18-485(L)

18-488 (CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARTIN JONATHAN BATTALLA VIDAL; MAKE THE ROAD NEW YORK, on behalf of itself, its members, its clients, and all similarly situated individuals; ANTONIO ALARCON; ELIANA FERNANDEZ; CARLOS VARGAS; MARIANA MONDRAGON; CAROLINA FUNG FENG, on behalf of themselves and all other similarly situated individuals; STATE OF NEW YORK, STATE OF MASSACHUSETTS, STATE OF WASHINGTON, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF IOWA, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, STATE OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF VIRGINIA, STATE OF COLORADO;

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, Secretary of Homeland Security; JEFFERSON B. SESSIONS III, Attorney General of the United States;

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY
AT NEW YORK UNIVERSITY SCHOOL OF LAW
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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[1] Under Federal Rule of Appellate Procedure 29(a)(4)(E), the Institute for Policy Integrity states that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

[2] This brief does not purport to represent the views of New York University School of Law, if any.

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INTEREST OF AMICUS CURIAE

The Institute for Policy Integrity at New York University School of Law (Policy Integrity) submits this brief as *amicus curiae* in support of Plaintiffs-Appellees (Appellees).[3] Policy Integrity is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, with a particular focus on economic issues. Policy Integrity consists of a team of legal and economic experts, trained in regulatory cost-benefit analysis and the proper application of economic principles to agency decisionmaking. Our director, Richard L. Revesz, has published more than eighty articles and books on environmental and administrative law, including several works that address the legal and economic principles that inform rational agency decisions.

This case concerns the Department of Homeland Security's (DHS) decision to terminate its Deferred Action for Childhood Arrivals program (DACA), which allows young immigrants meeting certain requirements to remain in the United States. The rescission of DACA is part of a broad pattern of illegal attempts by agencies across the Trump Administration to suspend or reverse duly promulgated

[3] Policy Integrity thanks Megan Wilkie and Cameron Williamson, students in New York University School of Law's Regulatory Policy Clinic, for assistance in preparing this brief.

regulations and other policies.[4] In furtherance of its mission to promote rational decisionmaking, Policy Integrity has filed several *amicus* briefs and comment letters regarding these suspensions and reversals, focusing on agencies' failure to consider the costs, in the form of forgone benefits, of their actions. *See, e.g.,* Br. for Inst. for Policy Integrity as *Amicus Curiae*, *Air Alliance Houston v. EPA,* No. 17-1155 (D.C. Cir. Nov. 1, 2017) (delay of a rule designed to prevent accidents at chemical facilities); Br. for Inst. for Policy Integrity as *Amicus Curiae*, *Open Cmtys. Alliance v. Carson*, 286 F. Supp. 3d 148 (D.D.C. 2017) (No. 17-2192) (delay of implementation of a rule aimed at aiding low-income families); Br. for Inst. for Policy Integrity as *Amicus Curiae*, *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (No. 17-cv-3804) (delay of a rule preventing natural gas leaks on public lands); Br. for Inst. for Policy Integrity as *Amicus Curiae*, *Clean Water Action v. Pruitt*, No. 17-cv-817-DLF (D.D.C. June 27, 2017) (delay of a rule limiting wastewater discharge of toxic metals). Thus far in such cases, courts have agreed that mischaracterizing or ignoring the costs of a policy change is arbitrary and capricious. *See California*, 277 F. Supp. 3d at 1123 ("Defendants' failure to consider the benefits of compliance with the provisions

[4] For a review of regulatory delays and reversals undertaken by the Trump Administration using a variety of methods, and the legal problems with these approaches, see Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 Harv. L. & Policy Rev. 14 (2018), http://harvardlpr.com/wp-content/uploads/2018/03/Heinzerling.pdf.

that were postponed, as evidenced by the face of the Postponement Notice, rendered their action arbitrary and capricious and in violation of the APA."); *California v. U.S. Bureau of Land Mgmt.*, No.17-cv-7186, 2018 WL 1014644, at *10 (N.D. Cal. Feb. 22, 2018) (finding rule delay arbitrary and capricious where agency "either deeply underestimate[d] the lost air quality and climate benefits, or overestimate[d] the reduction in compliance costs" caused by its action); *see also Open Cmtys. Alliance*, 286 F. Supp. 3d at 174 (finding risk of irreparable harm from rule delay, because delay would deprive plaintiffs of original rule's benefits).

