Nos. 18-587, 18-588, and 18-589

In The
Supreme Court of the United States

DEPARTMENT OF
HOMELAND SECURITY, et al.,

Petitioners,

v.

REGENTS OF THE
UNIVERSITY OF CALIFORNIA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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[Additional Captions Listed On Inside Cover]

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DONALD J. TRUMP,
President of the United States, et al.,
Petitioners,

v.

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, et al.,
Respondents.

**On Writ Of Certiorari Before Judgment
To The United States Court Of Appeals
For The District Of Columbia Circuit**

KEVIN K. McALEENAN,
Acting Secretary of Homeland Security, et al.,
Petitioners,

v.

MARTIN JONATHAN BATALLA VIDAL, et al.,
Respondents.

**On Writ Of Certiorari Before Judgment
To The United States Court Of Appeals
For The Second Circuit**

QUESTIONS PRESENTED

This dispute concerns the policy of immigration enforcement discretion known as Deferred Action for Childhood Arrivals (DACA). In 2016, this Court affirmed, by an equally divided vote, a decision of the Fifth Circuit holding that two related Department of Homeland Security (DHS) discretionary enforcement policies, including an expansion of the DACA policy, were likely unlawful and should be enjoined. *See United States* v. *Texas*, 136 S. Ct. 2271 (per curiam). In September 2017, DHS determined that the original DACA policy was unlawful and would likely be struck down by the courts on the same grounds as the related policies. DHS thus instituted an orderly wind-down of the DACA policy. The questions presented are as follows:

1. Whether DHS's decision to wind down the DACA policy is judicially reviewable.

2. Whether DHS's decision to wind down the DACA policy is lawful.

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INTEREST OF AMICUS CURIAE[1]

Amicus Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise. SLF drafts legislative models, educates the public on key policy issues, and litigates often before both state and federal courts. As an organization interested in federalism, agency powers, and separation of powers, SLF has a particular interest in sweeping non-statutory imposition of policies and programs that violate agency procedure, conflict with existing federal laws, and improperly seek to expand laws absent congressional or constitutional authority.

SUMMARY OF ARGUMENT

It is no secret that "[t]he administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010)). "[T]he authority administrative agencies now hold over our economic, social, and political activities[,]" *id*., contradicts the government of enumerated powers the Framers envisioned.

[1] Rule 37 statement: Amicus notified the parties to the filing of this brief and parties have consented by blanket consent on file with the Court. *See* Sup. Ct. R. 37.3(a). No party's counsel authored any of this brief; amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

Our Founding Fathers sought to create a limited government structure. Addressing concerns that the proposed national government would usurp the people's power to govern themselves, James Madison explained: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . ." The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., Signet Classics 2003).

Despite the dangers posed by the growing administrative state, it is within the province of the federal government to oversee immigration and to implement congressional purposes and objectives. *See* U.S. Const. art. I, § 8, cl. 4; U.S. Const. art. II, § 3; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Arizona v. United States*, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."); *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (the Constitution commits the power to classify aliens to the political branches of government). But that power is not without limits—both procedural and substantive.

The Department of Homeland Security's (DHS) decision to wind down and ultimately rescind the Deferred Action for Childhood Arrivals program (DACA) is lawful because DACA is both procedurally and substantively unlawful. Procedurally, DACA violates the Administrative Procedure Act (APA) because the public received neither notice nor a chance to comment

prior to the substantive rule's announcement and enforcement. And substantively, DACA conflicts with federal law, the U.S. Constitution, and international treaty law. Because DACA is unlawful, no further judicial inquiry should be required, and thus its rescission is not arbitrary and capricious.

Amicus writes to discuss not only the unlawfulness of DACA, but to highlight confusion in the lower courts about when they should use the APA arbitrary and capricious standard and the tests about discretion. Amicus suggests that a bright line rule could clarify that if an agency's discretionary enforcement policy is unlawful, then no secondary inquiry is needed to determine whether that agency's discretionary decision to rescind is arbitrary and capricious. Alternatively, if a reviewing court finds such a challenged policy lawful in the first instance, then it should apply the arbitrary and capricious standard to determine whether rescission was proper and otherwise lawful.

