No. 20-001

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HOMELAND SECURITY,

Petitioner,

v.

JOANNA DIAZ, ET AL.,

Respondents.

The petition for a writ of certiorari is granted. The parties are directed to brief the following questions:

(1) Whether the United States Department of Homeland Security decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program is arbitrary and capricious under the Administrative Procedure Act because it rests on the incorrect legal premise that DACA is unlawful.

(2) Whether the decision to rescind the Deferred Action for Childhood Arrivals, after undocumented immigrants registered with the federal government, is a violation of the Equal Protection Clause.

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

DOCKET NO. 20-001

DEPARTMENT OF HOMELAND SECURITY,

Defendant-Appellant,

v.

JOANNA DIAZ, ET AL.,

Plaintiff-Appellees,

Before: CHIEF JUDGE ROGERS, JUDGE STARK, and JUDGE WILSON

OPINION

Opinion by CHIEF JUDGE ROGERS, joined by WILSON, J. Dissenting opinion filed by Stark, J.

This litigation concerns the United States Department of Homeland Security's ("DHS") September 5, 2017 decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program. In April 2018, the district court found that decision to be unlawful and set it aside. The court first concluded that DACA was a lawful exercise of prosecutorial discretion under the Immigration and Nationality Act

("INA"). The court determined that the decision to rescind had to be set aside because it was based on an incorrect legal premise. The court additionally concluded that the decision to rescind DACA violated the Equal Protection Clause. Because we agree with the district court, we **AFFIRM**.

BACKGROUND

It is not hyperbole to say that Joanna Diaz embodies the American dream. Born into poverty, Joanna and her parents shared a house with other families to save money on rent, and was homeless for a time as a child. Joanna studied hard and excelled academically in high school. Her family could not afford to send her to the top university where she had been accepted. She was not deterred and enrolled in a local community college and ultimately put herself through a four-year university program where she excelled academically. She did this while working full-time as a legal assistant. She was awarded a scholarship that, together with her mother's life savings, enabled her to fulfill her longstanding dream of attending and graduating from law school. Today, Joanna maintains a thriving legal practice in San Francisco, where she represents members of underserved communities in civil, criminal, and immigration proceedings.

Joanna appears no different from any other productive and inspiring young American. But she stands apart. When Joanna was four years old, her parents

brought her to the United States in violation of United States immigration laws. To this day the United States of America is the only home she has ever known, and Joanna remains an undocumented immigrant.

In 2012, the Secretary of Homeland Security announced a policy that would provide valid immigrant status to individuals like Joanna. Known as Deferred Action for Childhood Arrivals ("DACA"), the program allows individuals that were brought to the United States as children, that have clean criminal records, and that meet various educational or military service requirements eligible to apply for two-year renewable periods of deferred action; a revocable decision by the government not to deport an otherwise removable person from the United States. DACA recipients are eligible to apply for authorization to work, pay taxes and operate in the above-ground economy. Joanna, along with hundreds of thousands of other young people, jumped at the opportunities extended under the DACA program, and throughout the succeeding years invested her time and resources under the security of the DACA promise.

In 2017, the newly elected administration announced a move to end the DACA program. The Acting Secretary of Homeland Security, upon the legal advice of the Attorney General, declared that DACA was illegal from its inception and must be rescinded. Joanna, along with other DACA recipients and affected states, municipalities, and organizations filed suit in federal district court that challenged

the decision to rescind. The district court concluded that the government's decision was unlawful and vacated the administration's decision to rescind DACA.

A. History of Deferred Action

The central benefit available under DACA is deferred immigration action. Deferred action means that deportation action and other adverse proceedings against an individual or class of individuals otherwise subject to removal is deferred for a period of time. *See* 6 Charles Gordon et al., Immigration Law & Procedure § 72.03[2][h] (2018) ("To ameliorate a harsh and unjust outcome, the immigration agency may decline to institute proceedings, may terminate proceedings, or may decline to execute a final order of deportation. This commendable exercise in administrative discretion . . . is now designated as deferred action."); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1119 n.3 (9th Cir. 2001) ("Deferred action refers to an exercise of administrative discretion by the [immigration agency] under which [it] takes no action to proceed against an apparently deportable alien based on a prescribed set of factors generally related to humanitarian grounds.") (internal quotation marks omitted).