Like the agencies in those cases, DHS rescinded DACA without considering the substantial harms its action would cause. Policy Integrity's expertise in risk assessment and cost-benefit analysis, and its experience with suspension and rescission cases, give it a unique perspective from which to evaluate Appellees' claims that the rescission of DACA was arbitrary and capricious.[5]

SUMMARY OF ARGUMENT

Our brief addresses only one issue in this case: DHS's contention that, separate from its claim that DACA was illegal, it had a reasonable, independent basis for rescinding DACA "based on the evident risk that the existing DACA

[5] All parties have consented to the filing of this brief.

policy would at a minimum be the subject of protracted litigation, and very likely be enjoined nationwide." Appellants' Br. 33, ECF No. 119.

As Appellees explain, DHS's September 5, 2017 memorandum rescinding DACA, Joint Appendix (JA) 464-68 (Rescission Memorandum), does not actually cite such "litigation risk" as an independent justification for the agency's action, and DHS is thus precluded by the *Chenery* doctrine from raising this rationale as a defense to its action in court. Br. for Plaintiffs-Appellees (Vidal Br.) 40-41, ECF No. 159; Brief for State Appellees (States Br.) 55, ECF No. 157. But even if DHS *had* expressly cited its desire to avoid a nationwide inunction of DACA as a justification for voluntarily rescinding the program, the agency's action would still be arbitrary and capricious.

Rational risk management requires an agency to do more than simply identify the possibility that an undesirable event will occur and then take any step, however costly, to prevent it. A homeowner might reasonably believe that his house has some chance of falling victim to arson. He could not, however, reasonably address that risk by burning down the house himself. The action would indeed eliminate the risk; it is, after all, impossible for an arsonist to set fire to a building that no longer exists. But the homeowner's decision would still be irrational, because the harm he avoided (*potential* destruction of his house) would be greatly outweighed by the harm he caused (*certain* destruction of the house).

Accordingly, before taking an action to prevent a feared event, an agency must assess the expected cost of that event—taking into account both the probability that it will occur and the magnitude of harm it would cause—and then weigh that expected cost against the expected cost of the agency's prevention plan. More plainly, the agency must show that the cure is preferable to the disease.

In this case, before concluding that rescinding DACA was a reasonable strategy for managing the risk of an injunction against the program, DHS would have first needed to develop at least a rough, qualitative estimate of the expected cost of that injunction, taking into account both the likelihood of its issuance and the amount of damage it would cause. Next, DHS would have needed to weigh the expected cost of an injunction against the harm that was certain to result from voluntary rescission—namely, the loss of DACA's enormous economic and humanitarian benefits and the severe disruption of the lives of hundreds of thousands of participants, as well as the lives of their families, friends, employers, and educators. Because the agency took neither of these fundamental analytical steps, its rescission of DACA is arbitrary and capricious.

ARGUMENT

Under the arbitrary and capricious standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle*

Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted). When the relevant action involves a *change* of policy, the agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

DHS claims that Acting Secretary Elaine Duke's concern that DACA "would be enmeshed in litigation and subject to a likely injunction" provided an adequate basis for a discretionary rescission of DACA "[r]egardless of whether [the program] was consistent with the [Immigration and Nationality Act]." Appellants' Br. 14. Appellees correctly criticize this as a *post hoc* rationalization that was not properly raised in DHS's Rescission Memorandum. Vidal Br. 40-41; States Br. 55. But even if the Rescission Memorandum *could* be read to invoke litigation risk as an independent basis for DHS's decision, the Acting Secretary's termination of DACA would still be arbitrary and capricious, for at least two reasons.

First, DHS failed to properly assess the risk of an injunction. Agencies across the federal government recognize that risk encompasses both the amount of harm that an undesirable event might cause and the probability of that event's

occurrence.[6] Indeed, DHS's own Risk Lexicon defines risk as the "potential for an unwanted outcome resulting from an incident, event, or occurrence, *as determined by its likelihood and the associated consequences*." DHS, Risk Steering Committee, DHS Risk Lexicon 27 (2010) (emphasis added) (DHS Risk Lexicon).[7] But the Rescission Memorandum did not credibly assess either the probability that an injunction would be issued or the magnitude of harm such an injunction would cause.

