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

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, et al.,
Petitioners,

v.

REGENTS OF THE
UNIVERSITY OF CALIFORNIA, et al.
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE REAL ESTATE ROUNDTABLE, AND THE ESSENTIAL WORKER IMMIGRATION COALITION IN SUPPORT OF RESPONDENTS

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

v.

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

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

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

v.

MARTIN JONATHAN BATALLA VIDAL, et al.
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Home Builders (NAHB) is a trade federation of more than 700 state and local associations whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. About one-third of NAHB's approximately 140,000 members are home builders or remodelers. NAHB members provide 80% of all homes constructed in the United States.

The Real Estate Roundtable (the Roundtable) brings together leaders of the nation's top publicly-held and privately-owned real estate ownership, development, lending, and management firms with the leaders of major national real estate trade associations to jointly address key national policy issues relating to real estate and the overall economy. By identifying, analyzing, and coordinating policy positions, the Roundtable's business and trade association leaders seek to ensure a cohesive industry voice is heard by government officials and the public about real estate and its important role in the global economy. Collectively, the Roundtable members' portfolios contain over 12 billion square feet of office, retail, and industrial properties valued at more than $3 trillion; over two million apartment units; and more than three million hotel rooms. Participating trade associations represent more than two million people involved in virtually every aspect of the real estate business.

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief by blanket consent on file with the Court.

The Essential Worker Immigration Coalition (EWIC) is a coalition of businesses, trade associations, and other organizations from across the industry spectrum concerned with the shortage of both lesser skilled and unskilled labor. EWIC supports policies that facilitate the employment of essential workers by U.S. companies and organizations, as well as reform of U.S. immigration policy to facilitate a sustainable workforce for the American economy while ensuring our national security and prosperity.

In addition to their respective interests in ensuring the vitality of the nation's construction workforce, the availability of affordable housing, and the existence of equal employment opportunities, *amici* each have a particular interest in ensuring appropriate judicial review of state and federal government decisions and actions.

INTRODUCTION

The U.S. construction industry, and the industries that provide related services to the real estate sector, are suffering from a prolonged labor shortage. Among other consequences, the labor shortage is increasingly hampering the construction and affordability of new homes. The country is not building enough new homes to keep pace with demand and maintain a healthy housing stock. Builders nationwide recognize the problem and report that the labor shortages are getting worse, creating a cascading impact on the pace of home construction and the price of new homes. The labor shortage is having similar negative effects in multiple support service industries, such as food preparation and serving, hotel and hospitality, health and elder care, and building and grounds cleaning and maintenance.

It is undisputed that immigrants provide a valuable source of construction labor and play a significant role in the workforce that services buildings once constructed.

Taken together, about 41% of DACA recipients work in industries represented by *amici*.[2] The decision to rescind the Deferred Action for Childhood Arrivals (DACA) policy threatens to further exacerbate the ongoing labor shortage and harm the U.S. economy, and make the American dream of homeownership harder than ever to achieve.

Courts can and should play a role in such agency decisions, as every court below in these consolidated cases appropriately concluded (and as many of the *amici* States otherwise supporting respondents agree). The Court's decision in *Heckler* v. *Chaney*, 470 U.S. 821 (1985), which established a presumption of nonreviewability of certain agency decisions, does not apply to the DACA rescission decision. To the contrary, that decision, based upon an agency's presumption that it lacked legal authority to act otherwise, is precisely the type of agency determination that courts are well equipped to review.

ARGUMENT

I. DACA Provides Necessary Workers for the Struggling U.S. Construction Workforce

A. DACA recipients and other immigrants are a valuable part of the U.S. labor workforce.

Immigrants comprise an essential part of the U.S. labor workforce. For example, immigrant workers now account for close to one in four workers in the construction industry, a percentage that has been rising since the Great Recession.[3] The share of immigrants is even higher in

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[2] Jie Zong, et al., *A Profile of Current DACA Recipients by Education, Industry, and Occupation*, Migration Policy Inst.: Fact Sheet 7 (Nov. 2017), https://www.migrationpolicy.org/sites/default/files/publications/DACA-Recipients-Work-Education-Nov2017-FS-FINAL.pdf.

