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, Honorable William H. Alsup, Presiding

SUPPLEMENTAL BRIEF OF APPELLEES THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, JANET NAPOLITANO, AND CITY OF SAN JOSÉ

Jeffrey M. Davidson
Mónica Ramírez Almadani
Erika Douglas
David S. Watnick
Breanna K. Jones
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, CA 94111-5356
(415) 591-6000

Robert A. Long
Mark H. Lynch
Alexander A. Berengaut
Megan A. Crowley
Ivano M. Ventresca
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Avenue, NW
Washington, DC 20001

Attorneys for Plaintiffs The Regents of the University of California, et al.

Justin T. Berger
Brian Danitz
COTCHETT, PITRE & MCCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
(650) 697-6000

Attorneys for Plaintiff City of San José

(ADDITIONAL COUNSEL LISTED ON SIGNATURE PAGE)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

This supplemental brief addresses the application 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) to this case, and whether the rescission of DACA is judicially reviewable under 5 U.S.C. § 701(a)(2) because it is a "general enforcement policy, rather than [] a single-shot non-enforcement decision." May 1 Order (citing *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994); *NAACP v. Trump*, 2018 WL 1920079, at *11-17 (D.D.C. Apr. 24, 2018)).

These authorities confirm—as every court to consider the issue has concluded—that the rescission is not subject to section 701(a)(2)'s narrow jurisdictional bar. First, the cases cited by the Court hold that where, as here, agency action is predicated on an agency's conclusions about the scope of its legal authority, that action is subject to judicial review under the APA. Second, these cases hold that where an agency announces a general enforcement policy, as opposed to a single-shot non-enforcement decision, that policy is subject to judicial review. The cases recognize that judicial review of agency policy decisions, especially those founded on legal determinations, is the only way to achieve the APA's goals of ensuring the accountability and rationality of agency decision-making. Because the

rescission of DACA was a programmatic decision based on an agency's conclusion about its authority, section 701(a)(2) does not apply.

ARGUMENT

I. When Agency Action Is Premised On The Agency's Conclusions About The Scope Of Its Legal Authority, The Action Is Subject To Judicial Review.

In *Heckler v. Chaney*, the Supreme Court concluded that a discretionary non-enforcement decision resting largely on policy, rather than legal, grounds was presumptively non-justiciable. 470 U.S. at 832, 833. The agency's decision in *Chaney* rested on a "complicated balancing of a number of factors" rather than a determination about the agency's legal authority. *Id.* *Chaney* expressly reserved judgment on whether a refusal by the agency to institute proceedings "based solely on the belief that it lacks jurisdiction" is non-justiciable. *Id.* at 833 n.4.

Since *Chaney*, the Supreme Court has repeatedly held that it is the role of the courts to decide the scope of agencies' legal authority to act. *See Negusie v. Holder*, 555 U.S. 511, 516 (2009) (remanding because the Board of Immigration Appeals denied relief based on an incorrect reading of Supreme Court precedent); *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007) (reviewing the EPA's conclusion that it lacked authority under the Clean Air Act to regulate greenhouse gas emissions from new motor vehicles).

In *Montana Air*, this Court reached the same conclusion, holding that an agency decision is "reviewable when that decision is based solely on [the agency's] belief that [it] lacks jurisdiction" to act. 898 F.2d at 756-57. In *Montana Air*, unlike in *Chaney*, the agency's non-enforcement decision rested on an interpretation of its legal authority. There, the general counsel of the Federal Labor Relations Authority concluded that the agency lacked jurisdiction to issue an unfair labor practice complaint that the plaintiffs had requested. *Id.* at 755. According to the general counsel, the requested complaint concerned only "negotiability" issues, which could "be raised *only*" through distinct "negotiability procedures of the [relevant] Statute." *Id.* at 755-57. When the plaintiffs challenged that determination, this Court rejected the FLRA's argument that the agency's refusal to issue a complaint was exempt from judicial review under section 701(a)(2) and *Chaney*. *Id.* at 756. While the basis for the general counsel's decision was not "free from doubt," his "opinion letters strongly indicate[d] that his decision was based solely on the belief that he did not have jurisdiction to issue an unfair labor practice complaint," and, as a result, he "did not exercise his discretion." *Id.* at 756-57 & n.1. Accordingly, the Court concluded the general counsel's decision was reviewable under the APA. *See id.* at 757 ("We therefore must

examine the General Counsel's statutory and regulatory interpretations to determine if his belief that he lacked jurisdiction was correct.").