Second, DHS failed to weigh the expected benefit of avoiding an injunction against the costs that voluntarily rescinding DACA would impose on DHS, program participants, their communities, and the broader economy. An action taken to manage risk is justified only if it does more good than harm. *See* DHS

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[6] *See, e.g.*, U.S. Dep't of Commerce, Nat'l Inst. of Standards & Tech., Guide for Conducting Risk Assessments 35 (2012), https://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-30r1.pdf ("Organizations assess the risks from threat events as a combination of likelihood and impact."); U.S. Nuclear Regulatory Comm'n, Backgrounder on Probabilistic Risk Assessment (2016), https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/probabilistic-risk-asses.html ("Risk is determined by two factors: How often might a particular hazard arise? How much harm is likely to result?"); U.S. Dep't of Health & Human Servs., Ctrs. for Medicaid & Medicare Services, Basics of Risk Analysis and Risk Management 12 (2007), https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/securityrule/riskassessment.pdf ("The level of risk is determined by analyzing the values assigned to the likelihood of threat occurrence and resulting impact of threat occurrence.").

[7] *Available at* https://www.dhs.gov/xlibrary/assets/dhs-risk-lexicon-2010.pdf.

Risk Lexicon 30 (defining "risk management" as a "process of . . . controlling [risk] to an acceptable level considering associated costs and benefits"). More generally, an agency cannot reasonably tout the advantages of an action without also acknowledging its disadvantages. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.").

Because DHS neither properly assessed the risk of an injunction nor made any effort to determine whether the benefits of avoiding that risk justified the costs of voluntarily rescinding DACA, the agency's "litigation risk" rationale for rescinding DACA is unreasonable.

I. DHS Failed to Properly Assess the Risk of an Injunction

In its brief, DHS claims that the Acting Secretary's decision was motivated by a determination that DACA was "very likely to be enjoined nationwide" and that she thus faced a choice "between a gradual, orderly, administrative wind-down of the policy, and the risk of an immediate disruptive, court-imposed one." Appellants' Br. 33, 39.[8] But even if such reasoning *could* fairly be gleaned from

[8] DHS also claims that the Acting Secretary was motivated by a conviction that DACA "would at a minimum be the subject of protracted litigation." Appellants' Br. 29. But as Appellees explain, a bare desire to avoid lawsuits could not possibly serve as a plausible justification for rescinding DACA, because DHS knew—or should have known—that a voluntary rescission of the program would *itself* be

the text of the Rescission Memorandum, it would not be reasonable given the information available to DHS. *State Farm*, 463 U.S. at 43 (action is arbitrary and capricious if agency offers an "explanation for its decision that runs counter to the evidence before the agency").

A. DHS Could Not Reasonably Conclude That an Injunction Would Be "Very Likely"

With respect to the likelihood of an injunction, the Rescission Memorandum itself made no predictions. It did, however, cite a letter to DHS from the Attorney General in which he opined that DACA "has the same legal and constitutional defects that courts recognized as to [the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA)]" and deemed it "likely that potentially imminent litigation would yield similar results with respect to DACA." JA 463.

As Appellees point out, the Attorney General's claim that courts had identified *constitutional* defects in DAPA was—and still is—flatly untrue. Vidal Br. 33-34; States Br. 51-54. Instead, a judge in the Southern District of Texas had preliminarily enjoined implementation of DAPA after finding a likelihood of

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subject to protracted litigation. *See Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (en banc) (rejecting agency's attempt to cite litigation against a rule as an independent justification for modifying it where the modification "predictably led to [another] lawsuit").

success on the merits of a *statutory* claim against the program. *Texas v. United States*, 86 F. Supp. 3d 591, 671-72 (S.D. Tex. 2015). That injunction was affirmed by the Fifth Circuit, *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2016), and, in an equally divided vote with no precedential effect,[9] by the Supreme Court, *United States v. Texas*, 136 S. Ct. 2271 (2016). And even those decisions could not reasonably support a determination that an injunction of DACA was likely, as the Attorney General suggested—much less that it was *very* likely, as DHS now contends in its briefing. Appellants' Br. 33.