[3] Natalia Siniavskaia, *Immigrant Workers in the Construction Labor Force*, NAHB (Jan. 2, 2018), https://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=260375.

construction trades, reaching 30%, and is particularly high in some of the trades needed to build a home and that consistently register high labor shortages, such as carpenters, painters, drywall/ceiling tile installers, brick masons, and construction laborers.[4]

Reliance on foreign-born workers is pronounced in some states. In 2018, immigrants comprised almost 42% of the construction workforce in California; 41% in Texas; 37% in New York and Nevada; and 35% in Florida.[5]

The importance of immigrant laborers extends throughout the national workforce. The role of immigrants in providing direct health care and working as nursing assistants, who work in our nation's hospitals, elder care facilities, and other health care properties, is illustrative. In 2017, one in four workers providing hands-on care to older people and people with disabilities nationwide was an immigrant, and that number continues to grow.[6] Including independent providers, about one million immigrants work in direct health care services.[7] Similarly, 21% of nursing assistants were born outside of the United States, compared to 17% of all U.S. workers.[8] The need for such health care workers is growing dramatically. From 2015 to 2050, the population of adults aged 65 and over will almost double, from 47.8 million to 88 million, and the number of adults over 85 will more than triple over the

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[4] *Ibid.*

[5] *Ibid.*

[6] Robert Espinoza, *Immigrants and the Direct Care Workforce*, PHI Research Br. (June 2017), https://phinational.org/wp-content/uploads/2017/06/Immigrants-and-the-Direct-Care-Workforce-PHI-June-2017.pdf.

[7] *Ibid.*

[8] PHI, *U.S. Nursing Assistants Employed in Nursing Homes: Key Facts* 3 (2019), https://phinational.org/wp-content/uploads/2019/08/US-Nursing-Assistants-2019-PHI.pdf.

same time period, from 6.3 million to 19 million.[9] As a result, nursing homes will have to fill nearly 680,000 nursing assistant job openings by 2026, primarily as workers leave the field.[10] The elder care industry will continue to rely on immigrants to fill that need.

Likewise, the sustainability and growth of the U.S. travel industry—estimated to generate $2.5 trillion in economic output, supporting a total of 15.7 million American jobs, and generating $170.9 billion in tax revenue to support infrastructure and other critical government services[11]—depends on the availability of foreign-born talent at all skill levels. Hotel and other lodging real estate assets confront serious workforce shortages.[12] "Even though immigrants comprise only 13 percent of the US population—they account for 31 percent of the workforce in the hotel and lodging industry and 22 percent in restaurants."[13]

DACA-eligible immigrants are a crucial component of the workforce in *amici*'s industries. Among the top ten industries employing DACA recipients, construction

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[9] PHI, *Understanding the Direct Care Workforce: Key Facts & FAQ*, https://phinational.org/policy-research/key-facts-faq/ (last visited Oct. 3, 2019).

[10] PHI, *U.S. Nursing Assistants Employed in Nursing Homes: Key Facts* 2 (2019), https://phinational.org/wp-content/uploads/2019/08/US-Nursing-Assistants-2019-PHI.pdf.

[11] U.S. Travel Ass'n, *U.S. Travel Answer Sheet*, https://www.ustravel.org/answersheet (last visited Oct. 3, 2019).

[12] Deloitte, *2019 US Travel and Hospitality Outlook*, https://www2.deloitte.com/content/dam/Deloitte/us/Documents/consumer-business/us-consumer-2019-us-travel-and-hospitality-outlook.pdf. "In 2009, the US Bureau of Labor Statistics estimated 353,000 job openings across the leisure and hospitality sector. As of 2018, * * * that number swelled to 1,139,000." *Id.* at 3 (footnote omitted).

[13] *Id.* at 11.

ranks second, employing more than 84,000.[14] Of that group, more than 27,000 identify as construction laborers.[15] A loss of these 84,000 workers amounts to more than 20% of the July 2019 job openings in construction.[16]

DACA recipients also account for material percentages of workers in a broad range of professions critical to serve the nation's building infrastructure, where Americans live, work, shop, recreate, and heal. In a 2017 study, a combined 41% of the DACA recipients worked as laborers in construction, food preparation and serving, office and administrative support, building grounds cleaning and maintenance, and transportation and material moving.[17] The study estimates that 23% of DACA recipients serve the "arts, entertainment, recreation, accommodations and food services" industries, and 14% are in the "retail trade,"[18] including personnel who work in malls and brick-and-mortar stores—key sectors that are essential to a thriving U.S. real estate industry.

