DHS V. REGENTS OF THE UNIVERSITY OF CALIFORNIA: ADMINISTRATIVE LAW CONCERNS IN REPEALING DACA

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INTRODUCTION

On its surface, deferred action is simple: it is a decision by Executive Branch officials to postpone deportation proceedings against an individual or group that is otherwise eligible to be removed from the United States.[1] Deferred action is an exercise of the Executive's inherent authority to manage its policies, but is not expressly grounded in statute.[2] Despite this lack of statutory authority, Congress and the Supreme Court have historically recognized deferred action policies. Indeed, records of such Executive discretion date back to the early twentieth century.[3] The Executive, grounding its justification in humanitarian concerns, has continued to institute categorical deferred action programs well into the modern era.[4] Perhaps the most well-known example of such a program is the deferred action policy known as Deferred Action for Childhood Arrivals ("DACA").

This Commentary evaluates the administrative law issues presented by the upcoming case *DHS v. Regents of the University of California*, which concerns the 2017 rescission of DACA.[5] Importantly, this Commentary does not evaluate the legality of DACA itself or argue that DACA cannot be rescinded as a matter of Executive discretion.

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1. Regents of Univ. Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 487 (9th Cir. 2018).
2. *Id.*
3. *Id.*
4. *See id.* at 489 (noting the implementation of deferred action for victims under the Violence Against Women Act, victims of human trafficking, foreign students unable to fulfill their visa requirements following Hurricane Katrina, and widowed spouses of U.S. citizens who had been married for less than two years).
5. 139 S. Ct. 2779 (mem.) (2019).

Instead, the focus is on whether the way in which the policy was rescinded was appropriate. The primary challenge to the rescission's legality is that DHS based the rescission on a determination that maintaining DACA was illegal—instead of rescinding it on policy grounds.[6] For various reasons, this distinction arguably opens the rescission to judicial review and even places its legality in question.[7] In order to evaluate these concerns, the Supreme Court must first consider whether the rescission is subject to judicial review; if review is appropriate, the Court must then determine whether the Executive's decision to rescind DACA was arbitrary and capricious under the Administrative Procedure Act ("APA").[8]

I. FACTUAL & PROCEDURAL BACKGROUND

A. Factual Background

In 2012, the Department of Homeland Security ("DHS") announced a policy known as DACA.[9] DACA provides that eligible individuals brought to the U.S. as children may apply for discretionary relief from removal, despite not having lawful immigration status.[10] To apply, an applicant must: meet certain age restrictions, have maintained continuous residence in the U.S. since 2007, and be a current student, a high school graduate or equivalent, or an honorably discharged service member.[11] In addition, to qualify an applicant cannot have a significant criminal record or pose a threat to national security or public safety.[12] If approved, deportation proceedings against the individual are deferred for two years, subject to renewal.[13] Approval does not, however, confer lawful immigration status: deferral can be revoked and does not provide a pathway to citizenship.[14]

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6. *See infra* Part IV.B.
7. *Id.*
8. *Regents of Univ. Cal.*, 908 F.3d at 510.
9. Brief for Respondents the Regents of the Univ. of Cal., Janet Napolitano, and the City of San José at 4–5, Dep't of Homeland Sec. v. Regents of Univ. Cal., 139 S. Ct. 2779 (mem.) (filed Sept. 27, 2019) (Nos. 18-587, 18-588, and 18-589) [hereinafter Brief for the Respondents].
10. *Id.* at 5.
11. *Id.*
12. *Id.*
13. Brief for the Petitioners at 5, Dep't of Homeland Sec. v. Regents of Univ. Cal., 139 S. Ct. 2779 (mem.) (filed Aug. 19, 2019) (Nos. 18-587, 18-588, and 18-589) [hereinafter Brief for the Petitioners].
14. *Id.*

In 2014, DHS announced plans to expand DACA and to create a new deferred action policy called Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA").[15] Under the expanded DACA policy, DHS planned to ease the age and residency requirements and increase the period of deferred action from two years to three years.[16] Similarly, DAPA was designed to provide DACA-like protections to undocumented parents whose children were U.S. citizens or lawful permanent residents.[17]

In response, Texas and twenty-five other states brought suit to prevent DHS from implementing DAPA and expanding DACA.[18] In *Texas v. United States (Texas I)*, the Southern District of Texas granted a nationwide preliminary injunction.[19] The Fifth Circuit affirmed in *Texas v. United States (Texas II)*,[20] holding that DAPA and the expansions to DACA did not allow for sufficiently individualized review of applicants and were enacted without proper notice under the APA.[21] The Supreme Court affirmed in *United States v. Texas (Texas III)*,[22] but was equally divided and did not issue an opinion.[23] Following this decision, the petitioners from this line of cases ("the *Texas* cases") announced their intention to amend their complaint and challenge DACA in its entirety.[24]