ARGUMENT

I. DACA's rescission was not arbitrary and capricious because DACA is unlawful.

Amicus agrees with Petitioners that the lower courts erred in finding that rescission was arbitrary and capricious. Pet'r. Br. at 32-57. An agency's rescission of a prior administration's discretionary enforcement policy is not an arbitrary and capricious decision when, like here: 1) the policy violated the notice-and-comment

requirements of the APA, and 2) the policy is not required by existing law, conflicts with both the Constitution and federal laws, and is a counterpart to a law already found to be unconstitutional (i.e., Deferred Action for Parents of Americans (DAPA)).[2] The APA provides that courts may "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law* . . . or *without observance of procedure required by law*." 5 U.S.C. §§ 706(2)(A), (D) (emphasis added). These standards are disjunctive and not mutually exclusive.

From its inception, DACA was unlawful. And because DACA is unlawful, DHS's discretionary agency decision to rescind it was not arbitrary and capricious. Declaring DACA's rescission arbitrary and capricious is illogical, cuts against the plain meaning of the APA and this Court's precedent, and undermines the foundational pillars of our system of justice. Just as a binding contract that is illegal at inception is judicially unenforceable, a court must find an unlawful policy invalid and void.

This Court has opined that it is imperative "that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley v. United States*, 490 U.S. 545, 556 (1989). Justice Oliver Wendell Holmes in

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[2] *Texas v. United States*, 809 F.3d 134, 184-86 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam) (*Texas I*) (holding DAPA unlawful and unconstitutional).

an oft-quoted aphorism stated as well: "We do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). For these reasons, 5 U.S.C. §§ 706(2)(A) and (D) set forth separate and distinct legal standards, any one of which can declare the policy at issue void. The lower courts here wrongfully focused on and errantly interpreted the arbitrary and capricious standard while giving no moment to the fundamental concern of whether DACA was lawful at inception. Although this issue may be a matter of first impression in the context of rescission of a prior administration's discretionary enforcement policy in the immigration context, Amicus urges the Court to consider all standards, the entirety of the APA, and other applicable laws.

It may also be helpful for this Court to clarify that when reviewing rescission of an agency's discretionary enforcement policy, courts should use a two-step process: first considering the policy's lawfulness and then scrutinizing the discretionary rescission. This would protect agency action from the improper imposition of both a higher standard and different levels of judicial scrutiny. A threshold analysis of whether the policy is lawful in the first instance would also be in the interests of judicial economy and would preserve a true notion of constitutional separation of powers. This analysis is particularly important when an agency decision concerns an agency policy that not only directly violates the APA, but also conflicts with an existing

comprehensive congressionally approved statutory scheme, as well as other laws.

When an agency concludes, based on the evidence before it that one of its discretionary policies is likely unlawful, it is improper for lower courts to impose a heightened standard to determine whether rescission of that policy was arbitrary and capricious. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (finding courts have no authority to impose procedural requirements beyond those stated in the APA). And it is certainly judicial overreach to create new standards such as policy differences or reliance interests that have no foundation in the APA. *Id*. at 1209. Indeed, this Court already foreclosed applying such a heightened searching review standard to rescission. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (holding there is "no basis . . . for a requirement that all agency change for a new policy be subjected to more searching review").

That said, if this Court finds that its prior opinions leave room for policy difference and reliance interests as a higher level of scrutiny of agency discretion, Amicus urges the Court to provide clarity on when courts should employ these added tests. In any case, the lower courts here avoid any real analysis of the question of lawfulness in the first instance, and fail to follow this Court's precedent and limited judicial review standards.

A. DACA violates the APA because it did not go through notice-and-comment.

Congress and the people are entitled to the benefits of the APA notice-and-comment procedures. The APA requires both notice and a chance to comment before enforcement of any substantive rule or regulation. 5 U.S.C. §§ 553(b)-(c); *see Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). In passing the APA, Congress recognized the hazards that agencies pose to the democratic process, separation of powers, and liberty. The APA requires that agencies issue substantive rules through the notice-and-comment procedure, while "general statement[s] of policy" do not. *Texas I*, 809 F.3d at 214. Ignoring these requirements, in 2012 DHS wrote and implemented DACA, a substantive rule, without giving the public notice or a chance to comment on the substantive rule. This disregard of the APA's requirements led to the very abuse of power and usurpation of congressional authority that Congress sought to curtail with the APA.

As this Court is aware, federal agencies issue, interpret, and enforce rules that govern our lives. "[A]s a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *City of Arlington*, 133 S. Ct. at 1877-78 (Roberts, C.J., dissenting).

The APA's chief procedural safeguard, Section 553, requires administrative agencies to provide "notice of proposed rulemaking" and "give interested persons an opportunity to participate in the rule making through submission of written verified data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. §§ 553(b)-(c). Congress understood that if agencies were going to wield quasi-legislative power, their procedures must "giv[e] adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses." S. Doc. No. 77-8, Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, at 102 (1941). Public notice-and-comment is "essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards in private interests." *Id.* at 103.