According to one past estimate, if the DACA rescission proceeds, an average of 915 DACA recipients each day will lose their work authorization and protection from

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[14] New Am. Econ., *Spotlight on the DACA-Eligible Population* (Feb. 8, 2018), https://research.newamericaneconomy.org/report/spotlight-on-the-daca-eligible-population/.

[15] *Ibid.*

[16] Robert Dietz, *Construction Job Openings Up in July*, NAHB: Eye on Housing (Sept. 10, 2019), https://eyeonhousing.org/2019/09/construction-job-openings-up-in-july/.

[17] Jie Zong, et al., *A Profile of Current DACA Recipients by Education, Industry, and Occupation*, Migration Policy Inst.: Fact Sheet 7 (Nov. 2017), https://www.migrationpolicy.org/sites/default/files/publications/DACA-Recipients-Work-Education-Nov2017-FS-FINAL.pdf.

[18] *Id.* at 6.

deportation.[19] Such losses will degrade an already struggling U.S. labor market.

B. Threats to the immigrant workforce are threats to the U.S. economy, particularly the construction industry.

The labor shortages in industries in which immigrants and DACA recipients are a material percentage of the workforce represent a substantial threat to the nation's economy. While such shortages are troubling for many industries, the lack of available workers is reaching crisis levels for the U.S. construction industry in particular. The number of open construction jobs nationwide has been increasing since the end of the Great Recession and reached post-Great Recession highs in 2019.[20] The overall trend in this metric signals the ongoing need for additional workers in the construction industry.[21]

Given the industry's labor shortage, it is unsurprising that cost and availability of labor has risen dramatically as an area of significant concern among builders over the past eight years. In 2011, for instance, only 13% of residential builders reported labor as a significant problem that they were currently facing.[22] That percentage increased in every subsequent year: to 30% in 2012; 53% in 2013; 61% in 2014; 71% in 2015; 78% in 2016; 82% in both 2017 and 2018.[23] In a January 2019 survey, 82% of

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[19] *Id.* at 3.

[20] Robert Dietz, *Job Openings Slow, Still Higher Year-over-Year*, NAHB: Eye on Housing (Aug. 6, 2019), http://eyeonhousing.org/2019/08/job-openings-slow-still-higher-year-over-year/.

[21] *Ibid.*

[22] Ashok Chaluvadi, *Top Challenges for Builders: Materials in 2018, Labor in 2019*, NAHB: Eye on Housing (Mar. 18, 2019), http://eyeonhousing.org/2019/03/top-challenges-for-builders-materials-in-2018-labor-in-2019/.

[23] *Ibid.*

NAHB's builder members identified cost and availability of labor as an area of expected significant concern for 2019, making it the number one such concern for builders.[24]

In a recent survey of home builders, shortages of labor directly employed by builders were widespread.[25] Many of the shortage percentages were little changed from where they were as of the same time in 2018.[26] Averaged across nine labor occupations that NAHB has been consistently covering since the 1990s, the incidence of labor shortages reached 69% in 2019—the highest number on record.[27]

C. Labor shortages hurt homebuilders and related service industries, and burden the availability of affordable housing.

The ongoing and worsening labor and subcontractor shortages continue to impact the homebuilding industry in a number of ways, including placing additional upward pressure on new home prices. In July 2019, more than 87% of builders reported the need to pay higher wages and higher subcontractor bids as a result of labor issues, 81% reported that issues with available labor made it difficult to complete projects on time, and 75% reported having to raise home prices as a result.[28] Since 2015, rising labor

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[24] NAHB, *Housing Market Index: Special Questions on Significant Problems Builders Faced in 2018 and Expect to face in 2019*, at 2 (Jan. 2019), http://eyeonhousing.org/wp-content/uploads/2019/03/HMI-Jan-2019-SplQ-REPORTEXTERNALFINAL.pdf.

[25] Paul Emrath, *Labor Shortages Still Hurting Affordability*, NAHB: Eye on Housing (Aug. 5, 2019), http://eyeonhousing.org/2019/08/labor-shortages-still-hurting-affordability/.

