Nos. 18-587, 18-588, & 18-589

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Counsel Listed on Inside Cover

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

ARI CUENIN
LANORA C. PETTIT
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

QUESTIONS PRESENTED

1. Whether the Department of Homeland Security (DHS)'s decision to wind down the DACA policy is judicially reviewable.

2. Whether the DHS's decision to wind down the DACA policy is lawful.

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Alaska, Arizona, Arkansas, Florida, Kansas, Louisiana, Nebraska, South Carolina, South Dakota, and West Virginia, and Governor Phil Bryant of Mississippi.[1]

The present lawsuits have forced the Executive to retain an unlawful "deferred action" program known as DACA. The administration is correct that DACA is unlawful: DACA operates contrary to substantive immigration law by affirmatively conferring "lawful presence" status and work-authorization eligibility on over 1.7 million unlawfully present aliens. DACA is thus materially identical to two programs (Expanded DACA and DAPA, *see infra* n.5) that were invalidated by the Fifth Circuit in a ruling affirmed by an equally divided vote of this Court. *See Texas v. United States*, 809 F.3d 134, 172, 184-86 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam) (*Texas I*).

DACA, like the programs held unlawful in *Texas I*, inflicts ongoing irreparable harm on the States. For example, amici "bear the costs of providing . . . social services required by federal law," including healthcare, education, and law-enforcement. *Texas v. United States*, 328 F. Supp. 3d 662, 700 (S.D. Tex. 2018) (*Texas II*). "[B]ecause DACA increases the total number of aliens in

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. The parties consent to the filing of this brief.

the States by disincentivizing those already present from leaving, the States must provide more . . . social services, which cost more." *Id.* According to an expert retained by DACA's defenders in *Texas II*, Texas alone "incurs more than $250,000,000 in total direct costs from DACA recipients per year." *Id.* at 700-01.

To seek redress for these injuries, a group of States, led by Texas, notified the federal government that it would challenge DACA on the same bases that succeeded as to DAPA and Expanded DACA unless the federal government rescinded DACA. AR 238-40.[2] In response, the Executive issued the September 2017 memorandum at issue here announcing DACA's rescission. Based on the memorandum, Texas and the other States agreed to dismiss their pending lawsuit. Pls.' Stip. of Voluntary Dismissal at 1, *Texas v. United States*, No. 1:14-cv-254 (S.D. Tex. Sept. 12, 2017), ECF No. 473. But DACA was not wound down. DACA's rescission was enjoined, and the Texas-led coalition ultimately filed suit seeking a declaration that DACA was unlawful. *Texas II*, 328 F. Supp. 3d 662.

This case thus directly implicates the States' effort to bring about an orderly end to DACA and threatens to continue the numerous harms inflicted on the States by this lawless program.

SUMMARY OF ARGUMENT

I. The courts below erred by concluding that DACA was lawful. The Executive decided to wind down

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[2] AR cites the Administrative Record, filed as Notice of Filing Administrative Record, *Regents of the University of California v. United States Department of Homeland Security*, No. 3:17-cv-5211-WHA (N.D. Cal. Oct. 6, 2017), ECF No. 64-1.

DACA after a new administration concluded that DACA was unlawful for the reasons affirmed by the Court in *Texas I*, or at least that DACA would likely be held unlawful, creating significant litigation risk if the program continued. Pet. App. 114a-18a.[3]

Respondents in these consolidated cases argue that rescinding DACA was arbitrary and capricious because the Executive's conclusion that DACA was unlawful was incorrect or insufficiently explained. The courts below and the Fourth Circuit have agreed. *E.g.*, *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 494-504 (9th Cir. 2018) (*Regents*); *CASA de Md. v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 697-701 (4th Cir. 2019).[4] As the multistate coalition litigating *Texas II* has demonstrated, the Executive was correct for several reasons. Amici will focus on two that demonstrate the fundamental misunderstandings of law underlying the decisions under review.

A. DACA is substantively unlawful because it exceeds the scope of authority delegated to the Executive by the INA. As the Court has repeatedly recognized, the power to establish when aliens are lawfully present is "entrusted exclusively to Congress," which has enacted "extensive and complex" statutes governing (among other things) lawful presence. *Arizona v. United States*, 567 U.S. 387, 395, 409 (2012) (quotation

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[3] Pet. App. cites the Appendix to the Petition for a Writ of Certiorari Before Judgment in *United States Department of Homeland Security v. Regents of the University of California*, No. 18-587 (S. Ct. filed Nov. 5, 2018).

[4] Although *CASA de Maryland* has not been consolidated with this case, it presents the same threshold legal issues.

marks omitted). Congress delegated limited rule-making authority to the Executive, which DACA exceeds.

Congress has never given the Executive *carte blanche* to grant lawful presence to any alien it chooses not to remove, let alone benefits including work authorization, health care, unemployment, and a pathway to citizenship. To the contrary, Congress enacted the Immigration Reform and Control Act (IRCA) in 1986 "as a comprehensive framework for combating the employment of illegal aliens." *Id.* at 404 (quotation marks omitted). Congress has defined numerous categories of aliens entitled to or eligible for work authorization. Entirely absent are the aliens covered by DACA. DACA contradicts those mandates and would render Congress's detailed provisions surplusage.

B. Even if the Court were to conclude that DACA is substantively lawful, DACA is procedurally invalid because it seeks to change this nation's immigration law without following the APA's notice-and-comment procedure. For forty years, this Court has held that any "substantive" agency rule that "affect[s] individual rights and obligations" must go through the notice-and-comment procedures established by the APA. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). DACA falls within this category of "substantive" rules because it sets criteria by which more than a million unlawfully present aliens may seek access to numerous benefits. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Moreover, DACA imposes extensive obligations on States to provide social services to an entire class of people. Assuming such changes could be adopted without congressional action, they could not be adopted without APA notice and comment.

Plaintiffs cannot avoid this commonsense conclusion by asserting that DACA is merely a "general policy statement," which leaves signficant discretion to the Executive. As the Fifth Circuit noted in *Texas I*, DACA and its Operating Procedures "contain nearly 150 pages of specific instructions for granting or denying deferred action." 809 F.3d at 173 (alterations omitted). Such a system affords line-level employees at the Department of Homeland Security (DHS) little practical discretion, belying the notion that DACA is a "general policy statement" without binding effect.