In 2017, Attorney General Jeff Sessions advised DHS to rescind DACA because the policy's effectuation was unconstitutional.[25] In the "Sessions Letter," Sessions warned then-Acting Secretary of Homeland Security Elaine Duke that leaving DACA in place risked litigation that would mirror *Texas II* and *III* "[b]ecause the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA."[26]

15. *Id.*
16. *Id.* at 6.
17. *Id.*
18. Brief for the Petitioners, *supra* note 13, at 6.
19. 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015).
20. 809 F.3d 134, 188 (5th Cir. 2015).
21. *Id.* at 175–78.
22. 136 S. Ct. 2271, 2272 (2016) (mem.) (*per curiam*).
23. Brief for the Petitioners, *supra* note 13, at 7.
24. *Id.*
25. LETTER FROM ATTORNEY GENERAL SESSIONS TO ACTING SECRETARY DUKE (September 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf [hereinafter Sessions Letter].
26. *Id.*

The next day, Acting Secretary Duke issued the "Duke Memorandum" rescinding DACA.[27] The Duke Memorandum instructed DHS to stop accepting new DACA applications and limited renewal applications.[28] Notably, the memorandum justified the rescission in just one sentence: "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in [the *Texas* cases], and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated."[29]

B. Procedural History

Following DACA's rescission, various plaintiffs ("Regents") filed suit against DHS in the Northern District of California, the District of Columbia, the District of Maryland, and the Eastern District of New York.[30]

First, Regents argued that DHS's rescission of DACA was reviewable.[31] The reviewability was in question because agency enforcement decisions are typically left to an agency's own discretion.[32] Here, however, each court held that the rescission was subject to review because DHS's actions were not based on policy considerations, which are normally granted deference.[33] Instead, the rescission was premised solely on DACA's supposed illegality, which the courts found to be a reviewable legal determination.[34]

Second, Regents argued that the rescission was arbitrary and capricious in violation of the APA.[35] In *Regents of University of California v. DHS*[36] and *Batalla Vidal v. Trump*,[37] the New York and California district courts held that the rescission was likely arbitrary and capricious and issued identical preliminary injunctions.[38]

27. Brief for the Respondents, *supra* note 9, at 9.

28. MEMORANDUM ON RESCISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (September 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [hereinafter Duke Memorandum].

29. *Id.*

30. Brief for the Respondents, *supra* note 9, at 10–13.

31. Brief for the Petitioners, *supra* note 13, at 8–9.

32. *Id.* at 9.

33. *Id.*

34. *See, e.g.*, Brief for the Respondents, *supra* note 9, at 11–12 (discussing how the Ninth Circuit held that agency actions based solely on the belief that any other action was foreclosed by law are not considered discretionary and are not granted deference); *see infra* Part III.

35. *Id.* at 8–9.

36. 279 F. Supp. 3d 1011, 1049–50 (N.D. Cal. 2018).

37. 279 F. Supp. 3d 401, 438 (E.D.N.Y. 2018).

38. Brief for the Petitioners, *supra* note 13, at 9.

Additionally, both courts found that the rescission violated the APA because the administrative record explaining DHS's rationale was incomplete.[39] Similarly, in *NAACP v. Trump*,[40] the D.C. district court found that the rescission was arbitrary and capricious because DHS's stated rationale was insufficient to explain the change.[41] However, rather than issuing an injunction, the district court issued a stay, giving DHS ninety days to better explain its original decision or issue a new decision with a clearer rationale.[42]

Within ninety days, then-Secretary of Homeland Security Kirstjen Nielsen issued the "Nielsen Memorandum" to the general public, describing several reasons for the rescission.[43] First, Nielsen explained that rescinding DACA was justified because DHS should not adopt non-enforcement policies for broad classes of aliens.[44] Second, DHS should use its discretionary non-enforcement only on an individualized basis.[45] Third, DHS needed to "project a message" that it will consistently and transparently enforce immigration law.[46] After considering the Nielsen Memorandum, the D.C. district court issued a preliminary injunction against DHS.[47] The court reasoned that, like the Duke Memorandum, the Nielsen Memorandum was based on the *Texas* cases and Attorney General Sessions's view that DACA was not legal.[48] Therefore the Nielsen Memorandum was not sufficient to explain the change.[49]

Several months later, the Ninth Circuit affirmed the injunction against DHS in *Regents of the University of California v. U.S. Department of Homeland Security*.[50] First, the court affirmed that the rescission was reviewable, holding that agency actions based solely on

39. Brief for the Respondents, *supra* note 9, at 55.

40. 298 F. Supp. 3d 209, 241 (D.D.C. 2018).