[26] *Ibid.*

[27] *Ibid.*

[28] NAHB, *Housing Market Index: Special Questions on Labor and Subcontractors' Availability* 16 (July 2019), http://eyeonhousing.org/wp-content/uploads/2019/08/July2019-SplQ-REPORT-

costs have outpaced inflationary effects. In 2018, for example, overall inflation was 2.9%, but labor costs increased by 5.2% over the same period.[29]

Other effects of labor shortages are less common but nevertheless also on the rise. For example, the share of builders indicating that labor shortages have slowed the rate at which they accept incoming orders doubled between 2015 and 2018 (from 16% to 32%).[30] Even the least common of the effects—lost or cancelled sales—was up to 26% in 2018, suggesting that the shortages are having a significant impact on production levels.[31]

The labor shortages further complicate the unfortunate reality that the United States is not building enough housing to meet the country's needs. According to a study by Freddie Mac, between 2011 and 2018, residential housing construction has increased, but only gradually—and not enough to meet demand.[32] Freddie Mac estimated that the annual rate of construction as of the end of 2018 was about 370,000 units below the level required by long-term housing demand.[33] After years of low levels of building, a significant shortfall had developed, with between 0.9 and 4.0 million too few housing units to accommodate long-term housing demand.[34] Freddie Mac predicted that until

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EXTERNAL.pdf.

[29] Paul Emrath, *Labor and Subcontractor Costs Outpacing Inflation, Raising Home Prices*, NAHB: Eye on Housing (Sept. 10, 2018), http://eyeonhousing.org/2018/09/labor-and-subcontractor-costs-outpacing-inflation-raising-home-prices/.

[30] *Ibid.*

[31] *Ibid.*

[32] Freddie Mac, *The Major Challenge of Inadequate U.S. Housing Supply* 1 (Dec. 2018), http://www.freddiemac.com/fmac-resources/research/pdf/201811-Insight-06.pdf.

[33] *Id.* at 8.

[34] *Id.* at 2.

construction ramped up, housing costs would likely continue rising above income, constricting household formation and preventing homeownership for millions of potential households.[35] Indeed, housing affordability hovered at a ten-year low as of the end of 2018.[36] In all, only 56.6% of new and existing homes sold in the last quarter of 2018 were affordable to families earning the U.S. median income of $71,900.[37]

The current administration has expressed concern regarding the issue of housing affordability. In establishing a White House Council on eliminating regulatory barriers to affordable housing, President Trump noted that "[f]or many Americans, access to affordable housing is becoming far too difficult." Exec. Order No. 13,878, 84 Fed. Reg. 30,853 (June 25, 2019). "Rising housing costs are forcing families to dedicate larger shares of their monthly incomes to housing. * * * These rising costs are leaving families with fewer resources for necessities such as food, healthcare, clothing, education, and transportation, negatively affecting their quality of life and hindering their access to economic opportunity." *Ibid.*

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The ongoing labor shortages in construction and related services are negatively affecting the U.S. economy, causing among other problems a decrease in available affordable housing. Policy decisions that threaten the availability of immigrant labor, such as the decision to rescind

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[35] *Id.* at 8.

[36] Rose Quint, *Housing Affordability Holds Steady at a 10-Year Low in the Fourth Quarter*, NAHB: Eye on Housing (Feb. 14, 2019), http://eyeonhousing.org/2019/02/housing-affordability-holds-steady-at-a-10-year-low-in-the-fourth-quarter/.

[37] *Ibid.*

DACA, are likely to further exacerbate the labor shortages and the negative consequences those shortages are already causing.

II. The Decision to Terminate DACA is Subject to Judicial Review

In each of the consolidated cases, petitioners contended below and reiterate in this Court that the decision to terminate DACA is not subject to judicial review, in part based on the "committed to agency discretion" exemption under Section 701(a)(2) of the Administrative Procedure Act (APA). 5 U.S.C. § 701(a)(2). Five federal courts, including the Ninth Circuit, have now rejected that argument, albeit for slightly different reasons. 18-587 Gov't Supp. Br. App. 23a-45a (9th Cir.); 18-587 Pet. App. 26a-33a (N.D. Cal.); 18-589 Pet. App. 24a-39a (E.D.N.Y); 18-588 Pet. App. 19a-21a, 25a-43a (D.D.C.); *Casa de Md.* v. *U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 769-770 (D. Md. 2018); cf. *Texas* v. *United States*, 809 F.3d 134, 163-170 (5th Cir. 2015), cert. granted, 136 S. Ct. 906, and aff'd by an equally divided court, 136 S. Ct. 2271 (2016) (per curiam). In addition, although supporting petitioners on the merits of rescinding DACA, *amici* the States of Texas, Alabama, Alaska, Arizona, Arkansas, Florida, Kansas, Louisiana, Nebraska, South Carolina, South Dakota, and West Virginia, and Mississippi Governor Phil Bryant, all agree with respondents that the decision to terminate the DACA program is subject to judicial review. States of Texas et al. Amicus Br. 30-32. That is indeed the correct conclusion.

