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

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
Plaintiffs-Appellees-Cross-Appellants,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Defendants-Appellants-Cross-Appellees.

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

SUPPLEMENTAL BRIEF OF THE STATES OF CALIFORNIA, MAINE, MARYLAND, AND MINNESOTA

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The Court has asked the parties to address: "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"; and "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. Peña*, 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*)." The cases the Court references support the district court's conclusion that defendants' rescission of DACA, based on an asserted legal conclusion that the program is unlawful, is subject to review under the APA.

1. There is normally a "'strong presumption'" in favor of judicial review of agency action. *E.g.*, *Robbins v. Reagan*, 780 F.2d 37, 44 (D.C. Cir. 1985) (per curiam). In *Chaney*, the Supreme Court recognized a contrary presumption, *against* review, for a limited class of decisions that have traditionally been considered unreviewable: discretionary decisions "not to undertake certain enforcement actions." 470 U.S. at 831. The cases this Court references in its supplemental briefing order address exceptions to that *Chaney* presumption. As the district court recognized, however, the agency decision at issue here is a

wholesale termination of a general program designed to channel and guide individual deferred action decisions with respect to a broad class of potential recipients. *Chaney*'s presumption against review simply does not apply to that type of decision. *See* ER 18-21; *see also Batalla Vidal v. Duke*, ___ F. Supp. 3d ____, 2017 WL 5201116, *10-*11 (E.D.N.Y. Nov. 9, 2017) (*Batalla Vidal I*); State Br. 17-20 (Dkt. 43). Nor does the decision fall into any other category of actions that courts have "traditionally regarded as committed to agency discretion." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); *see* State Br. 18-20.

This decision is therefore subject to the normal strong presumption in favor of review. And that presumption is not rebutted here. As every court to consider the question has held, the decision to terminate DACA, based on a legal conclusion regarding the scope of agency authority, is subject to judicially manageable standards of review. *See* ER 21; *NAACP*, 2018 WL 1920079, at *16-*17; *Casa de Md. v. DHS*, 284 F. Supp. 3d 758, 770 (D. Md. 2018); *Batalla Vidal I*, 2017 WL 5201116, at *10; State Br. 17-20.

2. Even if the decision to terminate DACA were of a type presumed to be unreviewable under *Chaney*, *see NAACP*, 2018 WL 1920079, at *12-*14, it would fall within a well-settled exception to that presumption. *Chaney* itself suggested that its presumption might not apply to an agency's action (or inaction) "based solely on the belief that it lacks jurisdiction." 470 U.S. at 833 n.4. And in

Montana Air this Court reached that question and expressly adopted the exception suggested by *Chaney*. *Montana Air* held that *Chaney*'s presumption against review did not apply where an agency's refusal to initiate an enforcement action was apparently based on a conclusion that it "lacked jurisdiction" to do so. *Montana Air*, 898 F.2d at 757; State Br. 19, 27.

If defendants' decision to terminate DACA were subject to *Chaney*, the jurisdictional exception recognized in *Montana Air* would apply here. Defendants assert that they rescinded DACA because it "was effectuated . . . without proper statutory authority." ER 176; *see* ER 129-130; AOB 38. There is no material difference between an agency's refusal to act based "on the belief that it lacks jurisdiction," *Montana Air*, 898 F.2d at 756, and a decision to rescind a program based on a conclusion that the agency lacks statutory authority to continue it. An "agency's interpretation of . . . the scope of [its] statutory authority" is the same as an interpretation of "its jurisdiction." *City of Arlington v. FCC*, 569 U.S. 290, 296-297 (2013).

