Consolidated Case Nos. 18-15068, 18-15069, 18-15070, 18-15071, 18-15072, 18-15128, 18-15133, 18-15134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

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INTRODUCTION AND SUMMARY OF ARGUMENT

On May 1, 2018, this Court directed the parties to submit supplemental briefs "addressing the effect of *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985), and *Montana Air Chapter No. 29 v. FLRA*, 898 F.2d 753, 756-57 (9th Cir. 1990), on the question whether 5 U.S.C. § 701(a)(2) bars judicial review of the Department of Homeland Security's rescission of the Deferred Action for Childhood Arrivals program [(DACA)]." The court further directed that "[t]he parties should consider whether the rescission is judicially reviewable as a general enforcement policy, rather than as a single-shot non-enforcement decision. *See Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994); *NAACP v. Trump*, Nos. 17-1907 & 17-2325, 2018 WL 1920079, at *11–17 (D.D.C. Apr. 24, 2018) (interpreting the standard in *Crowley*)."

In answering this Court's questions, it is critical to distinguish between whether an *enforcement decision* is reviewable, and whether the *supporting rationale* is reviewable on its own terms even if the underlying enforcement decision is not. Under *Heckler v. Chaney*, an agency enforcement decision is presumptively unreviewable. *See* 470 U.S. at 831-32. This principle clearly extends beyond "single-shot" non-enforcement decisions to general enforcement policies; in fact, the agency action at issue in *Chaney* was a general policy of non-enforcement with respect to lethal injection drugs. *See Chaney v. Heckler*, 718 F.2d 1174, 1191 n.45 (D.C. Cir. 1983); *Chaney*, 470 U.S. at 824-25. And it is equally clear that the mere fact that the agency provides a general legal rationale does not provide a "hook" to review the otherwise unreviewable decision

itself. *See ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (*BLE*). The district court in *NAACP v. Trump* correctly recognized these basic principles of law concerning the reviewability of enforcement decisions. *See* 2018 WL 1920079, at *11, *13-15.

Chaney's presumption of unreviewability for enforcement decisions is overcome *only* if the agency exceeds constraints imposed on its enforcement discretion. *See Chaney*, 470 U.S. at 832-33, 833 n.4. And that may include a categorical refusal to exercise its jurisdiction to enforce the law. *See Montana Air Chapter*, 898 F.2d at 756-57. Yet in holding that the Acting Secretary's decision was reviewable, the *NAACP* court did not and could not hold that the Acting Secretary exceeded her unfettered discretion to rescind DACA.

Instead, the court misconstrued the D.C. Circuit's *Crowley* line of cases concerning the reviewability of substantive legal interpretations provided as the rationale for enforcement decisions. *See NAACP*, 2018 WL 1920079, at *12, *14-15. Cases like *Crowley* do not create an exception to *Chaney*'s principle that enforcement decisions themselves are unreviewable. Rather, these cases raise the converse of the Supreme Court's decision in *BLE*: just as an unreviewable enforcement decision *does not itself become reviewable* simply because an agency gives a general legal reason for the enforcement decision, these cases concluded that a general legal interpretation that would be a reviewable interpretive rule, standing alone, *does not itself become unreviewable* simply because it is embedded in an unreviewable enforcement decision. *UAW v.*

Brock, 783 F.2d 237, 244-46 (D.C. Cir. 1986); *see also Montana Air Chapter*, 898 F.2d at 757-58. *Crowley* did not turn on any difference between general enforcement policies and single-shot non-enforcement decisions with respect to whether the enforcement decisions themselves are reviewable; instead, the holding of the case rested on the distinction that general enforcement policies may be "more likely" to contain embedded "direct interpretations of the commands of the substantive statute" that can be carved out and reviewed on their own terms as interpretive rules (separate from the underlying and unreviewable enforcement decision). 37 F.3d at 677.

