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NOTE
DEPARTMENT OF HOMELAND SECURITY V. REGENTS OF THE UNIVERSITY OF CALIFORNIA: THE SUPREME COURT'S DISINTEREST IN RELIANCE INTERESTS

RACHAEL E. SAVAGE*

"Anywhere we are planted we are capable of blooming."[1]

Abigail was born in Jamaica.[2] She lived in a clapboard house without access to clean water, let alone opportunity.[3] She was sent to the United States just before her twelfth birthday.[4] The neighborhood she was brought to was not the America she had envisioned: it was dangerous and overrun with gangs.[5] Despite the challenges of growing up in such a neighborhood, Abigail excelled socially and academically.[6] But even with these successes, she faced a major obstacle: she was brought to this country without the proper documents.[7] When she learned that she was undocumented, Abigail felt ashamed and feared being discovered.[8] "I felt like a criminal," she remembers.[9]

In 2012, Abigail's world changed.[10] President Obama's Department of Homeland Security ("DHS") issued a memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United

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1. Abigail, *Anywhere We Are Planted We Are Capable of Blooming*, NAT'L IMMIGR. L. CTR. (Feb. 21, 2018), https://www.nilc.org/2018/02/21/anywhere-planted-capable-of-blooming/.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

States as Children."[11] The memorandum outlined new priorities under which DHS should choose to exercise prosecutorial discretion and grant deferred action when dealing with certain individuals who were brought to this country as children.[12] The program became known as Deferred Action for Childhood Arrivals, or DACA,[13] and was popular with a majority of Americans.[14] Abigail and about 800,000 similarly-situated individuals[15] qualified for an exercise of discretion under DACA.[16] As part of the DACA program, Abigail could get her driver's license and work legally—she had a future here.[17] Abigail went on to earn her bachelor's and master's degrees.[18] She got a job working at a local nonprofit that served vulnerable individuals.[19] She supported and positively contributed to her community.[20] Then, in 2017, President Trump's DHS issued a memorandum ending the DACA program, [21] and with it, Abigail's security.

In *Department of Homeland Security v. Regents of the University of California*,[22] the Supreme Court addressed DHS's attempt to rescind the DACA immigration program.[23] The Court held that DHS's rescission of DACA was arbitrary and capricious within the meaning of Section 706 of the Administrative Procedure Act ("APA").[24] The Court correctly relied on faults in DHS's reasoning to render the program's rescission invalid, but the

11. Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, DEP'T OF HOMELAND SEC. (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [hereinafter *DACA Memo*].

12. *Id.*

13. *Deferred Action for Childhood Arrivals (DACA)*, DEP'T OF HOMELAND SEC. (Feb. 1, 2021), https://www.dhs.gov/deferred-action-childhood-arrivals-daca.

14. A 2012 poll found that fifty seven percent of Americans supported the DACA program. *New Poll: Obama's New DREAMer Deferred Action Policy Popular, Pragmatic*, AMERICA'S VOICE (Nov. 13, 2012), https://americasvoice.org/press_releases/new-poll-obamas-new-dreamer-deferred-action-policy-popular-pragmatic/. Nearly a decade later, a 2021 poll found that seventy two percent of Americans supported the program. Nicole Narea, *Poll: Most Americans Support a Path to Citizenship for Undocumented Immigrants*, VOX (Feb. 4, 2021, 8:30 AM), https://www.vox.com/policy-and-politics/2021/2/4/22264074/poll-undocumented-immigrants-citizenship-stimulus-biden.

15. *Deferred Action for Childhood Arrivals (DACA): An Overview*, AM. IMMIGR. COUNCIL (Feb. 5, 2021), https://www.americanimmigrationcouncil.org/research/deferred-action-childhood-arrivals-daca-overview.

16. Abigail, *supra* note 1.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Deferred Action for Childhood Arrivals (DACA)*, *supra* note 13.

22. 140 S. Ct. 1891 (2020).

23. *Id.* at 1901–02.

24. *Id.* at 1915.

Court failed to meaningfully address the many reliance interests at stake in the case.[25]

Weighing reliance interests is an important and necessary process courts must undertake to determine whether agency action is arbitrary or capricious.[26] Considering the impact of agency action on those who rely on prior agency policy is well-settled precedent, especially when those impacts are pecuniary or affect regulated industries.[27] Reliance interests must be considered not just when *industries* rely to their detriment, but also when *individuals* rely to their detriment.[28] This consideration is especially important when those individuals' interests also implicate pecuniary interests.[29] In neglecting to weigh the reliance interests at stake in DACA's

25. *See id.* at 1914 (dismissing the respondents' concerns about DACA recipients' reliance interests as "not necessarily dispositive"). The reliance interests of DACA recipients played a major role in opposition to the attempted rescission. Brief for Respondent at 6–7, 41, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (Nos. 18-587; 18-588; 18-589) [hereinafter *Brief for Regents*]. The respondents argued that DHS should have considered DACA recipients' reliance interests but did not. *Id.* Multiple briefs filed in support of the respondents also highlighted the importance of their reliance interests. *See, e.g.*, Brief for Alianza Americas et al. at 7–8, 13, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (Nos. 18-587; 18-588; 18-589) [hereinafter *Brief for Alianza Americas*] (highlighting the "major life decisions" the DACA policy incentivized); Brief for Ass'n of Am. Med. Coll. et al at 6–8, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (Nos. 18-587; 18-588; 18-589) [hereinafter *Brief for Association of American Medical Colleges*] (highlighting the "significant, long-term investments" the DACA policy incentivized); Brief for Nat'l Educ. Ass'n & Nat'l PTA at 5–29, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (Nos. 18-587; 18-588; 18-589) [hereinafter *Brief for National Education Association*] (highlighting the numerous contributions DACA recipients make to the American education system and the consequences of rescinding the program).

26. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); *see also infra* notes 105–120 and accompanying text.

27. See *infra* notes 112–117 and accompanying text for examples of cases in which the Supreme Court found relevant the pecuniary interests of industries that relied to their detriment on prior agency policies.

28. *See infra* Section IV.B (explaining that reliance interests are relevant in every instance of judicial review of agency action under APA § 706).

29. See *infra* notes 262, 265, 269, 271, 282 and accompanying text for examples of these pecuniary interests. As is discussed more fully below in Section IV.B, DACA recipients make substantial contributions to the United States economy. Nicole Prchal Svajlenka & Philip E. Wolgin, *What We Know About the Demographic and Economic Impacts of DACA Recipients: Spring 2020 Edition*, CTR. FOR AM. PROGRESS (Apr. 6, 2020, 9:01AM), https://www.americanprogress.org/issues/immigration/news/2020/04/06/482676/know-demographic-economic-impacts-daca-recipients-spring-2020-edition/. They pay more than $8.5 billion in federal, state, and local taxes each year. *Id.* DACA recipients also help fund Social Security and Medicare through their payroll tax contributions. *Id.* In addition to tax contributions, DACA recipients have nearly $25 billion in spending power to use in their communities. *Id.* They also own more than 56,000 homes across the United States and make more than $565 million in mortgage payments annually. *Id.* The Supreme Court should have taken these contributions into account when determining the legality of the DACA rescission. *See infra* Section IV.B.

rescission, the Court, contrary to its own long-established precedent, "failed to consider an important aspect of the problem."[30]

I. THE CASE

In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court decided three cases[31] resulting from challenges to the Trump Administration's attempted rescission of the DACA program.[32] The DACA program allows specified noncitizens who entered the United States as children, a group known as "Dreamers,"[33] to apply for a two-year deferral of removal.[34] In June of 2012, the Obama-era DHS enacted the DACA program by memorandum.[35] In November of 2014, DHS issued a second memorandum that expanded DACA eligibility and created the

30. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see infra* Section IV.B.

31. Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018), *vacated in part and rev'd in part*, 140 S. Ct. 1891 (2020); NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C. 2018), *aff'd sub nom*. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020); Vidal v. Nielsen, 291 F. Supp. 3d 260 (E.D.N.Y. 2018), *vacated in part*, *aff'd in part*, *rev'd in part sub nom*. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

32. *Regents*, 140 S. Ct. at 1901–02.

33. "Dreamers" get their name from the Development, Relief and Education for Alien Minors ("DREAM") Act. *The Dream Act: An Overview*, AM. IMMIGR. COUNCIL (Mar. 16, 2021), https://www.americanimmigrationcouncil.org/research/dream-act-overview. The Act would provide certain children who came to the country illegally with a pathway to legal status. *Id.* Since its first introduction to Congress in 2001, the DREAM Act or versions of it have been introduced more than ten times. *Id.* Despite bipartisan support for each version of the Act, no version has become law. *Id.*

34. *Regents*, 140 S. Ct. at 1901–02.

35. *Id.* at 1901. The DACA memorandum concluded that noncitizens who meet certain criteria "warrant favorable treatment under the immigration laws" and instructs Immigration and Customs Enforcement ("ICE") officials to use prosecutorial discretion to defer removal action for a period of two years. *Id.* at 1901–02. To qualify for DACA, individuals must have been under the age of thirty-one in 2012; have resided in the United States since 2007; be either current students, or have completed high school, or be honorably discharged veterans; not have been convicted of serious crimes; and not threaten national security. *Id.* at 1901. The DACA memorandum also directed ICE to consider DACA recipients for work authorization. *Id.* at 1901–02. Pursuant to 8 C.F.R. § 1.3(a)(4)(vi) and 42 C.F.R. § 417.422(h), recipients of deferred action are eligible to receive Social Security and Medicare benefits. *Id.* More than 700,000 individuals were eligible for DACA at its inception. *Id.* More than 1.3 million individuals are eligible today. *Deferred Action for Childhood Arrivals (DACA) Data Tools*, MIGRATION POL'Y INST. (Dec. 31, 2020), https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles.

Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")[36] program.[37]

Before the DAPA memorandum's implementation, Texas and twenty-five other states sued in the United States District Court for the Southern District of Texas.[38] The states alleged that the DAPA memorandum breached the Immigration and Nationality Act ("INA"), the APA's notice-and-comment requirement, and the Take Care Clause of the Constitution.[39] The district court found the states likely to succeed on the merits of at least one of their claims and entered a preliminary injunction against the DAPA memorandum's implementation.[40]

In 2015, a split panel of the United States Court of Appeals for the Fifth Circuit affirmed the injunction.[41] It found that the states were likely to succeed on their APA claim and that DAPA was "manifestly contrary" to the carefully crafted scheme of the INA.[42] The Supreme Court affirmed the Fifth Circuit's decision in "an equally divided Court."[43] Litigation over the DAPA memorandum and its expansion of the DACA program continued in Texas, but the programs remained enjoined.[44]

In June of 2017, DHS rescinded the DAPA memorandum.[45] That September, Attorney General Jeff Sessions advised Acting Secretary of Homeland Security Elaine Duke that DHS should also rescind the DACA

36. The DAPA program authorized deferred action for parents whose children legally were in the country, either as citizens or lawful permanent residents. *Regents*, 140 S. Ct. at 1902. At the time, the program would have made more than 4 million individuals eligible for deferred action and associated benefits. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1901–02 (citing Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015)).