Defendants have suggested that *Montana Air*'s analysis is foreclosed by a passage in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (*BLE*). *See* ARRB 9 n.2; *see also Crowley*, 37 F.3d at 676.[1] But *Montana Air* was

[1] "ARRB" refers to appellants' response and reply brief (Dkt. 134); "AOB" refers to appellants' opening brief (Dkt. 31).

decided three years after *BLE*. A three-judge panel is not "free to revisit" a decision of this Court based on Supreme Court authority pre-dating that decision. *United States v. Mandel*, 914 F.2d 1215, 1221 (9th Cir. 1990). *Montana Air* thus remains "binding precedent which can only be overruled on en banc rehearing." *Id.*[2]

In any event, *BLE* does not address the question reserved in *Chaney* and decided in *Montana Air*. Indeed, *BLE* did not involve a non-enforcement decision subject to *Chaney*. It involved an agency's discretionary refusal to re-open a prior proceeding to consider a renewed argument that the agency's underlying decision was erroneous, and it held that such a refusal was traditionally unreviewable. *BLE*, 482 U.S. at 282. Although the Court briefly discussed *Chaney*, *see id.*, it had no occasion to consider the question reserved in that case concerning reviewability of an agency decision based on an asserted lack of jurisdiction. There is no indication that the Court intended *BLE* to resolve, or even comment on, that question.

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[2] A district court in this Circuit once suggested that *Montana Air* might have been overruled on a different point by *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). *See Idaho Rivers United v. U.S. Forest Serv.*, 857 F. Supp. 2d 1020, 1031 (D. Idaho 2012). But the same court later held that *Montana Air* was not overruled. *See Idaho Rivers United v. U.S. Forest Serv.*, 2013 WL 474851, *6 (D. Idaho Feb. 7, 2013). Significantly, *Southern Utah* did not involve 5 U.S.C. § 701(a)(2); it instead addressed the requirement that claims under 5 U.S.C. § 706(1) must assert a failure to take a discrete agency action that is required by law. *See* 542 U.S. at 64.

Cf. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) (Scalia, J.) ("We have often said that drive-by jurisdictional rulings of this sort (if *Gwaltney* can even be called a ruling on the point rather than a dictum) have no precedential effect."); *NAACP*, 2018 WL 1920079, at *15.

Nor does the passage in *BLE* invoked by defendants undermine *Montana Air*. The passage responds to an argument that the refusal to re-open in *BLE* was reviewable because the agency's order included a lengthy discussion of the underlying merits. *See BLE*, 482 U.S. at 289-291 (Stevens, J., concurring in the judgment); *id.* at 276 (majority opn.) (describing agency order). It rejects "the principle that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Id.* at 283. The Court draws an analogy to the exercise of prosecutorial discretion in particular cases, noting that a "refusal to prosecute cannot be the subject of judicial review" even if "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." *Id.*; *cf. Montana Air*, 898 F.2d at 757 ("we would be compelled to deny review" if the agency had "determined after passing on the merits of the union's contention that the facts did not justify issuance of a complaint").

The point of this passage is that when an agency considering a particular case makes a discretionary and otherwise unreviewable decision, the decision does not

become reviewable simply because the agency chooses to proffer an explanation for how it has exercised its discretion. *See* AOB 23. The denial of the petition to re-open in *BLE* was wholly discretionary and traditionally unreviewable, and thus was "committed to agency discretion by law" no matter what the agency thought or chose to say about the merits. *BLE*, 482 U.S. at 282. There is no tension between that conclusion and *Montana Air*, which holds that an agency action that might be unreviewable if made as an exercise of discretion *is* reviewable if it is based instead "solely on the belief that [the agency] lacks jurisdiction." 898 F.2d at 756. Where an agency makes a decision not to act based on a professed belief that it lacks authority to do so, by definition it is not exercising any discretion that has been committed to it by law. On the contrary, it is asserting that the law has left it with *no* discretion. *See id.* at 757 (the agency "did not exercise [its] discretion" because it "believed [it] was prevented from issuing a complaint"). That is what defendants did here when they rescinded DACA based on a stated conclusion that the program was "unlawful." AOB 38; ER 129-130, 176.[3]

An agency assertion that the law puts a particular action or program outside the scope of the agency's authority or discretion is properly subject to judicial

[3] An analogous decision in the setting of *BLE* would have been an order concluding that the agency had no legal authority to grant a motion to reopen. Nothing in *BLE* suggests that the Court would have held such an order unreviewable.

review. To be sure, agency action resting on "an exercise of judgment in an area which Congress has entrusted to the agency . . . must not be set aside because the reviewing court might have made a different determination were it empowered to do so." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (*Chenery I*). But where an agency decision is based instead on a conclusion that Congress has *not* entrusted a particular decision to the agency's judgment, it is entirely appropriate—indeed, necessary—for the courts to review that conclusion. If the agency's position on the scope of its authority is adequately supported, its decision will stand. If not, the agency will be empowered to make (and be required to take responsibility for) whatever judgments Congress intended to commit to its discretion, "free of [any] mistaken legal premise" regarding the scope of its authority. *Negusie v. Holder*, 555 U.S. 511, 516 (2009); *cf. Montana Air*, 898 F.2d at 763 (remanding for agency "to exercise [its] discretion" based on a proper understanding of its authority).