Unlike most other forms of relief from deportation, deferred action is not expressly grounded in statute. It arises instead from the Executive's inherent authority to allocate resources and prioritize cases. *Cf.* 6 U.S.C. § 202(5) (charging the Secretary of Homeland Security with "[e]stablishing national immigration

enforcement policies and priorities"). As such, recipients of deferred action "enjoy no formal immigration status." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 964 (9th Cir. 2017) (*Brewer II*). But despite its non-statutory origins, Congress has historically recognized the existence of deferred action in amendments to the Immigration and Nationality Act (INA), as well as other statutory enactments. *See* 8 U.S.C. § 1227(d)(2) ("The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for . . . deferred action[.]"); REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2), 119 Stat. 231, 313 (2005) (listing proof of "approved deferred action status" as sufficient "evidence of lawful status" for the issuance of a driver's license). The Supreme Court also has recognized deferred action by name, describing the Executive's "regular practice (which ha[s] come to be known as 'deferred action') of exercising discretion for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999) (*AADC*). Thus, "it is well settled that the Secretary [of Homeland Security] can exercise deferred action." *Brewer II*, 855 F.3d at 967.

Official records of administrative discretion in immigration enforcement date back to the turn of the twentieth century, after the enactment of the nation's first general immigration statute in 1882. *See* Act of Aug. 3, 1882, ch. 376, 22 Stat. 214. A 1909 Department of Justice circular, regarding statutorily authorized

denaturalization, instructed that "as a general rule, good cause is not shown for the institution of proceedings . . . unless some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country." U.S. Dep't of Justice, Circular Letter No. 107 (Sept. 20, 1909) (quoted in Memorandum from Sam Bernsen, Gen. Counsel, INS, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* at 4 (July 15, 1976) (Bernsen Memorandum)).

The government's exercise of deferred action first came to light in the 1970s, as a result of Freedom of Information Act litigation over the government's efforts to deport John Lennon and Yoko Ono, apparently based on Lennon's British conviction for marijuana possession. *See generally* Shoba Sivaprasad Wadhia, Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases 2-27 (2015). Then known as "nonpriority status," the practice had been observed in secret within the former Immigration and Naturalization Service (INS) since at least the 1950s, but INS officials had publicly denied its existence. *See* Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 San Diego L. Rev. 42, 52-53 (1976). After the Lennon case revealed the practice, INS issued its first public guidance on the use of deferred action, stating that "[i]n every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for

nonpriority." Immigration and Naturalization Service, Operations Instructions § 103.1(a)(1)(ii) (1975). Although the 1975 guidance was rescinded in 1997, DHS officials continue to apply the same humanitarian factors in deciding whether to grant an individual deferred action. *See also AADC*, 525 U.S. at 484 n.8.

In addition to case-by-case adjudications, the Executive Branch has frequently applied deferred action and related forms of discretionary relief programmatically to entire classes of otherwise removable noncitizens. Indeed, the Congressional Research Service has compiled a list of twenty-one such "administrative directives on blanket or categorical deferrals of deportation" issued between 1976 and 2011. Andorra Bruno et al., Cong. Research Serv., *Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 20-23 (July 13, 2012); *see also id.* at 9 ("the executive branch has provided blanket or categorical deferrals of deportation numerous times over the years.").

For example, in 1956 President Eisenhower extended immigration parole to over thirty thousand Hungarian refugees who were otherwise unable to immigrate to the United States because of restrictive quotas then in existence. *See White House Statement on the Termination of the Emergency Program for Hungarian Refugees* (Dec. 28, 1957). The power to parole (to allow a noncitizen physically to enter the country while treating that person as "at the border" for purposes of immigration

law) is established by statute. However, the version of the INA in existence when President Eisenhower acted did not explicitly authorize programmatic exercises of the parole power. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188. Subsequent presidents made use of similar categorical parole initiatives.

