In the
Supreme Court of the United States

Department of Homeland Security, Petitioner

v.

Regents of the University of California, Respondent

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

Whether the district courts in these consolidated cases properly held (i) that petitioners' September2017 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.

INTRODUCTION

The Deferred Action for Childhood Arrivals (DACA) policy enables certain young people to apply for deferred action, a form of discretionary immigration relief, on an individual basis. Those eligible for consideration under DACA arrived in the United States as children and many of them have never known any other home. All are either enrolled in school, have completed it, or have served honorably in our armed forces. DACA recipients contribute to their States and the Nation as employees, parents, and productive members of our communities. Deferred action affords them a measure of stability and reassurance as they go about their lives and careers here. As a policy, DACA has enjoyed widespread support. As a legal matter, it is grounded in the Executive Branch's broad authority to set priorities and exercise discretion in enforcing the immigration laws, and is consistent with similar class-based discretionary relief policies adopted over the last six decades.

In September 2017, however, petitioners decided to terminate the DACA policy. The decision memorandum, signed by then-Acting Secretary of Homeland Security Duke, offered only one rationale: that DACA was unlawful. It cited a one-page letter from then-Attorney General Sessions asserting that the policy was unconstitutional and beyond the agency's statutory authority.

The respondents in the proceedings now before this Court filed suits challenging the termination decision in district courts in California, New York, and the District of Columbia. All three courts held that the decision was subject to review under the Administrative Procedure Act, in light of the legal rationale proffered for the action. The California and New York district courts granted preliminary injunctions on the ground that the agency's stated legal premise was incorrect, and the Ninth Circuit has since affirmed the grant of preliminary relief in the California proceeding. The D.C. district court vacated the agency's decision on the ground that the legal premise was, at a minimum, inadequately explained. Those rulings are correct, and the termination decision may be vacated on either ground identified by the courts below.

Petitioners complain that the lower courts "have forced DHS to maintain this entirely discretionary policy for nearly two years." In fact, no court has held that "DACA could not be rescinded as an exercise of Executive Branch discretion." On the contrary, the courts below have recognized and highlighted the Executive's wide discretion in setting policies regarding immigration enforcement. So far, however, petitioners have chosen to stand by their original decision, which is based not on policy grounds but on the assertion that DACA is unlawful. That decision must stand or fall on the contemporaneous rationale that the agency chose to offer as the public basis for its action. It cannot be sustained on that basis.

STATEMENT

A. Legal and Factual Background

1. Congress has granted the Executive Branch broad authority with respect to immigration enforcement. It has charged the Secretary of Homeland Security "with the administration and enforcement of "the Immigration and Nationality Act "and all other laws relating to . . . immigration and naturalization," directed him to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority," and made him responsible for "establishing national immigration enforcement policies and priorities."

That responsibility carries with it an obligation to exercise "broad discretion" in enforcing the immigration laws. Such discretion is a "principal feature of the removal system." It is inherent in the fact that the federal government cannot realistically remove every undocumented immigrant, even if doing so were desirable as a policy matter. And it "embraces immediate human concerns "and the "equities of an individual case," such as whether an

immigrant has “long ties to the community, or a record of distinguished military service.”

The authority to exercise discretion takes several forms. Some are specifically authorized by statute. Others have been recognized as inherent in the Executive’s authority in this area.

This case involves deferred action, a “regular practice “in which the Executive decides, “No action will thereafter be taken to proceed against an apparently deportable alien.” Under longstanding federal regulations, the validity of which is not disputed here, recipients of deferred action may seek work authorization and receive certain other limited benefits. Like other forms of discretionary immigration relief, deferred action may be exercised on a purely ad hoc basis, or through policies that provide a framework to guide individualized decisions for applicants in a particular class. For nearly 60years, the Executive Branch has operated dozens of class-based discretionary relief policies, including several that involved deferred action.

2. Established in 2012, DACA creates a framework guiding deferred action decisions regarding “certain young people who were brought to this country as children, “many of who “know only this country as home.” Individuals who obtain deferred action under DACA receive a provisional grant of forbearance from removal for a two-year period, subject to renewal. They do not gain any lawful immigration status, and immigration officials retain the ability to commence removal proceedings against them at any time.

Before the Secretary announced DACA, the Office of Legal Counsel at the Department of Justice advised that a policy such as DACA would be legally sound soling as immigration officials “retained discretion to evaluate its application on an individualized basis.” After the Secretary implemented DACA, the federal government successfully defended the policy against various legal challenges.