41. Brief for the States of N.Y., Mass., Wash., Colo., Conn., Del., Haw., Ill., Iowa, N.M., N.C., Or., Pa., R.I., Vt., and Va., and the District of Columbia, Respondents in No. 18-589 at 12, Dep't of Homeland Sec. v. Regents of Univ. Cal., 139 S. Ct. 2779 (mem.) (filed Sept. 27, 2019) (Nos. 18-587, 18-588, and 18-589) [hereinafter Brief for the Respondents in No. 18-589].

42. *Id.*

43. Brief for the Petitioners, *supra* note 13, at 10.

44. MEMORANDUM FROM SECRETARY KIRSTJEN M. NIELSEN (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf [hereinafter Nielsen Memorandum].

45. *Id.*

46. *Id.*

47. Brief for the Petitioners, *supra* note 13, at 12.

48. *Id.*

49. *Id.*

50. 908 F.3d 476, 510 (9th Cir. 2018).

the belief that any other action was foreclosed to them by law are not discretionary and are not granted deference.[51] Second, the court affirmed that the rescission was arbitrary and capricious in violation of the APA.[52] In doing so, the Ninth Circuit refused to consider the Nielsen Memorandum, viewing it as an impermissible *post hoc* rationalization.[53]

In November 2018, DHS filed a petition for certiorari in *Regents*, and sought certiorari before judgment in *NAACP* and *Batalla Vidal*.[54] In June 2019, the Supreme Court granted certiorari for all three.[55]

II. LEGAL BACKGROUND

A. The Reviewability of Agency Actions Under the Administrative Procedure Act

Regents contend that DHS's rescission of DACA is reviewable under the APA's provision that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."[56] Interpreting this, the Supreme Court has consistently articulated a strong presumption that agency actions will be subject to judicial review.[57] Nevertheless, this presumption is rebuttable and fails when it is clear from a statute that Congress intended the agency to address such concerns internally.[58] Specifically, APA § 701(a)(2) provides that judicial review is foreclosed to the extent that "agency action is committed to agency discretion by law."[59] However, this exception is construed narrowly and only applies where "statutes are drawn in such broad terms that in a given case there

51. *Id.*
52. *Id.* For a more in-depth discussion of the Ninth Circuit's holding, *see infra* Part III.
53. Brief for the Petitioners, *supra* note 13, at 13.
54. Brief for the Respondents, *supra* note 9, at 14.
55. *Id.*
56. 5 U.S.C. § 702 (2012).
57. *See, e.g.*, Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1651 (2015) (quoting Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986)); INS v. St. Cyr, 533 U.S. 289, 298–99 (2001); Lincoln v. Vigil, 508 U.S. 182, 190 (1995) (applying this presumption in the immigration context).
58. *Mach Mining*, 135 S. Ct. at 1651.
59. 5 U.S.C. § 701(a)(2) (2012).

is no law to apply."[60] Courts still decide any and all relevant legal questions.[61]

In *Heckler v. Chaney*, the Supreme Court clarified that the § 701(a)(2) exception encompasses an agency's discretionary decision not to investigate, enforce, or prosecute the substantive law.[62] Such a decision is generally committed to an agency's absolute discretion unless Congress has indicated otherwise.[63] The Court found a "tradition" of extending deference to such decisions as they often involve a "complicated balancing of factors which are peculiarly within [the agency's] expertise."[64] Additionally, the Court noted that agency *inaction* generally does not impose coercive power on the rights of individuals and typically needs less judicial review.[65]

In *Chaney*, the Supreme Court explicitly chose not to answer whether "a refusal by [an] agency to institute proceedings *based solely on the belief that it lacks jurisdiction*" would be subject to review under § 701(a)(2).[66] The answer is relevant because how an agency interprets its jurisdiction is no different from how an agency interprets the scope of its authority.[67] The Supreme Court has never decided the issue, though some circuit courts have determined that such decisions are reviewable.[68]

ICC v. Brotherhood of Locomotive Engineers[69] ("*BLE*") debatably clarifies *Chaney*'s lack of guidance.[70] In *BLE*, the Supreme Court held that highlighting a reviewable rationale put forth by an agency taking

60. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 752, 79th Cong., 1st Sess., 26 (1954)); *see also* Heckler v. Chaney, 470 U.S. 821, 830 (1985) ("[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.").

61. 5 U.S.C. § 706 (2012).

62. 470 U.S. 821, 837–38 (1985).

63. *Id.*

64. *Id.* at 831–32.

65. *Id.* at 832.

66. *Id.* at 833 n.4 (emphasis added).

