In the
Supreme Court of the United States

Department of Homeland Security, Petitioner

v.

Regents of the University of California, Respondent

BRIEF FOR PETITIONERS

QUESTIONS PRESENTED

Whether the district courts in these consolidated cases properly held (i) that petitioners' September 2017 decision to terminate the Deferred Action for Childhood Arrivals policy is subject to judicial review under the Administrative Procedure Act (APA), (ii) that the decision violated or likely violated the Act, and (iii) that petitioners' motions to dismiss certain other claims that remain pending in the California and New York proceedings should be denied.

STATEMENT

A. Legal Framework

The Immigration and Nationality Act (INA), charges the Secretary of Homeland Security "with the administration and enforcement" of the immigration laws. The Secretary is vested with the authority to "establish such regulations; * * * issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the Act, and is given "control, direction, and supervision" of all Department employees.

Individual aliens are subject to removal if, inter alia, "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." As a practical matter, however, the Executive Branch lacks the resources to remove every removable alien, and a "principal feature of the removal system is the broad discretion exercised by immigration officials." For any alien subject to removal, DHS officials must first "decide whether it makes sense to pursue removal at all." After removal proceedings begin, government officials may decide to grant discretionary relief, such as asylum or cancellation of removal. And, "at each stage" of the

process, "the executive has discretion to abandon the endeavor."

In making these decisions, like other agencies exercising enforcement discretion, DHS must engage in "a complicated balancing of a number of factors which are peculiarly within its expertise." Recognizing the need for such balancing, Congress has provided that the "Secretary of Homeland Security shall be responsible for * * * establishing national immigration enforcement policies and priorities."

Deferred action is a practice in which the Secretary exercises enforcement discretion to notify an alien of the agency's decision to forbear from seeking the alien's removal for a designated period. Under DHS regulations, aliens granted deferred action may receive certain benefits, including work authorization for the same period if they establish economic necessity. A grant of deferred action does not confer lawful immigration status or provide any defense to removal. DHS retains discretion to revoke deferred action

B. Factual Background

1. a. In 2012, DHS announced the non-enforcement policy known as Deferred Action for Childhood Arrivals (DACA). DACA provided deferred action to "certain young people who were brought to this country as children." The INA does not provide any exemptions or special relief from removal for such individuals. And dating back to at least 2001, bipartisan efforts to provide such relief legislatively had failed (and have continued to fail). Under the DACA policy, following successful completion of a background check and other review, an alien would receive deferred action for a period of two years, subject to renewal. The policy specified, however, that it "conferred no substantive right, immigration status or pathway to citizenship," because "only the Congress, acting through its legislative authority, can confer these rights."

In 2014, DHS announced an expansion of the DACA policy and a new, related policy of non-enforcement known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). The expansion of DACA would have loosened the age and residency criteria and e tended the deferred-action period to three years. DAPA would have provided deferred action to certain parents whose children were U.S. citizens or lawful permanent residents through a process designed to be "similar to DACA."

b. Texas and 25 other States promptly brought suit in the Southern District of Texas to enjoin DAPA and the expansion of DACA. The district court issued a nationwide preliminary injunction, finding a likelihood of success on the claim that the DAPA and expanded DACA memorandum violated the notice-and-comment requirement of the Administrative Procedure Act.

The Fifth Circuit affirmed the preliminary injunction, holding that DAPA and expanded DACA likely violated both the APA and INA. The court agreed that the DAPA and expanded DACA memorandum likely required notice-and-comment rulemaking. It also concluded that the policies were likely substantively contrary to the INA. The court reasoned that the INA contains an "intricate system of immigration classifications and employment eligibility," and "does not grant the Secretary discretion to grant deferred action and lawful presence on a class-wide basis to 4.3 million otherwise removable aliens."

This Court affirmed the Fifth Circuit's judgment by an equally divided vote.

c. Following this Court's decision, two relevant events occurred concerning the original DACA policy. First, Texas and other States in the Texas case announced their intention to amend their complaint to challenge DACA. They asserted that "for the same reasons that DAPA and Expanded DACA's unilateral Executive Branch conferral of eligibility for lawful presence and work authorization was unlawful, the original June 15, 2012 DACA memorandum is also unlawful." Second, in a letter to then-Acting Secretary of Homeland Security Elaine C. Duke, then-Attorney General Jefferson B. Sessions III concluded that, like the DAPA policy, the DACA policy was effectuated "without proper statutory authority," and thus "it was likely that the potentially imminent litigation would yield similar results" to the Texas litigation.