By September 2017 there were nearly 700,000active DACA recipients, with an average age of just fewer than 24 years old. More than 400,000 of those individuals lived in the respondent States. Over 90 percent of DACA recipients are employed, and 45 percent are in school. They have bought homes, embarked on careers, and started families. They are employees at our state and local agencies, and student sand staff at our public colleges and universities. They add value to the States and our local communities in many ways—including by contributing to our economies, paying billions of dollars in taxes, and parenting their children.

3. In 2014, then-Secretary of Homeland Security Johnson announced the creation of a new program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). DAPA would have applied to adults who, among other things, had been in the United States since 2010, were the parents of citizens or lawful permanent residents, and were not enforcement priorities. It also would have expanded the scope of DACA in several respects.

Before DAPA could be implemented, Texas and other States challenged its legality, and a district court granted a nationwide preliminary injunction temporarily barring its implementation. A divided panel of the Fifth Circuit affirmed that interlocutory order and this Court affirmed the Fifth Circuit's judgment by an equally divided vote. Before that litigation proceeded to final judgment, the current administration took office and rescinded the DAPA policy. DAPA and the intended expansion of DACA thus never went into effect. But the preliminary injunction entered and affirmed in Texas did not affect the original DACA policy.

4. The new administration initially retained DACA and continued to solicit and process applications for deferred action under the policy. Indeed, the President and other senior officials expressed their commitment to the policy. In the summer of 2017, however, officials at the Department of Justice began to discuss DACA with the plaintiffs in the Texas litigation (which remained pending despite the rescission of DAPA). On June 29,those plaintiffs publicly informed then-Attorney General Sessions that if the administration did not "phase-out the DACA program" by September 5, they would amend their complaint to challenge DACA.

On September 4, the Attorney General sent a one-page letter advising then-Acting Secretary of Homeland Security Duke that her Department "should rescind" DACA because it was "unconstitutional" and "effectuated . . . without proper statutory authority." He further asserted that DACA "has the same legal and constitutional defects that the courts recognized as to DAPA. The Attorney General announced the termination of DACA at a press conference the next day.

Also on September 5, Acting Secretary Duke issued a memorandum formally rescinding DACA. Her memorandum contained one sentence explaining the reason for the decision:

"Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing DAPA litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be

terminated." She instructed her Department to stop accepting new DACA applications immediately.

B. Procedural Background

These consolidated proceedings arise out of multiple suits challenging the decision to terminate DACA, which respondents filed in district courts in California, New York, and the District of Columbia.

1. The States of California, Maine, Maryland, and Minnesota, as well as the other respondents filed complaints in the Northern District of California. They alleged, among other things, that the termination decision was arbitrary, capricious, or otherwise not in accordance with law and thus invalid under the Administrative Procedure Act.

a. Petitioners proffered an administrative record consisting of 14 documents and "256 publicly available pages, roughly three-quarters of which are taken up by the three published judicial opinions from the Texas litigation." The parties disputed the adequacy of that putative administrative record, including in proceedings before this Court. Consistent with this Court's instructions, the district court postponed petitioners' obligation to complete the record and stayed discovery pending review of certain threshold defenses.

Thereafter, the district court rejected petitioners' arguments on reviewability, and granted a limited preliminary injunction. The court held that respondents were likely to succeed on their APA claim because, among other things, the agency's decision was based on the incorrect premise that DACA was unlawful. The court also concluded that the equities favored provisional relief. The preliminary injunction partially preserved the status quo for individuals who had already received deferred action under DACA. It allowed the agency to continue exercising individualized discretion in reviewing renewal applications and to "proceed to remove any individual, including any DACA enrollee, who it determines poses a risk to national security or public safety, or otherwise deserves, in its judgment, to be removed." In a separate order, the court dismissed some additional claims, while allowing certain due process and equal protection claims to proceed..

b. The court of appeals affirmed. It first addressed whether petitioners' decision to terminate DACA was unreviewable as a matter "committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2). The court assumed without deciding that the decision fell within the scope of Heckler v. Chaney, which applied Section 701(a)(2) to create a presumption of non-reviewability for "agency refusals to institute investigative or

enforcement proceedings." The court concluded, however, "an agency's non-enforcement decision is outside the scope of the Chaney presumption—and is therefore presumptively reviewable—if it is based solely on a belief that the agency lacked the lawful authority to do otherwise." Here, the termination decision was reviewable because it was based "solely on a belief that DACA was beyond the authority of DHS." The court also rejected petitioners' argument that 8 U.S.C. § 1252 stripped the district court of jurisdiction to hear this case.