Following *Montana Air*, in *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016), this Court again underscored that courts have jurisdiction to review agency action premised on an agency's misunderstanding of the limits of its own legal authority. *Bonilla* concluded that there was "jurisdiction to review [Board of Immigration Appeals'] decisions denying sua sponte reopening [of deportation proceedings] for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error." *Id.* This was so even though such single-shot discretionary actions, if taken "against the correct 'legal background,'" were not subject to judicial review. *Id.* As the Court explained, judicial review is necessary to "assure" that an agency's "decision . . . is made on a proper understanding of the underlying law." *Id.*

The reviewability of the government's rescission of DACA is controlled by *Montana Air*. On the basis of the Attorney General's determination that "DACA was effectuated . . . without proper statutory authority and . . . was an unconstitutional exercise of authority by the Executive Branch," the Acting Secretary of Homeland Security concluded—like the FLRA's general counsel in *Montana Air*—that the agency lacked the

legal authority to continue DACA and therefore rescinded the program. *See* ER 127-30; ER 176. The Acting Secretary did not exercise discretion or apply expertise in rescinding DACA, but instead concluded that she was required to terminate the program due to the legal limits on DHS's authority to act. Just as in *Montana Air*, the Acting Secretary's belief that she was legally barred from continuing DACA "is the essence of a jurisdictional decision," and is reviewable under the APA. 898 F.2d at 757.

Thus, notwithstanding the government's arguments to the contrary, the rescission of DACA is *not* akin to the non-enforcement action based on a "complicated balancing of . . . factors" at issue in *Chaney*. *See* 470 U.S. at 831. There is no "balancing" in the rescission memorandum, but rather a singular focus on the lawfulness of DACA. *See, e.g.*, ER 127-30; ER 176; Pet. for Cert. 31, *DHS v. Regents of Univ. of Cal.*, No. 17-1003 (U.S. Jan. 18, 2018); *see id.* at 12. The rescission simply is not the type of discretionary non-enforcement decision that *Chaney* concluded was exempt from review under section 701(a)(2).[1]

[1] The rescission also bears no resemblance to traditionally discretionary decisions like an agency's "allocation of funds from a lump-sum appropriation," *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993), or an agency's denial of a petition for reconsideration based on material error, *ICC v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 280 (1987) (*BLE*).

The government's attempts to reframe the Acting Secretary's legal conclusions as an assessment of "litigation risk" do not alter this result. The district court correctly rejected the agency's litigation risk rationale because it is a post hoc justification that is not fairly discernable from the record. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *Regents of the Univ. of Cal. v. DHS*, 279 F. Supp. 3d 1011, 1043-44 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 430 (E.D.N.Y. 2018).

Moreover, the "litigation risk" rationale articulated by the government's lawyers in this case is simply a repackaging of the agency's legal conclusion about the scope of its own authority. It is not meaningfully different for DHS to say that "DACA is outside its legal authority" or that "a court would find that DACA is outside its legal authority." *See NAACP*, 2018 WL 1920079, at *16 (an agency cannot "insulate from judicial review any legal interpretation simply by framing it as an enforcement policy and then offering as an additional, 'discretionary' justification the assertion that a court would likely agree with the agency's interpretation").

The government has sought to cast doubt on the viability of *Montana Air* in light of *BLE*, *see* Appellants' Resp. and Reply Br. at 9 n.2, but *Montana Air* post-dates *BLE* by three years and accordingly is binding precedent. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en

banc) (holding that a three-judge panel may overrule circuit precedent only due to "*later* and controlling authority" (emphasis added)).[2]

In any event, *BLE* does not cast doubt on *Montana Air*. In *BLE*, the Supreme Court held that an agency's denial of a petition to reconsider based on material error was a "traditionally" unreviewable decision and noted in dictum that an "otherwise unreviewable action" does not become reviewable merely because "the agency gives a 'reviewable' reason" for its action. *Id.* at 282-84.[3] But that sentence of dictum does not apply here: its language refers