67. *See* City of Arlington v. F.C.C., 569 U.S. 290, 296–97 (noting that an "agency's interpretation of . . . the scope of [its] authority" is no different from an interpretation of "its jurisdiction").

68. *See, e.g.*, Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth., 898 F.2d 753, 754 (9th Cir. 1990) (holding that *Chaney*'s presumption of nonreviewability "may be overcome if the refusal is based solely on the erroneous belief that the agency lacks jurisdiction"); Int'l Longshoremen's Ass'n v. Nat'l Mediation Bd., 785 F.2d 1098, 1100 (D.C. Cir. 1986) (holding that agency nonenforcement decisions are reviewable when they are based on a belief that the agency lacks jurisdiction).

69. 482 U.S. 270 (1987).

70. Brief for the Petitioners, *supra* note 13, at 25–26; *contra* Brief for the Respondents, *supra* note 9, at 24–25.

action that is otherwise unreviewable does not impact the action's reviewability.[71] For example, questionable reasons behind an agency's action will not bear on the action's reviewability if taking the action falls within a tradition of nonreviewability.[72] What matters is the agency's formal action, not how the decision was made.[73] In *BLE*, the Court held that an agency decision not to reconsider a final action was otherwise unreviewable.[74] As in *Chaney*, the Court reasoned that the action fell within a "tradition of nonreviewability."[75]

B. The Rescission's Legality

1. Legality under the APA

Regents also challenge DHS's rescission of DACA under the APA's requirement that agency action be held unlawful and set aside if it is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law."[76] This consideration is made with review of the whole record or, at minimum, those parts that refer to the action's rationale.[77] This is a narrow scope of review and courts are not meant to simply override an agency's judgement.[78] Nevertheless, the agency's action must be the product of "reasoned decisionmaking [sic]."[79] An agency must be able to articulate a satisfactory explanation that demonstrates consideration of relevant factors without any clear error in judgment.[80] There must be a rational connection between these factors and the action taken.[81] Moreover, the explanation must be clear enough to be understandable.[82] These criteria are meant to check that agencies offer genuine justifications for their actions and ensure that

71. *BLE*, 482 U.S. at 283.
72. *Id.*
73. *Id.* at 281.
74. *Id.* at 282.
75. *Id.*
76. 5 U.S.C. § 706 (2012); *see also* SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) ("[A]n order may not stand if the agency has misconceived the law.").
77. 5 U.S.C. § 706 (2012).
78. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).
79. *Id.* at 52.
80. *Id.* at 42–43.
81. *Id.* at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).
82. SEC v. Chenery Corp., 332 U.S. 194, 196–97 (1947).

the Executive remains accountable to the courts and the general public.[83]

2. Legality of *Post Hoc* Justifications in the Common Law

Regents argue the Nielsen Memorandum should be excluded as an impermissible *post hoc* rationalization because administrative law requires that courts consider only the agency's contemporaneous explanation when reviewing an agency's action.[84] Accordingly, these determinations must be made by considering only the existing administrative record.[85] Under a narrow exception to this rule, a court can "remand to the agency for a fuller explanation of the agency's reasoning at the time of the agency action."[86] However, the court may only do this to clarify the agency's reasoning when "there was such failure to explain administrative action as to frustrate effective judicial reviw."[87] Once the reason behind the action is identified, any subsequent explanation cannot cite additional rationales.[88]

Martin v. Occupational Safety and Health Review Commission states that an agency official's interpretation of the agency's own regulation can be a form of agency action—"not a *post hoc* rationalization"—and is therefore permissible.[89] For example, in *Martin*, the relevant statute granted the Secretary of Labor the power to interpret the meaning of the agency's rules.[90] Therefore, the Court deferred to the Secretary's "reasonable" interpretation of an ambiguous regulation, considering it agency action.[91]

III. HOLDING

This section focuses on the holding of the Ninth Circuit because it was the only circuit court to rule before certiorari was granted. The Supreme Court granted certiorari before judgment in *Batalla Vidal* and

83. *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575–76 (2019) (stating that agency rationales must be clear enough to ensure that agencies put forth "genuine justifications for important decisions . . . that can be scrutinized by courts and the general public").

84. *Id.* at 2573; *see also* Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169 (1962) (stating if agency action is to be upheld, it should be "on the same basis articulated in the order by the agency itself").

85. *Dep't of Commerce*, 139 S. Ct. at 2573.

86. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990).

87. Camp v. Pitts, 411 U.S. 138, 142–43 (1973).

88. *Id.* at 143.

89. 499 U.S. 144, 156–57 (1991).

90. *Id.* at 152.

91. *Id.* at 158–59.