On the merits, the court of appeals noted that the only preliminary injunction factor in dispute was respondents 'likelihood of success on the merits of their APA claim.' Because an agency action "based solely on an erroneous legal premise . . . must be set aside," the court examined petitioners' stated ground that DACA was unlawful. In view of the Executive Branch's broad authority over immigration enforcement policy and priorities and its longstanding practice of using class-based discretionary relief policies, the court concluded, "that DACA was a permissible exercise of executive discretion." It emphasized that it was "not holding that DACA could not be rescinded as an exercise of Executive Branch discretion." But petitioners' decision to rescind the program "based on an erroneous view of what the law required" was subject to vacatur. The court next held that the district court's decision to make its preliminary injunction effective nationwide was not an abuse of discretion under the circumstances of this case. It also affirmed the district court's ruling on petitioners' motion to dismiss.

2. The Eastern District of New York entered a preliminary injunction co-extensive with the one affirmed in the California proceeding. The court reasoned that the asserted basis for the termination decision was inadequately explained and rested on a premise that was legally and factually flawed.

3. The district court for the District of Columbia entered a final judgment vacating the termination decision. It reasoned that the decision "was predicated primarily on a legal judgment that the program was unlawful. "But that legal judgment could not support the agency's action because it was "virtually unexplained." The court temporarily stayed its judgment to afford the agency an opportunity to "provide a fuller explanation for the determination that the program lacks statutory and constitutional authority."

Two months later, petitioners submitted a supplemental memorandum from then-Secretary of Homeland Security Nielsen. She "declined to disturb" her predecessor's decision and offered her own "understanding of the Duke

memorandum." The district court held that this supplemental memorandum "failed to elaborate meaningfully on the agency's primary rationale for its decision." Secretary Nielsen merely "repackaged legal arguments previously made" and offered new rationales that could not support the original decision because they were not identified in Duke's memorandum. The court accordingly adhered to its original final judgment, but it partially stayed its order pending appeal, to the extent that full vacatur would provide relief beyond the preliminary injunctions that had been entered in the other cases.

4. This Court granted certiorari in the California case, granted certiorari before judgment in the New York and D.C. cases, and consolidated the proceedings for purposes of briefing and argument.

SUMMARY OF ARGUMENT

The critical feature of this case is that petitioners decided to terminate DACA on the stated ground that the policy was unlawful. That drives the analysis of both the reviewability and merits questions.

As to reviewability, petitioners contend that the courts are powerless to review this decision because it is a type of agency action that has traditionally be entreated as presumptively immune from review. The termination decision does not, in fact, fall within such tradition. But even if it did, it would still be subject to review because the sole rationale that the agency offered for the decision was that it lacked authority to maintain DACA. The Administrative Procedure Act's narrow exception precluding review of actions that are "committed to agency discretion by law," cannot apply when the publicly stated basis for the action is that the law left the agency with no discretionary choice to make.

As to the merits, agency action that is based on an invalid legal premise must be vacated. Here, petitioners 'assertion that they lack authority to maintain DACA is incorrect. The Executive Branch has broad authority to set policies and priorities and to exercise discretion in enforcing the immigration laws. That includes the authority to grant deferred action and other forms of discretionary relief, as well as the authority to adopt a policy framework that guides individual relief decisions for a class of potential applicants with common characteristics. DACA is part of along tradition of class-based discretionary relief policies that stretches back six decades. It applies to carefully defined class of young people who are particularly likely to present compelling cases for discretionary relief; it facilitates the agency's efficient and evenhanded consideration of their applications for deferred action, while

preserving its discretion to deny relief where appropriate; and, for those who receive deferred action, it provides a measure of stability and reassurances they go about their lives and careers. The INA does not require petitioners to continue the DACA policy, but it also does not prohibit them from doing so. And the agency's contrary assertion was not only incorrect; it was almost entirely unexplained, which provides an additional ground for vacatur.

Before this Court, petitioners primarily defend the termination decision based on "policy grounds"' that they advanced in a supplemental memorandum long after the decision was made. Those rationales are not properly considered here (and, in any event, would be insufficient to support the decision). Administrative action must "stand or fall" on the basis of the original rationale offered by the agency at the time of the decision, judged in light of the complete administrative record. Courts sometimes afford an agency the opportunity to provide further explanation for its original rationale, as the D.C. district court did here. But agencies may not use that opportunity to introduce new rationales for an old decision. A contrary rule would blur the lines of accountability and create confusion about the actual basis for agency action. That result is not acceptable—especially when an agency has made a decision as consequential as this one.

CONCLUSION

The judgments below should be affirmed.