41. Texas v. United States, 809 F.3d 134, 188 (5th Cir. 2015). In *Texas*, the government argued that the DAPA memorandum was based on prosecutorial discretion because "'lawful presence' is not [] status," so DHS could revoke or alter the parameters of lawful presence at any time. *Id.* at 167. If DHS's actions were based on prosecutorial discretion, those actions would be unreviewable because decisions whether to prosecute are left entirely to agency officials and courts may not interfere with such decisions. *Id.* The Fifth Circuit majority disagreed, reasoning that DAPA was reviewable because the program would confer lawful presence *and* benefits on a certain class of noncitizens and was "much more than nonenforcement." *Regents*, 140 S. Ct. at 1902 (internal quotation marks omitted).

42. *Id.* (quoting *Texas*, 809 F.3d at 179–81 (internal quotation marks omitted)). The Fifth Circuit also rejected the federal government's claims that DACA was an exercise of prosecutorial discretion, citing the benefits DACA recipients could receive if they were granted deferrals. *Id.* at 1920 (Thomas, J., concurring in the judgment in part and dissenting in part).

43. United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (per curiam).

44. *Regents*, 140 S. Ct. at 1903.

45. *Id.* The Trump Administration DHS cited DAPA never taking effect, the injunction and Texas litigation, and the Administration's new immigration enforcement priorities as reasons for the rescission. *Id.*

memorandum because it "shared the 'same legal . . . defects that the courts recognized as to DAPA' and was 'likely' to meet a similar fate."[46] Secretary Duke issued a decision memorandum explaining that DACA would be terminated and specified the process by which the program would be "wound down."[47]

Plaintiffs, ranging from individuals to advocacy groups, challenged Secretary Duke's decision in California,[48] New York,[49] and District of Columbia federal district courts.[50] Plaintiffs claimed "the rescission was arbitrary and capricious in violation of the APA and that it infringed the equal protection guarantee of the Fifth Amendment's Due Process Clause."[51] All three district courts ultimately found for the plaintiffs.[52] The United States District Court for the District of Columbia held that Secretary Duke's "conclusory statements were insufficient to explain" the DACA rescission.[53] The court stayed its order to permit DHS to reissue its memorandum terminating DACA so that DHS could provide a "fuller explanation" for its rescission.[54]

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46. *Id.*

47. *Id.* The "wind-down of the program" was effective immediately. Elaine C. Duke, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, DEP'T OF HOMELAND SEC. (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [hereinafter *Duke Memo*]. Secretary Duke's memorandum advised that no new DACA applications would be accepted. *Id.* DHS could, on "an individual, case-by-case basis," review applications for two-year renewals from DACA recipients whose benefits would expire within six months of the memorandum. *Id.* For all other recipients, previously issued deferred action determinations and work authorizations would not be revoked but would expire at the end of their validity periods with no prospect for renewal. *Id.*

48. Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 298 F. Supp. 3d 1304 (N.D. Cal. 2018).

49. Vidal v. Nielsen, 291 F. Supp. 3d 260 (E.D.N.Y. 2018).

50. NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C. 2018).

51. *Regents*, 140 S. Ct. at 1903.

52. *Id.* All three courts rejected the government's arguments that the claims were unreviewable based on the APA and that the courts lacked jurisdiction under the INA. *Id.* at 1903–04. The *Regents* and *Vidal* courts also held that the plaintiffs had adequately alleged equal protection claims and proceeded to enter "coextensive nationwide preliminary injunctions." *Id.* at 1904. Immigrants' rights organization Casa de Maryland also challenged the DACA rescission. *Id.* at 1903 n.2. In a memorandum opinion, the United States District Court for the District of Maryland granted partial summary judgment to the government despite lamenting its holding. Casa de Md. v. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 779 (D. Md. 2018) ("This Court does not like the outcome of this case."). After the government filed petitions for certiorari in *Regents*, *Vidal*, and *NAACP*, the United States Court of Appeals for the Fourth Circuit reversed the district court's decision and found the Secretary's rescission arbitrary and capricious, therefore in violation of the APA. Casa de Md. v. Dep't of Homeland Sec., 924 F.3d 684, 706 (4th Cir. 2019). The Fourth Circuit stayed its mandate after the Supreme Court took up *Regents*, *Vidal*, and *NAACP*. *Regents*, 140 S. Ct. at 1903 n.2.

53. *NAACP*, 298 F. Supp. 3d at 243–45 (deferring ruling on the equal protection ground but granting partial summary judgment to plaintiffs on the APA claim).

54. *Id.* at 245.

Secretary Duke's successor, Secretary Kirstjen Nielsen, responded via memorandum two months later by '"declin[ing] to disturb' the rescission."[55] She purported to clarify Secretary Duke's memorandum by identifying three reasons for rescinding DACA.[56] The government petitioned the U.S. District Court for the District of Columbia to revise its order based on Secretary Nielsen's memorandum, but the court declined.[57] The court reasoned that the Nielsen memorandum '"fail[ed] to elaborate meaningfully' on the agency's illegality rationale" and "still did not provide an adequate explanation" for the rescission.[58] The government appealed the decision.[59] After the Ninth Circuit affirmed the injunction the district court ordered in *Regents*,[60] but before the other federal circuits decided, the Supreme Court granted certiorari and consolidated all of the cases for argument.[61]

II. LEGAL BACKGROUND

Agency action is subject to judicial review under the APA[62] where no organic statute governs the action and where the action is not committed to agency discretion.[63] The APA's framework "sets forth the procedures by which federal agencies are accountable to the public and their actions subject

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55. *Regents*, 140 S. Ct. at 1904 (quoting Application to Petition for Writ of Certiorari, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (No. 18-587), p. 121a).

56. *Id.* Secretary Nielsen cited the Attorney General's conclusion that DACA was unlawful, DHS's doubts about DACA's legality, and the Trump Administration's new policy priorities. *Id.* Specifically, Secretary Nielsen outlined the following Trump Administration priorities: "any class-based immigration relief should come from Congress . . . ; DHS's preference for exercising prosecutorial discretion on 'a truly individualized, case-by-case basis'; and [] the importance of 'project[ing] a message' that immigration laws would be enforced . . . ." *Id.* (quoting Application to Petition for Writ of Certiorari, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (No.18-587), pp. 123a–24a) (alteration in original).

57. *Id.* at 1904–05 (quoting *NAACP*, 315 F. Supp. 3d at 460, 473–74).

58. *Id.*

59. *Id.* at 1905.

60. 908 F.3d 476, 486 (9th Cir. 2018).

61. *Regents*, 140 S. Ct. at 1905.

62. Administrative Procedure Act, 5 U.S.C. §§ 500–96.

63. Administrative Procedure Act, 5 U.S.C. § 701(a); Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984); *see, e.g.*, Drake v. Fed. Aviation Admin., 291 F.3d 59, 62 (D.C. Cir. 2002) (holding that judicial review of the Federal Aviation Administration's ("FAA") action under the APA was unavailable as the FAA's actions were already regulated by an organic statute). The Supreme Court has recognized a "strong presumption that Congress intends judicial review of administrative action." Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986). This presumption of judicial review is embodied in the APA. *See* Administrative Procedure Act, 5 U.S.C. §§ 500–96. Where judicial review is permitted, the APA lays out courts' scope of review, which determines how and by which legal standards courts may review agency action. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 706 (outlining the standards by which courts may review agency action); *id.* § 553 (outlining the standards by which courts may review agencies' compliance with procedural requirements).

to review by the courts."[64] The APA requires agencies' decision-making to be "reasoned"[65] and demands that "arbitrary" or "capricious" decisions be "set aside."[66] The standard of review is "narrow," meaning courts are not to "substitute [their] judgment for that of the agency."[67] Instead, courts must determine only whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment."[68] Section II.A describes the function of the APA as a check on agency power.[69] Section II.B discusses the parameters for judicial review of agency action under the APA.[70] Section II.C details the process of rescinding agency actions pursuant to the APA, specifically addressing the arbitrary and capricious standard and remedies for violations of that standard.[71]

A. The Administrative Procedure Act as a Check on Agency Power

The APA outlines the procedures used to hold federal agencies accountable to both the general public and the judiciary.[72] The procedures laid out in the APA serve two main purposes: (1) promoting "agency accountability"[73] and (2) instilling "confidence"[74] in agency decisions.[75] The APA requires agencies to articulate "reasoned analysis" for the implementation of policies[76] and ensures that "interested persons" have an opportunity to fully respond to these reasons before the policy's

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64. Franklin v. Massachusetts, 505 U.S. 788, 796 (1992).

65. Michigan v. EPA, 576 U.S. 743, 750 (2015) (quoting Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998) (internal quotation marks omitted)).

66. Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

67. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted)).

68. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

69. *See infra* Section II.A.

70. *See infra* Section II.B.

71. *See infra* Section II.C.

72. Franklin v. Massachusetts, 505 U.S. 788, 796 (1992).

73. Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 643 (1986).

74. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020).

75. *See* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (describing how the requirements of the APA help mitigate possible appearances of agency impropriety). The APA promotes agency accountability by requiring agencies to present proposed regulations to the public and by requiring the final regulations to be "logical outgrowths" of the initially proposed regulations. *See, e.g.*, Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 626 F.3d 84, 94–95 (D.C. Cir. 2010) (holding regulations neither arbitrary nor capricious where they were logical outgrowths of the initial proposal and where interested parties had sufficient notice of the regulations and opportunity to comment on them). The APA also serves as a "check upon administrators," ensuring accountability. United States v. Morton Salt Co., 338 U.S. 632, 644 (1950).

76. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

promulgation.[77] This process promotes agency accountability insofar as it provides a public check on agencies' authority to promulgate regulations.[78] These procedures also instill confidence in agency decisions by ensuring that the reasons provided are not retroactive "convenient litigating position[s]," but rather the true goals of the agency.[79]

B. Reviewability of Agency Action under the APA

The APA articulates the framework for judicial review of agency action.[80] Section 706 of the APA governs the scope of that standard of review.[81] Specifically, Section 706(2)(A) provides that decisions deemed "arbitrary" or "capricious" will be "set aside."[82] This standard of review is "narrow." [83] This standard is narrow because when courts are determining whether agency action is "arbitrary" or "capricious," their analysis is limited to the reasons the agency provided at the time of the initial action and the information the agency relied on at the time of that action.[84] In reviewing whether a decision is arbitrary or capricious, courts are "not to substitute [their] judgment for that of the agency."[85] Review by the courts should assess only whether the decision was "based on consideration of the relevant factors and whether there has been a clear error of judgment."[86] The presumption of judicial review applies unless a statute precludes such relief or the action is committed by law to agency discretion.[87]

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77. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.").