The APA must remain "a 'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'" *Fox Television Stations, Inc.*, 556 U.S. at 537 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1248 (1982)). The authority agencies have accumulated is startling. They have combined the once inviolate and separate characteristics of legislative, executive, and judicial powers. If courts do not uphold and enforce required procedures such as APA notice-and-comment, bureaucracy as an independent force

will swallow the very framework and intent of checks and balances enshrined in our Constitution.

Against this backdrop, neither agencies nor courts can ignore the APA's notice-and-comment. Politics can shape policy, but politics must not overrun law and when it does, it is not harmless error. DACA can, has, and will continue to profoundly affect our nation's immigration landscape. Interested persons on both sides of the issue should have had a chance to present written verified data, differing views, and the dangers and benefits of alternative courses before DHS instituted DACA. Both the APA and our nation's democratic process require that DACA, as a substantive rule for APA purposes, be subjected to notice-and-comment. 5 U.S.C. § 551(5); *Chrysler Corp.*, 441 U.S. at 302 (substantive rules can be legally binding, policy statements cannot); *Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (finding a substantive rule exists where benefits eligibility merely "affect[ed] individual rights and obligations"). This is especially true given the legally binding impact the policy will have on immigration law.

DACA, as pleaded by plaintiffs in the consolidated and other related cases, provides that the grantees are granted substantive benefits. The *California* Plaintiffs have pleaded, among other things, that they are "granted the right not to be arrested or detained based solely on their immigration status"; "granted eligibility to receive employment authorization"; "allow[ed] travel"; "not disqualified on the basis of their immigration status from receiving certain public benefits . . . includ[ing] federal Social Security, retirement,

and disability benefits"; and "other benefits and opportunities." Compl. at 17-18 ¶¶ 82-86, *California v. U.S. Dep't of Homeland Sec.*, No. 3:17-cv-05235-WHA (N.D. Cal. Sept. 11, 2017), ECF No. 1 (citations omitted). The *Garcia* Plaintiffs have also pleaded that "DACA confers numerous important benefits on those who apply for and are granted DACA status." Compl. at 9 ¶ 27, *Garcia v. United States*, No. 3:17-cv-5380-WHA (N.D. Cal. Sept. 18, 2017), ECF No. 1.

Likewise, the plaintiffs in the Second and D.C. Circuits challenging the memorandum winding-down DACA pleaded in substance that DACA conferred substantive rights but was wound-down without following the notice-and-comment procedures of the APA. Compl., *NAACP v. Trump*, No. 1:17-cv-1907-CRC (D.D.C. Sept. 18, 2017), ECF No. 1; 3d Am. Compl., *Batalla Vidal v. Nielsen*, No. 1:16-cv-4756-NGG-JO (E.D.N.Y. Dec. 11, 2017), ECF No. 113. And the *New York* Plaintiffs pleaded: "DACA confers numerous benefits on DACA grantees"; "DACA grantees are granted the right not to be arrested or detained based solely on their immigration status"; and "DACA grantees are eligible to receive certain public benefits . . . includ[ing] Social Security, retirement, and disability benefits, and, in certain states, benefits such as driver's licenses or unemployment insurance." Compl. at 41 ¶¶ 218, 220, *New York v. Trump*, No. 1:17-cv-5228-NGG-JO (E.D.N.Y. Sept. 6, 2017), ECF No. 1. The *New York* Plaintiffs further stated:

> In implementing the DHS Memorandum, federal agencies have changed the substantive

> criteria by which individual DACA grantees work, live, attend school, obtain credit, and travel in the United States. Federal agencies did not follow the procedures required by the APA before taking action impacting these *substantive rights*.

Id. at 54 ¶ 289 (emphasis added). Thus, to the extent that DACA's rescission "affect[ed] substantial individual rights and obligations" as a substantive rule, then DACA's creation must also have "affect[ed] individual rights and obligations[.]" *Ruiz*, 415 U.S. at 232. For these reasons, notice-and-comment was required at DACA's inception.

While the lower court decisions here confront the consolidated DACA cases from different procedural angles, one must return to the nub of the case—the threshold question of the legality of DACA as a substantive rule at inception. If unlawful at inception, this finding is dispositive, and rescission was not arbitrary and capricious.