A. Reviewability under the APA

The APA provides for judicial review of "agency action." 5 U.S.C. §§ 701-706. Any person "adversely affected or aggrieved" by agency action, including a "fail[ure] to act," is entitled to "judicial review thereof," as long as the action is a "final agency action for which there is no other adequate remedy in a court." *Id.* §§ 702, 704.

This Court has consistently articulated "a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015) (quoting *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)); see also, *e.g.*, *Weyerhauser Co.* v. *U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (noting that this Court has "long applied a strong presumption favoring judicial review of an administrative action" (quoting *Mach Mining*, 135 S. Ct. at 1653)); *Lincoln* v. *Vigil*, 508 U.S. 182, 190 (1993) ("[W]e have read the APA as embodying a 'basic presumption of judicial review.'" (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140 (1967), abrogated on other grounds by *Califano* v. *Sanders*, 430 U.S. 99 (1977))). This Court has indicated that the APA's review provisions are "generous" and that courts "must" give them "a hospitable interpretation." *Abbott Labs.*, 387 U.S. at 140-141 (citations omitted). The government carries a "heavy burden" to overcome the presumption of judicial review. *Mach Mining*, 135 S. Ct. at 1651.

Section 701(a)(2) of the APA provides an exception to judicial review when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This Court has instructed that this "is a very narrow exception." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), abrogated on other grounds by *Califano* v. *Sanders*, 430 U.S. 99 (1977); see also *Weyerhaeuser*, 139 S. Ct. at 370 (noting that the Court has "read the exception in § 701(a)(2) quite narrowly" in light of the "strong presumption favoring judicial review" (quoting *Mach Mining*, 135 S. Ct. at 1653)).

As this Court has explained, Section 701(a)(2) "is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Overton Park*, 401 U.S. at 410 (citation omitted); see also *Chaney*, 470 U.S. at 830 ("[R]eview is not to be had if the statute is drawn so that a court would have no

meaningful standard against which to judge the agency's exercise of discretion.").

In *Chaney*, this Court interpreted the scope of Section 701(a)(2) in considering "the extent to which a decision of an administrative agency to exercise its 'discretion' not to undertake certain enforcement actions is subject to judicial review under the [APA]." 470 U.S. at 823. The case involved a challenge by several death-row inmates to the decision by the Commissioner of the U.S. Food & Drug Administration to exercise discretion not to consider the inmates' request for an investigation into the safety and effectiveness of lethal injection drugs. *Id.* at 823-825. The D.C. district court dismissed the lawsuit for lack of jurisdiction, holding that "decisions of executive departments and agencies to *refrain* from instituting investigative and enforcement proceedings are essentially unreviewable by the courts." *Id.* at 825 (citation omitted).

A divided panel of the D.C. Circuit reversed. Relying in part on this Court's decision in *Overton Park*, the D.C. Circuit began with the presumption that Section 701(a)(2) should be narrowly construed and invoked only where the substantive statute left the courts with "no law to apply." *Id.* at 826 (citing *Overton Park*, 401 U.S. at 410). The court determined, however, that judicial review of the FDA Commissioner's nonenforcement decision was not foreclosed because of an FDA policy statement indicating that the agency was "obligated" to investigate certain unapproved drug uses. *Ibid.* Having concluded that the policy statement provided sufficient "law to apply," and in light of the strong presumption that all agency action is subject to review, the court proceeded to review the decision, concluding it was irrational. *Id.* at 826-827.