78. *See generally id.* §§ 500–96 (outlining the regulations by which agencies must abide).

79. *Christopher*, 567 U.S. at 155 (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988) (internal quotation marks omitted)).

80. Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 (1967) (stating the APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action.'" (quoting Administrative Procedure Act, 5 U.S.C. § 702)).

81. Administrative Procedure Act, 5 U.S.C. § 706.

82. *Id.* § 706(2)(A). *Compare* P.R. Sun Oil Co. v. EPA, 8 F.3d 73, 81 (1st Cir. 1993) (setting aside the agency's decision as arbitrary and capricious where there were no "legitimate reasons" for the decision), *with* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 529–30 (2009) (declining to set aside the agency's decision as arbitrary and capricious where there was a reasonable rationale for the decision).

83. *Fox Television Stations*, 556 U.S. at 513 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)) (describing the arbitrary and capricious standard of review) (internal quotation marks omitted).

84. *Id.* at 513–14.

85. *Id.* at 513 (internal quotation marks omitted).

86. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

87. Administrative Procedure Act, 5 U.S.C. § 701(a).

1. Action Committed to Agency Discretion Is Reviewed Narrowly

According to Section 701(a) of the APA, federal agency decisions are reviewable unless a statute precludes review or the agency has complete discretion over the action.[88] Courts have read the exception relating to agency discretion in Section 701(a)(2) "quite narrowly" to "honor the presumption of review."[89] The exception has been historically confined to "administrative decision[s] traditionally left to agency discretion."[90] The category of decisions not subject to judicial review includes agencies' choices not to pursue enforcement of their regulations,[91] as such choices are "committed to an agency's absolute discretion."[92]

C. Rescinding Agency Action under the APA

According to Section 706 of the APA, a judicially reviewable agency action may be rescinded if that action is considered to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[93] Under this standard of review, courts must consider only whether the agency's action was based on a full "consideration of the relevant factors"[94] or whether there exists a "clear error of judgment."[95] An agency must "articulate a satisfactory explanation for its action"[96] that includes a "rational

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88. *Id.*

89. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018); *see* Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (explaining that the exceptions in Section 701(a)(2) are restricted to "those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion'" (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)).

90. *Lincoln*, 508 U.S. at 191; *see* Interstate Com. Comm'n v. Locomotive Eng'rs, 482 U.S. 270, 282 (1987) (holding Section 701(a)(2) precludes judicial review of administrative decisions "traditionally" committed to agency discretion (quoting Heckler, 470 U.S. at 832 (internal quotation marks omitted)); Webster v. Doe, 486 U.S. 592, 599, 601 (1988) (holding Section 701(a)(2) precludes judicial review in an area of executive action where courts rarely intervene out of "extraordinary deference"); Franklin v. Massachusetts, 505 U.S. 788, 818–19 (1992) (holding Section 701(a)(2) precludes judicial review in areas where "courts have long been hesitant to intrude").

91. *Heckler*, 470 U.S. at 831. In *Heckler*, the Court held that the Food and Drug Administration's denial of a petition to prevent certain drugs for lethal injection was unreviewable as there was a "tradition" of committing to "an agency's absolute discretion." *Id.* Therefore, the decision to enforce or not enforce its policies was left up to the agency. *Id.* at 837. The Court identified a number of factors that corroborated its decision, including that "when an agency refuses to act" there is no action for courts to review. *Id.* at 832.

92. *Id.* at 831.

93. Administrative Procedure Act, 5 U.S.C. § 706.

94. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

95. Indep. Meat Packers Ass'n v. Butz, 526 F.2d 228, 238 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976).

96. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

connection between the facts found and the choice made."[97] Courts are prohibited from substituting their judgments for agency judgments.[98] However, courts may "uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned."[99]

1. The Arbitrary and Capricious Standard

Agencies must adequately explain their actions to avoid arbitrary or capricious decisions that violate Section 706 of the APA.[100] It is a "foundational principle of administrative law" that courts "may uphold agency action only on the grounds that the agency invoked when it took the action."[101] Thus, judicial review of agency action is limited to the original reasons set forth by the agency upon implementation of its action.[102] Courts may find these original reasons to be flawed if:

> [T]he 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.[103]

Courts also find agency action arbitrary or capricious if the agency "does not take account of legitimate reliance" by the public on the status quo before the agency's action.[104]

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97. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). The Supreme Court requires agencies to "make findings that support [their] decision[s]" and mandates that those findings be "supported by substantial evidence." *Id.*

98. *Id.* at 168–69.

99. *See* Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 284, 286, 290 (1974) (finding the Interstate Commerce Commission's decision neither arbitrary nor capricious where there was "substantial evidence" that allowed the Court to "discern" the path the agency took to justify its rule); *see also* Colo. Interstate Gas Co. v. Fed. Power Comm'n, 324 U.S. 581, 595 (1945) (finding the reasoning behind the Federal Power Commission's decision neither arbitrary nor capricious where "the path which it followed [could] be discerned").

100. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000 (2005) (holding when agencies seek to change previously implemented rules, they must adequately address the basis for that change with a "reasoned explanation").

101. Michigan v. EPA, 576 U.S. 743, 758 (2015) (citing SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943)).

102. *Id.*

103. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

104. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996); *see* United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 674–75 (1973) (noting the importance of reliance in arbitrary and capricious analysis).

a. Relevance of Reliance Interests

The Supreme Court dictates that an agency must "be cognizant" of whether it induced a party to rely to its detriment on the agency's policy or policies.[105] The Court has held that "it would be arbitrary or capricious to ignore" any "serious reliance interests" that agencies' prior policies incentivized.[106] Accordingly, agencies must provide "more detailed justification[s]" for their decisions when they decide to rescind or reverse previously implemented policies that "ha[ve] engendered serious reliance interests."[107] Agencies need not show that a new policy is preferable to the existing policy it replaces unless that new policy (1) rests on factual findings that contradict the agency's previous findings or (2) poses a harm to those who relied on the existing policy.[108]

Supreme Court precedent not only requires agencies to weigh reliance interests when taking new action, but it also requires courts to weigh them when they review previous agency action.[109] The Court declines to defer to an agency's interpretation of its decision in cases where it determines that serious reliance interests are threatened.[110] While the term "serious" in the context of reliance interests is left undefined, the Court tends to consider industry or pecuniary reliance interests "serious" enough to weigh.[111] For

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105. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016).

106. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009). The Court has yet to directly define "serious" in the context of reliance interests but has found agency action arbitrary and capricious where industry and pecuniary interests are at stake. *See, e.g.*, *infra* notes 112–116; *see also* Nat'l Lifeline Ass'n v. FCC, 921 F.3d 1102, 1114 (D.C. Cir. 2019) (finding agency action was arbitrary and capricious when it departed from a prior nonenforcement policy because it "fail[ed] to consider . . . the reliance interests" of regulated parties and others). While *National Lifeline Association* was a decision from the District Court for the District of Columbia rather than the Supreme Court, the district court relied on Supreme Court precedent in its analysis of reliance interests. *Id.*

107. *Fox Television Stations*, 556 U.S. at 515. While the *Fox* majority noted the importance of weighing reliance interests, it did not focus its analysis on Fox's reliance on prior FCC policy in the opinion. *Id.* Justice Kennedy, in his concurrence in part and concurrence in the judgment, also contended that reliance interests "have weight" in APA analysis, but did not go so far as to weigh those interests. *Id.* at 536 (Kennedy, J., concurring in the judgment in part and concurring in part).

108. *Id.* at 515.

109. *See, e.g.*, Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 159 (2012) (addressing the agency's failure to meaningfully consider reliance interests then proceeding to weigh those interests to determine the validity of the agency's action).

110. *See id.* at 158 (declining to defer to the Department of Labor's new policy interpretation in part because the "agency's announcement of its interpretation [was] preceded by a very lengthy period of conspicuous inaction" on which the pharmaceutical industry reasonably relied); Kisor v. Wilkie, 139 S. Ct. 2400, 2421 (2019) (noting that courts should not defer to an agency interpretation that "creates unfair surprise or upsets reliance interests"); Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 613–14 (2013) (reiterating that agency interpretations that upset reliance interests may lose their deferential weight).

111. *See infra* notes 112–116 (providing examples of instances where the Court has considered pecuniary interests significant).

example, the Court has considered the reliance interests of the pharmaceutical industry,[112] car dealerships,[113] mortgage bankers,[114] purchasing departments of aerospace companies,[115] and out-of-state customers of credit card companies serious enough to weigh.[116] While the Court does not always find the industry reliance detrimental enough to rescind the agency action, it still weighs those interests.[117]

Challengers alleging detrimental reliance on prior agency policies must "specifically identif[y]" the harm or potential harm to their interest, demonstrate that the harm was "reasonably incurred," and "causally tie[]" the harm to the agency action.[118] As noted above, relevant harms have traditionally been pecuniary.[119] Where challengers can prove that they reasonably relied to their detriment on a previous agency interpretation of its regulation, courts will hold the new regulation invalid.[120]

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112. *Christopher*, 567 U.S. at 158 (declining to defer to the agency's new interpretation of its regulation because the interpretation was directly contrary to long-standing pharmaceutical industry practice and thus would unfairly burden employers).

113. *Encino*, 136 S. Ct. at 2126 (declining to defer to the agency's most recently promulgated regulation because the car dealership industry had relied on the agency's previous regulation to negotiate and structure employee compensation plans).

114. Perez v. Mortg. Bankers Ass'n., 575 U.S. 92, 106 (2015) (reiterating the importance of weighing whether the "prior policy ha[d] engendered serious reliance interests that must be taken into account" but not finding those reliance interests serious enough to rescind the Department of Labor's new policy (quoting *Fox Television Stations*, 556 U.S. at 515)).

115. NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 295 (1974) (noting the importance of weighing "[t]he possible reliance of [the aerospace] industry on the [National Labor Relations] Board's past decisions with respect to buyers").

116. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996) (noting the importance of weighing credit card holders' "legitimate reliance on prior interpretation").

117. *See, e.g.*, *Perez*, 575 U.S. at 106 (finding agency action permissible despite real estate finance companies' reliance on prior policy regarding mortgage loan officers' exemption from minimum wage requirements).

118. Solenex LLC v. Bernhardt, 962 F.3d 520, 529 (D.C. Cir. 2020). In *Paralyzed Veterans of America v. D.C. Arena L.P.*, the Court of Appeals for the District of Columbia Circuit contended that parties must prove that they relied on prior agency policy to trigger an arbitrary and capricious determination. 117 F.3d 579, 587 (D.C. Cir. 1997). The strict rule in *Paralyzed Veterans* was ultimately overruled by the Supreme Court in *Perez v. Mortgage Bankers Association*, but the majority still considered the reliance interests in that case. *Perez*, 575 U.S. at 106.