Applying these principles of reviewability, the Acting Secretary's decision to rescind DACA is not subject to judicial review. The rescission itself is a general enforcement policy decision that is presumptively unreviewable. The presumption is not overcome even assuming *arguendo* that the sole rationale for the decision was that DACA is unlawful (rather than that it presented significant legality and litigation-risk concerns even if it were ultimately lawful). Such a legal rationale could not be used as a hook to review the otherwise unreviewable enforcement decision to rescind DACA. And that legal rationale would not exceed any constraints on the Acting Secretary's discretion to rescind DACA, because nothing in the Immigration and Naturalization Act (INA) required her to maintain DACA or to consider any particular factors before choosing to enforce the law without this extraordinary prosecutorial discretion policy. In *enforcing* the law, the Acting Secretary's decision does not exceed her enforcement discretion, even if that decision were based on an erroneous belief that

DACA runs afoul of the INA's limits on *prosecutorial discretion*. This is fundamentally different from an agency *refusing to enforce* the law based on an erroneous belief as to the limits on its *jurisdiction*, which may amount to an abdication of responsibility that in some circumstances could perhaps exceed its enforcement discretion. In short, agencies may be required by statute to enforce the law, but the INA does not require DHS to exercise prosecutorial discretion *not to enforce* the law.

Even if a general legal rationale in the Acting Secretary's memorandum could be carved out for review on its own terms as an interpretive rule, that would not justify setting aside the underlying enforcement policy decision to rescind DACA itself. And in any event, there is no such reviewable interpretive rule here. In rescinding DACA, the Acting Secretary was not interpreting any of the INA's substantive commands governing the primary conduct of aliens or other parties (*e.g.*, which crimes render an alien removable). Rather, her enforcement decision interpreted, at most, the scope of her own enforcement discretion. The rescission thus rests on enforcement discretion all the way down.

Finally, it warrants emphasis that the contrary position would lead to the untenable result that courts could review the decision of a prosecutor to rescind a general non-enforcement policy whenever the decision was based on the belief that the prior policy was arguably, or in fact, illegal. Neither plaintiffs nor the *NAACP* court have provided a plausible basis for distinguishing that scenario from this one, and none exists.

ARGUMENT

1. The Administrative Procedure Act (APA) precludes review of agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In *Heckler v. Chaney*, 470 U.S. 821, 833 (1985), the Supreme Court instructed that agency decisions whether or not to take enforcement action "should be presumed immune from judicial review under § 701(a)(2)." This presumption of non-reviewability applies with particular force in the context of immigration enforcement, where the "broad discretion exercised by immigration officials" is a "principal feature of the removal system," *Arizona v. United States*, 567 U.S. 387, 396 (2012), and litigation challenging the exercises of such discretion seeks the extraordinary relief of ordering the government to allow a "continuing violation of United States law." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999) (*AADC*).

Chaney's presumption of non-reviewability applies equally when immigration enforcement discretion is exercised through the adoption of broad policies to enforce as through individual non-enforcement decisions. The government has previously explained why it is untenable in this context to distinguish between enforcement and non-enforcement, or between broad and individual exercises of enforcement discretion. *See, e.g.*, Br. 18-21; Reply Br. 9-13. To recap briefly, the enforcement/non-enforcement distinction is foreclosed by this Court's opinion in *Morales de Soto v. Lynch*, 824 F.3d 822, 827 n.4 (9th Cir. 2016), which expressly rejected the notion that *Chaney*'s presumption would apply only to a "decision *not* to enforce agency

regulations" and not to "the contrary decision *to* enforce." The general/individual distinction, meanwhile, is foreclosed by *Chaney* itself, which involved a "refus[al] to take any action with regard to an *entire category* of allegedly prohibited activity." *Chaney v. Heckler*, 718 F.2d 1174, 1190 n.45 (D.C. Cir. 1983); *see Chaney*, 470 U.S. at 824-25 (describing the general policy decision not "to interfere with [a] particular aspect of state criminal justice systems"). This Court has similarly recognized that a statutory grant of enforcement discretion "precludes . . . review of [an agency's] failure to enforce" the law, even when the agency has done so through a broad "written policy stating that subsistence hunting in Alaska during the closed season would not be punished." *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 935, 938 (9th Cir. 1987).