II. Three circuit courts have now examined the sweeping changes to American immigration law effected by the creation of DACA (or the closely related Expanded DACA and DAPA programs[5]), and two of them have considered DACA's rescission. *Texas I*, 809 F.3d at 163-70; *Regents*, 908 F.3d at 494-504; *CASA de Md.*, 924 F.3d at 697-701. These courts agree that these Executive actions were rules subject to judicial review. This conclusion follows the text of the Immigration and Nationality Act (INA), the Administrative Procedure Act (APA), and this Court's precedent.

III. Because DACA exceeded DHS's authority under the INA and was promulgated without notice and comment, it was never a valid legislative rule. It cannot

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[5] DHS announced DACA in 2012 to grant lawful presence to aliens who arrived in this country as children. In 2014, DHS expanded DACA to cover additional aliens and lengthen the lawful-presence period for aliens awarded relief. At the same time, DHS created the DAPA program to provide lawful presence for unlawfully present aliens with children who were either U.S. citizens or lawful permanent residents. *See Texas I*, 809 F.3d at 147-49.

be arbitrary or capricious for the Executive to rescind a program that was both substantively and procedurally unlawful. Indeed, such a rule is incompatible with our constitutional system, which imposes on the President an obligation "that the Laws be faithfully executed." U.S. Const. art. II, § 3.

ARGUMENT

I. DACA Is Unlawful.

DACA effected one of the largest shifts in immigration policy in American history, granting "lawful presence" to hundreds of thousands of unlawfully present aliens. That policy shift occurred without public input because the Executive bypassed APA notice-and-comment procedures. And it violated substantive immigration laws duly enacted by Congress.

On June 29, 2017, an 11-state coalition, led by Texas, sent a letter to the federal government proposing a DACA wind-down to end the *Texas I* litigation challenging the Executive's ability to unilaterally confer lawful presence and work authorization. AR 238-40. At that time, *Texas I* challenged only DAPA and Expanded DACA, but the coalition informed the Attorney General that it would expand the case if DACA were not wound down. AR 239-40. This letter explained how the legal arguments that the Fifth Circuit, and ultimately this Court, sustained against DAPA applied equally to DACA. AR 238-39.[6]

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[6] Also available to the Attorney General was an amicus brief filed before this Court, Br. for the States of Texas et al., *Brewer v. Ariz. Dream Act Coal.*, No. 16-1180, 2017 WL 1629324 (U.S. May 1, 2017), which explained that DACA was unlawful for the same substantive and procedural infirmities

The letter persuaded DHS that DACA is unlawful. DHS effectively acceded to Texas's request "after consulting with the Attorney General, and considering the likelihood of success on the merits of the ongoing litigation." AR 254. On September 5, 2017, Acting DHS Secretary Elaine C. Duke issued a memorandum stating that the "DACA program should be terminated" in light of the "rulings in the ongoing litigation." AR 255. In particular, Secretary Duke invoked the Fifth Circuit's decision in *Texas I*, which concluded that DAPA "conflicted with the discretion authorized by Congress" because the INA "'flatly does not permit the reclassification of millions of illegal aliens as lawfully present,'" and that "implementation of the program did not comply with the [APA] because the Department did not implement it through notice-and-comment rulemaking." AR 253-54 (quoting *Texas I*, 809 F.3d at 184). Secretary Kristjen M. Nielsen issued a separate memorandum on June 22, 2018 further explaining the Agency's conclusion that DACA was unlawful and should be discontinued for policy reasons. Pet. App. 120a-126a.

DHS's conclusion was correct. For the reasons Texas presented in the letter and successfully litigated in the Southern District of Texas, DACA is substantively and procedurally unlawful.

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found in *Texas I* regarding Expanded DACA and DAPA, *see* Br. for State Respondents at 44-70, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 1213267.

A. DACA contravenes Congress's extensive immigration-enforcement scheme.

DACA is substantively unlawful for the same reasons the Fifth Circuit held Expanded DACA and DAPA unlawful. The Fifth Circuit assumed without deciding that the standard set forth in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), controlled the review of DAPA. *Texas I*, 809 F.3d at 178-79 & n.159. Under *Chevron*'s familiar two-part test, a court must defer to an agency's interpretation of its own statute if the text of the statute is ambiguous and the agency's interpretation is reasonable. *Chevron*, 467 U.S. at 844. DACA, like DAPA, fails *Chevron* at either step: Congress has unambiguously spoken to the precise questions at issue, *id.* at 842-43; *Texas I*, 809 F.3d at 185-86. And a program that is "manifestly contrary" to Congress's statutory scheme is necessarily unreasonable. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Texas I,* 809 F.3d at 186.

1. DACA contravenes Congress's extensive statutory framework for lawful presence.

DACA violates Congress's extensive statutory framework defining when aliens are lawfully present in the country. Beneficiaries under DACA receive so-called "[d]eferred action," which in this context "means that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States." *Texas I*, 809 F.3d at 168 & n.107 (quoting executive memo extending DACA's deferred-action period from two to three years).[7]

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[7] The Executive has repeatedly explained that under DACA, "while [an applicant's] deferred action is in effect," the alien is

DACA's purported grant of lawful presence violates the INA. As the Fifth Circuit explained in *Texas I*, the "INA flatly does not permit the [Executive to deem] aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits." 809 F.3d at 184. The Executive has no power to unilaterally create immigration classifications that authorize aliens' presence in this country because "the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present." *Id.* at 179.[8]

a. "Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress"—not the Executive. *Arizona*, 567 U.S. at 409; *see* U.S. Const. art. I, § 8, cl. 4. Congress has accordingly enacted "extensive and complex" statutory provisions governing when aliens may be lawfully present in the country. *Arizona*, 567 U.S. at 395; *accord Texas I*, 809 F.3d at 179.

Congress has delineated over 40 classes of lawfully present aliens. *See Texas I*, 809 F.3d at 179. The INA

"considered to be lawfully present in the United States." USCIS, Frequently Asked Questions, https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (last visited July 20, 2019). The Executive has even described DACA recipients as having "lawful status." U.S. Br. as Amicus Curiae in Opp. to Reh'g En Banc 16, *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (No. 13-16248).

[8] DACA also violates the Take Care Clause, U.S. Const. art. II, § 3, because DACA "dispens[es]" with certain immigration statutes. *Kendall v. United States*, 37 U.S. 524, 613 (1838); *See* Zachary Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 676, 690-91 (2014).

creates two primary categories of aliens permitted to be present in the country:

- Aliens admitted as "nonimmigrant" aliens, who receive temporary permission to be lawfully present according to one of several visa categories, 8 U.S.C. § 1101(a)(15)(A)-(V); and
- Aliens admitted under "immigrant" visas, who have lawful permanent residence (LPR) status, commonly known as possessing "green cards," *id.* §§ 1101(a)(20), 1151, 1153, 1181.