119. For example, in *NLRB v. Bell Aerospace*, the Supreme Court considered the reliance interests of the Bell Aerospace company in the context of whether there were "fines or damages" incurred due to a change in prior policy. 416 U.S. at 295. The Court considered similar fines-based reliance interests in *FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 506 (2009).

120. *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (invalidating the agency's new regulation where "decades of industry reliance" were at issue); *Bell Aerospace*, 416 U.S. at 295 (upholding the agency's new interpretation where petitioners had not shown "adverse consequences ensuing" from their reliance); Alaska Pro. Hunters Ass'n v. Fed. Aviation Admin., 177 F.3d 1030, 1034 (D.C. Cir. 1999) (invalidating agency interpretation that upset thirty years of reliance on contradictory advice from local agency officials); *Paralyzed Veterans*, 117 F.3d at 587 (upholding the agency's new interpretation where petitioners had not "reasonably relied to their detriment" on the agency's previous interpretation).

2. Judicial Review of Agency Action

Judicial review of agency action is limited to "the grounds on which the agency acted."[121] Rather than striking a proposed action entirely, "remanding [the action] to the agency . . . is the preferred course."[122] If a court finds the grounds the agency acted on to be inadequate, the court can remand the case for the agency to either provide "a fuller explanation" of the reasoning the agency employed "at the time of the agency action"[123] or "deal with the problem afresh" by taking new action that includes new or better-articulated reasons.[124] A fuller articulation or new action is required because allowing agencies to invoke belated, unrelated justifications for their actions upsets "the orderly functioning of the process of review."[125]

a. Remedying by Providing a Fuller Explanation

When an agency decides to provide a fuller explanation for the reasoning it employed at the time it took the action, it may not provide *new* reasons for its action, but instead must better articulate its *original* reasons.[126] The Court has held that agencies must "cogently explain" their decisions.[127] Lower courts have permitted agencies to provide "amplified articulation[s]"[128] of prior "conclusory" reasons.[129] Notably, agencies are not permitted to engage in "*post hoc* rationalizations" of their actions; these "cannot serve as sufficient predicate" for their actions.[130]

121. Michigan v. EPA, 576 U.S. 743, 760 (2015).

122. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990).

123. *Id.*

124. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 201 (1947).

125. *Chenery I*, 318 U.S. 80, 94 (1943).

126. Camp v. Pitts, 411 U.S. 138, 142–43 (1973) (per curiam).

127. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 48 (1983). An agency does not explain "cogently" when it relies "on factors which Congress has not intended it to consider," neglects to consider an important aspect of the problem, offers "an explanation for its decision that runs counter to the evidence," or uses reasoning "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43. Additionally, an agency's decision is cogently explained when it does not rely on post hoc rationalizations of its reasoning. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971). Post hoc rationalizations are impermissible whether they come from agencies, agency attorneys, or reviewing courts. *Id.*; *Chenery I*, 318 U.S. at 94.

128. Int'l Brotherhood of Teamsters v. NLRB, 546 F.2d 989, 992 (D.C. Cir. 1976).

129. Alpharma, Inc. v. Leavitt, 460 F.3d 1, 5 (D.C. Cir. 2006) (quoting A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995)). In *Alpharma*, the district court held that the reasons the Food and Drug Administration supplied on remand after a challenge to its initial decision were not post hoc rationalizations because they expanded on the agency's original reasons, and thus were sufficient to justify its position. *Id.* at 6–7 (citing *Int'l Brotherhood of Teamsters*, 546 F.2d at 992).

130. Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 539 (1981); *see Overton Park*, 401 U.S. at 419 (rejecting litigation affidavits from agency officials as impermissible post hoc rationalizations of inadequate agency reasons).

b. Remedying by Taking New Action

An agency may respond to a challenge to its action by rescinding the initial action and taking new action premised on novel or different reasoning.[131] Thus when an agency decides to take new action to implement a challenged policy, it is not limited by the reasons it articulated in its initial action.[132] The agency may supply entirely different reasons than those upon which it originally relied, provided the agency complies with the procedural requirements for agency action.[133] Requiring a new agency decision before permitting new justifications is more than just "an idle and useless formality."[134] This requirement ensures "agency accountability" by forcing agencies to properly justify their exercises of authority.[135]

III. THE COURT'S REASONING

Writing for a five justice majority, Chief Justice Roberts first clarified that "all parties agree[d]" that DHS could rescind the program, therefore that issue was not at stake.[136] The majority identified three issues that were at stake in the DACA rescission: (1) whether the APA claims were reviewable, (2) whether the rescission was arbitrary and capricious, and (3) whether the respondents put forth a viable equal protection claim.[137] The majority found the claims to be reviewable and the rescission to be arbitrary and capricious in violation of the APA, but did not find the respondents' equal protection claims viable.[138]

The majority held that the claims were reviewable under the APA.[139] The Court determined that the DACA memorandum was more than just "a passive non-enforcement policy."[140] Deferral constituted a series of

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131. *Chenery II*, 332 U.S. 194, 209 (1947).

132. *See generally id.* (upholding new action taken by the Securities and Exchange Commission ("SEC") on a previously litigated issue because the novel reasons the agency employed in the second action were based on substantial evidence, consistent with the SEC's authority, and clearly articulated).

133. *Id.*; *see also* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764–65 (1969) (holding the NLRB's action invalid for failure to comply with procedural requirements, but allowing the action based on subsequent properly-enacted adjudications).

134. *Wyman-Gordon Co.*, 394 U.S. at 766 n.6 (holding that remanding on account of improper implementation procedure would be "an idle and useless formality").

135. Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 643 (1986).

136. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020).

137. *Id.*

138. *Id.* at 1915 ("None of these points, either singly or in concert, establishes a plausible equal protection claim.")

139. *Id.* at 1905.

140. A "passive non-enforcement policy" would be unreviewable as an expression of agency discretion. *Id.* at 1905–06.

individualized adjudications, and DACA conferred benefits in addition to simply deferring removal.[141]

After finding the claims to be reviewable,[142] the majority held that the rescission was arbitrary and capricious.[143] To rescind DACA, the APA required DHS to either explain its reasons at the time of the initial rescission in more detail or take new action rescinding the program.[144] Secretary Nielsen opted to further explain the decision rather than take new action.[145] The majority found that her explanation was inadequate because her reasons neither matched nor elaborated on Secretary Duke's reasons.[146] The majority held that the decision to rescind DACA was arbitrary and capricious because Secretary Nielsen's memorandum "failed to consider . . . important aspect[s] of the problem," including alternatives to achieving the Trump Administration's policy goals and the reliance interests of DACA recipients.[147]

The majority also held that the respondents had not adequately stated an equal protection claim because they did not raise "a plausible inference that the rescission was motivated by animus."[148] The majority determined that the "disparate impact of the rescission" on Latinx immigrants from Mexico, the "unusual history" of the rescission, and President Trump's statements on immigration—even taken together—could not establish a plausible equal protection claim.[149] They found nothing presented by the respondents to be credibly indicative of animus: Mexican immigrants would be expected to

141. *Id.*

142. The majority also determined that it had jurisdiction to hear the claims despite the government's argument that provisions in the INA were independent bars to review. *Id.* at 1907. The majority found the provisions in 8 U.S.C. § 1252(b)(9) and 1252(g) to be narrow, holding that the rescission "is not a decision to 'commence proceedings'" or "to 'adjudicate' a case or 'execute' a removal order." *Id.* (quoting 8 U.S.C. § 1252(g)).

143. *Id.* at 1915.

144. *Id.* at 1908.

145. *Id.* at 1908–10.

146. *Id.* The majority found that Secretary Nielsen's reasoning bore "little relationship" to Secretary Duke's reasoning. *Id.* at 1908. Because Secretary Nielsen was limited to DHS's original reasons, her memorandum failed to satisfy the explanation requirement. *Id.* The majority also determined that the timing of the Nielsen memorandum was problematic, as the APA requires "contemporaneous explanations." *Id.* at 1908–09.

147. *Id.* at 1910–15 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Specifically, the majority quoted *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, holding that "when an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Id.* at 1913 (alteration in original). Secretary Nielsen's memorandum did not consider forbearance at all—not even in the context of maintaining the forbearance policy without the attendant benefits as an alternative to rescission. *Id.* The Court also contended that Secretary Duke's memorandum failed to consider any reliance interests of DACA recipients. *Id.* at 1914.

148. *Id.* at 1916.

149. *Id.* at 1915.

make up a large share of those affected as they make up a large share of immigrants, the history of DACA's rescission was not irregular because agencies often rescind prior actions, and President Trump's inflammatory statements were too "remote in time" and made in contexts too "unrelated" to be considered in the animus calculation.[150]

Justice Sotomayor concurred in the judgment in part and dissented in part.[151] She agreed with the majority on the issues of reviewability and arbitrary and capriciousness, but disagreed on the issue of equal protection.[152] Justice Sotomayor would have permitted respondents' equal protection claims to proceed on remand because each complaint "set forth particularized facts that plausibly allege[d] discriminatory animus."[153] Justice Sotomayor emphasized the relevance and weight of the respondents' three "factors"[154] of discrimination and chastised the majority for "bypassing context."[155]

Justice Thomas, joined by Justice Alito and Justice Gorsuch, concurred in the judgment in part and dissented in part.[156] The Justices agreed with the majority on the issue of equal protection but disagreed on the issues of reviewability and arbitrary and capriciousness.[157] Justice Thomas took a "two wrongs make a right" approach: DACA was implemented "unilaterally" and by "mere memorandum," so it could be rescinded the same way.[158] He reiterated that DACA was "unlawful from its inception"[159] and argued that "[s]o long as the agency's determination of illegality is sound, our review should be at an end."[160] He also cited the "perverse incentives"[161] created by the majority's decision, asserting that the majority's decision would make it

150. *Id.* at 1915–16. For a discussion on the Supreme Court's inconsistent willingness to consider political statements in equal protection analysis, see Justice Sotomayor's dissent in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*. 141 S. Ct. 63, 80 (2020) (Sotomayor, J., dissenting) (per curiam) (noting that the Court considered important Governor Cuomo's comments on religion in the context of COVID-19 restrictions but did not consider important then-President Trump's comments on religion in the context of immigration restrictions in *Trump v. Hawaii*).

151. *Regents*, 140 S. Ct. at 1917 (Sotomayor, J., concurring in part, concurring in the judgment, and dissenting in part).

152. *Id.*

153. *Id.*

154. *Id.* at 1915 (majority opinion).

155. *Id.* at 1918 (Sotomayor, J., concurring in part, concurring in the judgment, and dissenting in part).

156. *Id.* (Thomas, J., concurring in the judgment in part and dissenting in part).