These points were recently underscored by the district court in *NAACP v. Trump*, which rejected both purported distinctions as "unpersuasive." Nos. 17-1907, 17-2325, 2018 WL 1920079, at *13-14 (D.D.C. Apr. 24, 2018). That court had "little difficulty concluding that *Chaney* extends to the *revocation* of nonenforcement decisions" because *Chaney*'s "rationales apply here with equal force": first, "[a]n agency's decision to revoke a nonenforcement policy involves the same prioritization and resource-allocation considerations as its decision to implement such a policy"; second, "there are no agency proceedings here to provide a 'focus for judicial review'" and "DACA's rescission does not itself involve the exercise of coercive power over any person"; and third, "both types of decisions are substantially immunized from

judicial review in the criminal context." *Id.* at *13-14. Further, the court recognized that the suggestion that "*any* general enforcement policy is exempt from *Chaney*'s presumption of unreviewability" is "in substantial tension with *Chaney* itself." *Id.* The facts of that case establish that "discretionary enforcement policies . . . are presumptively unreviewable." *Id.* at *14.

2. Although *Chaney* made plain that categorical enforcement discretion policies are presumptively unreviewable, the Court noted that the presumption could be overcome if the agency exceeded statutory constraints on its discretion. 470 U.S. at 832-33; *see also Texas v. United States*, 809 F.3d 134, 168 (5th Cir. 2015) (reviewing whether DAPA ran afoul of alleged INA constraints on enforcement discretion). *Chaney* left open whether discretion could be exceeded because an agency's "general policy" of non-enforcement was "so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4. Likewise, the Court left open whether an agency might exceed its discretion if it "refus[ed] . . . to institute proceedings based solely on the belief that it lacks jurisdiction." *Id.*

In *Montana Air Chapter No. 29 v. Association of Civilian Technicians*, 898 F.2d 753 (9th Cir. 1990), this Court recognized an exception for a non-enforcement decision based on perceived lack of jurisdiction. That case involved a challenge to the decision by an agency General Counsel to not issue a complaint based on his belief that "the *type* of claim raised by the union cannot be an unfair labor practice absent special circumstances" that were not present. *Id.* at 757. The General Counsel "believed he

was prevented from issuing a complaint," which the Court explained "is the essence of a jurisdictional decision." *Id.*

Montana Air Chapter does not stand for the proposition that judicial review is available whenever an enforcement decision is based on a perceived lack of statutory authority. That case dealt with a perceived lack of power *to enforce* the law, not a perceived lack of power *to decline to enforce* the law. The General Counsel based his decision "solely on his belief that he lack[ed] jurisdiction to issue [the requested] complaint, thereby refusing to exercise the functions assigned to him" by law. 898 F.2d at 756. That action thus at least potentially could be viewed as exceeding enforcement discretion in a manner similar to the other exception reserved by *Chaney*'s footnote 4: if an agency's categorical and extreme refusal to exercise acknowledged jurisdiction in a particular area would amount to an "abdication of its statutory responsibilities," 470 U.S. at 833 n.4, then so, too, might the refusal to take action based on the erroneous belief that jurisdiction does not exist. But an agency's erroneous belief that it lacks the power to adopt a categorical policy of discretionary non-enforcement cannot be an *abdication* of its statutory responsibilities, because it is *fulfilling* those responsibilities by enforcing the law.

This understanding of *Montana Air Chapter* harmonizes the case with *BLE*, a Supreme Court precedent that *Montana Air Chapter* did not discuss. In that case, the Supreme Court expressly rejected the proposition that "if the agency gives a 'reviewable reason for otherwise unreviewable action, the action becomes

reviewable." *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987). By way of example, the Court observed that "a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction," yet "it is entirely clear that the refusal to prosecute cannot be the subject of judicial review" notwithstanding that the prosecutor's belief "is surely an eminently 'reviewable' proposition." *Id.* Thus, after *BLE*, a court cannot justify judicial review of an agency's discretionary enforcement decision simply on the ground that the decision was based on a general interpretation of law. A mere legal rationale cannot provide a hook to support review of the underlying enforcement decision.

The D.C. Circuit recognized the effect of *BLE* in *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671 (D.C. Cir. 1994). In that case, an agency had denied a third party's request for a waiver of enforcement that would allow it to compete against the plaintiff, but the agency denied the request on the ground that no waiver was necessary because the plaintiff was not protected from competition under the statute. *Id.* at 672. Although the plaintiff of course did not challenge the underlying enforcement decision to deny the third party's request for a waiver, it sued the agency to challenge the rationale supporting the enforcement decision, arguing that "*Chaney*'s presumption of non-reviewability is inapplicable when the agency bases its refusal to enforce in an individual case solely on a legal interpretation without explicitly relying on its enforcement discretion"—exactly the scenario left open by *Chaney*'s footnote 4.