Congress also created other avenues to lawful presence, such as admission as a refugee, *id.* §§ 1157, 1159, asylum, *id.* § 1158, and humanitarian "parole" into the country, *id.* § 1182(d)(5)(A).

By contrast, "unlawful presence" is defined as an alien's presence in the United States "after the expiration of the period of stay authorized by the [Executive] or presen[ce] in the United States *without being admitted or paroled*." *Id.* § 1182(a)(9)(B)(ii) (emphasis added). Of course, an alien's unlawful presence does not automatically mean that he will be removed. Congress has imposed several statutory limitations on removal. *E.g.*, *id.* §§ 1229b (cancellation of removal), 1231(b)(3) (withholding of removal). And, due to limited enforcement resources, the Executive generally has "discretion to abandon" removal proceedings on a "case-by-case basis"—forbearance rooted in prosecutorial discretion and traditionally called "deferred action." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 & n.8 (1999) (*AADC*). But this traditional conception of deferred action is far removed from "deferred-action status" as DACA defines it: granting lawful presence on a

systematic basis to potentially over one million otherwise unlawfully present aliens.

To be sure, there are four narrow contexts in which Congress has decided to grant lawful presence to certain categories of unlawfully present aliens. These include (1) certain aliens seeking relief under the Violence Against Women Act, (2) immediate family members of LPRs killed by terrorism or (3) in combat, and (4) applicants for T- and U- visas denied an administrative stay. *See Texas II*, 328 F. Supp.3d at 717 n.78 (collecting statutes). But no such legislation covers unlawfully present aliens who entered the country as minors. Indeed, as discussed further below (at 25 & n.17), such legislation has been repeatedly proposed and rejected.

b. DACA also flouts four statutory mechanisms that Congress enacted to discourage aliens from being unlawfully present in the country.

First, the lawful presence granted by DACA negates Congress's determination that an alien is removable as either "present in the United States in violation of [federal law]," 8 U.S.C. § 1227(a)(1)(B); or present "without being admitted or paroled," *id.* § 1182(a)(6)(A)(i). That is because once an alien has enrolled in the DACA program, the Executive treats him as though he were not "present in the United States without being admitted or paroled." *See* Pet. Br. at 9 n.3, *Texas*, 136 S. Ct. 2271 (No. 15-674), 2016 WL 836758.

Second, DACA vitiates the INA's reentry bar. Congress directed that, depending on the total time that an alien is "unlawfully present" in the country, an alien may not reenter the country legally for three or ten years after departure. 8 U.S.C. § 1182(a)(9)(B)(i). But DACA stops the reentry-bar clock by granting lawful presence

to unlawfully present aliens. *Texas I*, 809 F.3d at 166 n.99.

Ordinarily the reentry-bar clock starts when an alien crosses the border "without being admitted or paroled." 8 U.S.C. § 1182(a)(9)(B)(ii). The INA allows the President to stop that clock by granting humanitarian "parole," but only in very limited circumstances. *Id.* § 1182(d)(5)(A). The INA does *not* authorize the Executive to stop this clock for any alien of its choosing based on the Executive's priorities for removal proceedings—yet that is what DACA seeks to effect.

Third, DACA gives unlawfully-present aliens a pathway to citizenship that Congress has disallowed. For an alien to be eligible to adjust to permanent-resident status (and ultimately citizenship), the alien must be lawfully "admitted or paroled into the United States." *Id.* § 1255(a). Unlawfully present aliens who depart the country, however, are generally inadmissible upon return. *See id.* § 1182(a)(9)(B).

DACA status gives aliens access to "advance parole," an Executive practice that allows them to leave and reenter the country lawfully.[9] *Cf. id.* § 1182(d)(5)(A). Advanced parole allows an otherwise inadmissible alien to be "admitted" into the country, removing a significant

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[9] *See* Letter from León Rodríguez, Dir., USCIS, to Sen. Grassley 1 (June 29, 2016), available at https://www.judiciary.senate.gov/imo/media/doc/2016-06-29 USCIS to CEG - DACA Advance Parole Program.pdf; Deferred Action for Childhood Arrivals (DACA) Toolkit 23-24, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-254), ECF No. 38-6; Letter from León Rodríguez, Dir., USCIS, to Sen. Grassley 3-4 (Oct. 9, 2014), *Texas*, 86 F. Supp. 3d 591 (No. 1:14-cv-254), ECF No. 64-48.

barrier to seeking LPR status. DACA thereby "enable[s] certain individuals to change their inadmissible status (due to unlawful entry) into an admitted/paroled category." *Texas I*, 809 F.3d at 720. Having been paroled into the country, the alien can seek LPR status.[10]

As of August 2017, approximately 1,056 DACA recipients had been given citizenship and approximately 39,514 DACA recipients had been given green cards, the first step on the pathway to citizenship. *See* Motion for Preliminary Injunction, App. 12, *Texas v. United States* (S.D. Tex. May 2, 2018) (1:18-cv-68), ECF No. 6, Exh. 3. DACA thus "directly undermines the intent and deterrent effect intended by Congress, and contradicts the express wording of the DACA program's instituting memorandum." *Texas II*, 328 F. Supp. 3d at 720.

Fourth, DACA makes otherwise unlawfully present aliens eligible for Social Security, Medicare, and the Earned Income Tax Credit. But in 1996, Congress eliminated most federal benefits for unlawfully present aliens. As part of welfare-reform legislation, Congress declared that only those with "lawful presence" are eligible for specified benefits. As relevant here, Congress required aliens to be "lawfully present in the United

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[10] Under DACA's detailed procedures, officials were to interpret access to this benefit very broadly. *See* U.S. Dep't of Homeland Sec., DACA Nat'l Standard Operating Procedures 139-42 (2013). Under these procedures, work-related conferences, semester-abroad programs and job interviews would all count as "urgent humanitarian" reasons to travel abroad, which would provide "significant public benefit." *Id.* at 135.