157. *Id.*

158. *Id.*

159. *Id.* at 1919. Justice Thomas cited the INA's "elaborate statutory scheme" as a reason DHS had "no discretion to create an additional class" of noncitizens eligible for lawful presence. *Id.* at 1923.

160. *Id.* at 1919. Justice Thomas determined that "[t]he decision to rescind an unlawful agency action is *per se* lawful," thus DACA's rescission—no matter the form—was appropriate. *Id.* at 1922.

161. *Id.* at 1919.

more difficult for future administrations to undo illegal actions by their predecessors.[162] Ultimately, Justice Thomas also found that "DHS *did* provide a sufficient explanation for its action" by citing the Attorney General's determination of DACA's illegality.[163]

Justice Alito also concurred in the judgment in part and dissented in part.[164] He argued that the Court did "not resolve the question of DACA's rescission," but rather told DHS "to go back and try [to rescind the program] again."[165] Justice Alito agreed with Justice Thomas's points regarding DACA's unlawfulness and DHS's adequate explanation of rescission.[166] He took issue with the fact that DACA's rescission was prevented for the whole of President Trump's term in office.[167]

Justice Kavanaugh, too, concurred in the judgment in part and dissented in part, arguing that DHS had offered sufficient explanation for DACA's rescission in Secretary Nielsen's memorandum, and that her memorandum was not an impermissible post hoc rationalization of agency action.[168] He asserted that the post hoc rationalization prohibition applied to agency lawyers or reviewing judges, but not necessarily agency decisionmakers themselves.[169] Justice Kavanaugh also contended that Secretary Nielsen's memorandum constituted "new" [170] agency action, and was therefore permissible under the APA.[171]

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162. *Id.* at 1928.

163. *Id.*

164. *Id.* at 1932 (Alito, J., concurring in the judgment in part and dissenting in part).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 1933 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

169. *Id.* at 1934 ("Under our precedents, however, the *post hoc* justification doctrine merely requires that courts assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced *by agency lawyers during litigation* (or by judges)." (emphasis in original)). In this case, Secretary Nielsen made the post hoc rationalizations in her memorandum responding to the Duke memorandum, not agency lawyers during litigation. *See id.* at 1909 (majority opinion) (noting that "the problem is the timing, not the speaker"). Justice Kavanaugh premised his argument on cases like *State Farm*, which noted that "courts may not accept appellate counsel's *post hoc* rationalizations for agency actions." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983). In his *Regents* dissent, Justice Kavanaugh implied that while post hoc rationalizations by lawyers or judges are impermissible, such rationalizations, when made by agency officials like Secretary Nielsen, are permissible. *See Regents*, 140 S. Ct. at 1934 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (asserting that the post hoc rationalization doctrine is "directed at reviewing courts," but not agencies (quoting Alpharma, Inc. v. Leavitt, 460 F.3d 1, 6 (D.C. Cir 2006))).

170. *Id.*

171. *Id.* Harkening back to the majority's contention that DHS had to either reasonably explain their decision or "'deal with the problem afresh' by taking *new* agency action," *id.* at 1908 (majority opinion), Justice Kavanaugh found that Secretary Nielsen's memorandum constituted a "'rule' setting forth 'an agency statement of general . . . applicability'" and thus fulfilled the 'new "agency

IV. ANALYSIS

In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court held that the Trump Administration's rescission of DACA violated Section 706 of the APA because it was arbitrary and capricious.[172] The Court found that the reasoning DHS articulated in Secretary Nielsen's second DACA memorandum was too attenuated from Secretary Duke's first DACA memorandum and that the Nielsen memorandum "failed to consider . . . important aspect[s] of the problem."[173] The Court briefly referenced the reliance interests at stake, but was careful to note that such interests are "noteworthy concerns, but they are not necessarily dispositive."[174]

The majority in *Regents* properly applied some required elements of arbitrary and capricious analysis, like the need for contemporaneous explanations and thoughtful consideration of policy alternatives, but failed to address a crucial element of that analysis: the reliance interests at stake in rescinding DACA.[175] Not only did Dreamers reasonably rely to their detriment on the agency's policy, but many other Americans did, too.[176] These interests are both tangible and intangible, and they affect the lives of millions of people.[177] Thus, while the Court correctly concluded that the recission of DACA was arbitrary and capricious,[178] the Court incorrectly dismissed the serious reliance interests induced by the program as not dispositive.[179]

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action' requirement for rescinding DACA. *Id.* at 1933 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (quoting 5 U.S.C. § 551(4)).

172. *Id.* at 1910 (majority opinion).

173. *Id.* (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted)). Secretary Nielsen's reasoning only supported a partial recission of DACA and failed to address viable alternative policies. *Id.* at 1912–13.

174. *Id.* at 1914.

175. *See infra* Section IV.B.

176. *Id.*

177. *Id.* Tangible interests include purchasing homes and starting businesses, and intangible interests include cultivating diverse communities and protection from deportation. *See infra* Section IV.B (addressing the importance of reliance interests in APA arbitrary and capricious analysis and detailing the reliance interests of Dreamers and other Americans based on the existence of the DACA program).

178. *See infra* Section IV.A.

179. *See infra* Section IV.B.

A. The Court Properly Held that the Rescission of DACA was Arbitrary and Capricious.

The APA requires agencies' decision-making to be "reasoned"[180] and requires courts to "hold unlawful and set aside" decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[181] Here, the Court properly held that DACA's recission was arbitrary and capricious.[182] The reasons Secretary Nielsen provided in her memorandum did not derive from those provided in Secretary Duke's initial memorandum,[183] and DHS ignored potential alternatives to recission.[184] Moreover, the rescission appeared to be an attempt to indulge President Trump and implement his anti-immigrant agenda.[185] Policies that intimately affect hundreds of thousands of lives[186] cannot—and should not—be

180. Michigan v. EPA, 576 U.S. 743, 750 (2015) (quoting Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998) (internal quotation marks omitted)).

181. Administrative Procedure Act, 5 U.S.C. § 706(2)(A). In their review, courts are limited to "the grounds that the agency invoked when it took the action." *Michigan*, 576 U.S. at 758. Additionally, courts must determine whether agencies considered alternatives to their proposed policies that are "within the ambit of the existing" policy. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983); *see supra* Section II.B.

182. *See supra* Section II.C.1.

183. *See infra* Section IV.A.1.

184. *See infra* Section IV.A.2.

185. For examples of how the Trump Administration's policies were both blatantly and subtly anti-immigrant, see Mónica Verea, *Anti-Immigrant and Anti-Mexican Attitudes and Policies during the First 18 Months of the Trump Administration*, 13 NORTEAMÉRICA 197 (2018); Ted Hesson & Chris Kahn, *Trump Pushes Anti-immigrant Message Even as Coronavirus Dominates Campaign*, REUTERS (Aug. 14, 2020, 6:03 AM), https://www.reuters.com/article/us-usa-election-immigration-insight/trump-pushes-anti-immigrant-message-even-as-coronavirus-dominates-campaign-idUSKCN25A18W; Michael D. Shear & Miriam Jordan, *Undoing Trump's Anti-Immigrant Policies Will Mean Looking at the Fine Print*, N.Y. TIMES (Feb. 10, 2021), https://www.nytimes.com/2021/02/10/us/politics/trump-biden-us-immigration-system.html; Michael D. Shear & Emily Cochrane, *Trump Says Administration Will Try Again to End 'Dreamers' Program*, N.Y. TIMES (June 19, 2020), https://www.nytimes.com/2020/06/19/us/politics/trump-daca.html; Stuart Anderson, *A Review of Trump Immigration Policy*, FORBES (Aug. 26, 2020, 2:01 AM), https://www.forbes.com/sites/stuartanderson/2020/08/26/fact-check-and-review-of-trump-immigration-policy/?sh=1cbfcee556c0; Leila Schochet, *Trump's Immigration Policies Are Harming American Children*, CTR. FOR AM. PROGRESS (July 31, 2017, 9:01 AM), https://www.americanprogress.org/issues/early-childhood/reports/2017/07/31/436377/trumps-immigration-policies-harming-american-children/; Peniel Ibe, *Trump's Attacks on the Legal Immigration System Explained*, AM. FRIENDS SERV. COMM. (Apr. 23, 2020), https://www.afsc.org/blogs/news-and-commentary/trumps-attacks-legal-immigration-system-explained.

186. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020). "Hundreds of thousands" is an extremely conservative estimate: DACA affects the lives of its recipients, but it also affects the rest of the American population. *DACA Facts: The Case for Protecting Dreamers*, FWD.US (Apr. 16, 2020), https://www.fwd.us/news/daca-facts/. DACA recipients contribute more than $42 billion to the country's annual gross domestic product. *Id.* Dreamers also pay billions in taxes every year. *Id.* More important than economics, Dreamers add value to American society: they work and attend schools, launch their own businesses, and enrich

rescinded by unelected agency leaders[187] for their own political gain.[188] Because both the stated and unstated reasons for DACA's rescission were problematic, the Court correctly considered the attempted rescission arbitrary and capricious.[189]

1. The Court Correctly Determined that DHS Failed to Articulate Acceptable Reasons for Rescission.

The Court correctly decided that DHS's inadequate reasoning failed under the APA's arbitrary and capricious standard.[190] Chief Justice Roberts noted that when an agency chooses to elaborate on its initial explanation of the agency action instead of taking new action with new reasoning, courts must review the explanations "critically."[191] As discussed above, the Trump Administration initially attempted to rescind DACA through the Duke memorandum in September of 2017.[192] The Duke memorandum provided a bare-bones explanation for rescission that rested almost entirely on then-Attorney General Jeff Sessions's determination that DACA was illegal.[193] The Duke memorandum contained no reference to the reasonable reliance interests of DACA recipients and no evidence that DHS had considered

communities with diverse cultures and perspectives. *Id.*; Joe McCarthy, *5 Ways Immigration Actually Enhances a Country's Culture*, GLOB. CITIZEN (July 18, 2018), https://www.globalcitizen.org/en/content/how-immigrants-benefit-society-trump/; *see also infra* notes 267–269 and accompanying text.

187. Even President Trump recognizes the dangers of "unaccountable," unelected leaders dictating the law. Eric Katz, *Trump Signs Orders to Restrict 'Unaccountable Bureaucrats' from Creating Backdoor Regulations*, GOV'T EXEC. (Oct. 9, 2019), https://www.govexec.com/management/2019/10/trump-signs-orders-restrict-unaccountable-bureaucrats-creating-backdoor-regulations/160493/.

188. It is clear that Secretaries Duke and Nielsen attempted to rescind the program for their own political gain because they could not—and did not—articulate valid reasons for the rescission. *See infra* Section IV.A.1. Rather, the Secretaries bowed to political pressure from the Trump Administration and cited surface-level, insufficient reasons. *See, e.g.*, Michael D. Shear, Julie Hirschfeld & Adam Liptak, *How the Trump Administration Eroded Its Own Legal Case on DACA*, N.Y. TIMES (Nov. 12, 2019), https://www.nytimes.com/2019/11/11/us/politics/supreme-court-dreamers-case.html; *see also infra* notes 212–220 and accompanying text.