Id. at 675; *see NAACP*, 2018 WL 1920079, at *11 (noting that *Crowley* addressed "the question reserved in *Chaney*"). The D.C. Circuit correctly recognized that the answer to that question "is dictated by [the] intervening decision of the Supreme Court" in *BLE*. *Crowley*, 37 F.3d at 676. Thus, as the *NAACP* court explained, *Crowley* relied on *BLE* to hold that individual "nonenforcement decisions based solely on agency statutory interpretation" are not subject to judicial review. *NAACP*, 2018 WL 1920079, at *14.

Because the plaintiff in *Crowley* challenged only the rationale embedded in the enforcement decision, but not the enforcement decision itself, the *Crowley* decision focused on whether a court can carve out and review a legal rationale on the theory that an interpretive rule concerning the statute's substantive commands remains reviewable, notwithstanding the fact that it is embedded in an unreviewable enforcement decision. The court explained that the answer was "no" for the single-shot non-enforcement decision at issue in that case because there was no clear and definitive substantive interpretation, but that such a reviewable embedded interpretation might be "more likely" to exist in a general enforcement policy. *Crowley*, 37 F.3d at 677. (The court further noted in dicta that a general non-enforcement policy may even be so extreme as to amount to "abdication" allowing review of the non-enforcement decision itself. *Id.*)

This distinction between the unreviewability of an enforcement decision and the possible reviewability of its legal rationale is well illustrated by the D.C. Circuit's

decision in *UAW v. Brock,* 783 F.2d 237 (D.C. Cir. 1986). In *Brock*, the Department of Labor denied a union's request to take enforcement action against a corporation for failing to report certain activities. *Id.* at 241-42. In so doing, the agency explained that it "*was now interpreting the statute as no longer requiring reporting of two of the activities involved in the case.*" *Id.* at 242-43. When the union challenged the Department's action, the D.C. Circuit explained that "there is no review available from the agency's specific nonenforcement decision . . . or its overall pattern of decisions not to pursue enforcement action in these areas." *Id.* at 245; *see also id.* ("If the Union had challenged only the Department's decision not to take enforcement action against [certain entities], *or even against this entire genus of practices*, our task would be completed." (emphasis added)). The court went on to hold, however, that "when a legal challenge focuses on an announcement of a substantive statutory interpretation," judicial review was available. *Id.* A contrary rule, the court reasoned, "would be handing agencies carte blanche to avoid review by announcing new interpretations of statutes only in the context of decisions not to take enforcement action." *Id.* at 246; *see also NAACP*, 2018 WL 1920079, at *14.

In *Montana Air Chapter*, this Court relied on *Brock* to similarly hold that it could carve out for review the substantive legal rationale supporting a non-enforcement decision. *See Montana Air Chapter*, 898 F.2d at 757 (*Brock* "held that the Department of Labor's 'ultimate decision not to take enforcement action is nonreviewable,' but the DOL's 'pronouncement of new statutory interpretations in an opinion explaining the

non-enforcement decision is reviewable.'"); *see also id.* at 758 ("When the FLRA implements a statutory interpretation in the course of a refusal to issue an unfair labor practice complaint, . . . [s]uch an interpretation is subject to judicial review."). But the Court did not, and could not, rely on *Brock* in holding that the substantive statutory interpretation was a hook to review the underlying non-enforcement decision, because *Brock* held the exact opposite—as had *BLE*, which *Crowley* later recognized. Rather, as discussed above, the Court in *Montana Air Chapter* relied on the "lack of jurisdiction" exception left open by *Chaney*'s footnote 4, which, as discussed, is inapposite here. In any event, *Montana Air Chapter* is also distinguishable because the agency's enforcement decision there was based on a substantive rationale, whereas here (as explained below) the enforcement decision was based on an enforcement rationale.