States" to obtain Social Security, Medicare, and another retirement benefit. 8 U.S.C. § 1611(b)(2)-(4).[11]

DACA purports to re-enable access to those benefits. *See* 8 C.F.R. § 1.3(a)(4)(vi); 45 C.F.R. § 152.2(4)(vi).[12] Yet extensive statutory criteria define when an alien's presence is lawful, and these provisions do not mention discretion to deem any alien in the country lawfully present. *See supra* pp. 8-11. DACA thus does what Congress prohibited in 1996: It authorizes benefits for aliens, not because their presence is authorized by Congress, but simply because the Executive is forbearing from removal.

2. DACA contravenes statutes defining which aliens are authorized to work in this country.

Likewise, DACA's conferral of work authorization violates substantive immigration law.

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[11] The legislative history confirms that those whom the Executive granted deferred removal, previously eligible for such benefits as "[p]ersons residing under color of law," would no longer be eligible for those benefits because they were to "be considered to be aliens unlawfully present in the United States." H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.), reprinted in 1996 U.S.C.C.A.N. 2649, 2771. Congress recognized "approved deferred action status," *i.e.*, the four programs that it had approved, as a lawful status when it passed the Real ID Act of 2005 without returning to the *status quo ante*. *See* Pub. L. No. 109-13 § 202(c)(2)(B)(viii), 119 Stat. 231, 313.

[12] In addition to these federal benefits, lawful presence under DACA also makes aliens eligible under some state laws for benefits, such as driver's licenses, *e.g.*, Tex. Transp. Code § 521.142(a), and unemployment insurance, *e.g.*, Tex. Lab. Code § 207.043(a)(3).

a. Congress has imposed numerous restrictions to discourage the employment of unauthorized aliens. In 1986, IRCA created "a comprehensive framework for 'combating the employment of illegal aliens.'" *Arizona*, 567 U.S. at 404 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)). Breaking with previous law, Congress created penalties for employers who hire "unauthorized aliens."[13] 8 U.S.C. § 1324a(a), (f); *see Texas I*, 809 F.3d at 181 & n.174. Unauthorized employment also generally makes aliens ineligible to adjust to LPR status, 8 U.S.C. § 1255(c)(2), or to toll the unlawful-presence clock under the INA's reentry bar, *id.* § 1182(a)(9)(B)(iv).

b. As with lawful presence, Congress has not given the Executive free rein to grant work authorization. Instead, Congress has intricately defined which aliens are authorized for employment in the country.

In particular, Congress has chosen to authorize employment as to about 20 nonimmigrant-visa categories. *E.g.*, *id.* § 1101(a)(15)(H) (temporary employment for defined specialty occupations), (P) (entertainment work).[14]

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[13] The INA defines "unauthorized alien" to include aliens who are neither LPRs nor "authorized to be so employed by [the INA] or by the [Executive]." 8 U.S.C. § 1324a(h)(3)(B). The section does not address the scope of the Executive's delegated work-authorization power. *Texas I*, 809 F.3d at 183 & n.185. It merely tells employers that they can rely on work authorization conferred by statute or by the Executive without fear of liability for hiring "unauthorized aliens." 8 U.S.C. § 1324a(a).

[14] *See also* USCIS, How Do I Change to Another Nonimmigrant Status? 2 (Jan. 2016), https://www.uscis.gov/sites/default/files/USCIS/Resources/C2en.pdf.

In addition, Congress has required the Executive to authorize employment of other categories of aliens, including:

- Asylum holders, *id.* § 1158(c)(1)(B);
- Aliens granted temporary protected status, *id.* § 1254a(a)(1)(B);
- Aliens granted and applying for relief under IRCA, *id.* § 1255a(b)(3), (e)(1)-(2);
- Aliens granted "Family Unity" under the Immigration Act of 1990, Pub. L. No. 101-649, tit. III, § 301, 104 Stat. 4978, 5029 (codified as amended at 8 U.S.C. § 1255a note).

Congress has further provided that aliens in certain categories are "eligible" for or "may" receive work authorization from the Executive. Those categories include:

- Asylum applicants, 8 U.S.C. § 1158(d)(2);
- Certain battered spouses of nonimmigrants, *id.* § 1105a(a);
- Certain agricultural worker preliminary applicants, *id.* § 1160(d)(3)(A);
- Certain nationals applying for status adjustment, Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, div. A, § 101(h), tit. IX, § 902(c)(3), 112 Stat. 2681-538, 2681-539; Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit. II, § 202(c)(3), 111 Stat. 2160, 2193, 2195 (1997);
- Deferred-action U-visa applicants, 8 U.S.C. § 1184(p)(6); *id.* § 1227(d)(1)-(2);
- Deferred-action family members of LPRs killed on September 11, 2001, USA PATRIOT Act of

2001, Pub. L. No. 107-56, tit. IV, § 423(b)(1)-(2), 115 Stat. 272, 361;

- Deferred-action family members of U.S. citizens killed in combat, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, tit. XVII, § 1703(c)(2), 117 Stat. 1392, 1694-95; and
- Deferred-action Violence Against Women Act self-petitioners and family members, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV), (a)(1)(K).

Congress, in short, has carefully set out which aliens are eligible to work. And it has likewise prohibited employment of aliens who "either entered the country illegally, or are in an immigration status which does not permit employment." H.R. Rep. No. 99-682(I), at 46, 51-52 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5650, 5655-56.[15]

Except as set out above, Congress has not granted the Executive the power to unilaterally grant work authorization. And in light of Congress's "comprehensive framework," *Arizona*, 567 U.S. at 404, there is no basis to infer such a grant of power to the Executive. If there were, then Congress's detailed work-authorization provisions would be surplusage. *See Bd. of Trs. of Leland Stanford Jr. Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 788 (2011).

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[15] A regulation, 8 C.F.R. § 274a.12(c)(14), makes work authorization available on a case-by-case basis to aliens granted "deferred action" who "establish[] an economic necessity." To the extent this provision would cover aliens outside the four categories of deferred-action recipients that Congress made eligible for work authorization, it too is invalid.

It makes good sense that Congress would keep tight control over alien work authorization, because work authorization brings a host of other benefits. For example, aliens' receipt of work authorization connotes that their "status is so changed as to make it lawful for them to engage in such employment," thus allowing a Social Security number to issue. 42 U.S.C. § 405(c)(2)(B)(i)(I); *accord* 20 C.F.R. § 422.104(a)(2). And with a Social Security number comes eligibility for Social Security benefits and the valuable Earned Income Tax Credit. *Texas I*, 809 F.3d at 149 & n.18; *see* 26 U.S.C. § 32(c)(1)(E), (m); 42 U.S.C. §§ 402(a)-(h), 414(a). IRCA made clear that these generous benefits should be available only to a discrete category of aliens. In overriding that determination, DACA grants those benefits far more broadly than Congress permitted.