2. On September 5, 2017, DHS decided to wind down DACA in an orderly fashion. Acting Secretary Duke explained that, "taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation," as well as the Attorney General's view that the DACA policy was unlawful and that the "potentially imminent" challenge to DACA would "likely * * * yield similar results" as the Texas litigation, "it is clear that the June 15, 2012 DACA program should be terminated." The Acting Secretary accordingly announced

that, "in the exercise of her authority in establishing national immigration policies and priorities," the original DACA policy was "rescinded."

The Duke Memorandum stated, however, that the government would "not terminate the grants of previously issued deferred action * * * solely based on the directives in this memorandum." It also explained that DHS would "provide a limited window" in which it would "adjudicate—on an individual, case by case basis—properly filed pending DACA renewal requests * * * from current beneficiaries that have been accepted by the Department as of the date of this memorandum, and from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017."

A. Procedural History

These challenges to DACA's rescission were filed in the Northern District of California, the District of Columbia, and the Eastern District of New York. Collectively, respondents allege that the rescission of DACA is arbitrary and capricious under the APA; violates the APA's requirement for notice-and-comment rulemaking; and denies equal protection and due process to DACA recipients.

1. District courts enjoin or vacate the rescission on a nationwide basis

In all three of the cases before the Court, district courts either enjoined or vacated DHS's decision on a nationwide basis.

a. In Regents and Batalla Vidal, the district courts granted in part and denied in part the government's motions to dismiss, and entered identical preliminary injunctions. Those courts determined that, although agency enforcement decisions "are generally not reviewable," the rescission of DACA was different because it terminated a general policy of non-enforcement, and the "main" rationale was the "supposed illegality" of the prior policy. They further concluded that the rescission was likely arbitrary and capricious, primarily because, in their view, DACA was lawful. Each court ordered the government to maintain DACA "on the same terms and conditions as were in effect before the rescission," with certain exceptions, principally that "new applications from applicants who have never before received deferred action need not be processed." The courts also both declined to dismiss the equal protection claim, finding that respondents' allegations "raised a plausible

inference that racial animus towards Mexicans and Latinos was a motivating factor in the decision to end DACA."

b. In NAACP, the district court granted summary judgment to respondents and vacated the rescission of DACA in its entirety. Like the other district courts, the D.C. district court determined that the rescission was reviewable because it was "a general enforcement policy predicated on a legal determination that the program was invalid." Unlike the other courts, the D.C. district court did not address whether DHS's legal conclusion was correct— i.e., whether DACA was lawful. Instead, the court concluded that the Duke Memorandum's "legal reasoning was insufficient" to satisfy arbitrary-and-capricious review. In light of that ruling, the court deferred addressing respondents' equal protection claim. And it stayed its order for 90 days to permit DHS to "reissue a memorandum rescinding DACA, this time providing a fuller e planation."

2. Secretary Nielsen further explains the rescission

On June 22, 2018, then-Secretary of Homeland Security Kirsten M. Nielsen issued a memorandum responding to the D.C. district court's invitation to provide further e planation of DHS's decision to rescind DACA. Secretary Nielsen explained that "the DACA policy properly was—and should be—rescinded, for several separate and independently sufficient reasons."

First, the Secretary agreed that "the DACA policy was contrary to law." The Secretary endorsed the Fifth Circuit's conclusion that " 'the INA did not grant her discretion to grant deferred action and lawful presence on a class-wide basis' "at the scale of the DAPA policy, and she explained that "any arguable distinctions between the DAPA and DACA policies" were "not sufficiently material" to alter that conclusion.

Second, the Secretary reasoned that, "like Acting Secretary Duke, she lacked sufficient confidence in the DACA policy's legality to continue this non-enforcement policy, whether the courts would ultimately uphold it or not." She noted, "sound reasons for a law enforcement agency to avoid discretionary policies that are legally questionable," including the risk of "undermining public confidence" in the agency and "the threat of burdensome litigation that distracts from the agency's work."

Third, the Secretary offered several "reasons of enforcement policy to rescind the DACA policy," regardless of whether the policy is "illegal or legally

questionable." She reasoned that, in her view, "public policies of non-enforcement * * * for broad classes and categories of aliens" should be "enacted legislatively," not "under the guise of prosecutorial discretion." She reasoned that DHS should exercise its prosecutorial discretion only "on a truly individualized, case-by-case basis." And she reasoned that, given the unacceptably high numbers of illegal border crossings, it was "critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens."

Finally, the Secretary explained that, although she "did not come to these conclusions lightly," "neither any individual's reliance on the expected continuation of the DACA policy nor the sympathetic circumstances of DACA recipients as a class" outweigh the reasons to end the policy. And she noted that the rescission of the policy would not "preclude the exercise of deferred action in individual cases if circumstances warrant."