NAACP, in which both the Second Circuit and the D.C. Circuit Court had heard oral arguments on appeal but had not yet rendered decisions.[92] However, the Supreme Court granted certiorari after the Ninth Circuit issued its ruling in *Regents*.[93]

The Ninth Circuit upheld the district court's injunction against the rescission of DACA.[94] The court concluded that *Chaney*'s protections against judicial review did not apply when an agency acted solely out of the belief that it had no other legal option.[95] This conclusion, paired with the APA's strong presumption towards judicial review, guided the court's determination that DACA's rescission was reviewable.[96] The court determined that the Acting Secretary based the rescission solely on an incorrect belief that DACA was illegal.[97] Because the court determined that DACA's creation was a permissible exercise of executive discretion, any rationale for the rescission that was based on DACA's illegality was found to be insufficient.[98] Therefore, DHS's actions likely satisfied the arbitrary and capricious claim and fulfilled the criteria for an injunction.[99] The court dismissed arguments concerning notice-and-comment rulemaking under the APA.[100]

IV. ARGUMENTS

A. Petitioner's Arguments

1. The Rescission is not Reviewable

First, DHS argues rescission is not judicially reviewable because, under the APA, such action was "committed to agency discretion by law."[101] The decision to rescind DACA falls within a tradition of agency discretion, given the similarities between the current case and *Chaney*.[102] Here, DHS's decision to *retain* DACA (a policy of non-enforcement) is akin to the decision in *Chaney* to *adopt* a policy of non-

92. Brief for the Respondents in No. 18-589, *supra* note 41, at 13.
93. *Id.*
94. Regents of Univ. Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 520 (9th Cir. 2018).
95. *Id.* at 497.
96. *Id.* at 497–98.
97. *Id.* at 503.
98. *Id.* at 510.
99. *Regents of Univ. Cal.*, 908 F.3d at 510–12.
100. *Id.* at 512–18.
101. Brief for the Petitioners, *supra* note 13, at 17 (quoting 5 U.S.C. § 706(2)(A) (2012)).
102. *Id.* at 18.

enforcement.[103] Both decisions require "complicated balancing" within the particular expertise of an agency.[104] They merit balancing given the wide range of acceptable considerations, which include the proper allocation of resources and overall agency policies.[105] Additionally, the abandonment a nonenforcement policy lacks a final adverse order and thus does not invoke the agency's coercive power, reducing the need for judicial oversight.[106] Given that the decision to rescind DACA was committed to agency discretion by law, there are no relevant legal considerations for the court absent a statutory directive circumscribing DHS's traditional discretion.[107]

Second, DHS believes that *BLE* resolves *Chaney*'s decision not to rule on the reviewability of agency decisions based solely on the belief that other courses of action are foreclosed to the agency by law.[108] Here, *Chaney*'s gap is irrelevant because *BLE* states that agency actions that fall within a "tradition of nonreviewability" are not made reviewable simply because the agency gives an otherwise reviewable justification for taking the action.[109] Even if DHS's stated rationale for rescinding DACA is in question, the action itself was committed to agency discretion, so the rationale has no bearing on its reviewability.[110]

2. The Rescission was Legal

First, DHS argues that a fair reading of the Duke Memorandum shows that the rescission was never based solely on a legal conclusion that DACA was illegal.[111] Instead, the decision was justified by DHS's "serious doubts about the lawfulness of the policy and the litigation risks in maintaining it."[112] DHS was not confident in the legality of DACA following the repeal of DAPA and feared that maintaining a legally questionable policy could undermine public confidence in DHS.[113]

103. *Id.* at 19.
104. *Id.* (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).
105. *Id.* at 22.
106. *Id.* at 19.
107. Brief for the Petitioners, *supra* note 13, at 19.
108. *Id.* at 23–25.
109. *Id.* at 23.
110. *Id.*
111. *Id.* at 26.
112. Brief for the Petitioners, *supra* note 13, at 33.
113. *Id.*

Second, DHS argues that the Nielsen Memorandum further articulates these reasons and should be considered.[114] DHS asserts that the Nielsen Memorandum is not a *post hoc* rationalization because it is the Acting Secretary explaining her own reasoning and therefore "*is* agency action."[115] Additionally, the policy arguments in the Nielsen Memorandum adequately justify rescission on their own.[116]

B. Respondents' Arguments

1. The Rescission is Reviewable

Regents argue that the rescission of DACA is reviewable given the "strong presumption" that administrative actions are subject to judicial review.[117] Additionally, agency action based solely on the belief that any other course of action was foreclosed as a matter of law is not an exercise of agency discretion and is not granted deference.[118] Regents argue that this is *not* an instance where there is no "law to apply" because the entirety of DHS's argument relies on interpreting and applying the *Texas* cases.[119] By relying on judicial decisions, DHS places responsibility on the courts to determine what the law is.[120] The courts are well equipped to address DACA's legality and the APA provides that the courts are to decide such questions of law.[121] Accordingly, agency action premised solely on the belief that such action was required by law cannot fall within the APA's narrow § 701(a)(2) exception from judicial review because there is no tradition demonstrating that such action is "committed to agency discretion by law."[122]