3. Finally, *Crowley* and *NAACP* establish that the decision to terminate DACA would be reviewable even apart from *Montana Air*'s exception for decisions based on conclusions about an agency's jurisdiction or legal authority.

In *Crowley*, the D.C. Circuit held that *Chaney*'s presumption against review applied to the Maritime Administration's decision not to initiate an enforcement action challenging particular conduct by a regulated party, where the agency had concluded that the conduct was not unlawful. 37 F.3d at 672-673. In reaching that

holding, the court reasoned that *BLE* foreclosed applying any exception to *Chaney* based on agency conclusions about jurisdiction or legal authority in the context of a "*single-shot* non-enforcement decision." *Id.* at 676; *see id.* at 675-676; *NAACP*, 2018 WL 1920079, at *11-*12.[4] But *Crowley* "was careful to preserve another line of circuit precedent" holding "that *Chaney*'s presumption of unreviewability does not apply to 'an agency's announcement of its interpretation of a statute'" that is made in the context of "'an agency's statement of a *general enforcement* policy.'" *NAACP*, 2018 WL 1920079, at *12 (quoting *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993), and *Crowley*, 37 F.3d at 676).[5] Applying that exception, the D.C. Circuit later held that *Chaney*'s presumption did not apply to the Maritime Administration's general policy of refusing to enforce a statutory provision against certain vessels, where that policy was based on a determination

[4] *But see Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1036 (D.C. Cir. 2007) (noting the "possible exception to the rule of *Chaney*" but concluding that there is no "concern in this case that EPA has declined to enforce the Acts because it falsely believes that it lacks jurisdiction").

[5] As *NAACP* recognized, *see* 2018 WL 1920079, at *13, some language in the D.C. Circuit's cases suggests that this reasoning extends to *all* general enforcement policies. *See, e.g.*, *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.").

that the vessels were not in violation of the law as the agency construed it. *See OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 811-812 (D.C. Cir. 1998).[6]

The D.C. Circuit has identified "ample reasons for distinguishing" between one-time, "single-shot" decisions not to take a particular enforcement action and general enforcement policies that an agency may adopt. *Crowley*, 37 F.3d at 677; *cf.* ER 19-21; State Br. 22-24. Among other things, general statements of enforcement policy typically present "a clearer (and more easily reviewable) statement of [an agency's] reasons for acting" than individual non-enforcement decisions. *Crowley*, 37 F.3d at 677. And general statements of enforcement policy are "more likely to be direct interpretations of the commands of the substantive statute than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Id.*; *see generally NAACP*, 2018 WL 1920079, at *12.

[6] This Court adopted a similar position in *Montana Air* (in addition to the agency-jurisdiction point discussed above). *See Montana Air*, 898 F.2d at 756 ("[A]n agency's statutory interpretations made in the course of nonenforcement decisions are reviewable.") (citing *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers v. Brock*, 783 F.2d 237, 245 (D.C. Cir. 1986)). *Montana Air* did not expressly distinguish between general enforcement policies and one-time non-enforcement decisions, as the D.C. Circuit has.