Another salient example is the Family Fairness program, established by the Reagan Administration and expanded under President George H.W. Bush. The Immigration Reform and Control Act of 1986 (IRCA) had provided a pathway to legal status for hundreds of thousands of undocumented noncitizens, but did not make any provision for their close relatives unless those individuals separately qualified under the Act's criteria. President Reagan's INS Commissioner interpreted IRCA not to authorize immigration benefits for anyone outside the statutory criteria, but nevertheless exercised executive discretion to defer the deportation of minor children of noncitizens legalized under the statute. Alan C. Nelson, Comm'r, INS, *Legalization & Family Fairness: An Analysis* (Oct. 21, 1987). Additionally, in 1990, the INS instituted "significant liberalizations" of the policy by granting one-year periods of extended voluntary departure to children and spouses of individuals legalized under IRCA who could establish admissibility, continuous residency, and a clean criminal record. *INS Reverses Family Fairness Policy*, 67 No. 6 Interpreter Releases 153 (Feb. 5, 1990). Contemporary estimates by INS officials of the number

of people potentially eligible ranged as high as 1.5 million. *See* Immigration Act of 1989 (Part 2): Hearings Before the Subcomm. on Immigration, Refugees & Int'l Law of the H. Comm. on the Judiciary, 101st Cong. 49, 56 (1990) (testimony of Gene McNary, Comm'r, INS). Extended voluntary departure, the mechanism through which these individuals were allowed to remain in the United States is like deferred action, a creature of executive discretion not specifically authorized by statute. *See Hotel & Rest. Emps. Union, Local 25 v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (en banc) (opinion of Mikva, J.).

Since then, the immigration agency has instituted categorical deferred action programs for self-petitioners under the Violence Against Women Act; applicants for T and U visas (issued to victims of human trafficking and of certain crimes, respectively); foreign students unable to fulfill their visa requirements after Hurricane Katrina; and widowed spouses of United States citizens who had been married less than two years. None of these deferred action programs were expressly authorized by statute at the time they were initiated.

B. The DACA Program

On June 15, 2012, DACA was announced in a memorandum from Secretary of Homeland Security Janet Napolitano, entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." *See* Janet Napolitano, Former Secretary of Homeland Security, Memorandum adopting DACA, June

15, 2012 ("Napolitano Memo"). Secretary Napolitano explained that the nation's immigration laws "are not designed . . . to remove productive young people to countries where they may not have lived or even speak the language," especially where "many of these young people have already contributed to our country in significant ways," and because they were brought here as children, "lacked the intent to violate the law." *Id.* at 2-3. She therefore determined that "[p]rosecutorial discretion, which is used in so many other areas, is especially justified here." *Id.* at 3.

The Napolitano memorandum thus laid out the basic criteria of the DACA program under which a noncitizen will be considered for a grant of deferred action if he or she:

> 1. came to the United States under the age of sixteen;
> 2. has continuously resided in the United States for at least five years preceding [June 15, 2012] and is present in the United States on [June 15, 2012];
> 3. is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
> 4. has not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, nor otherwise poses a threat to national security or public safety; and
> 5. is not above the age of thirty [on June 15, 2012].

Id. at 2. If approved into the DACA program, an applicant is granted a renewable two-year term of deferred action ("a form of prosecutorial discretion whereby the Department of Homeland Security declines to pursue the removal of a person unlawfully present in the United States.") *Brewer II*, 855 F.3d at 967. In addition to the deferral of removal

itself, pre-existing DHS regulations allow all deferred-action recipients to apply for employment authorization, enabling them to work legally and pay taxes. 8 U.S.C. § 1324a(h)(3) (empowering the Executive Branch to authorize the employment of noncitizens); 8 C.F.R. § 274a.12(c)(14) (providing that "[a]n alien who has been granted deferred action" is eligible for work authorization upon a showing of "economic necessity for employment"). Indeed, "DACA recipients are required to apply for employment authorization, in keeping with the Executive's intention that DACA recipients remain 'productive' members of society." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014) (*Brewer I*). Finally, DHS does not consider deferred action recipients, including those benefitting from DACA, to accrue "unlawful presence" for purposes of the INA's re-entry bars. 8 U.S.C. § 1182(a)(9)(B)(ii); s*ee Brewer I*, 757 F.3d at 1059.

