confirmed that there has been no change. That is in our briefing. And I believe the FAQs that they rely on have been incorporated into their complaint.

And as another matter, there's never been a promise by the agency that information would not be shared in any circumstance or that the policy would never change. The entire information policy -- and it's the same in every single document that they've incorporated into their complaint and referred to in their preliminary injunction motion -- it has always included exceptions for the use and sharing of information and explicitly stated that it could be modified, superseded or terminated at any time.

So for the plaintiffs really to ignore those parts of the policy and only focus on the ones that are very helpful to them in their view is simply cherry-picking.

And to the extent that they think any injunctive relief is necessary on the information sharing claim, I would say that they have not shown any imminent harm with respect to the information sharing policy.

THE COURT: If it's not a preliminary injunction but rather a ruling on the -- final ruling on the merits, I'm not sure there's a harm analysis that's necessary. Do you think it's appropriate for me to rule as a final matter on that question?

MS. DAVIS: We believe the Court can dismiss that claim now. They have not met the pleading standard and they have not stated a claim for a due process violation --

THE COURT: Can I rule in their favor on summary judgment now? I know you don't want me to. But it's a procedural question.

MS. DAVIS: In our view, there's no genuine dispute about a material fact. The policy has not changed, and that's simple. And there's never been a promise that it would not be changed in the future. So in that respect, yes, I think you could enter final judgment on that claim, and we would ask that you enter it in favor of the government.

THE COURT: All right.

MS. DAVIS: And just to note, there is a -- the government has recently represented in the District of Maryland case where there is an outstanding permanent injunction with respect to the information sharing policy. We've at least represented in the context of trying to amend that injunction that the information policy would not be changed and that we would comply with that policy.

THE COURT: Well, if you made that representation, then you should make that representation by filing something here. I don't like to rule on just what counsel says from the lectern.

MS. DAVIS: Sure.

THE COURT: So if you think there's something that is relevant to my assessment of that issue, you should submit something.

MS. DAVIS: Okay.

THE COURT: Not a brief.

MS. DAVIS: No need for more paper in this case, Your Honor. But just to make the Court aware, that representation has been made with respect to another injunction. Again, merits against further injunctive relief here or the necessity of any relief at all.

So, Your Honor, I would just ask that the Court dismiss plaintiffs' complaint, or in the alternative grant summary judgment in favor of defendants in this case and to deny plaintiffs' cross-motion.

THE COURT: Thank you. So very briefly, whatever points you wish to make.

MR. PERRELLI: Certainly, Your Honor. Very briefly. We do think this is a legal judgment. Litigation risk, I know there's been a lot of discussion about that post hoc, but as I think the Court indicated, to the extent that it's a decision

based on a legal assessment, and that was the sole basis for it, it sort of merges into the legal judgment.

Whatever that legal judgment was -- and I think, you know, only now are we starting to hear a new sort of separation of powers rationale -- it's insufficiently explained, and we think the Court can rule based on that lack of explanation.

We also think, to the extent it is a conclusion based on the INA that the Secretary did not have discretion to have DACA or a program like DACA, we think it was wrong. And we would note Judge Alsup's decision on page 32 where he struggles with this question of the government has told me all these things are legal and they have massive discretion, why is this program a problem? We don't think that's ever been explained by the government in this case or in any case.

THE COURT: So why isn't Judge Titus right that all we need here is sort of a reasonable explanation? I hesitate to say close enough for government work, but if the government comes forward with a reasonable explanation, it doesn't have to be right. It's just that it's good enough under an arbitrary and capricious assessment.

MR. PERRELLI: I think that legal questions are reviewed *de novo*. And I think here again I go back to the *Prill* line of cases, which is the government is saying here that it's -- asserting here that it's exercising its discretion. But it can only exercise discretion if it knows that it has it. And

if the Secretary is relying on something from the Attorney General that says something is unlawful, and it's not, then there I think *Prill* and that line of cases come into play. As we said, I don't think we even get there because it's just not sufficiently explained.

All the arguments about the Fifth Circuit, we don't know, is it a notice and comment problem that the Fifth Circuit talked about? The substantive DAPA analysis in the Fifth Circuit deals, as the Court said, with a host of statutory provisions, intricate provisions related to family members and their immigration status. Nothing, as the Court indicated, deals with inculpable children who were brought to this country.

Last thing I wanted to mention was just on the remedial issues, the Court asked about it, essentially applying *Allied Signal*, the two-part test, in *Allied Signal* here. On the disruption point, I don't think the government can really argue that there is disruption from vacatur here in this sense. They have not sought stays of the other injunctions in this case, they have said to the Supreme Court they wanted to get there quickly because they thought it was just better to sort of leave DACA in place while these cases -- they wanted to rocket them to the Supreme Court, but leave it in place while the cases were being litigated.

THE COURT: What about with respect to new applications and their belief that they would be under an

obligation to accept the process and rule on new applications?

MR. PERRELLI: And, Your Honor, we believe if there is vacatur here, there would be an obligation to accept new applications. We recognize that is different from the injunctions currently in place. There are -- recision was done on a particular day and as of the next day, if you were writing your application, you were unable to apply, you were harmed. And we think that vacatur is appropriate here of the recision, and that also the result should be that they should be required to take new applications because they do not have a policy in place other than the DACA policy which should -- after the court's ruling.

THE COURT: All right. Thank you, Mr. Perrelli.

MR. PERRELLI: Thank you, Your Honor.

THE COURT: Thank you all. I appreciate the briefing and the argument. The case is submitted and I will get on with it as quickly as I can. Thank you all.

(Proceedings adjourned at 12:09 p.m.)

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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Bryan A. Wayne
BRYAN A. WAYNE