In distinguishing *Chaney* and *BLE*, Regents note that *Chaney* involved *specific* enforcement proceedings and describe the action as only involving a "one-time enforcement decision," which is different from the ongoing, widespread effects of rescinding DACA.[123] First,

114. *Id.* at 28.
115. *Id.* at 29 (emphasis original). For an example of when agency explanations are agency action, *see supra* Part II.B.2.
116. *Id.* at 37–42.
117. Brief for the Respondents, *supra* note 9, at 17 (quoting Weyerhauser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018)).
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 20 (quoting 5 U.S.C. § 706 (2012)).
122. *Id.* at 18 (quoting 5 U.S.C. § 701(a)(2) (2012)).
123. Brief for the Respondents, *supra* note 9, at 22.

there is no established tradition of non-reviewability for *programmatic* policy decisions.[124] Second, the rescission implements an agency's coercive power, unlike in *Chaney*. Third, *Chaney* explicitly does not apply to agency decisions based solely on the belief that the action was required by law.[125] Lastly, Regents reject DHS's interpretation of *BLE* as too broad.[126] *BLE* is "narrow" and limited to "recognized categor[ies] of traditionally unreviewable agency action," which do not include the decision to rescind DACA.[127]

Regents contend that the Nielsen Memorandum is an impermissible *post hoc* rationalization and that, regardless, Nielsen's rationales do not adequately explain the rescission.[128] When reviewing agency actions, courts are limited to the reasons the agency gave when it took the action in question.[129] Agencies cannot alter the rationale for their actions amidst review, because otherwise "agencies could render briefs, oral argument, and even lower court opinions obsolete by issuing *post hoc* documents unsupported by the administrative record."[130] These concerns are especially relevant when, as in this case, the record is incomplete, because agencies could potentially continuously change their rationale while withholding the materials considered by the original decisionmaker.[131] Either way, the Nielsen Memorandum does not impact reviewability because the rescission does not fall within a traditionally unreviewable category, and under the APA agency actions are reviewed for "abuse of discretion."[132]

2. The Rescission was Illegal

First, Regents contend that the rescission of DACA was illegal because it was arbitrary and capricious and therefore in violation of the APA.[133] The rescission was not adequately explained because DHS failed to clearly disclose the grounds on which the decision was made or offer a satisfactory explanation for the rescission.[134] The one-

124. *Id.* at 23 (noting that DACA's rescission is programmatic because it impacts nearly 700,000 people and has widespread indirect effects).
125. *Id.* at 24.
126. *Id.*
127. *Id.* at 25.
128. *Id.* at 26–30.
129. Brief for the Respondents, *supra* note 9, at 27.
130. *Id.*
131. *Id.* at 28.
132. *Id.* at 27.
133. *Id.* at 31.
134. *Id.* (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983)).

sentence explanation in the Duke Memorandum is both superficial and inadequate because there is no explanation of how or why the cited sources led to the rescission of DACA.[135]

Second, Regents further contend that the Nielsen Memorandum is a *post hoc* rationalization and should not be considered, but that, even if considered, it does not cure the defects in the rescission's explanation.[136] The legal and policy rationales put forward by the Nielsen Memorandum "are largely a repackaging of the rationale that DACA is unlawful."[137] The only rationale that does not depend on DACA's legality is that DHS needed to "project a message" that they will enforce immigration laws.[138] This justification is insufficient, unreasonable, and lacking in any support from the administrative record.[139] Regents also note that hundreds of thousands of people living in the U.S. rely on DACA.[140]

Lastly, Regents argue that the administrative record is incomplete, which constitutes a violation of the APA.[141] It is implausible that DACA was rescinded "based on nothing more than a handful of judicial opinions and other public documents."[142] Without access to all of the evidence and the analysis behind the rescission, courts are unable to determine whether the decision was arbitrary and capricious.[143] This is especially concerning given evidence that the explanation provided by DHS may have been pretextual.[144]

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135. Brief for the Respondents, *supra* note 9, at 32–33.
136. *Id.* at 37.
137. *Id.* at 38.
138. Nielsen Memorandum, *supra* note 46, at 3.
139. Brief for the Respondents, *supra* note 9, at 39.
140. *Id.* at 40–41.
141. *Id.* at 55.
142. *Id.*
143. *Id.* at 56.
144. *Id.* (noting that Jeff Session's announcement of the rescission stated that DACA "denies Americans jobs and contributes to crime" and that President Donald Trump indicated that DACA would be rescinded unless funding was received for a border wall with Mexico, neither of which are cited in DHS's reasoning behind the rescission); *see also* Donald Trump (@realDonaldTrump), TWITTER (Dec. 29, 2017, 5:16 AM), https://goo.gl/aZ19im ("The Democrats have been told, and fully understand, that there can be no DACA without the desperately needed WALL at the Southern Border and an END to the horrible Chain Migration & ridiculous Lottery System of Immigration etc."); Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 23, 2018, 8:07 PM), https://goo.gl/Zz46iq ("[I]f there is no Wall, there is no DACA.").