In sum, the foregoing discussion may be distilled down to three principles: (1) enforcement decisions are presumptively unreviewable, and that presumption may be overcome only where an agency's action exceeds an its enforcement discretion, which might include the adoption of an extreme policy effectively abdicating a statutory duty to exercise jurisdiction to enforce the law; (2) where an enforcement decision is otherwise unreviewable, a court may not use the fact that the decision rests on a general legal rationale as a hook to permit judicial review of the underlying enforcement decision; and (3) where an unreviewable enforcement decisions rests on a general legal interpretation of the statute's substantive commands, a court may in

certain situations "carve out" that embedded interpretive rule for review and vacatur (assuming that other prerequisites to judicial review are met), but it may not set aside the underlying enforcement decision.

3. Applying these principles, plaintiffs' substantive APA claim is not subject to judicial review. Plaintiffs claim that the decision is reviewable because, in their view, the Acting Secretary determined that the prior enforcement policy was unlawful and must be rescinded. That reading is incorrect (Reply Br. 27-29), but in any event it would not make the Acting Secretary's enforcement decision reviewable.

The Acting Secretary's decision is a general enforcement policy decision that is presumptively unreviewable, and the presumption is not overcome in this case. There is no claim that, in rescinding the DACA policy, the Acting Secretary *exceeded* her enforcement discretion or abdicated any statutory responsibilities. *Cf. Chaney*, 470 U.S. at 832 n.4; *Montana Air Chapter*, 898 F.2d at 756-57. Nothing in the INA required the Acting Secretary to maintain DACA, and the Acting Secretary's decision to enforce the law by rescinding a prosecutorial discretion policy does not exceed her enforcement discretion.

Nor—even assuming *arguendo* that the sole rationale for the decision was that DACA is unlawful—could the Acting Secretary's purported legal rationale be used as a hook to review the otherwise unreviewable enforcement decision to rescind DACA. As explained, permitting such review is directly contrary to the Supreme Court's decision in *BLE*, which expressly rejected the proposition that "if the agency gives a

'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." 482 U.S. at 283.

Even if a legal rationale in the Acting Secretary's memorandum could be carved out for review on its own terms as an interpretive rule embedded in the underlying enforcement policy decision, that would not justify setting aside the rescission of DACA itself. *See Montana Air Chapter*, 898 F.2d at 757 (citing *Brock*, 783 F.2d at 245-46); *Crowley*, 37 F.3d at 676. In any event, there is no reviewable substantive interpretation at issue here. There is no question in this case as to the substantive scope of the INA, and the Acting Secretary's decision to rescind DACA did not directly interpret the INA's provisions governing the primary conduct of aliens or other parties (*e.g.*, which crimes render an alien removable). All parties agree that nothing in the INA or its regulations requires that deferred action be granted to DACA recipients, and plaintiffs' legal challenge does not "focus[] on an announcement of a substantive statutory interpretation" that they independently want a court to review. *Brock*, 783 F.2d 246. Instead, plaintiffs asked the district court to enjoin the rescission of an enforcement policy that was not required by statute and they pointed to the agency's legality rationale as a hook for review. As *BLE* makes clear, however, the presence of a reviewable rationale for an agency decision does not make an otherwise unreviewable decision subject to review.

Any embedded legal interpretation here would concern, at most, the scope of the Acting Secretary's enforcement discretion. But that interpretation does not govern

the behavior of the parties—no one disputes that DACA recipients are removable under the statute. Indeed, the decision at issue here rests on enforcement discretion all the way down. In contrast, the embedded legal interpretation at issue in *Brock*, for example, governed the primary conduct of regulated entities, and the agency's interpretation of the statute affected the legal rights and obligations of the parties. *See* 783 F.2d at 246 ("[P]laintiffs challenge the interpretation of the statute precisely because of the immediate and certain effect that it has on employers' and consultants' reporting duties."). But as the D.C. Circuit explained, "[t]here are real and cognizable practical differences distinguishing an agency's announcement of how it will exercise its discretion, from an agency's announcement of what a citizen's duties are under a statute." *Id.*

In sum, the Acting Secretary's enforcement rationale is not reviewable, much less is it is a basis to review her underlying enforcement decision to rescind the DACA policy. Any again, the contrary conclusion would lead to the unprecedented and untenable result that countless changes in prosecutorial discretion based on views about the law would be exposed to judicial review.

Respectfully submitted,

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May 2018

CERTIFICATE OF COMPLIANCE

This brief complies with page limits contained in this Court's order of May 1, 2018, because it is 15 pages. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Mark B. Stern
MARK B. STERN

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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