First, any inferences the Attorney General or Acting Secretary attempted to draw from the Supreme Court's affirmation of the DAPA injunction were necessarily unreasonable. As the judgment of an equally divided court, that decision was not accompanied by any opinions. *See Texas*, 136 S. Ct. at 2271. In other words, it provided the government with absolutely no insight into *why* the Justices voted as they did and whether their views might lead them to support an injunction of DACA as well.

Nor was it appropriate to assume that judges of the Southern District of Texas and the Fifth Circuit would make the same determinations about the likely legality of DACA as they had about DAPA. As Appellees explain, the two programs differ

[9] *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987) ("[A]n affirmance by an equally divided Court is not entitled to precedential weight.").

substantially. Vidal Br. 36-39; States Br. 42-47. For example, unlike DACA, DAPA offered deferred action to people who had alternative means of pursuing legal status through the Immigration and Nationality Act. Vidal Br. 37; States Br. 44-45. But the Rescission Memorandum did not mention their differences, much less analyze whether the Southern District of Texas, Fifth Circuit, or Supreme Court would deem those differences legally significant.

More importantly, even if Texas and other challengers persuaded a Southern District of Texas judge that they were likely to succeed on the merits of their claims against DACA, the court could not issue a preliminary injunction (and the Fifth Circuit and Supreme Court could not affirm one) without also considering the balance of equities and the public interests at stake. *See e.g., Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 460 (5th Cir. 2016) (upholding denial of a preliminary injunction where plaintiffs failed "to carry their burden of persuasion on . . . the balance of harm and the public interest"). Those factors would look very different in a 2017 challenge to DACA than they did in the 2015 challenge to DAPA. When DAPA was enjoined, it had not yet taken effect, and the district court found that an injunction was necessary to "preserve the status quo." *Texas*, 86 F. Supp. 3d at 674-76. By contrast, enjoining DACA, after it had already been in effect for more than five years, would be a seismic disruption of the status quo.

Perhaps recognizing that the Rescission Memorandum cannot support the agency's contention that a disruptive injunction was "very likely," DHS also argues that the Acting Secretary was simply not required to assess the probability of an injunction before invoking it as a reason for rescission. Appellants' Br. 35 (rejecting the idea that rescission on the basis of litigation risk required an "evaluation of the likelihood of success in various district courts, the courts of appeal, and the Supreme Court"). In the agency's view, "[s]o long as the ultimate litigation judgment was reasonable, the Acting Secretary's decision was not arbitrary and capricious." *Id.*

But it is impossible to evaluate the reasonableness of the action that DHS purportedly took to avoid an injunction without considering the probability that such an injunction would be issued. If an agency knew for certain that it would soon incur a harm worth $100, it could reasonably spend $99.99 to prevent it. But if the agency estimated that the probability of the $100 harm was only 1 percent, investing even $10 in prevention would be irrational. This is just as true when the agency sacrifices regulatory benefits to avoid a harm as it is when the agency spends tax dollars to avoid it. *See* John C. Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory*, 69 Am. Pol. Sci. Rev. 594, 595 (1975) (book review) ("It is extremely irrational to make your

behavior wholly dependent on some highly unlikely unfavorable contingencies regardless of how little probability you are willing to assign to them.").

The point is not that DHS had an obligation to assign a precise numerical value to the probability of an injunction. But in order to justify rescission based on litigation *risk*, DHS was required, at minimum, to prepare a qualitative assessment of an injunction's likelihood, and to ground that assessment in the available evidence. DHS Risk Lexicon at 27 (defining risk as a function of probability and magnitude); *State Farm*, 463 U.S. at 43 (agency must examine "relevant data" and articulate explanation that includes "rational connection between the facts found and the choice made" (internal quotation marks omitted)). The Rescission Memorandum does not meet this standard.