---

[2] The government suggests that this Court can discard *Montana Air* because that decision cited a D.C. Circuit opinion, *International Longshoremen's Ass'n v. National Mediation Bd.*, 785 F.2d 1098, 1100 (D.C. Cir. 1986), that, the government contends, the D.C. Circuit has since "recognized . . . was abrogated by the Supreme Court's later decision in *BLE*." Appellants' Resp. and Reply Br. at 9 n.2. (citing *Crowley*, 37 F.3d at 675-76). But in *Montana Air* the Court did not regard itself as bound by the reasoning of the D.C. Circuit; instead, it reached its own conclusion, guided by the "suggest[ions]" of both *Chaney* and *Longshoremen's Association*, that section 701(a)(2) was inapplicable to agency actions taken on the basis of a perceived lack of jurisdiction. *See* 898 F.2d at 756.

[3] As *NAACP* observed, this point in *BLE* was the Court's response to "what it took to be the concurrence's suggestion" regarding reviewability. 2018 WL 1920079, at *11 (citing *BLE*, 480 U.S. at 283). The concurrence, however, "disputed this characterization of its argument." *Id.* at *11 n.12 (citing *BLE*, 480 U.S. at 290 n.2 (Stevens, J., concurring in the judgment)). The concurrence contended that, because agency actions can be upheld only on the grounds put forth by the agency, where the agency "base[s] its decision on its reading of a statute or a constitutional provision, its decision cannot be sustained on the conjecture that it has the discretion to deny reopening on a variety of grounds." *BLE*, 482 U.S at 290-91 (Stevens, J., concurring in the judgment).

only to decisions that are "traditionally" unreviewable, *id.* at 282, such as the denial of reconsideration for material error at issue in *BLE*. Here, far from identifying a "tradition" of declining review over a programmatic decision like the rescission, the government has not cited a single case that has done so. *See* Appellees' Principal Br. at 6; *see also* SER 265-66.

Montana Air remains a correctly decided, controlling decision of this Court, and it requires that the rescission—a programmatic administrative action based on DHS's incorrect interpretation of its own authority—be subject to APA review. 898 F.2d at 756.

II. The Rescission Is Also Subject To Judicial Review Because It Is A General Enforcement Policy Rather Than A Single-Shot Non-Enforcement Action.

The rescission is also reviewable because it is a programmatic agency action rather than a single-shot non-enforcement decision. In determining reviewability of agency action under section 701(a)(2), courts distinguish between general enforcement policies, which generally are reviewable, and decisions "to decline enforcement in the context of an individual case," which presumptively are not. *Crowley*, 37 F.3d at 676; *see also OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) ("[A]n agency's adoption of a general enforcement policy is subject to review.").

Chaney itself involved such a "single-shot" non-enforcement decision. There, the Supreme Court held that the Food and Drug Administration's decision not to take enforcement actions to prevent the use of certain drugs in lethal injections was not reviewable. It characterized the FDA's action as "an agency's refusal to take requested enforcement action" that "share[d] to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict"—in other words, the case involved a "single-shot" non-enforcement action rather than a general enforcement policy. 470 U.S. at 831-32.

The government has disputed the characterization of *Chaney* as a single-shot non-enforcement decision, but the courts disagree. *See Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996) (concluding that "*Chaney* applies to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards"); *Crowley*, 37 F.3d at 676 (distinguishing *Chaney* from "a general enforcement policy [that] may be reviewable for legal sufficiency where the agency has . . . articulated it in some form of universal policy statement").

The D.C. Circuit in *Crowley* reasoned that a reviewable enforcement policy is distinguishable from an unreviewable single-shot enforcement decision because "[b]y definition, expressions of broad enforcement policies

are abstracted from the particular combinations of facts the agency would encounter in individual enforcement proceedings." *Id.* at 677. It noted that, unlike the one-shot non-enforcement decisions at issue in *Chaney* and *Crowley*, enforcement policies are "more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are . . . peculiarly within the agency's expertise and discretion." *Id.*

In cases involving general enforcement policies, in contrast, this Court and the D.C. Circuit consistently have concluded that judicial review is available. *See Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374, 1378 (9th Cir. 1989) (INS policy of allowing certain nonimmigrant aliens to work in the United States subject to review); *OSG Bulk Ships*, 132 F.3d at 809, 812 (concluding that the Maritime Administration's "longstanding interpretation" of a statute was reviewable as "a general enforcement policy"); *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 331 (D.C. Cir. 1993) (same for EPA enforcement policy); *Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765, 772-75 (D.C. Cir. 1992) (same for regulation explaining when EPA could "refuse to initiate proceedings" under the Safe Drinking Water Act).