3. Neither historical practice nor other Executive programs can cure DACA's unlawfulness.

Unable to point to any statutory language or legislative history authorizing DACA, its defenders try to justify the program based on past executive actions. In particular, they point to opinion letters and legal briefs asserting the legality of classic deferred action, Principal and Response Brief of Appellees the Regents of the University of California, Janet Napolitano, and City San Jose at 46-47, *Regents*, 908 F.3d 476 (9th Cir. 2018) (No. 18-15068), 2018 WL 1414352, and instances when the "executive branch has provided blanket or categorical deferrals of deportation." *Regents*, 908 F.3d at 488 (quotation marks omitted). The Court should reject that argument for four reasons.

First, "historical practice . . . 'does not, by itself, create power.'" *Texas I*, 809 F.3d at 184 & n.193 (quoting *Medellin v. Texas*, 552 U.S. 491, 532 (2008)). This alone forecloses any attempt to justify DACA based on past practice.

Second, the leading historical example on which the Ninth Circuit relied, the 1990 Family Fairness program, is inapposite. *Regents*, 908 F.3d at 489. That program offered "extended voluntary departure," *see* 8 U.S.C. §§ 1252(b), 1254(e) (1988), to about 1% of the country's unlawfully present aliens (about 47,000 people), David Hancock, *Few Immigrants Use Family Aid Program*, MIAMI HERALD, Oct. 1, 1990, at 1B. But it did so through a form of Executive forbearance specifically authorized by Congress at the time, which the Executive interpreted to allow it to grant removable aliens an indefinite period to "depart voluntarily" from the United States. Congress took that power away in 1996. 8 U.S.C. § 1229c(a)(2)(A).

Likewise, other historical programs preceding DACA where the Executive forbore from removing classes of aliens were supported by statutory authorization that Congress has either curtailed or declined to extend to DACA recipients. These include forms of "parole," which previously had been left to the "discretion" of the Executive. *Id.* § 1182(d)(5)(A) (1952). Congress limited the Executive's statutory parole authority in 1996 to humanitarian parole, which may be granted only "on a case-by-case basis," and only "for urgent humanitarian reasons or significant public benefit." *See id.* § 1182(d)(5)(A).

Third, no relevant historical practice supports DACA's work authorization. No practice preceding

IRCA in 1986 is relevant because there was no general federal ban on hiring unauthorized aliens.

Post-1986, Congress has never amended IRCA's definition of "unauthorized alien" in 8 U.S.C. § 1324a(h)(3). Congress has thus consistently maintained its general prohibition against "employment of aliens" who "entered the country illegally." H.R. Rep. No. 99-682(I), at 46, 1986 U.S.C.C.A.N. at 5650. Congress reinforced that position in 1996 by eliminating the basis for work authorization provided under programs like the 1990 Family Fairness program.

The Executive did promulgate a post-IRCA work-authorization regulation that covered a few categories of aliens. *E.g.*, 8 C.F.R. § 274a.12(c)(9)-(10), (c)(14), (c)(16). But most aliens who received work authorization under that regulation already had lawfully present status via, for example, a nonimmigrant visa. *E.g.*, *id.* § 274a.12(a). While the regulation did grant work-authorization eligibility to some deferred-action recipients who fell outside the four narrow contexts in which IRCA deemed deferred-action recipients eligible for work authorization, *see supra* p. 11, that eligibility applied to an exceedingly small number of aliens. *See* 52 Fed. Reg. 46,092, 46,092-93 (Dec. 4, 1987) (number of aliens covered was so small as "to be not worth recording statistically" and "the impact on the labor market is minimal"); *see also Texas*, 86 F. Supp. 3d 591, 639 n.46 (only 500-1,000 aliens received deferred action annually from 2005-2010, before DACA). The amici States doubt the validity of that action, but even if it were lawful, it cannot show congressional acquiescence to a massive new program like DACA.

Fourth, previous grants of deferred action outside the categories authorized by Congress "are not

analogous to [DACA]." *Texas I*, 809 F.3d at 184. In particular, "many of the previous programs were bridges from one legal status to another, whereas [DACA] awards lawful presence to persons who have never had a legal status and may never receive one." *Id.* (footnotes omitted); *see* Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96, 119-25 (2015) (historical overview); *see also* Pet. Br. at 46-49 (discussing prior executive actions). Unlike earlier stop-gap measures designed to facilitate congressional policies *see Texas I*, 809 F.3d at 184-85 & nn.195, 197, DACA flouts Congress's scheme for conferring lawful presence. *See* Br. for State Respondents at 59 n.47, *Texas*, *supra* (listing lawful-status paths for past deferred-action programs).[16]

B. DACA is procedurally unlawful because it was promulgated contrary to the APA's requirements.

Even if DACA were consistent with the INA, it would still be invalid because it was promulgated without notice-and-comment rulemaking. DACA is indisputably a "rule" for APA purposes. 5 U.S.C. § 551(4). If DACA created a "substantive" or "legislative" rule, it had to go

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[16] The courts below have also upheld DACA on the grounds that (1) DACA affects fewer people than DAPA, and (2) DACA creates a pathway to citizenship rather than simply making it easier as DAPA did. *E.g.*, *Regents*, 908 F.3d at 507-09. This too was in error. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 325-28 (2014) (holding that limitations on unlawful regulatory overreach cannot be justified as interpretive rules); *see also* Pet. Br. at 35-37 (explaining why those distinctions do not support DACA's legality).

through the notice-and-comment procedure unless it was subject to an exception. *Id.* § 553(b); *Texas I*, 809 F.3d at 171. DACA's defenders have argued that DACA is exempt from notice-and-comment rule making because DACA is a "general policy statement" rather than a "substantive rule." But settled law confirms the opposite.

A rule is "substantive" if it *either* (1) "affect[s] individual rights and obligations," *Morton*, 415 U.S. at 232; or (2) does not "genuinely leave[] the agency and its decisionmakers free to exercise discretion," *Am. Bus. Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). Based on "the language of the purported statement and the circumstances of its promulgation," *id.* at 530, both tests confirm that DACA is a substantive rule, not a general policy statement.

