

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION FOR	.	
THE ADVANCEMENT OF COLORED	.	CA No. 17-1907 (JDB)
PEOPLE, et al.,	.	
	.	
Plaintiffs,	.	
v.	.	
	.	
DONALD TRUMP, et al.,	.	
	.	
Defendants.	.	
.....	.	
	.	
THE TRUSTEES OF PRINCETON	.	CA No. 17-2325 (JDB)
UNIVERSITY, et al.,	.	
	.	
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,

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

3 THE COURT: Thank you, Mr. Perrelli.

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

9 THE COURT: Good morning to all of you.

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

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

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

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

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

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

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

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

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

4 In addition, Your Honor, we think --

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

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

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

19 MR. LUCAS: Yes, Your Honor.

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

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

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

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

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

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

15 THE COURT: How would you like to read them?

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

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

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

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

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

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

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

24 THE COURT: What are the multiple reasons?

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

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

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

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

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

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

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

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

19 THE COURT: Which two cases are you distinguishing
20 between?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 In fact, Justice Stevens in his concurrence in the

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

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

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

16 THE COURT: I'll do so.

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

1 policy of not going after lethal injection drugs affected around
2 200 inmates on death row at that point. So it was not sort of a
3 single-shot individual nonprosecutorial discretion decision; it
4 was in fact based on the FDA's view that it lacked jurisdiction.

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

8 MR. LUCAS: Yes, Your Honor.

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

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

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

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

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

22 MR. LUCAS: Even accepting --

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

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

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

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

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

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

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

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

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

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

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

1 particular action.

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

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

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

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

22 THE COURT: All right.

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

25 THE COURT: Let's move on.

1 MR. LUCAS: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 THE COURT: Why does that make it reviewable?

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

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

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

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

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

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

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

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

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

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

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

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

1 THE COURT: All right.

2 MR. PERRELLI: Thank you.

3 THE COURT: Good morning.

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

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

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

24 THE COURT: Basically, notice and comment.

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

1 recision of DACA is a substantive rule --

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

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

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

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

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

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

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

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

25 THE COURT: What case stands for that proposition?

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

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

10 MS. HARRISON: A little bit --

11 THE COURT: -- leaves me a little doubtful.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 Third --

25 THE COURT: This is leading into the litigation risk

1 articulation.

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

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

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

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

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

22 THE COURT: All right.

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

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

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

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

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

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

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

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

14 THE COURT: Setting aside the notice and comment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MS. HARRISON: Well, I think what the D.C. Circuit
17 would say is first you look at the language of the guidelines
18 and the priorities, and if it speaks in mandatory language,
19 using words like "will," that suggests the rigor of a rule and
20 not the pliancy of a policy. And therefore, yes, it does have
21 to go through notice and comment, but you also look at is it
22 outcome determinative. And that's what the Court asked in
23 *Pickus*. And I think in this case undoubtedly it's outcome
24 determinative because there is no alternative way in which these
25 800,000 people are going to be able to get deferred action.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 THE COURT: Illegal meaning without statutory
9 authority?

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

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

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

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

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

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

18 THE COURT: Law or policy.

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

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

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

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

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

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

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

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

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

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

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

6 THE COURT: Good morning.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 THE COURT: Well, I hope they don't enjoin this Court.

2 (Laughter.)

3 That's not what injunctions normally do.

4 MR. SELLERS: I understand, and as a result I think
5 this Court is fully in a position to render its own decision
6 pursuant to the precedent in this circuit.

7 THE COURT: But the question with respect to harms and
8 a preliminary injunction is whether I need to render a decision.

9 MR. SELLERS: I understand. And -- well, I would
10 submit that at any time those injunctions may be modified, they
11 may be dissolved.

12 THE COURT: That doesn't usually cut it for the
13 immediacy of the threat of irreparable harm.

14 MR. SELLERS: Well, the record speaks for itself. I
15 submit to you that the government has taken the position that it
16 can change its position at any time with respect to information
17 sharing. I recognize that the Court in California and the Court
18 in Maryland at least have both directed maintenance of the
19 status quo as to this position. The decision in California is
20 up on review in the Ninth Circuit. I understand the decision in
21 Maryland is maybe subject to further review. It was just issued
22 I think two weeks ago. And so we may be back here soon. And if
23 that's the way the Court wishes to proceed, we will do so.

24 THE COURT: Well, so set aside the preliminary
25 injunction for a second, and tell me why it is you think this

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. SELLERS: We are seeking a vacatur.

11 THE COURT: And why?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. SELLERS: I understand.

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

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

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

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

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

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

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

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

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

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

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

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

24 THE COURT: All right.

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

1 points. As my understanding is that plaintiffs here do not
2 solely argue that *Crowley* alone disposes of this issue. They
3 seem to suggest in both their reply and today that perhaps
4 there's some general nonenforcement policies or general
5 enforcement policy changes that would be unreviewable under
6 701(a)(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 THE COURT: Both what?

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

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

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

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

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

11 (Laughter.)

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

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

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

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

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

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

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

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

1 to challenge DACA.

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

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

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

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

19 THE COURT: Legal rationale.

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

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

1 the unlawfulness.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Now, also in the administrative record is the Fifth

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 applying.

2 MS. DAVIS: Correct.

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

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

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

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

14 THE COURT: And is it *Chevron* deference?

15 MS. DAVIS: What's that?

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

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

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

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

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

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

23 THE COURT: The Supreme Court did what?

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

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

3 MS. DAVIS: Correct.

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

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

9 THE COURT: That's certainly true.

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

12 THE COURT: That's certainly true.

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

17 THE COURT: I've read the decision.

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

1 decision through.

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

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

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

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

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

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

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

13 MS. DAVIS: There was not.

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

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

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

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

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

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

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

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

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

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

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

8 THE COURT: And a large part of the --

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

11 THE COURT: You done?

12 MS. DAVIS: Yes.

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

16 MS. DAVIS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

14 THE COURT: Whatever the right terminology is.

15 MS. DAVIS: Sure.

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

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

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

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

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

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

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

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

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

5 THE COURT: And why is that?

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

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

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

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

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

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

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

25 THE COURT: Because right now, new applications are

1 not being accepted and reviewed by the agency. Correct?

2 MS. DAVIS: Correct.

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

5 MS. DAVIS: If you vacated the policy --

6 THE COURT: The rescision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MS. DAVIS: Correct.

20 THE COURT: Here there's not.

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

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

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

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

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

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

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

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

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

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

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

11 THE COURT: You may take one minute.

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

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

1 Second, there was no --

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

4 MS. DAVIS: That I just referred to?

5 THE COURT: Yes.

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

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

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

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

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

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

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

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

18 THE COURT: All right.

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

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

5 MS. DAVIS: Sure.

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

9 MS. DAVIS: Okay.

10 THE COURT: Not a brief.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 obligation to accept the process and rule on new applications?

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

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

14 MR. PERRELLI: Thank you, Your Honor.

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

18 (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