The rescission of DACA is plainly a general enforcement policy, not a single-shot non-enforcement decision—and the government does not claim otherwise. The rescission does not announce a fact-bound decision in an individual case involving a discrete party or parties. Instead, the rescission represents an across-the-board policy change equally applicable to all 700,000 DACA recipients that categorically (i) required the rejection of all initial DACA requests received after September 5, 2017; (ii) barred all DACA renewal requests received after October 5, 2017; and (iii) forbade DHS from processing any advance parole applications for all DACA recipients. ER 130-31. Accordingly, it is beyond the narrow scope of section 701(a)(2). *See Meese*, 891 F.2d at 1378; *Crowley*, 37 F.3d at 677; *OSG Bulk Ships*, 132 F.3d at 812.

Consistent with these authorities, the district court in *NAACP* properly concluded that the rescission of DACA is a general enforcement policy, 2018 WL 1920079, at *17, and joined every other court to consider the issue in holding that the rescission was subject to judicial review under the APA. *Id.*; *see Regents*, 279 F. Supp. 3d at 1029-31; *Batalla Vidal v. Duke*, 2017 WL 5201116, at *9-11 (E.D.N.Y. Nov. 9, 2017); *Casa de Maryland v. DHS*, 284 F. Supp. 3d 758, 769-70 (D. Md. 2018).

In explaining its rationale, the *NAACP* court reasoned that the rescission was subject to judicial review because it was a general enforcement policy that also "relie[d] solely on the agency's view of what the law requires." *NAACP*, 2018 WL 1920079, at *16 (citing *Crowley*, 37 F.3d at 676). The *NAACP* court left open whether an agency's general enforcement policy could be reviewed if it were based on non-legal considerations, but held that a policy based on legal conclusions certainly was subject to review. *See id*.

Because *Crowley* focused on the distinction between general enforcement policies and one-shot enforcement decisions and did not concern itself with whether the policy was based on a legal rationale or not, 37 F.3d at 677, a legal rationale is not *necessary* to render enforcement policies reviewable under *Crowley*. *See also OSG Bulk Ships*, 132 F.3d at 812. However, a legal rationale for an enforcement policy is *sufficient* to ensure review, and here DHS's actions are manifestly rooted in its "view of what the law requires." *NAACP*, 2018 WL 1920079, at *16. Indeed, defendants have straightforwardly admitted that they rescinded DACA because "continuing the DACA policy would itself have been unlawful." Pet. for Cert. 31, *DHS v. Regents of Univ. of Cal.*, No. 17-1003 (US. Jan. 18, 2018); *see id.* at 12. Accordingly, the rescission is subject to judicial review,

as it is a general enforcement policy based on a legal conclusion. *See NAACP*, 2018 WL 1920079, at *17.

CONCLUSION

The Court should reject the government's justiciability arguments and affirm the district court's preliminary injunction on the merits.

Respectfully submitted,

s/ Jeffrey M. Davidson

Justin T. Berger
Brian Danitz
Tamarah Prevost
COTCHETT, PITRE & MCCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
(650) 697-6000

Attorneys for Plaintiff City of San José

Jeffrey M. Davidson
Mónica Ramírez Almadani
Erika Douglas
David S. Watnick
Breanna K. Jones
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, CA 94111
(415) 591-6000
jdavidson@cov.com

Robert A. Long
Mark H. Lynch
Alexander A. Berengaut
Megan A. Crowley
Ivano M. Ventresca
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Avenue, NW
Washington, DC 20001
(202) 662-6000

Attorneys for Plaintiffs The Regents of the University of California and Janet Napolitano, in her official capacity as President of the University of California

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of the Court's Order requesting supplemental briefing, and the requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), because it is filed by separately represented parties, is set in a proportionately spaced serif font, has a typeface of 14 points, and does not exceed 15 double-spaced pages.

Dated: May 11, 2018

s/ Jeffrey M. Davidson

CERTIFICATE OF SERVICE

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

Dated: May 11, 2018

s/ Jeffrey M. Davidson