B. DHS Could Not Reasonably Conclude That an Injunction Would Require an Immediate Halt to DACA

In addition to exaggerating the probability of an injunction, DHS's brief exaggerates the magnitude of damage that an injunction would cause. Specifically, DHS claims that the injunction would have required an "immediate, disruptive" unwinding of DACA. Appellants' Br. 39. But courts have broad discretion when fashioning equitable relief. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."). Given that flexibility, it beggars belief for DHS to suggest that a district court would, over the

agency's objection, require it to dismantle overnight a program of such vital importance to hundreds of thousands of participants.[10] *Int'l Bhd. of Teamsters Airline Div. v. Frontier Airlines, Inc.*, 628 F.3d 402, 407 (7th Cir. 2010) ("[I]t is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all . . . whose interests the injunction may affect." (quoting *Bhd. of Locomotive Eng'rs v. Missouri-Kansas-Texas R. Co.*, 363 U.S. 528, 532 (1960))).

Even if a court *did* find that an injunction was warranted, it would have many options short of a complete and immediate halt to DACA. For example, a court might order the agency only to stop accepting *new* applications to the program. *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (declining to "fault the district court's exercise of its discretion to issue a partial injunction balancing the equities rather than an automatic full injunction"). Or the court might require a full halt to the program but give the agency ample time to come into compliance with the order. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (finding that district court's equitable discretion was not limited to "order of

[10] It is similarly implausible that the Fifth Circuit and Supreme Court would decline to reverse such an unnecessarily disruptive order as an abuse of discretion. *See, e.g.*, *McKinney ex rel. NLRB v. Creative Vision Res., L.L.C.*, 783 F.3d 293, 298 (5th Cir. 2015) (overturning preliminary injunction "issued several years after [defendant] commenced the allegedly wrongful conduct" as abuse of discretion where district court failed to show "that injunctive relief was just and proper based on the balance of the equities").

immediate cessation"). In other words, a court might have ordered a remedy that was no more disruptive than the rescission plan that DHS adopted voluntarily. In the absence of a credible showing that an injunction would be more disruptive than a voluntary rescission, even a finding that an injunction was almost certain to be issued could not justify voluntary rescission.[11]

Ultimately, litigation risk, like any other form of risk, cannot reasonably be managed if it is not first properly assessed. The alternative—allowing agencies to scrap policies whenever they identify a possibility, however remote, of judicial injunction—would make a mockery of the Administrative Procedure Act's requirement that agencies provide "good reasons" for policy reversals. *Fox*, 556 U.S. at 515; *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) ("If an agency could engage in rescission by concession, the doctrine requiring agencies to give reasons before they rescind rules would be a dead letter."). Here, the Rescission Memorandum failed to include any express assessment of the likelihood that an injunction would be issued or of the harm that such an injunction was likely to cause. Furthermore, the *post hoc* conclusions

[11] To understand why, imagine a policy that is expected to generate $100 in net benefits to society. Now assume that the policy has a 99 percent chance of being enjoined but that the injunction will impose no costs beyond the loss of the policy's benefits. The policy still has an expected value of $1 (its $100 in net benefits multiplied by its 1 percent chance of being upheld) and rescinding it would be net costly for society.

offered in DHS's brief—that an injunction was "very likely" and that it would require an "immediate, disruptive" dismantling of DACA—could not reasonably be drawn from the evidence before the agency at the time of rescission. Accordingly, DHS's decision to rescind DACA was arbitrary and capricious.

II. DHS Failed to Weigh the Benefits of Avoiding an Injunction Against the Costs of Voluntary Rescission

Even if DHS *had* properly assessed the expected harm of retaining DACA in the face of litigation, rescinding the program to avoid that harm would be rational only if the agency found the benefits of doing so outweighed the costs of voluntarily sacrificing DACA's enormous benefits and disrupting the lives of the hundreds of thousands of people who had come to rely on the program.[12] As the Supreme Court has made clear, "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan*, 135 S. Ct. at 2707. In weighing a possible action, an agency "cannot tip the scales . . . by promoting [the action's] possible benefits while ignoring [its] costs." *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983). Nor may it "put a thumb on the

[12] Imagine again a policy with $100 in expected net benefits. This time, assume the agency has concluded that the policy has a 50 percent chance of being enjoined and that this injunction will impose $20 in costs above and beyond the policy's lost benefits. If the agency voluntarily rescinds the policy, it has paid $50 in forgone expected net benefits (because the policy had a 50 percent chance of being upheld) to avoid $10 in injunction costs (the $20 resulting from the injunction multiplied by the 50 percent probability that the injunction would be entered). As a result, voluntary rescission imposes a net cost on society of $40 and is irrational.

scale by undervaluing [one] and overvaluing the [other]." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008). Furthermore, when an agency is changing policy, it must provide a reasoned explanation for disregarding any facts and circumstances that underlay that policy or the reliance interests the policy has engendered. *Fox*, 556 U.S. at 515.