189. *See infra* Sections IV.A.1 and IV.A.2.

190. *See infra* notes 191–234 and accompanying text.

191. *See generally Fifth Amendment – Due Process Clause – Equal Protection* – Department of Homeland Security v. Regents of the University of California, 134 HARV. L. REV. 510, 513 (2020) (quoting *Regents*, 140 S. Ct. at 1908) (noting the emphasis Chief Justice Roberts places on the level of scrutiny used in reviewing agency action).

192. *See supra* note 47 and accompanying text.

193. *Regents*, 140 S. Ct. at 1908. The Duke memorandum also mentioned the ongoing litigation around DAPA as a reason to rescind DACA. It assumed but did not explain that the legal foundations of DAPA and DACA were the same, thus if one fell so should the other. *See Duke Memo*, *supra* note 47.

alternatives to the program, despite allegedly "[r]ecognizing the complexities associated with winding down the program."[194]

By failing to meaningfully address anything other than the Attorney General's illegality determination and the ongoing DAPA litigation, DHS "failed to consider . . . important aspect[s] of the problem."[195] Secretary Duke's memorandum, while discussing both DACA and DAPA, did not distinguish between the programs despite their marked differences.[196] Under the DACA program, about 700,000 noncitizens who entered the United States illegally as children received a renewable two-year forbearance of removal (deferred action), work authorization, and access to related federal benefits.[197] The DAPA program would have conferred the same forbearance, work authorization, and associated benefits to more than 4.3 million noncitizens—more than six times the number of noncitizens benefitting from DACA—whose children were United States citizens or lawful permanent residents.[198]

The obvious difference between the programs is the circumstances of the qualifying individuals.[199] Dreamers "know only this country as home."[200] The only individuals who could qualify for DACA's protections were those who (1) were under the age of thirty-one in 2012; (2) lived in the United States continuously since 2007; (3) were current students, high school graduates, or honorably discharged veterans; (4) had never been convicted of a serious crime; and (5) did not threaten national security or public safety.[201] DACA's protections applied to a much smaller subsection of the population than DAPA, whose protections extended to those who (1) were parents of

194. *Duke Memo*, *supra* note 47; *Regents*, 140 S. Ct. at 1908.

195. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The Court relied heavily on *State Farm* in its analysis. *Regents*, 140 S. Ct. at 1912. In *State Farm*, the National Highway Traffic Safety Administration ("NHTSA") promulgated a regulation that required automobiles manufactured after 1982 to be equipped with passive restraints, either automatic seatbelts or airbags. *State Farm*, 463 U.S. at 37–38. Prior to the regulation going into effect, NHTSA decided that automatic seatbelts were not sufficiently protective and proceeded to rescind the regulation in full even though airbags were still considered to be sufficiently protective. *Id.* at 38. The Court concluded that the rescission was arbitrary and capricious because NHTSA did not consider implementing an airbag-only policy and failed to explain its rationale for not doing so. *Id.* at 51.

196. *Duke Memo*, *supra* note 47; *see also* Kirstjen M. Nielsen, *Memorandum from Secretary Kirstjen M. Nielsen*, DEP'T OF HOMELAND SEC. (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf [hereinafter *Nielsen Memo*] (dismissing distinctions between DAPA and DACA by stating "[a]ny arguable distinctions between the DAPA and DACA policies are not sufficiently material to convince me that the DACA policy is lawful.").

197. *Regents*, 140 S. Ct. at 1901.

198. *Id.* at 1902–03.

199. *Id.*

200. *Id.* at 1912 (internal quotation marks omitted).

201. *Id.* at 1901.

United States citizens or lawful permanent residents as of November of 2014; (2) continuously lived in the United States since before 2010; (3) were physically present in the United States on November 20, 2014; (4) had no lawful immigration status; (5) did not fall within DHS's enforcement priorities; and (6) "present[ed] no other factors that, in the exercise of discretion, ma[de] [ ] the grant of deferred action inappropriate."[202] By failing to address the significant differences between DACA and DAPA, and assigning the perceived problems with DAPA to DACA, Secretary Duke did not provide adequate reasons for DACA's rescission.[203] The decision-first-explanation-later approach will render this type of agency action arbitrary and capricious, as it necessitates impermissible post hoc rationalizations.[204]

The Nielsen memorandum, too, failed to provide adequate reasons for DACA's rescission.[205] Secretary Nielsen could have defended Secretary Duke's DACA rescission in two ways: she could have (1) elaborated on Secretary Duke's reasoning or (2) taken new agency action premised on new or additional reasons that were not present in the Duke memorandum.[206] Secretary Nielsen chose not to take new agency action; so, to justify the rescission, she was required to elaborate on Secretary Duke's reasoning.[207] She did not; instead, Secretary Nielsen chose to present three new, "meaningfully distinct" reasons for DACA's rescission.[208]

Secretary Nielsen's first reason did address the heart of the Duke memorandum—the Attorney General's determination that DACA was illegally implemented—but it merely repeated Secretary Duke's analysis rather than elaborating on it.[209] The Court has reiterated time after time that

202. John F. Kelly, *Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")*, DEP'T OF HOMELAND SEC. (June 15, 2017), https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful.

203. *Regents*, 140 S. Ct. at 1911–12.

204. *See id.* at 135 (highlighting the arbitrariness of decisions not stemming from agency expertise). In certain instances, this type of approach may be justified, for example when agencies wait until after notice-and-comment periods to explain the rationale behind their policy choices. Christopher J. Walker, *What the DACA Rescission Case Means for Administrative Law: A New Frontier for* Chenery I's *Ordinary Remand Rule*, YALE J. REG.: NOTICE & COMMENT (June 19, 2020), https://www.yalejreg.com/nc/what-the-daca-rescission-case-means-for-administrative-law-a-new-frontier-for-chenery-is-ordinary-remand-rule/. DHS did not provide a notice-and-comment period when it rescinded DACA. Gabriella D'Agostini, *No Status, No Notice, No Comment: The Lack of Procedural Adherence to the APA Notice and Comment Requirement Concerning Immigration Rules*, MICH. J. ENV'T ADMIN. L. BLOG (Feb. 1, 2018), http://www.mjeal-online.org/no-status-no-notice-no-comment-the-lack-of-procedural-adherence-to-the-apa-notice-and-comment-requirement-concerning-immigration-rules/.

205. *Regents*, 140 S. Ct. at 1908–09.

206. *Id.* at 1908.

207. *Id.*

208. *Id.*

209. *Id.*

when an agency seeks to elaborate on the reasons for its implementation of or change in a policy, it must rely on *and better explain* the initial reasons it presented when first attempting the action.[210] Secretary Nielsen's second and third reasons, which were maintaining public confidence in the rule of law and various policy reasons, including a preference for legislative fixes, were never mentioned in the Duke memorandum.[211]

While the *Regents* majority did not address this point, one wonders whether the lack of consistent, reasoned analysis in the memoranda demonstrates the "foregone conclusion" of the DACA rescission.[212] Secretary Nielsen's memorandum purporting to fix the flaws in the Duke memorandum was a "boldly and blatantly results-oriented"[213] attempt to dismantle a program politically unpopular for her appointer, President Trump. Secretaries Duke and Nielsen served as "rubber stamp[s]"[214] for President Trump's immigration priorities,[215] effectively disregarding their APA-imposed duty to provide reasonably explained decisions with legitimate motivations.[216] The timelines of the Secretaries' employment is illustrative.[217] While the Secretaries executed policy priorities that President

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210. *Chenery I*, 318 U.S. 80, 95 (1943); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 417 (1971); Michigan v. EPA, 576 U.S. 743, 760 (2015). Better explaining their initial reasoning ensures that agencies cannot "conceal the real motivations and considerations behind the administrative policies." Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 564 (2018) (internal quotation marks omitted). Here, the Court defended the tradition of agency transparency, which furthers the democratic process by allowing the public to accurately assess its government. Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE. L. & POL'Y REV. 79, 80 (2012). Agency transparency is especially important because agency leaders are unelected officials who cannot be held accountable by the people through the democratic process the way that elected leaders can. Michael Halberstam, *Beyond Transparency: Rethinking Election Reform from an Open Government Perspective*, 38 SEATTLE U.L. REV. 1007, 1007–08 (2015). For government to be truly representative, citizens must have insight into the actual motivations of agencies. *Id.*

211. *Regents*, 140 S. Ct. at 1908.

212. Jonathan Blitzer, *The Trump Administration's Plot to End DACA Faces a Supreme Court Test*, NEW YORKER (Nov. 10, 2019), https://www.newyorker.com/news/news-desk/the-trump-administrations-plot-to-end-daca-faces-a-supreme-court-test.

213. R. Parker Sheffy & Geoffrey A. Hoffman, *Appellate Exceptionalism? The Troubling Case of Immigration Decisions' Continued Precedential Effect Even After Circuit Court Vacatur*, 2020 U. ILL. L. REV. ONLINE 129, 135 ("Decisions which are not the result of agency expertise but are rather boldly and blatantly results-oriented are similarly likely arbitrary and capricious. The Supreme Court's recent decision finding the government's attempted rescission of the DACA Program to be arbitrary and capricious is an excellent example."). The authors also note that "unfairness and injustice" result from this kind of approach. *Id.* at 138.

214. Blitzer, *supra* note 212.

215. One of the Trump Administration's stated immigration priorities was rescinding DACA. *See* Michael D. Shear & Emily Cochrane, *supra* note 185.

216. *See supra* Section II.C.

217. *See* Nick Miroff, *Top Homeland Security Official, Who Clashed with White House Over Immigration Policy, to Step Down*, WASH. POST (Feb. 23, 2018, 6:18 PM), https://www.washingtonpost.com/world/national-security/top-homeland-security-official-who-

Trump liked, they were safe in their positions.[218] However, as soon as the Secretaries executed a policy that he did not like, they were forced to resign.[219] Secretaries Duke and Nielsen knew that if they wanted to maintain their positions they had to appease the President, so that is what they did.[220] Because the Nielsen memorandum could be construed as a political ploy that failed to elaborate on the Duke memorandum's only stated reason and asserted new reasons not provided by Secretary Duke, the Court correctly determined that the Nielsen memorandum was an impermissible "*post hoc* rationalization[]"[221] in violation of the APA.[222]

Moreover, the *Regents* majority found that neither the Duke memorandum nor the Nielsen memorandum contained reasoning that considered the reasonable, legitimate reliance interests[223] induced by the DACA program.[224] Where an affected party relied on an agency's prior policy, the agency is required to explain why its interest outweighs the party's

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clashed-with-white-house-over-immigration-policy-to-step-down/2018/02/23/c3659d66-18e4-11e8-942d-16a950029788_story.html (providing the timeline of Secretary Duke's employment); Zolan Kanno-Youngs, Maggie Haberman, Michael D. Shear, & Eric Schmitt, *Kirstjen Nielsen Resigns as Trump's Homeland Security Secretary*, N.Y. TIMES (Apr. 7, 2019), https://www.nytimes.com/2019/04/07/us/politics/kirstjen-nielsen-dhs-resigns.html (providing the timeline of Secretary Nielsen's employment).