V. Analysis

A. The Department of Homeland Security's Decision to Wind Down DACA is Judicially Reviewable

The Supreme Court should review DACA's rescission because neither *Chaney* nor *BLE* prohibit it, and review is consistent with administrative law objectives repeatedly noted by the Court. *Chaney* identifies one exception to the default rule favoring judicial review of agency action: the case in which when an agency exercises its discretion to not take certain enforcement actions.[145] This is consistent with the narrow set of actions committed to agency discretion because agency *inaction* is not typically proscribed by statute, so "there is no law to apply."[146] However, the Court explicitly did not answer whether agency inaction based "solely on the belief that [the agency] lacks jurisdiction" would fall within the scope of this exception.[147] This is a logical reservation, as such action involves a *non*-discretionary interpretation of the substantive law, which is outside the purview of agency expertise.[148] Unlike agency inaction rooted in a lack of statutory guidance, it is "almost ludicrous to suggest that there is 'no *law* to apply' in reviewing whether an agency has reasonably interpreted a *law*."[149] Therefore, these questions of law should be reserved for the courts.[150]

Similarly, this argument does not conflict with the proposition in *BLE* that "otherwise unreviewable" agency actions stand even when an agency provides a reviewable justification.[151] In *BLE*, the Court deemed the action "otherwise unreviewable" because of a "tradition" of nonreviewability similar to that in *Chaney*.[152] However, the Court has explicitly stated that the tradition in *Chaney* does not encompass agency inaction based solely on the agency's belief that it lacked authority to do otherwise.[153] For *BLE* to apply, the Court would need to find a separate tradition of nonreviewability for the type of inaction at hand. This seems unlikely, given that the basis for deference is often

145. Heckler v. Chaney, 470 U.S. 821, 823 (1985).
146. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); *see also Chaney*, 470 U.S. at 830 ("[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.").
147. *Chaney*, 470 U.S. at 833 n.4.
148. Regents of Univ. Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 495 (9th Cir. 2018).
149. Int'l Union v. Brock, 783 F.2d 237, 246 (D.C. Cir. 1986) (emphasis in original).
150. 5 U.S.C. § 706 (2012).
151. ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 283 (1987).
152. *Id.* at 282–83.
153. Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985).

rooted in a "complicated balancing of factors . . . peculiarly within [the agency's] expertise."[154] Here, DHS cited no policy issues to balance.[155] At issue is whether the *Texas* cases[156] required DHS to rescind DACA, and such "questions of law" are generally reserved to the expertise of the courts.[157] Altogether, given that there is likely no legal barrier to judicial review, the "strong presumption favoring judicial review of administrative action" should apply here.[158]

B. The Department of Homeland Security's Decision to Wind Down DACA was Unlawful

It is less clear whether DHS's decision to rescind DACA was illegal, especially in light of the *Texas* cases and the possibility that the Court will decide that DACA's effectuation was illegal regardless. However, the case does raise concerns about the lack of clarity and transparency in DHS's justification.

The analysis in the previous section is dependent on DHS rationalizing DACA's rescission solely on the belief that it is illegal.[159] DHS argues that this is not the case.[160] DHS insists that DACA was rescinded due to "litigation risks," but these risks are not mentioned at all in the Duke Memorandum.[161] Though the Sessions Letter makes reference to potential litigation reaching "similar results" to the *Texas* cases, the rest of the letter indicates that this is not an independent reason for the rescission but merely a natural consequence of DACA's supposed illegality.[162] The only clear rationale asserted in the Sessions Letter is that DACA was effectuated without authority and is fundamentally unconstitutional.[163] Further, the Duke Memorandum cites only this letter and the *Texas* cases in its one-sentence justification.[164] As Regents point out, this is alarming considering that

154. *Id.* at 831–32.

155. *See supra* Part I.A (explaining that Duke's only rationales for the rescission were the *Texas* cases and the Sessions Letter). DHS argues that this is not the case. *See infra* Part V.B (discussing the merits of DHS's argument).

156. *See infra* Part V.B (laying out the *Texas* cases addressing the legality of DAPA and proposed expansions to DACA).