This Court reversed. *Id.* at 838. The Court reiterated that Section 701(a)(2) is a "narrow" exemption, *ibid.*, and that it precludes review of agency action "if the statute is

drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830. But the Court took issue with the D.C. Circuit's interpretation of *Overton Park*: "*Overton Park* did not involve an agency's refusal to take requested enforcement action. It involved an affirmative act of approval under a statute that set clear guidelines for determining when such approval should be given." *Id.* at 831. After discussing several relevant factors why nonenforcement decisions are inapt for judicial review, *id.* at 831-832, the Court concluded that Section 701(a)(2) encompasses and excludes judicial review of "agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise." *Id.* at 838.

In reaching that conclusion, however, the Court in a footnote expressly disclaimed any opinion as to the reviewability of an agency's decision *not* to act because of the agency's belief that it lacked jurisdiction to act. *Id.* at 833 n.4 ("We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction," and expressing no opinion as to "whether such decisions would be unreviewable under § 701(a)(2)").

Following *Chaney*, both the Ninth and D.C. Circuits concluded that judicial review was appropriate in the situation that the Court reserved in *Chaney*'s footnote. In *Montana Air Chapter No. 29* v. *Federal Labor Relations Authority*, 898 F.2d 753 (9th Cir. 1990), a union representing civilian technicians employed by the Montana Air National Guard sued to challenge a decision of the Federal Labor Relations Authority's General Counsel not to issue an unfair labor practice complaint. *Id.* at 755. The district court granted FLRA summary judgment on the basis that the court lacked jurisdiction to review the agency's decision. *Id.* at 756.

The Ninth Circuit reversed, citing to *Chaney*'s footnote and concluding that *Chaney*'s presumption of nonreviewability "may be overcome if the refusal is based solely on the erroneous belief that the agency lacks jurisdiction." *Id.* at 754-756 (citing *Chaney*, 470 U.S. at 833 n.4). The court noted that had the FLRA's General Counsel indicated a discretionary refusal to act, the court "would be compelled to deny review." *Id.* at 757. But the General Counsel's communications "strongly indicate[d] a belief that the General Counsel lacked jurisdiction" to consider the alleged unfair labor practice. *Ibid.* That question of statutory interpretation was subject to review. *Id.* at 762-763 (agreeing that the decision not to issue an unfair labor practice complaint was presumptively unreviewable, but the mistaken basis for that decision—a lack of jurisdiction to act—was subject to review).

The Ninth Circuit noted support from the D.C. Circuit for this conclusion. *Id.* at 756. ("[T]he D.C. Circuit has recognized two exceptions to the general rule of unreviewability of agency nonenforcement decisions: 1) agency nonenforcement decisions are reviewable when they are based on a belief that the agency lacks jurisdiction; and 2) an agency's statutory interpretations made in the course of nonenforcement decisions are reviewable.") (internal citations omitted).[38]

Relatedly, this Court in *City of Arlington* v. *FCC*, 569 U.S. 290 (2013), has explained that the question of agency jurisdiction to act is inseparable from the question of agency authority to act. *City of Arlington* involved whether an agency's determination of its own jurisdiction is entitled to *Chevron* deference. The Court concluded

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[38] The D.C. district court below noted some inconsistency in the D.C. Circuit rulings on the issue of *Chaney*'s applicability to agency decisions based on presumed lack of jurisdiction. See 18-588 Pet. App. 28a (D.D.C.).

that "[t]he reality, laid bare, is that there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has." *Id.* at 299. As the Ninth Circuit below elucidated, "*City of Arlington* teaches that there is no difference between an agency that lacks jurisdiction to take a certain action, and one that is barred by the substantive law from doing the same; the question 'is always, simply, whether the agency has stayed within the bounds of its statutory authority.'" 18-587 Gov't Supp. Br. App. 29a (9th Cir.) (citing *City of Arlington*, 569 U.S. at 297).

A cogent analytical structure emerges from these decisions. Under *Chaney,* an agency's refusal to enforce the substantive law is presumptively unreviewable because that discretionary nonenforcement function is "committed to agency discretion" within the meaning of the APA. 470 U.S. at 828-830. But a nonenforcement decision should be reviewable notwithstanding *Chaney* if the agency based its decision on its belief that it lacked jurisdiction to act—the issue the Court expressly reserved in *Chaney*. See *id.* at 833 n.4. Thus, an agency's nonenforcement decision is outside the scope of the *Chaney* presumption—and is therefore presumptively reviewable—if it is based on a belief that the agency lacked the lawful authority to do otherwise. That is, where the agency's decision is based not on an exercise of discretion, but instead on a belief that any alternative choice was foreclosed by law, the APA's "committed to agency discretion" bar to reviewability, 5 U.S.C. § 701(a)(2), does not apply.