1. DACA required notice and comment because it affected the substantive rights of individuals and obligations of States.

DACA is a substantive rule, not—as respondents imagine—a mere policy statement. Courts have routinely held that an "important touchstone for distinguishing" substantive rules from policy statements is that "a substantive rule . . . [i]s one 'affecting individual rights and obligations.'" *Chrysler*, 441 U.S. at 302 (quoting *Morton*, 415 U.S. at 232); *see also, e.g.*, *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014) (Kavanaugh, J.) (describing impact on private parties as "most important factor" in determining substantive rule). Policy statements and interpretive rules, by contrast, do "'not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015)

(quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)).

Amici do not challenge the Executive's well-established authority to defer removal action on a case-by-case basis. Deferred action under DACA, however, "is far from any program conducted in the past." *Texas II*, 328 F. Supp. 3d at 721. DACA is "not just an announcement of [DHS's] refusal to enforce the statutory . . . requirements; it purports to *alter* those requirements" for over a million unlawfully present aliens. *Util. Air Regulatory Grp.*, 573 U.S. at 326. In so doing, DACA both alters individual rights and imposes obligations on States. It therefore is procedurally unlawful because it never underwent the mandatory notice-and-comment process. *Nat'l Mining Ass'n*, 758 F.3d at 251-52 (summarizing the law).

a. The plain language of the memorandum creating DACA has a significant impact on individual rights. As discussed above, when a DHS field office grants a DACA permit, that act changes the immigrant's status to "lawful presence," which triggers numerous benefits, including creating a defense to removability, allowing the alien to work in the United States, tolling the reentry bar, and making the alien eligible for numerous social services at the state and federal levels. *See supra* pp. 8-14.

This Court has required notice-and-comment procedures for far less significant administrative acts. In *Morton v. Ruiz*, for example, the Court examined whether notice-and-comment rulemaking was required before the Bureau of Indian Affairs could exclude "full-blooded, unassimilated Indians living in an Indian community near their native reservation," 415 U.S. at 211, from benefits provided by Congress to Indians living "on a

reservation," *id.* at 208. The Court concluded that such a regulation was "substantive" because it "affect[ed] individual rights and obligations." *Id.* at 231-37. DACA, of course, does that and far more. *See supra* pp. 11-14. There is no serious argument that DACA does not "affect individual rights and obligations." *See Morton*, 415 U.S. at 232.

b. As the Fifth Circuit recognized in *Texas I*, DACA also obligates individual States to increase their spending on various social services. 809 F.3d at 155-56 (discussing impact on Texas). These services include healthcare, education, and law-enforcement, as well as social services required by federal law. *Texas II*, 328 F. Supp. 3d at 700-04. According to an expert retained by DACA's defenders, Texas alone "incurs more than $250,000,000 in total direct costs from DACA recipients per year." *Id.* at 700-701. If the administrative state wishes to impose that significant burden on States, it must at a minimum initiate notice-and-comment review. *Nat'l Mining Ass'n*, 758 F.3d at 252 (finding rule to be interpretive where "State permitting authorities 'are free to ignore it'"); *cf. Chrysler*, 441 U.S. at 302.

This Court should reject any argument that a DACA permit merely triggers benefits that flow from other regulations. As discussed above (at 13-14), DACA recipients would be ineligible for these benefits under existing statutes. But DACA makes eligible those whom Congress has deemed ineligible. It thus must be considered a substantive rule because "in the absence of the rule there would not be an adequate legislative basis" for DHS either "to confer benefits" relating to lawful status on this class of individuals or impose the accompanying obligations on States. *Am. Mining Cong. v. Mine Safety &*

Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993); *cf. Shalala*, 514 U.S. at 99-100 (holding policy manual was interpretive rule because it was consistent with regulations).

c. The "circumstances of its promulgation" further confirm that DACA creates substantive rights. *Am. Bus. Ass'n*, 627 F.2d at 530. After all, DACA arose as President Obama's attempted workaround to Congress's failure to pass the Development, Relief, and Education for Alien Minors (DREAM) Act.[17] The DREAM Act, if adopted, would have shared many features with DACA, including allowing unlawfully present aliens who arrived before they were 16 to apply for lawful presence.

But the DREAM Act never reached President Obama's desk. When the DREAM Act failed in Congress for the third time, the President set out to do what Congress refused to do: confer lawful presence, and associated benefits, on hundreds of thousands of aliens. The President did so even though "nothing in the statute, prior regulations, or case law" authorized the benefits in question. *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 320-21 (D.C. Cir. 2011). That effort to "change[] the law" cannot be described as anything other than substantive. *Id.*; *see also Texas I*, 809 F.3d at 176-78.

d. Respondents' own pleadings further confirm that DACA was a "substantive rule" requiring notice and comment.

The University of California respondents contend that the DACA-wind-down memorandum "constitutes a

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[17] *See also* Pet. Br. at 5 & n.2 (discussing failed history of DREAM Act); *id.* at 38 (quoting concessions of need for Congressional action to provide this relief).

substantive rule subject to APA's notice-and-comment requirements." Complaint at 14 ¶ 61, *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. 3:17-cv-5211-WHA (N.D. Cal. Sept. 8, 2017), ECF No. 1. In support of this legal conclusion, respondents allege that DACA purports to unilaterally confer lawful presence. *Id.* at 8 ¶ 31 ("Individuals with DACA status were 'not considered to be unlawfully present during the period in which deferred action [was] in effect.'" (alteration in original) (citing USCIS FAQs)). Furthermore, these respondents admit that aliens with DACA status would not have been able—but for DACA—lawfully to "obtain jobs and access to certain Social Security and Medicare benefits." *Id.* at 2 ¶ 3.

The State of California respondents likewise plead that DACA's attributes meet the test for a substantive rule requiring APA notice-and-comment procedure. For instance, these respondents plead that "**DACA Provides Numerous Benefits**," including (1) "the right not to be arrested or detained based solely on their immigration status," (2) "eligibility to receive employment authorization," (3) the ability to "travel," specifically the ability "to briefly depart the U.S. and legally return," (4) eligibility for "federal Social Security, retirement, and disability benefits" not available to other undocumented immigrants, and (5) "equal access to other benefits and opportunities" with other individuals who are lawfully present in this country. Complaint at 17-18 ¶¶ 82-86, *California v. U.S. Dep't of Homeland Sec.*, No. 3:17-cv-5235 (N.D. Cal. Sept. 11, 2017), ECF No.1.

Indeed, DACA's defenders insist over and over again that "DACA *confers* numerous important *benefits* on those who apply for and are granted DACA status."