However, in general, the lower courts wrongly overlooked the central issue of whether DACA is subject to the APA's notice-and-comment requirement as a substantive rule. For example, the Ninth Circuit's reliance on policy ignored the APA's definition of "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551(4). Further, even if a court

found that DACA contains mere policy language, such a finding would not preclude categorizing DACA as a substantive rule under the APA definition requiring notice-and-comment. Any reliance on the purported discretion in DACA is more theoretical than based in reality. If statistics are to govern, there is a slippery slope that emerges. How is a court to draw any conceivable or meaningful line to preserve the voice of Congress and the people, against a president imposing legally binding "policy" rules through an unchecked fourth branch of government?

B. DACA violates the INA, the Constitution, and international treaty law.

On top of its procedural flaws, DACA violates the APA because it violates the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq*., the Constitution, and international treaty law. *See* 5 U.S.C. § 706(2)(A) (agency action must be "otherwise not in accordance with law").

Before DACA's announcement in 2012, Congress enacted a comprehensive legal scheme under the INA which neither requires DACA, contemplates DACA, nor gives DHS the authority to implement DACA or any other deferred action plan. DACA, like DAPA, is "foreclosed by Congress's careful plan." *Texas I*, 809 F.3d at 186. It violates the congressionally approved immigration scheme because it is a discretionary enforcement policy at its core, not part of any existing law. Thus, it involves agency decision, discretion, and

action to make substantive judgments about non-enforcement of a comprehensive congressional scheme already mandated by the INA to require deportation of illegal aliens. *Id*. at 186 n.202. In *Texas I*, the Fifth Circuit held that similar DAPA and expanded DACA policies were "manifestly contrary" to the INA. *Id*. at 186.

As the DHS Secretaries concluded after considerable analysis and reliance on well-reasoned decisions involving DAPA including analysis from the Attorney General, they lacked "sufficient confidence in the DACA policy's legality to continue this non-enforcement policy, whether the courts would ultimately uphold it or not." Memorandum from Elaine C. Duke, Acting Sec'y on Rescission of Deferred Action For Childhood Arrivals (DACA) (Sept. 5, 2017); *see also* Memorandum from Sec'y Kirstjen M. Nielsen (June 22, 2018). The Duke and Nielsen Memorandums further provided multiple reasons of "enforcement policy" to rescind DACA, including that Congress has "repeatedly considered but declined to protect" illegal aliens.[3] *Id.* The analysis, before rescission, was enough to satisfy the APA.

Their analysis shows that the INA does not give DHS the authority to implement or to enact DACA. This is because Congress did not give DHS authority to grant, through executive policy, lawful presence to large classes of people outside the INA (including visa requirements under 8 U.S.C. § 1201 *et seq*.), the

[3] A reason may also exist in the Privileges and Immunities Clause which only identifies "citizens" as having a right to such privileges and immunities as opposed to illegal aliens. U.S. Const. art. IV, § 2, cl. 1.

Constitution, or applicable international treaty law. As the Fifth Circuit held in *Texas I*: "In specific and detailed provisions, the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present." 809 F.3d at 179. The INA also specifies classes of aliens eligible and ineligible for work authorization and visa issuance, requiring extensive inquiry and satisfaction of mandatory requirements. *Id.* at 180-81. Because the congressional scheme is comprehensive, DHS should not be allowed to sidestep or undermine it through unchecked policies.

The INA is also silent about the group of around 4.3 million aliens identified under DACA and makes no mention or reference regarding deferred action with respect to this large group of otherwise removable aliens. Deferred action under DACA amounts to much more than a mere decision not to pursue removal of an alien. Indeed, it is equivalent to declaring and conferring extra-constitutional and extra-statutory rights of lawful presence. The INA statutorily mandates bars for reentry based on unlawful presence, eligibility for advance parole, and eligibility for federal benefits. DACA disregards the statutory scheme. An agency cannot be left to legislate or create categories not contemplated by the legislation, especially when it fails to adhere to the required notice-and-comment procedures. *United States v. Mead*, 533 U.S. 218, 230 (2001) ("Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure. . . .").

Our Constitution also requires adherence to international treaties and congressional approval of same as the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. DACA provides a clear mechanism to circumvent, obstruct, or inhibit removal and extradition under applicable international treaties.[4] DACA gives lawful status to illegal aliens and thus impedes statutorily mandated removal, extradition, and deportation. As found by the Fifth Circuit, "DACA prevents removal of its recipients—whom Congress has deemed removable." *Texas v. United States*, 328 F. Supp. 3d 662, 714 (*Texas II*).