B. The DACA termination decision is reviewable.

Petitioners contend that DHS's decision to terminate the DACA program "is a quintessential exercise of enforcement discretion" that is exempted from judicial

review under Section 701(a)(2). 18-587 Gov't Br. 17. Under the analytical framework described above, petitioners are incorrect.

1. Chaney*'s presumption does not extend to programmatic rescissions such as occurred here.*

Petitioners substantially rely on *Chaney* as being dispositive of the reviewability question here. 18-587 Gov't Br. 17-26. By its terms, however, *Chaney* involved and applies to agency decisions "not to take enforcement action." 470 U.S. at 832. It strains logic to describe the rescission of an entire policy as an agency decision not to undertake an individual enforcement action. To the contrary, programmatic rescission is fundamentally different than one-off agency enforcement decisions.

Several circuits agree, appropriately distinguishing between individualized nonenforcement decisions, which are unreviewable under *Chaney*, and agency adoptions of general enforcement policies, which *are* subject to judicial review. See *OSG Bulk Ships, Inc.* v. *United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (citing *Crowley Caribbean Transp., Inc.* v. *Pena*, 37 F.3d 671, 674-675 (D.C. Cir. 1994)); see also *Kenney* v. *Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Nat'l Treasury Emps. Union* v. *Horner*, 854 F.2d 490, 496-497 (D.C. Cir. 1988). Two of the district courts below noted this substantial distinction in rejecting the applicability of *Chaney*'s presumption to DACA's rescission. 18-589 Pet. App. 28a-31a (E.D.N.Y) ("The decision to rescind DACA is unlike the nonenforcement decision at issue in *Chaney*."); 18-587 Gov't Pet. App. 26a-30a (N.D. Cal.) (noting that the DACA termination "is different from *Chaney*[, in which] the agency simply refused to initiate an enforcement proceeding"). The D.C. Circuit has noted that broad policy changes "are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of

fact, policy, and law that drive an individual enforcement decision." *Crowley*, 37 F.3d at 677.

The Court in *Chaney* noted several policy considerations supporting its conclusion about the nonreviewability of nonenforcement decisions, including that such decisions require balancing factors peculiarly within the agency's expertise, and that such decisions are akin to the exercise of prosecutorial discretion that is typically the province of the Executive Branch. *Chaney*, 470 U.S. at 831-832. Such considerations may apply to individual nonenforcement decisions; they do not apply to a broad policy change affecting hundreds of thousands of DACA enrollees. The Court noted in *Chaney* that in making a nonenforcement decision, an agency "does not exercise its *coercive* power over an individual's liberty" and thus "does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. That rationale *supports* reviewability here, given that the DACA rescission amounts to the rescission of a nonenforcement commitment made to DACA holders. See 18-587 Gov't Pet. App. 29(a) (N.D. Cal.) ("In contrast to nonenforcement decisions, 'rescissions of commitments, whether or not they technically implicate liberty and property interests as defined under the fifth and fourteenth amendments, exert much more direct influence on the individuals or entities to whom the repudiated commitments were made.'" (quoting *Robbins* v. *Reagan*, 780 F.2d 37, 47 (D.C. Cir. 1985))).

Because the decision to rescind DACA dramatically extends beyond individualized nonenforcement decisions, *Chaney*'s presumption of nonreviewability simply does not apply.

2. Agency decisions not to act based on supposed lack of legal authority are subject to judicial review.

In any event, as the record demonstrates and the

Ninth Circuit below thoroughly explained, DHS did not base its DACA rescission decision on the type of policy rationales the Court discussed in *Chaney*, but did so rather on the forthright and solitary position that the DACA program was unlawful. 18-587 Gov't Supp. Br. App. 34a-42a (9th Cir.) (noting that Attorney General Sessions advised the DHS Acting Secretary to rescind the program because "DACA was effectuated . . . without proper statutory authority," and that DACA "was an unconstitutional exercise of authority by the Executive Branch"); 18-587 Pet. App. 30a (N.D. Cal.) ("The main, if not exclusive, rationale for ending DACA was its supposed illegality.").