Here, DHS not only overvalued the expected benefits of rescission (to the extent it explicitly considered them at all) but also completely ignored the costs that rescission would impose in the form of DACA's forgone benefits. Furthermore, DHS failed to consider the deep and widespread reliance interests that DACA had engendered since its creation. The agency's failure to take these "facts and circumstances" into account when rescinding DACA was arbitrary and capricious. *Fox*, 556 U.S. at 516.

A. DHS Failed to Consider the Benefits of DACA That Would Be Forgone by Rescission

In the memorandum that created DACA, then-Secretary of Homeland Security Janet Napolitano explained that deferred action was important because the "productive young people" who would participate in DACA "have already contributed to our country in significant ways." JA 214. In a speech announcing and justifying the adoption of DACA, President Obama expanded on DHS's reasoning: "[I]t makes no sense to expel talented young people . . . who want to

staff our labs, or start new businesses or defend our country . . . because these young people are going to make extraordinary contributions." Remarks by the President on Immigration, June 15, 2012.[13]

DACA participants have, if anything, exceeded these lofty expectations, and rescission threatens their substantial contributions. As Congressman John Lewis warned the Acting Secretary, "[e]mployers would face huge costs, businesses owned by *DREAMers* would close, and the Social Security trust funds would lose millions of tax dollars" if DACA were rescinded. JA 453. Several more members of Congress provided the Acting Secretary with data to illustrate the scope of the damage should DACA be rescinded. JA 454 ("Ending DACA would increase the nation's undocumented population, profoundly and negatively impact our nation's economy, contracting the nation's GDP by $460.3 billion. Additionally, this reduces federal tax contributions to Social Security and Medicare by $24.6 billion over a decade, and costs businesses $3.4 billion in unnecessary turnover costs."); *see also* States Br. 61-63. But the Rescission Memorandum does not mention these economic benefits.

DHS also ignored its prior finding that DACA will "ensure that our enforcement resources are not expended on these low priority cases." JA 213. DHS

[13] *Available* at https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration.

lacks the resources to remove the vast majority of undocumented aliens. U.S. Dep't of Justice, Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present*, 38 Op. O.L.C. 1, 9 (Nov. 19, 2014), JA 224. DACA allows DHS to focus on high-priority cases. Such prioritization increases DHS's efficiency by "enabl[ing] [its] enforcement divisions to more easily identify non-priority aliens and focus their resources on pursuing aliens who are strong candidates for removal." *Id.* at JA 241. Again, DHS completely failed to consider the efficiency benefits that motivated DHS to adopt DACA and that will be forgone by rescission.

Finally, DHS adopted DACA in order to provide significant humanitarian benefits directly to DACA recipients. Secretary Napolitano explained that "our Nation's immigration laws . . . are [not] designed to remove . . . young people to countries where they may not have lived or even speak the language." JA 214. President Obama echoed this justification when announcing the program, stating that giving "innocent young kids" "a better path and freedom from fear" instead of "liv[ing] under the fear of deportation" is "the right thing to do." Remarks by the President on Immigration, *supra* at 17-18. Yet again, the Rescission Memorandum does not analyze, consider, or even mention these humanitarian benefits.

The Rescission Memorandum is silent as to the forgone economic, enforcement efficiency, and humanitarian benefits of DACA, the very "facts and

circumstances that underlay . . . the prior policy." *Fox*, 556 U.S. at 516. Because DHS has failed to even acknowledge the negative consequences of its change in policy, much less attempt to weigh those costs against any purported benefit of rescission, its rescission of DACA is arbitrary and capricious. *Id.* at 537 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.").