Although not involving the APA, there is at least one example of a court invalidating an executive policy that conflicted with an existing comprehensive federal legal scheme. In 1995, President Bill Clinton issued Executive Order 12954 which prohibited the federal government from contracting with organizations that had strike-breakers on the payroll. 60 Fed. Reg. 13,023 (Mar. 10, 1995). But because the policy conflicted with the express provisions of the National Labor Relations Act, the reviewing court invalidated the policy.

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[4] *See*, *e.g.*, Extradition Treaty, Mexico-U.S., Jan. 25, 1980, 31 U.S.T. 5059, art. 2; art. 9; art. 13 ("Extradition shall take place, subject to this Treaty, for willful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties. . . . Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so. . . . The request for extradition shall be processed in accordance with the legislation of the requested Party. . . .").

Chamber of Commerce of the United States v. Reich, 74 F.3d 1322 (D.C. Cir. 1996). Similarly, DACA's rescission is proper because DACA conflicts with the INA, the Constitution, and treaty law.

Of course, if the agency discretionary action is "otherwise not in accordance with law" in the first instance, the rational test and so-called agency discretion inquiry should be unnecessary. 5 U.S.C. § 706(2)(A). Courts typically review agency actions and factual findings made during formal proceedings under a substantial evidence test, 5 U.S.C. § 706(2)(E), and uphold the agency's findings if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In formal proceedings, the agency must support its action with evidence in the record. But in informal proceedings, the agency can point to any evidence it possessed when it made its determination. *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007). In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), the Court clarified that an agency decision may be unlawful

> [i]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could

> not be ascribed to a difference in view or the product of agency expertise.

Id. at 43.[5] Here, however, in rescinding DACA, DHS considered exactly what Congress intended it to consider.

II. Courts cannot unilaterally expand the APA's standard of review.

Judicial review of discretionary enforcement policies should not expand procedurally beyond the standard set forth in the APA or substantively beyond constitutional muster. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (finding that when an agency acts, the action itself provides a focus for judicial review to determine whether the agency exceeded its statutory powers). Here, the inquiry should be narrowly constrained to the threshold issue of whether DHS's discretionary enforcement policy—DACA—is unlawful. If so, then, DHS's rescission based, in part, on such rational inquiry into the lawfulness of DACA cannot be arbitrary and capricious.

Here, for example, the Ninth Circuit de-emphasizes the unlawfulness of DACA in the first instance and

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[5] Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 763 (2008) ("In its seminal decision in *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, the Court entrenched hard look review and clarified its foundations.").

instead focuses on the degree of inquiry to be applied to an agency decision. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018). Focus on enlarging the APA review standards ignores this Court's explanation that the arbitrary and capricious standard becomes neither heightened nor more stringent just because an agency's action alters or changes its prior policy. *Fox Television Stations, Inc.*, 556 U.S. 502. Indeed, there is a complete lack of precedent supporting application of a different heightened standard to review of a rescission of a discretionary enforcement policy than to review of the original policy. Yet at least one of the lower courts imposes an improper heightened substantial evidence standard, and likewise a heightened judicial scrutiny including factors far beyond the plain language of the APA—so-called policy differences or reliance interests. *Perez*, 135 S. Ct. at 1209.

The APA establishes plain language standards governing judicial review of decisions and actions made by federal administrative agencies. *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999). The APA's discretion standard is limited and, regarding the agency action here, does not permit courts to engage in heightened searching review. The APA instructs reviewing courts to decide "all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action . . . and set aside agency action . . . found to be . . . arbitrary, capricious, or . . . without observance of procedure required by law. . . ." 5 U.S.C. §§ 706, 706(2)(A), (D). Agency "action" is defined as "the whole or a part

of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id*. at § 551(13); *Hearst Radio v. FCC*, 167 F.2d 225, 227 (D.C. Cir. 1948) (APA covers only those activities included within the statutory definition of "agency action"). Judicial review may also be limited because it would contravene congressional intent, such as disrupting or impeding the intended and prompt implementation of complex congressionally approved regulatory frameworks. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). Thus, a reasoned and rational explanation to justify the agency's change in course related to a discretionary enforcement policy is found sufficient. *Id.* Reasons for a change in a discretionary enforcement policy do not require justification exceeding the reasons to adopt the rulemaking policy in the first instance. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 29. Interpretation should be logical from a commonsense reading. If an agency action from inception is otherwise not in accordance with law, the threshold judicial inquiry should end there. Whether the agency action met the evidentiary standards applicable to the arbitrary and capricious standard should be a secondary analysis.

CONCLUSION

The judgments of the Ninth Circuit and the District Court for the District of Columbia, as well as the orders of the Eastern District of New York, should be reversed.

Respectfully submitted,

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