3. The D.C. district court declines to reconsider its decision in light of the Nielsen Memorandum

Following Secretary Nielsen's memorandum, the D.C. district court denied the government's motion to reconsider its prior order. The court refused to reconsider whether DHS's decision was reviewable, reasoning that the Nielsen Memorandum, like the Duke Memorandum, was based "first and foremost" on the view that " 'the DACA policy was contrary to law.' " And the court concluded that the independent, non-legal policy reasons offered by Secretary Nielsen were simply "attempt s to disguise an objection to DACA's legality as a policy justification for its rescission." On the merits, the court reaffirmed its conclusion that DHS had not provided a sufficient "legal assessment." The court further asserted that the Secretary's memorandum "failed to engage meaningfully with the reliance interests and other countervailing factors that weigh against ending the program." Ibid. The court therefore reaffirmed its conclusion that the rescission "must be set aside" in its entirety, though it ultimately stayed its order with respect to aspects of the rescission exempted from the injunctions issued in California and New York.

4. The Ninth Circuit affirms the nationwide preliminary injunction

Several months later, the Ninth Circuit in Regents affirmed the preliminary injunction and the orders resolving the government's motion to dismiss.

a. The panel majority acknowledged that an agency's non-enforcement decision is "generally committed to an agency's absolute discretion." But it reasoned that such a decision is nevertheless reviewable if it is "based solely on a belief that the agency lacked the lawful authority to do otherwise." The panel majority determined that DACA's rescission, as reflected in the initial Duke Memorandum, rested exclusively on "a belief that DACA was unlawful," not on concerns about maintaining the policy in the face of the then-ongoing litigation or any other exercise of the agency's discretion. And it refused to consider the Nielsen Memorandum, suggesting that it was an impermissible "posthoc rationalization" and was not part of the record. On the merits, the panel majority agreed that respondents were likely to succeed on their APA claim because DHS's decision was based entirely on an erroneous legal conclusion that DACA was unlawful.

The panel also affirmed the denial of the government's motion to dismiss respondents' equal protection claim, concluding that respondents had plausibly alleged that the rescission was racially motivated.

b. Judge Owens concurred. He disagreed that the rescission was reviewable "for compliance with the APA." He explained that "when determining the scope of permissible judicial review, courts consider only the type of agency action at issue, not the agency's reasons for acting," and that DHS's decision to "rescind a non-enforcement policy in the immigration context is the type of administrative action" that this Court has recognized is " 'committed to agency discretion by law.' " Nevertheless, Judge Owens explained that he would affirm the preliminary injunction and remand for the district court to consider whether respondents' equal protection claim provided an alternative ground for enjoining the rescission.

SUMMARY OF ARGUMENT

I. The orders and judgments under review hold that DACA's rescission either is or likely is arbitrary and capricious under the APA. But the rescission is not reviewable under that standard. Section 701(a)(2) exempts agency action from arbitrary-and-capricious review to the extent the action is "committed to agency discretion by law." A decision to rescind a policy of non-enforcement is a quintessential action committed to an agency's absolute

discretion, absent a statutory directive limiting that discretion. And no one contends that the INA itself limits DHS's authority to resume enforcing the law as written.

The lower courts held that Section 701(a)(2) does not apply to DACA's rescission principally on the ground that DHS based its decision solely on a determination that DACA was unlawful. Even if the rescission were based solely on DHS's legal judgment, however, this Court has squarely held that an otherwise unreviewable agency action does not become reviewable due to the reasons that an agency provides. In any event, the rescission did not rest solely on a legal rationale. The Duke and Nielsen Memoranda make clear that DHS's decision also rests on policy grounds. The lower courts' reasons for disregarding those policy rationales are unpersuasive. Thus, even under the lower courts' theory, arbitrary-and-capricious review is unavailable.

II. Even assuming the rescission were reviewable, DHS provided multiple, independently sufficient grounds for withdrawing DACA. First, as a practical matter, DHS was reasonably concerned about maintaining a non-enforcement policy that is similar to, if not materially indistinguishable from, two related policies that the Fifth Circuit had held unlawful, in a decision affirmed by an equally divided vote of this Court. Second, as a matter of policy, DHS wanted to terminate a legally questionable non-enforcement policy and leave the creation of policies as significant as DACA to Congress. Third, as a matter of law, DHS correctly, and at a minimum reasonably, concluded that DACA is unlawful. None of those three grounds is remotely arbitrary or capricious, let alone all three. Finally, respondents' equal protection claim fails as a matter of law and provides no basis for affirming the orders and judgments below.

CONCLUSION

The judgments of the Ninth Circuit and the District Court for the District of Columbia, as well as the orders of the Eastern District of New York, should be reversed. Respectfully submitted.