In 2014, in an attempt to build on the success of the DACA program, Secretary of Homeland Security Jeh Johnson issued a separate memorandum that announced the related Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"), which allowed deferred action for certain noncitizen parents of American citizens and lawful permanent residents. *See* Jeh Charles Johnson, Former Secretary of Homeland Security, *Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the*

Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014). Twenty-six states challenged this extension in federal court, arguing that DAPA is unconstitutional. All of the policies outlined in the Johnson memorandum were enjoined nationwide in a district court order upheld by the Fifth Circuit and affirmed by an equally divided Supreme Court. *See United States v. Texas*, 136 S. Ct. 2271(2016); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015); *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015); *see also Neil v. Biggers*, 409 U.S. 188, 192 (1972) (affirmance by an equally divided court has no precedential value). The original DACA program remained in effect.

C. The Rescission

During his campaign, President Donald J. Trump made negative statements about undocumented immigrants. For example, on June 16, 2015, when he announced his candidacy, he characterized Mexicans as criminals, rapists, and "people that have lots of problems." Three days later, President Trump tweeted that "[d]ruggies, drug dealers, rapists and killers are coming across the southern border," and asked, "When will the U.S. get smart and stop this travesty?" During the first Republican presidential debate, President Trump claimed that the Mexican government "send[s] the bad ones over because they don't want to pay for them." Additionally, in August 2017, he referred to undocumented immigrants as "animals"

who are responsible for "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, MS-13."

In 2017, President Trump took office, bringing with him a change in immigration policy. On February 20, 2017, acting Secretary of Homeland Security John Kelly issued a memorandum that set out the administration's new enforcement priorities, stating that "the Department no longer will exempt classes or categories of removable aliens from potential enforcement." Memorandum from Secretary John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest*, at 3 (Feb. 20, 2017) (Kelly Memo I). However, the memorandum explicitly left DACA and DAPA in place. In a second memorandum issued June 15, 2017, after "consider[ing] a number of factors, including the preliminary injunction in the [Texas] matter, the ongoing litigation, the fact that DAPA never took effect, and our new immigration enforcement priorities," Secretary Kelly rescinded DAPA as an "exercise of [his] discretion." *See* Memorandum from Secretary John Kelly, *Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents*, at 4 (June 15, 2017) (Kelly Memo II).

On September 4, 2017, Attorney General Jefferson Sessions sent a letter to Acting Secretary of Homeland Security Elaine Duke. *See* Jefferson B. Sessions II, Former Attorney General Sessions, Letter to Elaine C. Duke, Former Acting

Secretary of Homeland Security, re: *Rescission of DACA* (Sept. 4, 2017) (Sessions Letter). The Attorney General's letter "advise[d] that the Department of Homeland Security . . . should rescind" the DACA memorandum based on his legal opinion that the Department lacked statutory authority to have created DACA in the first place. *Id.* at 1. He wrote:

> DACA was effectuated by the previous administration through executive action, without proper statutory authority and with no established end date, after Congress'[s] repeated rejection of proposed legislation that would have accomplished a similar result. Such an open ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch.

Id. The Attorney General further opined that "[b]ecause the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA." *Id.* at 1-2.

The very next day, following the Attorney General's directive, acting Secretary Duke issued a memorandum rescinding DACA. The memorandum begins with a "Background" section that covers DACA, DAPA, the *Texas* litigation, Secretary Kelly's previous memoranda, and the Attorney General's letter. *See* Elaine C. Duke, Former Acting Secretary of Homeland Security, Memorandum of Rescinding DACA, at 2 (Sept. 5, 2017) (Duke Memo). Then, in the section titled "Rescission of the June 15, 2012 DACA Memorandum," the Duke memorandum states:

> Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated. In the exercise of my authority in establishing national immigration policies and priorities, except for the purposes explicitly identified below, I hereby rescind the June 15, 2012 memorandum.