218. *Id.*

219. *Id.* Secretary Duke refused to end the Temporary Protected Status program, which protects thousands of immigrants fleeing violence or disasters. Miroff, *supra* note 217. Secretary Nielsen refused to block all immigrants from seeking asylum. Kanno-Youngs, Haberman, Shear, & Schmitt, *supra* note 217. After these refusals, President Trump pushed the Secretaries out of their positions. *Id.*

220. *See, e.g.*, Elizabeth Williamson & Ron Nixon, *Kirstjen Nielsen Was a Target of Trump's Immigration Ire. Now She's His Protector.*, N.Y. TIMES (June 19, 2018), https://www.nytimes.com/2018/06/19/us/politics/nielsen-trump-immigration-protector.html (detailing how Secretary Nielsen shielded former President Trump from criticism after politically damaging news of the Administration's family separation policy broke).

221. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971) (citing Burlington Truck Lines v. United States, 371 U.S. 156, 168–69 (1962)) (observing that post hoc rationalizations "have traditionally been found to be an inadequate basis for review"). The Court noted that agency action is arbitrary and capricious where "the decision was [not] based on a consideration of [all] relevant factors." *Id.* at 416.

222. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 104 S. Ct. 1891, 1909 (2020).

223. *See supra* note 186 and accompanying text; *see also infra* Section IV.B.

224. *Regents*, 104 S. Ct. at 1913–14. Reliance interests are some of the "relevant factors" discussed in the Court's decision in *Overton Park*. 401 U.S. at 416; *see also* United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 674–75 (1973) (remanding the case to determine whether the company reasonably relied on the agency's original interpretation of its regulation). Without that determination, the Court could not consider all of the relevant factors and therefore could not determine whether the agency action was arbitrary or capricious. *Id.* Although the court recognized that DHS had not weighed the reliance interests in its reasoning, it also chose not to weigh those interests. See *infra* Section IV.B for a more detailed discussion of the reliance interests at issue and the Court's responsibility to weigh them.

interest.[225] DHS argued that Secretaries Duke and Nielsen were not required to address any alleged reliance interests because DACA "conferred no substantive rights."[226] While it may not have conferred substantive *rights*, it did confer substantive *benefits* that warrant reliance interest analysis.[227] Not only were Dreamers provided specific government-sponsored benefits in two-year increments,[228] but Dreamers also received tangential benefits that were dependent upon DACA's promises.[229]

The Court noted that even if it took DHS's argument that DACA recipients had no reasonable reliance interests at face value, the agency was required at least to address that contention in its rescission to comply with the APA.[230] DHS did not articulate acceptable reasoning in either memorandum.[231] In its first memorandum the reasoning rested solely on the Attorney General's determination and did not take into account reliance interests.[232] In its second memorandum DHS did not articulate acceptable reasoning because it failed to elaborate on the agency's original reason and did not address reliance interests.[233] These "omission[s] alone render[] . . . [the] decision arbitrary and capricious."[234]

2. The Court Correctly Determined that DHS Failed to Consider Viable Policy Alternatives.

The Court also correctly used the APA's arbitrary and capricious standard to analyze the issue of DHS's failure to consider reasonable policy alternatives.[235] In *State Farm*, the Court made clear what it alluded to in *Overton Park*: agency decisions are not "unimpeachable."[236] Agencies are required to at least consider "feasible and prudent alternative[s]" before enacting contemplated changes.[237] This consideration helps maintain the

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225. *Cf.* John Gedid, *Administrative Procedure for the Twenty-First Century: An Introduction to the 2010 Model State Administrative Procedure Act*, 44 ST. MARY'S L.J. 241, 276 (2012) (analyzing the 2010 Model State Administrative Procedure Act in the context of the Administrative Procedure Act).

226. *Regents*, 140 S. Ct. at 1913 (quoting Application to Petition for Writ of Certiorari, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (No.18-587), p. 125a).

227. *Id.*

228. *Id.* The government-sponsored benefits include, but are not limited to, Social Security numbers and Medicare eligibility. *Id.* at 1902.

229. *See, e.g.*, *supra* note 177; *see also infra* Section IV.B.

230. *Regents*, 140 S. Ct. at 1913–14.

231. *Id.* at 1908–14.

232. *Id.*

233. *Id.*

234. *Id.* at 1913.

235. *See infra* notes 236–253 and accompanying text.

236. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983).

237. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 408 (1971).

status quo, which mitigates the risk of upsetting reasonable reliance interests.[238] It is especially important in the context of DACA because of Dreamers' serious reliance on the policy.[239]

In the first DACA rescission memorandum, Secretary Duke made no attempt to explain why DACA's forbearance policy could not be divorced from benefits eligibility.[240] When making his illegality determination, Attorney General Sessions focused only on the conferral of benefits.[241] He "neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy."[242] Although Secretary Duke was left with the option to remove benefits eligibility while leaving the forbearance policy untouched, she declined to consider this option.[243] In the second DACA rescission memorandum, Secretary Nielsen also made no attempt to explain why the program's forbearance and benefits policies could not be separated.[244]

The ability to separate the forbearance and benefits policies in DACA was critical in the Court's determination because, according to the government, the benefits component of the program was what made DACA illegal.[245] While the APA does not require agencies to consider *all* policy alternatives,[246] DHS was required to consider the efficacy of a forbearance-only policy because it was "within the ambit of the existing" policy.[247]

238. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009) (noting the importance of the status quo when assessing industry reliance); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (emphasizing the importance of consistency and noting that "unexplained inconsistency is . . . a reason for holding an [agency] interpretation to be an arbitrary and capricious change from agency practice").

239. *See supra* note 186 and accompanying text; *see also infra* notes 265, 267–270 and accompanying text.

240. *Regents*, 140 S. Ct. at 1912–13; *Duke Memo*, *supra* note 47 (failing to mention forbearance and addressing only benefits).

241. *Regents*, 140 S. Ct. at 1912.

242. *Id.*

243. *Id.* Given DHS's supposed familiarity with proper APA policy, it is unclear why Secretary Duke declined to consider removing benefits while maintaining forbearance. *Id.* One explanation could be pressure from the Trump Administration to end the policy, no matter the manner. *See* Blitzer, *supra* note 212 (explaining how Trump's DHS served as a "rubber stamp" for his policies).

244. *Id.* at 1908–09; *Nielsen Memo*, *supra* note 196. Secretary Nielsen's enthusiasm to end the program could come from the same motivation as Secretary Duke's: appeasing the president. *See supra* note 220.

245. *Regents*, 140 S. Ct. at 1912–13. The government could have precluded Dreamers from accessing the benefits while maintaining the forbearance policy. *Id.* To do that, the government could have amended the regulations codified in the Code of Federal Regulations that conferred the substantive benefits to individuals subject to deferred action. *Id.* DHS, according to its own reasoning, did not even consider this course of action. *Id.* at 1903–04.

246. *State Farm*, 463 U.S. at 51.

247. *Id.*

DACA has two components: deferred action and benefits eligibility.[248] The heart of DACA, however, is its deferred action, or forbearance, policy.[249] Forbearance is not just within the ambit of the policy, rather it is the policy.[250] By relying on problems that applied to only one part of the policy as sufficient to rescind the policy in its entirety,[251] Secretary Duke "failed to supply the requisite 'reasoned analysis.'"[252] Secretary Nielsen's memorandum, replete with the same flaws, could not make up for Secretary Duke's deficiency.[253]

B. The Court Improperly Dismissed the Reliance Interests at Stake in the Rescission.

While the Court was correct in determining that the rescission of DACA was arbitrary and capricious within the meaning of the APA for lack of reasoned analysis, it was incorrect in diminishing the reliance interests at stake in this case as not significant enough to strike the rescission on their own.[254] Both agencies *and courts* are required to consider reliance interests in arbitrary and capricious analyses.[255] Although the Court went so far as to note that failure to address reliance interests "would be arbitrary or capricious,"[256] the Court also stated that jeopardizing these legitimate reliance interests was "not necessarily dispositive" of the rescission's arbitrariness or capriciousness.[257] Where agencies and courts fail to consider reliance interests—even interests seemingly less significant than the ones at stake in the DACA rescission[258]—not only do the agencies make decisions that are arbitrary and capricious within the meaning of the APA, but the courts decide cases in problematic and harmful ways.[259]

The Supreme Court has considered significant the reliance interests of various industries.[260] In each case where the Court weighed industry reliance

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248. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020).

249. *Id.*

250. *Id.*

251. *See State Farm*, 463 U.S. at 51 (requiring agencies to consider policies in their entirety before making changes to them).

252. *Id.* at 57 (quoting Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.1970)).

253. *Regents*, 140 S. Ct. at 1916.

254. *See infra* notes 255–300 and accompanying text.

255. *See supra* Section II.C.1.a.

256. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

257. *Regents*, 140 S. Ct. at 1914.

258. *See* NAACP v. Trump, 298 F. Supp. 3d. 209, 240 (D.D.C. 2018) (noting that "[t]he Supreme Court has set aside changes in agency policy for failure to consider reliance interests that pale in comparison to the ones at stake [in DACA].").

259. *See supra* Section II.C.1.a.

260. *See supra* notes 112–116 and accompanying text.

interests, the Court looked to their pecuniary interests.[261] Here, while not industry-specific, there are substantial pecuniary interests at stake that the Court should have considered: DACA recipients' own financial interests and the financial interests of the country as a whole.[262] The pecuniary reliance interests at stake in the Court's prior cases may have been very important, but none of them dealt with the individual lives, livelihoods, and liberties[263] of more than 700,000 people.[264] DACA recipients made major life decisions based on the expected protections of the DACA program, including divulging their undocumented status to the government.[265]

In *NAACP v. Trump,*[266] the District Court for the District of Columbia noted that the more than 700,000 DACA recipients' reliance interests included not only educational interests,[267] employment interests,[268] and

261. *See* Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2137 (2019) (noting that "reliance interests may be pecuniary" but "may also include nonpecuniary expectations").

262. Courtney Vinopal, *What ending DACA could cost the U.S. Economy*, PBS (Nov. 12, 2019, 5:50 PM), https://www.pbs.org/newshour/economy/making-sense/what-ending-daca-could-cost-the-u-s-economy (explaining how DACA's rescission would impact Dreamers as well as every part of the American economy).