Complaint at 9 ¶ 27, *Garcia v. United States*, No. 3:17-cv-5380 (N.D. Cal. Sept. 18, 2017), ECF No. 1 (emphases added). They have done so in multiple courts. *See, e.g.*, Complaint, *Trs. of Princeton Univ. v. United States*, No. 1:17-cv-2325 (D.D.C. Nov. 3, 2017), ECF No. 1; Complaint, *NAACP v. Trump*, No. 1:17-cv-1907 (D.D.C. Sept. 18, 2017), ECF No. 1; 3d Am. Complaint, *Vidal v. Nielsen*, No. 1:16-cv-4756 (E.D.N.Y. Dec. 11, 2017), ECF No. 113; Complaint, *New York v. Trump*, No. 1:17-cv-5228 (E.D.N.Y. Sept. 6, 2017), ECF No. 1.

Respondents list these benefits to support their assertion that by rescinding DACA "federal agencies have changed the substantive criteria by which individual[] DACA grantees" are permitted to "work, live, attend school, obtain credit, and travel in the United States." Complaint at 54 ¶ 289, *New York v. Trump*, No. 1:17-cv-5228 (E.D.N.Y. Sept. 6, 2017), ECF No. 1. But that could be true only if DACA's creation was itself a substantive rule—one "affect[ing] individual rights and obligations." *Morton*, 415 U.S. at 232. If DACA did not create substantive criteria by which these immigrants gained the benefits listed in their complaints, *id.*, winding down this program could not have changed any substantive criteria.

The necessary implication of these allegations is that DACA was a substantive rule that was never validly implemented. If DACA's rescission "affect[ed] individual rights and obligations," *id.* at 232, so too did DACA's creation.

2. DACA, as implemented, did not leave immigration officials with discretion to deny relief.

Unable to deny that DACA altered substantive rights, its defenders claim that notice-and-comment rulemaking was unnecessary because it is worded as a "general policy statement" regarding how DHS will exercise prosecutorial discretion. While the APA exempts policy statements from notice and comment, *see* 5 U.S.C. § 553(d)(2), that exemption has no application here for at least two independent reasons.

First, "a general statement of policy" is a statement that, by definition, does not alter statutory law or existing regulation. Stated differently, in contrast to a "substantive rule," a "general policy statement," *cannot* "impose any rights and obligations." *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995). Such a statement may only lay out the factors that the agency may consider in applying discretion going forward. *Id.*; *accord Azar v. Alina Health Servs.*, 139 S. Ct. 1804, 1811-12 (2019) (distinguishing "policy statements" under Medicare, which can create "substantive rules," from "policy statements" under APA, which cannot). Because DACA "affect[s] individual rights and obligations," it is a "legislative" rule whose promulgation "must conform with any procedural requirements imposed by Congress." *Chrysler Corp.*, 441 U.S. at 302-03. There is no support in either the APA or this Court's precedent for the notion that an agency action that changes substantive immigration law may be adopted without notice-and-comment rulemaking merely because it provides the agency with some level of discretion in its

application. Nor would such a rule be consistent with the purpose of notice-and-comment rulemaking, which is to ensure that those agencies making binding rules do so in a way that is open, fair, and accountable. *Cf. Perez*, 135 S. Ct. at 1206.

Second, DACA does not genuinely give DHS officials discretion; it removes discretion where it previously existed. While DHS's label of this policy as "discretionary" is relevant, the true test is how the program is actually administered. *Azar*, 139 S. Ct. at 1812 ("Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements.") (citing *inter alia Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666-67 (D.C. Cir. 1978)). When a rule purports to allow discretion "is in purpose or likely effect . . . a binding rule of substantive law," courts uniformly look past the label and take the rule "for what it is." *Guardian*, 589 F.2d at 666-67; *see also, e.g.*, *Iowa League of Cities v. EPA*, 711 F.3d 844, 862-63 (8th Cir. 2013); *Phillips Petro. Co. v. Johnson*, 22 F.3d 616, 619-20 (5th Cir. 1994).

In *Texas I*, the Fifth Circuit acknowledged that (like DAPA) the language in the original memo creating DACA purported to "instruct[] agencies to review applications on a case-by-case basis and exercise discretion." 809 F.3d at 172. But, the court correctly gave more weight to three facts in the record: (1) DACA is implemented through a 150-page manual of associated operating procedures that leaves little actual discretion, (2) of the 723,000 applications accepted for evaluation under DACA, only 5% had been rejected, and (3) "[d]espite a request by the [district c]ourt, the Government's counsel did not provide the number, if any, of requests that were

denied" for discretionary reasons once the agency concluded that "the applicant met the DACA criteria." *Id.* at 172-73 (cleaned up). In the presence of those circumstances, the Fifth Circuit concluded that regulatory reality trumps labels in the original DACA memo. *Id.*

Despite extensive discovery in *Texas II*, DACA's defenders still have not established that DHS field offices exercise meaningful discretion in implementing DACA. To the contrary, one reason the Executive decided to rescind DACA was that it could not find a single individual who qualified for DACA but was nonetheless denied relief for discretionary reasons. Pet. App. 112a-13a n.1; *see also* Pet. Br. at 39 & n.7 (explaining less than 10% of applications were denied, most of were denied because applicants were ineligible). Even if some de minimis number of applications were denied for discretionary reasons, the Court should still consider the policy binding and subject to the notice-and-comment rulemaking procedures established by Congress. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988) (where model was used to resolve 96 out of 100 applications it was a substantive rule).

II. The Executive's Decisions Both to Create and to Rescind DACA Are Subject to Judicial Review.

DACA is substantively and procedurally unlawful—and the federal courts are empowered to say so. The Executive's decisions to create and, later, to wind down DACA are reviewable agency actions under the APA. Courts have "long applied a strong presumption favoring judicial review of administrative action." *Weyerhaeuser Co. v U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). This presumption can be rebutted in only two

ways: (1) if the challenged action is "committed to agency discretion by law," or (2) if the relevant statute "preclude[s] review." 5 U.S.C. §§ 701(a)(1), (a)(2). These "very narrow" exceptions, *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), do not apply here.

First, DACA cannot be considered an "agency action committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exception is limited to "certain categories" that have been "traditionally committed to agency discretion," including "a decision not to institute enforcement proceedings" or allocation of lump-sum appropriations. *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993); *see also Weyerhaeuser Co.*, 139 S. Ct. at 370. Rulemaking is *not* an area left to agency discretion.