In *NAACP*, Judge Bates applied this distinction between "single-shot" non-enforcement decisions and general enforcement policies to defendants' rescission of DACA. He viewed the rescission as, for these purposes, "a general enforcement policy predicated on DHS's legal determination that the program was invalid when it was adopted." *NAACP*, 2018 WL 1920079, at *17. *Chaney*'s presumption against review does not apply to such a policy. *Id.*

Defendants argued in *NAACP* that the rescission of DACA does not come within the reasoning of *Crowley* because the rescission memorandum "'does not contain an embedded interpretation of the INA (or any other statute).'" *NAACP*, 2018 WL 1920079, at *14. They have made the same argument in this case, reasoning that the decision to rescind DACA did not "directly interpret the INA's provisions governing the primary conduct of aliens or other parties," but instead addressed the "INA's constraints on [the Secretary's] enforcement discretion *to maintain* DACA." ARRB 8-9; *see also* AOB 20 n.5. As Judge Bates explained, however, that is a "distinction without a difference." *NAACP*, 2018 WL 1920079, at *14. The letter from Attorney General Sessions "makes clear that DACA's rescission was based (at least in significant part) on the Attorney General's view that the program lacked 'proper statutory authority.'" *Id.* The conclusion that an agency action is "'without statutory authority'" is just another way of saying that "no statutory provision authorizes that action." *Id.* And there is no "meaningful

difference between an agency's conclusion that it lacks statutory authority and its interpretation of a specific statutory provision." *Id.*; *see City of Arlington*, 569 U.S. at 297.

Judge Bates also properly rejected defendants' argument based on *BLE*. *See NAACP*, 2018 WL 1920079, at *15. He noted that "*BLE* addressed the reviewability of enforcement decisions only in *dictum*; its actual holding concerned the reviewability of an agency's refusal to reconsider a prior decision." *Id.* Moreover, the passage on which defendants rely "concerned a prosecutor's decision not to bring a *single* criminal charge," and is best understood as referring only to "*individual* non-enforcement decisions." *Id.* (citing *Crowley*, 37 F.3d at 676-677).

Finally, in *NAACP* defendants contended that the decision to rescind DACA was unreviewable because it was based not only on "illegality" but also on an "assessment of what the government now calls 'litigation risk.'" 2018 WL 1920079, at *15. Unlike the district court in this case and the Eastern District of New York, Judge Bates concluded that the "litigation risk" rationale was not entirely *post hoc*; but he nonetheless held that the decision remained reviewable under *Crowley*. *See NAACP*, 2018 WL 1920079, at *16, *22.[7] The "litigation-risk

[7] *See also* ER 38-39; *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 429-430 (E.D.N.Y. 2018) (*Batalla Vidal II*); State Br. 53-54.

justification was too closely bound up with [defendants'] evaluation of DACA's legality to trigger *Chaney*'s presumption of unreviewability." *Id.* at *16. And the *Crowley/OSG* rule allowing review of legal interpretations stated or reflected in general enforcement policies "would be seriously undermined if an agency could insulate from judicial review any legal interpretation stated as a general enforcement policy simply by pointing to one case where one court tentatively agreed with the agency on a similar legal issue," as defendants seek to do in this case. *Id.*

* * *

Four different federal courts have now considered whether 5 U.S.C. § 701(a)(2) bars review of defendants' termination of DACA. Each court has concluded that it does not. *See* ER 18-21; *Batalla Vidal I*, 2017 WL 5201116, at *9-*12; *Casa de Maryland*, 284 F. Supp. 3d at 770; *NAACP*, 2018 WL 1920079, at *16-*17. Although they took somewhat different analytical paths, each court relied on the fact that the rescission of DACA was based on an asserted legal conclusion that the program is unlawful. No one disputes that this legal conclusion is subject to judicially manageable standards of review. Indeed, reviewing such questions "is a quintessential role of the courts." ER 21.

Defendants chose to explain their decision to terminate a program that has become essential to the lives and futures of hundreds of thousands of young

Americans by asserting that they have no lawful power, and thus no discretion, to maintain it. That legal assertion is subject to judicial review under the APA. Defendants "cannot claim that the law ties [their] hands while at the same time denying the courts' power to unbind" them. *NAACP*, 2018 WL 1920079, at *28. They "may escape political accountability or judicial review, but not both." *Id.*

CONCLUSION

The district court's order granting a preliminary injunction should be affirmed.

Dated: May 11, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a)(5)-(6) and this Court's supplemental briefing order (Dkt. 157) because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, is double-spaced, and is 14 pages long.

Dated: May 11, 2018

s/ Michael J. Mongan

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 by using the appellate CM/ECF system. I certify that all other 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/ Michael J. Mongan