Id. at 7. As of September 4, 2017, the day before the rescission, approximately 689,800 individuals were enrolled in DACA.

When the rescission was announced, the President then publicly supported DACA recipients. For example, he tweeted, "Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really!" and that "they have been in our country for many years through no fault of their own – brought in by parents at young age."

In late June, Secretary of Homeland Security Kirstjen M. Nielsen issued a memorandum. *See* Kirstjen Nielsen, Former Secretary of Homeland Security, Supplemental Letter, at 1 (June 22, 2018) (the "Nielsen Memo"). Secretary Nielson "declin[ed] to disturb" the earlier decision to rescind the program by then acting Secretary of Homeland Security Duke. *Id.* at 2. Secretary Nielsen went on to offer several reasons why "the decision to rescind the DACA policy was, and remains, sound." *Id.*

D. Procedural History

The rescission of DACA instantly sparked litigation across the country, including the cases on appeal here. Suits were filed by a group of individual DACA

recipients, among other parties, led by Joanna Diaz. The Plaintiffs' primary claim is that the rescission was arbitrary and capricious under the Administrative Procedure Act ("APA") because the decision to end DACA was based on an incorrect legal premise that DACA itself was unlawful. Even if DACA is unlawful, Plaintiffs insisted that the rescission cannot stand because it violates the Equal Protection Clause.

The district court agreed with Plaintiffs. First, the district court, having determined that DACA was lawful, set aside the rescission under the APA. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (*Chenery I*) ("[A]n order may not stand if the agency misconceives the law."). Second, the district held that the even if DACA was unlawful, the rescission violated the Equal Protection Clause. The government now appeals those holdings.[1]

DISCUSSION

A. The Rescission Is Based On An Incorrect Legal Premise.

Because the Department of Homeland Security's rescission of DACA was premised on the belief that the DACA program was unlawful, we turn first to the question of whether that legal conclusion was correct. If it is not, the APA requires that we set the rescission aside. We find that it is not.

[1] Our newly created Fourteenth Circuit has yet to address these issues squarely, so we rely upon precedent from the Ninth Circuit, from which the Fourteenth Circuit was recently split.

Attorney General Sessions' September 4, 2017 letter expresses several possible bases for the agency's ultimate conclusion that DACA was unlawful. First, the Attorney General states that "DACA was effectuated by the previous administration through executive action . . . after Congress'[s] repeated rejection of proposed legislation that would have accomplished a similar result." Sessions Letter at 1. But Congress' failure to pass the Development, Relief, and Education for Alien Minors Act ("DREAM") "does not signal the illegitimacy of the DACA program," partly because "the DREAM Act and the DACA program are not interchangeable policies because they provide different forms of relief" (the DREAM Act would have provided a path to lawful permanent resident status, while DACA simply defers removal). *Brewer II*, 855 F.3d at 976 n.10; *see also, e.g.*, DREAM Act of 2011, S. 952, 112th Cong. (2011). Moreover, there is nothing inherently problematic about an agency addressing a problem for which Congress has been unable to pass a legislative fix, so long as the particular action taken is properly within the agency's power. Therefore, this argument provides no independent reason to think that DACA is unlawful.

Next, the Attorney General concluded that the DACA program was "effectuated . . . without proper statutory authority" and that it amounted to "an unconstitutional exercise of authority." Sessions Letter at 1. More specifically, the Attorney General asserted that "the DACA policy has the same legal and

constitutional defects that the courts recognized as to DAPA" in the Texas litigation. *Id.* at 1-2.

The claim of "constitutional defects" is a puzzling one because no court has ever held that DAPA is unconstitutional. The Fifth Circuit and district court in *Texas* explicitly declined to address the constitutional issue. *See Texas*, 809 F.3d at 154 ("We decide this appeal . . . without resolving the constitutional claim."); *Texas*, 86 F. Supp. 3d at 677 ("[T]he Court is specifically not addressing Plaintiffs' likelihood of success on . . . their constitutional claims."). We therefore do not address it further.