B. DHS Failed to Consider the Reliance Interests Engendered by DACA

In addition to failing to consider the forgone benefits of DACA, DHS also failed to consider the additional costs that rescission would impose by severely disrupting the reliance interests of participants and their communities. Appellees have extensively catalogued how rescission of DACA would "necessitate systemic, significant changes to the . . . arrangements" of DACA recipients, as well as their families, schools, employers, and communities. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Participants' personal, familial, and professional lives will be upended. Vidal Br 43-45; States Br. 47-51. Universities and businesses may lose the significant financial and training investments made and the limited employment, enrollment, and housing slots allocated based on the program. States Br. 47-48.

"It [is] arbitrary and capricious to ignore" these "serious reliance interests." *Fox*, 556 U.S. at 515*; see also Encino Motorcars*, 136 S. Ct. at 2126-27 (holding that an agency's "conclusory statements" for reversing a long-standing policy that engendered reliance did not constitute a "reasoned explication"). DHS was not permitted to "put a thumb on the scale" of its purported risk management decision by ignoring the lives and investments that would be upended by terminating DACA. *Ctr. for Biological Diversity*, 538 F.3d at 1198.

Appellants claim that DACA could not create legally cognizable reliance interests because it confers relief in two-year periods and is subject to termination. Appellants' Br. 34. They further claim that the Supreme Court's affirmation of the Fifth Circuit's decision to preliminarily enjoin DAPA somehow created a "change in circumstances" that rendered any reliance so "insubstantial" that the Department did not even need to address it when reversing its long-standing prior policy. Appellants' Br. 38. But the relevant question is not whether those affected by a policy could reasonably assume that the policy would continue to benefit them in perpetuity; if that were the case, no policy could ever engender reliance interests, as the turnover of political appointees with new priorities, the initiation of litigation, and the process of agency decisionmaking under the Administrative Procedure Act means that there is some reasonable likelihood that every agency policy will change in the future. Nor is the question whether an affected group

should have made decisions in reliance on a given policy. Instead, the proper inquiry is whether a prior policy *actually did* give rise to substantial reliance interests, as these interests constitute "facts and circumstances . . . engendered" by that prior policy and which must be considered when changing the policy. *Fox*, 556 U.S. at 516. DHS's contention that participants' reliance was not well-founded might permissibly have affected the *weight* it assigned to reliance in its analysis—subject, of course, to judicial review under the arbitrary and capricious standard. The fact that a policy has engendered reliance interests does not preclude an agency from changing that policy. *Encino Motorcars*, 136 S. Ct. at 2128 (Ginsburg, J., concurring). But it does compel the agency to expressly acknowledge the disruption that change will create for those who relied on the policy and explain why the agency's action is justified in spite of that disruption. *Id.* DHS's opinion as to the reasonableness of participants' reliance on DACA cannot excuse the agency's complete failure to identify and discuss the issue.

Moreover, participants' reliance on DACA could not fairly be deemed unreasonable. It would be absurd to expect program participants to have predicted a discretionary rescission of DACA simply because four Supreme Court justices voted to affirm a single circuit court's preliminary determination about the likely legality of a *different* program. Indeed, after the Supreme Court's decision, high-level government officials in both the Obama and Trump Administrations—

including those at the top ranks of DHS—repeatedly urged participants *not* to draw such a conclusion. *See* JA 4027 (then-DHS Secretary Jeh Johnson: "We believe these representations made by the U.S. government upon which DACA applicants most assuredly relied must continue to be honored."), JA 3527 (then-DHS Secretary John Kelly: "The DACA status is a commitment . . . by the government towards the DACA person."); JA 1177 (President Trump: "The dreamers should rest easy. Ok? I'll give you that. The dreamers should rest easy.").

Thus, DHS cannot dispute that DACA engendered reliance interests cognizable under the Administrative Procedure Act and cannot excuse its failure to weigh the costs of disrupting those interests against the purported benefits of avoided litigation risk. As a result, the agency's decision to rescind DACA was arbitrary and capricious.

CONCLUSION

For the reasons discussed above, the district court's grant of a preliminary injunction should be affirmed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,439 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word and Times New Roman font size 14.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on April 11, 2018.

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