DACA cannot be defended as simply an announcement of enforcement priorities or an exercise of prosecutorial discretion. DACA, like DAPA and Expanded DACA, "is much more than nonenforcement" because it "affirmatively confer[s] 'lawful presence' and associated benefits on a class of unlawfully present aliens." *Texas I*, 809 F.3d at 166. That plainly distinguishes DACA from the form of immigration-enforcement forbearance known as "deferred action." *AADC*, 525 U.S. at 482-84. DACA also creates a massive bureaucracy to grant applicants that status. As every court to consider the question has concluded, the creation and subsequent dismantling of such a bureaucracy is not a question committed to one branch of government's unilateral discretion. *E.g.*, *CASA de Md. v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 765 (D. Md. 2018) ("[J]udicial decisions throughout the DAPA litigation illustrate" that "challenges to DAPA or analogous immigration programs

promulgated by DHS without approval by Congress are justiciable."), *aff'd*, 924 F.3d 684, 698-700 (4th Cir. 2019).

Second, no INA provision precludes judicial review of the Executive's decision to grant lawful presence to entire classes of aliens. DACA's rescission is not made unreviewable by 8 U.S.C. § 1252(g), which shields final deportation orders from review, because DACA reflects no claim "by or on behalf of any alien" challenging removal-proceeding determinations. Indeed, the idea that section 1252(g) "precludes judicial review has been rejected repeatedly." *CASA de Md.*, 284 F. Supp. 3d at 769.

III. The Executive's Rescission of DACA Was Neither Arbitrary Nor Capricious.

The arguments against DACA's rescission are premised on the notion (rebutted above) that DACA was lawful. They also reflect a fundamental misunderstanding of the scope of arbitrary-and-capricious review under the APA. Tellingly, no court has found that rescinding an unlawful executive policy is arbitrary and capricious. Instead, respondents maintain that a court may block an agency from rescinding its own policy merely because the court disagrees with the agency that the policy is unlawful. That is not the law.

The standard of review under the APA is "narrow." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As this Court has repeatedly stated, a court may only look to whether the Executive examined "the relevant data" and articulated "a satisfactory explanation for its action including a 'rational connection between the facts found and the choice

made.'" *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).[18]

The Executive here did precisely that. Secretary Duke's memorandum winding down DACA summarized DHS's conclusion that DACA was illegal "after consulting with the Attorney General and considering the likelihood of success on the merits of the ongoing litigation" in *Texas I*. Specifically, the memo recited the Attorney General's "legal determination[s]" that (1) "DACA 'was effectuated by the previous administration through executive action, without proper statutory authority," (2) "[s]uch an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch," and (3) "because DACA has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA." Pet. App. 116a (quotation marks omitted); *see also id.* 122a-23a (explaining how Secretary Nielsen reached similar conclusion).

As discussed above, the Executive's conclusion that DACA is illegal was correct. But, at the very least, it met this Court's requirement that "the [Executive] examine the relevant data,'"—here, the legal opinions of the Fifth Circuit as affirmed by this Court and the highest-ranking lawyer in the United States—and explained why she

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[18] As Amici have previously explained, this standard does not change simply because the new administration has different policy goals or reaches a different conclusion about the legality of DACA. *See* Brief for the States of Texas, et al., as Amici Curiae in Support of Petitioners, *U.S. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587, at 5-8 (U.S. Dec. 6, 2018).

thought the program was unlawful. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43 (quotation marks omitted). That is all the APA requires.

The courts below held to the contrary only by imposing additional standards not required by the APA. Each court to consider the question has recognized that "DACA was rescinded based on [DHS'] view that the policy was unlawful." *CASA de Md.*, 924 F.3d at 704; *see also Regents*, 908 F.3d at 500; *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018). The courts concluded that the Executive action was nonetheless arbitrary because they disagreed with either the Fifth Circuit analysis the Executive invoked or its applicability to DACA. *See Regents*, 908 F.3d at 508-10; *CASA de Md.*, 924 F.3d at 705; *NAACP*, 298 F. Supp. 3d at 239-40. For example, the Ninth Circuit concluded that Secretary Duke erred in deciding that DACA was illegal under the Fifth Circuit's opinion in *Texas I* because she failed to expressly address the differences in size between the DACA and DAPA populations. *Regents*, 908 F.3d at 509 ("As the district court laconically put it, 'there is a difference between 4.3 million and 689,800.'").

That is not arbitrary-and-capricious review. An agency is not required to explain the reasons behind its policy changes in minute detail. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009). Moreover, courts are to "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974); *see also, e.g.*, *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 544-45 (2008) (upholding action that was legally required even if agency cited

different rationale for decision). There is no basis in this Court's jurisprudence to require an agency to anticipate and discuss every legal distinction that a district court might later deem relevant. Such searching review is the definition of substituting the judgment of judges for that of the Executive, which the APA and this Court's precedent foreclose.

Applying the APA otherwise would intrude on the President's Article II obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The "executive department[] of the Federal Government, no less than the judicial department, ha[s] a duty to defend the Constitution." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011). Absent a ruling by this Court, "subordinate executive agencies supervised and directed by the President" may "decline to follow [even a] statutory mandate" that the President concludes is unconstitutional. *In re Aiken Cty.*, 725 F.3d 255, 261 (D.C. Cir. 2013) (Kavanaugh, J.). This Court should hold that it is not arbitrary and capricious for the Executive to discontinue a prior unilateral executive action that it determines is unlawful.

CONCLUSION

The decisions enjoining the Executive's rescission of DACA should be reversed.

Respectfully submitted.

STEVE MARSHALL
Attorney General of
Alabama

KEVIN G. CLARKSON
Attorney General of
Alaska

MARK BRNOVICH
Attorney General of
Arizona

LESLIE RUTLEDGE
Attorney General of
Arkansas

ASHLEY MOODY
Attorney General of
Florida

DEREK SCHMIDT
Attorney General of
Kansas

JEFF LANDRY
Attorney General of
Louisiana

KEN PAXTON
Attorney General of
Texas

JEFFREY C. MATEER
First Assistant
Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

ARI CUENIN
LANORA C. PETTIT
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

PHIL BRYANT
Governor of
Mississippi

DOUG PETERSON
Attorney General of
Nebraska

ALAN WILSON
Attorney General of
South Carolina

JASON R. RAVNSBORG
Attorney General of
South Dakota

PATRICK MORRISEY
Attorney General of
West Virginia

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