That reason for agency decisionmaking—when an agency bases its decision not on an exercise of discretion but rather on its belief that the law forecloses any other alternative—is plainly analogous to the type of situation that the Court explicitly left undecided in *Chaney*. 470 U.S. at 833 n.4 (noting that "[w]e do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction," and expressing no opinion as to "whether such decisions would be unreviewable under § 701(a)(2)"). Each of the courts below rejected the *Chaney* presumption of nonreviewability in such circumstances. 18-587 Gov't Supp. Br. App. 23a-45a (9th Cir.); 18-587 Pet. App. 26a-33a (N.D. Cal.); 18-589 Pet. App. 24a-39a (E.D.N.Y); 18-588 Pet. App. 19a-21a, 25a-43a (D.D.C.); *Casa de Md.*, 284 F. Supp. at 769-770; cf. *Texas* v. *United States*, 809 F.3d at 163-170. As one of the district courts below stated, "an official cannot claim that the law ties her hands while at the same time denying the courts' power to unbind her. She may escape political accountability or judicial review, but not both." 18-588 Pet. App. 73a (D.D.C.).

That outcome is in line with Ninth Circuit and D.C. Circuit precedent holding that agency inaction caused by an agency's determination that it lacks jurisdiction to act

is appropriately reviewable by the courts. *Montana Air*, 898 F.2d at 754 (concluding that *Chaney*'s presumption of nonreviewability "may be overcome if the refusal is based solely upon the erroneous belief that the agency lacks jurisdiction"); *Int'l Longshoremen's Ass'n, AFL-CIO* v. *Nat'l Mediation Bd.*, 785 F.2d 1098, 1100 (D.C. Cir. 1986) (noting that federal courts are empowered to review National Mediation Board decisions disclaiming jurisdiction).

And subjecting such a decision to judicial review accords with this Court's guidance in *Chaney*. Section 701(a)(2) excludes from review only decisions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). DHS's decision to terminate DACA, however, was fundamentally based upon its determination that the program was unlawful, and that the agency *had no discretion but to act as it did*. Such a conclusion—that an agency *lacks* any discretion to act—is a legal interpretation that is subject to "judicially manageable standards" of review. *Chaney*, 470 U.S. at 830. Judicial review in such circumstances does not tread on the agency's discretion; rather, judicial review appropriately determines whether an agency has correctly interpreted the scope of its own legal authority. That is well within the courts' wheelhouse. 18-587 Pet. App. 30a (N.D. Cal.) (rejecting the presumption of nonreviewability when an agency bases its decision on lack of legal authority to act, because "determining illegality is a quintessential role of the courts").

The Court's decision in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987) (*BLE*) does not lead to a different conclusion. *BLE* concerned the reviewability of the Interstate Commerce Commission's denial of a motion to reopen proceedings on grounds of material error. *Id.* at 280. The Court concluded such agency action was presumptively unreviewable based upon "a similar tradition of nonreviewability" to nonenforcement decisions as arose in *Chaney*. *Id.* at 282. The Court thus

rejected the proposition that "if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Id.* at 283.

BLE has no applicability here. In *Chaney*, the Court left open the question of reviewability of agency decisions not to act when the agency based that decision on a lack of legal authority to act. *Chaney*, 470 U.S. at 833 n.4. For the reasons described above, such decisions are appropriately subject to judicial review. Accordingly, *BLE*'s guidance regarding an unreviewable decision is irrelevant here.

3. Actions committed to agency discretion remain subject to constitutionality review.

"It is well-established that 'even where agency action is "committed to agency discretion by law," review is still available to determine if the Constitution has been violated.'" 18-589 Pet. App. 31a (E.D.N.Y) (citing cases). In *Webster* v. *Doe*, 486 U.S. 592 (1988), this Court held that Section 701(a)(2) did not preclude judicial review of constitutional claims by a former CIA employee. 486 U.S. at 603-604 (rejecting the Government's arguments that constitutional claims were unreviewable under Section 701(a)(2) because the National Security Act vested the CIA director with termination decisions, because the Act did not expressly preclude review of such claims). The same result is merited here.

CONCLUSION

The judgments of the Ninth Circuit and the District Court for the District of Columbia, as well as the orders of the Eastern District of New York, should be affirmed as to their respective determinations that the termination of the DACA program is subject to judicial review under the APA.

Respectfully submitted.

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