157. 5 U.S.C. § 706 (2012).

158. Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1651 (2015) (quoting Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986)).

159. *See supra* Part V.A.

160. *See supra* Part IV.A.

161. Regents of Univ. Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 501 (9th Cir. 2018)

162. *Id.*

163. Brief for the Respondents, *supra* note 9, at 8.

164. *Id.* at 9.

no court has ever found a deferred action policy unconstitutional, no comparison of DACA and DAPA was provided, and the reasoning behind these determinations was not explained.[165]

Therefore, as articulated in the Sessions Letter and the Duke Memorandum, the rationale behind the rescission cannot rise to the level of clarity and "reasoned decisionmaking" required by the APA.[166] The reasoning provided is not sufficient to allow for real "scrutin[y] by courts and the general public" because it offers no insight into DHS's decision-making process.[167] Therefore, the rescission should be held arbitrary and capricious under the APA.

DHS argues these defects are cured by the Nielsen Memorandum's expanded explanation;[168] however, Secretary Nielsen's *post hoc* rationalizations are not merited under the APA and should be excluded from consideration. In violation of one of the foundational principles of administrative law,[169] the Nielsen Memorandum was not issued contemporaneously with the decision to rescind DACA.[170] Additionally, even if the memorandum can be considered necessary for a fuller explanation, its explanation impermissibly exceeds the reasoning identified in the Duke Memorandum: namely the illegality of DACA and its parallels to DAPA.[171]

Additionally, DHS's argument that the Nielsen Memorandum was itself agency action fails because it is an overbroad interpretation of the principle in *Martin*.[172] In *Martin*, the then-Secretary's interpretation of an ambiguous law was considered agency action only because the then-Secretary was statutorily proscribed the power to interpret the meaning of agency rules.[173] This is inapplicable because there is no statute granting the Secretary of Homeland Security the power to retroactively justify already explained agency actions. Regardless, even if the Nielsen Memorandum is considered, two of its three rationales depend on the supposed illegality of DACA and the third is not

165. *Id.* at 8–9.
166. *See supra* Part II.B.
167. Brief for the Respondents, *supra* note 9, at 8–9 (quoting Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575–76 (2019)).
168. *See supra* Part IV.A.
169. *See supra* Part II.C. (quoting Dep't of Commerce v. New York, 139 S. Ct. 2551, 2573 (2019)).
170. Brief for the Respondents, *supra* note 9, at 28.
171. *See supra* Part II.C.
172. *See supra* Part II.B.2.
173. Martin v. Occupational Safety and Health Rev. Comm'n, 499 U.S. 144, 152 (1991).

presented as independently sufficient grounds for rescission.[174] Accordingly, the Nielsen Memorandum presents the same defects as the Duke Memorandum and does not rise to the level of clarity and rationalism required by the APA.[175]

On a policy level, Regents accurately note that *post hoc* explanations are especially problematic "where, as here, courts have found that the administrative record is incomplete."[176] If DHS's explanations are not found to be arbitrary and capricious, the Court should order the record be made complete in compliance with the APA.[177] The Court should not allow DHS to "manipulate judicial review by changing the rationale for its decisions while withholding the full administrative record that was before the original decisionmaker."[178] By affirming review over a complete and clear record, the Court will promote the Executive Branch's accountability, ensure political oversight over federal agencies, and affirm the fundamental, democratic obligations the Executive owes to the public.[179]

CONCLUSION

DHS based its rescission of DACA on a claim that it was required to do so by law instead of rescinding it on policy grounds. In doing so, DHS stripped itself of the protections typically afforded to agency decisions. The rationale DHS has put forth is too limited to be clearly understandable and offers such insufficient evidence of its decision-making that the rescission should be deemed arbitrary and capricious. For these reasons, the Supreme Court should affirm the injunction against DHS. This would force DHS to either reattempt the rescission as a matter of clear policy or let DACA remain in place.

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174. *See* Brief for the Respondents, *supra* note 9, at 29 (arguing that Nielsen's statement that DHS should only enforce laws enforced by Congress rests on a legal conclusion regarding DACA's inconsistency with said laws, that Nielsen's statement that DHS should implement deferred action on an individualized basis rests on a conclusion that DACA cannot be applied in such a manner, and that Nielsen's "messaging" rationale is not presented as an independent justification for rescission).

175. *See supra* Part II.B.

176. Brief for the Respondents, *supra* note 9, at 29.

177. 5 U.S.C. § 706 (2012).

178. Brief for the Respondents, *supra* note 9, at 28.

179. *See* Regents of Univ. Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 498 (9th Cir. 2018) (noting that judicial review over Executive action is essential for democratic responsiveness and public accountability).