263. Liberties were at stake insofar as Dreamers were required to provide detailed information about their lives to the government, which, in the absence of DACA, would make them deportable. *See infra* note 265.

264. All of the interests referenced in notes 112–116 are simply pecuniary industry interests, whereas DACA involves pecuniary *and* individualized interests. *See NAACP*, 298 F. Supp. 3d. at 240 ("DACA had been in place for five years and had engendered the reliance of hundreds of thousands of beneficiaries, many of whom had structured their education, employment, and other life activities on the assumption that they would be able to renew their DACA benefits.").

265. *Brief for Regents*, *supra* note 25, at 6–7; *Brief for Alianza Americas*, *supra* note 25, at 7–8. Revealing undocumented status to the government exemplifies the significance of Dreamers' reliance on DHS's policy. *Brief for Alianza Americas*, *supra* note 25, at 13. To apply for DACA, Dreamers are required to disclose biographical information, information about their entry into the United States, and current and former addresses. *Id.* This disclosure is significant because the information required for DACA is the same information that ICE, a part of DHS, uses to find and detain undocumented individuals. *See New Documents Reveal ICE Access to DACA Recipients' Information*, NAT'L IMMIGR. L. CTR. (Apr. 21 ,2020), https://www.nilc.org/2020/04/21/new-documents-reveal-ice-access-to-daca-recipients-information/ (noting the danger to DACA recipients of allowing ICE access to their personal identifying information).

266. 298 F. Supp. 3d. 209 (D.D.C. 2018).

267. Educational interests include earning advanced degrees, participating in postgraduate research and studies, and accessing student loans, among others. *Id.* at 240 n.24; *see also Brief for Alianza Americas*, *supra* note 25, at 5.

268. Employment opportunities are related to the provision in DACA that allows recipients to obtain work authorization. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1902 (2020).

financial interests,[269] but also personal interests like starting families.[270] Dreamers have invested millions of dollars into the American economy through their purchase of assets like homes and cars. [271] More than 43,000 Dreamers have started their own businesses.[272] DACA recipients have also invested heavily in education and job training programs with the expectation that they would be able to work in the country legally while their removal was deferred.[273] Losing their DACA status would mean that Dreamers would lose access to the investments they have made in themselves because they would lose their work authorization, or worse, be deported.[274]

While standing alone these interests are significant enough to warrant an arbitrary and capricious determination, DACA recipients' interests are not the only ones at stake: employers, schools, families, and communities all have interests in DACA's continued existence.[275] Of the more than 700,000 current Dreamers, ninety three percent are either working or in school.[276] Some 202,500 Dreamers work in jobs classified as "essential" during the COVID-19 pandemic, including more than 29,000 frontline healthcare workers.[277] Around eighty one percent of DACA recipients have graduated high school and taken at least one higher education course.[278] Thousands of DACA recipients are still involved in higher learning, either as educators or

269. DACA recipients relied on the program's protections to make financial decisions like opening bank accounts, buying houses, and starting businesses. *See Brief for Regents*, *supra* note 25, at 40–43; *Brief for Alianza Americas*, *supra* note 25, at 1–2, 15.

270. *NAACP*, 298 F. Supp. 3d. at 240. Note that DACA recipients and their families total more than 1 million people. Blitzer, *supra* note 212.

271. Parija Kavilanz, *For Dreamers, DACA's End Could Mean Losing Their Homes*, CNN (Jan. 24, 2018, 10:45 AM), https://money.cnn.com/2018/01/24/news/economy/daca-dreamers-homeowners/index.html.

272. Vinopal, *supra* note 262.

273. *Id.*; Claudia Flores & Nicole Prchal Svajlenka, *Why DACA Matters*, CTR. FOR AM. PROGRESS (Apr. 29, 2021, 9:01 AM), https://www.americanprogress.org/issues/immigration/news/2021/04/29/498944/why-daca-matters/.

274. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1902 (2020) (noting that work authorization was a benefit Dreamers received only as part of the DACA program); *Brief for Alianza Americas*, *supra* note 25, at 19 (noting that temporary protection from deportation was a protection Dreamers received only as part of the DACA program).

275. *Regents*, 140 S. Ct. at 1914. The Court even notes that Dreamers' families include more than 200,000 United States citizen children. *Id.*

276. Vinopal, *supra* note 262.

277. Amy Sherman, *How Many DACA Recipients Are Essential Workers Amid COVID-19 Pandemic?*, POLITIFACT (Feb. 9, 2021), https://www.politifact.com/factchecks/2021/feb/09/richard-durbin/how-many-daca-recipients-are-essential-workers-ami/.

278. Vinopal, *supra* note 262.

researchers.[279] Additionally, more than 1.5 million people currently live with a DACA recipient, including 254,000 United States citizen children.[280]

The government itself would also be harmed if DACA were rescinded.[281] Not only would the government lose out on billions of dollars in taxes each year,[282] but it would also see a dip in Social Security and Medicare funds.[283] Dreamers also contribute more than $42 billion annually to America's gross domestic product.[284] The impact of DACA's rescission would "radiate outward" to every aspect of American society.[285] With the "serious," life-altering significance of these interests, the Court should have found the Dreamers' reliance interests alone to be "dispositive" of the arbitrariness and capriciousness of DHS's recission, not just "one factor to consider."[286] Properly analyzing agency action under the APA means analyzing the reliance interests of DACA recipients.[287] Given the APA's requirements and the magnitude of the reliance interests at stake in the program, it is unlikely the DACA policy could ever be reasonably rescinded within the parameters of the APA.[288]

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279. *Brief for National Education Association*, *supra* note 25, at 16–18.

280. Prchal Svajlenka & Wolgin, *supra* note 29.

281. *Supra* note 29.

282. Dreamers pay $8.7 billion in federal, state, and local taxes each year. Prchal Svajlenka & Wolgin, *supra* note 29.

283. Flores & Prchal Svajlenka, *supra* note 273.

284. Vinopal, *supra* note 262.

285. *Regents*, 140 S. Ct. at 1914 (quoting *Brief for Regents*, *supra* note 25, at 41–42 (internal quotation marks omitted)).

286. *Id.*

287. *See supra* Section II.C.1.a (discussing agencies' and courts' obligations to weigh reliance interests).

288. *But see* Maria Sacchetti & Amy B Wang, *U.S. Judge Blocks New Applicants to Program that Protects Undocumented 'Dreamers' Who Arrived as Children*, WASH. POST (July 17, 2021, 10:56 AM), https://www.washingtonpost.com/immigration/daca-court-decision/2021/07/16/6c9a35be-e677-11eb-a41e-c8442c213fa8_story.html. On July 17, 2021, a federal judge in Texas issued a permanent injunction vacating the DACA memorandum stating that the memorandum was "illegally implemented" and that "the public interest of the nation is always served by the cessation of a program that was created in violation of law." *Id.* (internal quotations omitted). He defended his order as "reasonable" and purported to weigh the competing interests of Dreamers and the states challenging the program. *Id.* He determined that "[h]undreds of thousands of individual DACA recipients, along with their employers, states, and loved ones, have come to rely on the DACA program," but decided that states' interests in limiting noncitizens' competition with Americans for local jobs was more important. *Id.* He recognized that "it is not equitable for a government program that has engendered such a significant reliance to terminate suddenly," but still enjoined all administration of the DACA program effective immediately. *Id.* Although the judge asserted his consideration of reliance interests, his determination that the states' pecuniary interests outweighed all others runs contrary to Supreme Court caselaw, especially considering the pecuniary *an* liberty interests of Dreamers and the rest of the country.

Moreover, the Court appears to contradict itself when discussing whether DHS was required to weigh the reliance interests at all.[289] The Court explicitly notes that "DHS was not required" to weigh the reliance interests, then later in the same paragraph states that DHS "*was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[290] This apparent contradiction in whether DHS was required to weigh reliance interests indicates that the Court improperly weighed their importance, especially considering the massive impact of recission on DACA recipients and the country as a whole.[291] Although the Court notes that "hardship to DACA recipients" should be considered, the Court ultimately rests its decision exclusively on the agency's failure to provide a reasoned analysis.[292]

This improper weighing could also be viewed as the Court avoiding its responsibility to address the merits of the respondents' claims. Here, both DHS and the Court were required to at least consider DACA recipients' reliance interests.[293] The Court—despite its holdings in *Encino Motorcars*,[294] *Fox Television Stations*,[295] and *Smiley*[296]—skirted the issue of weighing reliance interests altogether by punting the responsibility of weighing these interests back to DHS alone.[297] In other cases where significant reliance interests were at stake,[298] the Court addressed these concerns, weighed them, and then based on that analysis determined whether the agency action was valid.[299] By refusing to address the merits of the rescissions and focusing only on Secretary Duke's reasoning, the Court left open the possibility for DHS to rescind DACA at a later date despite Dreamers' serious, reasonable reliance on the program.[300] Thus, the Court did just what it chastised DHS for: failed to address the reliance issues at stake.

289. *Id.*
290. *Id.* at 1914–15.
291. *See supra* notes 265, 267–270 and accompanying text.
292. *Regents*, 140 S. Ct. at 1916.
293. *See supra* Section II.C.1.a.
294. *See supra* note 113.
295. *See supra* note 107.
296. *See supra* note 116.
297. *Regents*, 140 S. Ct. at 1914.
298. *See supra* notes 112–116.
299. *Id.*
300. *Regents*, 140 S. Ct. at 1914.

V. CONCLUSION

In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court held that DHS's attempted rescission of DACA was arbitrary and capricious in violation of Section 706 of the APA.[301] The Court correctly determined that the flawed reasoning in the Duke and Nielsen memoranda rendered the rescission arbitrary and capricious, but incorrectly dismissed Dreamers' reliance interests.[302] Failing to articulate adequate reasons for agency action will render agency action arbitrary and capricious,[303] but so too will failing to address legitimate reliance interests.[304] In dismissing the many reliance interests at stake in the program's rescission as not "dispositive"[305] of arbitrariness or capriciousness, the Court incorrectly applied the analysis required by Section 706 of the APA.[306] DHS's failure to weigh the serious reliance interests of both Dreamers and the country as a whole could have alone rendered the rescission arbitrary and capricious.[307] Hundreds of thousands of Dreamers like Abigail built their lives on the promises of DACA and enriched their communities in the process.[308] The APA mandates that their reliance be taken into account.[309]

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301. *Id.* at 1915.
302. *See supra* Section IV.
303. *See supra* Section II.C.1.
304. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); *see also supra* notes 110–116 and accompanying text.
305. *Regents*, 140 S. Ct. at 1914.
306. *See supra* Section IV.B.
307. *Id.*
308. *See supra* note 29; *see also supra* notes 265, 267–270 and accompanying text.
309. *See supra* Section II.C.1; *see also supra* notes 112–116 and accompanying text.