With respect to DACA's alleged "legal . . . defects," the district court explained in great detail the long history of deferred action in immigration enforcement, including in the form of broad programs; the fact that the Supreme Court and Congress have both acknowledged deferred action as a feature of the immigration system; and the specific statutory responsibility of the Secretary of Homeland Security for "[e]stablishing national immigration enforcement policies and priorities," 6 U.S.C. § 202(5). The government does not contest any of these propositions, which themselves go a long way toward establishing DACA's legality. Instead, the government argues that the Fifth Circuit's reasons for striking down the related DAPA policy would also apply to DACA.

As to the substantive holding in *Texas*, the Fifth Circuit concluded that DAPA conflicted with the INA largely for a reason that is inapplicable to DACA. Specifically, the Fifth Circuit reasoned that the INA provides "an intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status" but that "DAPA would allow illegal aliens to receive the benefits of lawful presence solely on account of their children's immigration status without complying with any of the requirements . . . that Congress has deliberately imposed." *Texas*, 809 F.3d at 179-80. As the district court noted, there is no analogous provision in the INA defining how immigration status may be derived by undocumented persons who arrived in the United States as children. Therefore, one of the major problems the Fifth Circuit identified with DAPA is not present.

The second major element of the Fifth Circuit's analysis on the substantive issues was that the INA itself "prescribes . . . which classes of aliens can achieve deferred action and eligibility for work authorization." *Texas*, 809 F.3d at 186. The court drew the implication that the statute must therefore preclude the Executive Branch from granting these benefits to other classes. *Id.* (pairing this notion with the "pathway to lawful presence" argument as the keys to its conclusion).

But "[t]he force of any negative implication . . . depends on context." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013). Indeed, "[w]e do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress

considered the unnamed possibility and meant to say no to it." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Here, the express grants of deferred action cited by the Fifth Circuit were not passed together as part of the original INA; rather, they were added to the statute books piecemeal over time by Congress. *See* Violence Against Women Act of 2000, Pub. L. No. 106-386, div. B, sec. 1503, § 1154(a)(1)(D)(i), 114 Stat. 1491 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)) (specifying deferred action for certain VAWA self-petitioners); USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (same, for family members of lawful permanent residents killed by terrorism); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694–95 (same, for relatives of noncitizens killed in combat and posthumously granted citizenship).

Given this context, we find it improbable that Congress "considered the . . . possibility" of all other potential uses for deferred action "and meant to say no" to any other application of that tool by the immigration agency. *Barnhart*, 537 U.S. at 168. We think the much more reasonable conclusion is that in passing its seriatim pieces of legislation, instructing that this and that "narrow class" of noncitizens should be eligible for deferred action, *Texas*, 809 F.3d at 179, Congress meant to say nothing at all about the underlying power of the Executive Branch to grant the same

remedy to others. We do not read an "and no one else" clause into each of Congress' individual express grants of deferred action.

Another element in the Fifth Circuit's analysis was that "DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits, and 'we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.'" *Id.* at 181 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). DACA, on the other hand, had 689,800 enrollees as of September 2017. The government asserts that this difference in size is "legally immaterial," but that response is unconvincing. If the point is that the "economic and political magnitude" of allowing 4.3 million people to remain in the country and obtain work authorization is such that Congress would have spoken to it directly, then surely it makes a difference that one policy has less than one-sixth the "magnitude" of the other. *Id.* As the district court laconically put it, "there is a difference between 4.3 million and 689,800."

The executive agencies charged with immigration enforcement do not have the resources required to deport every single person present in this country without authorization. *Compare* Bernsen Memorandum, *supra* p. 7 (stating, in 1976, that "[t]here simply are not enough resources to enforce all of the rules and regulations

presently on the books"), *with* Memorandum from John Morton, Assistant Secretary, DHS, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, at 1 (June 30, 2010) (estimating that ICE has enough resources to deport only 4% of the undocumented population in any given year, and concluding that "ICE must prioritize the use of its . . . removal resources to ensure the removals the agency does conduct promote the agency's highest enforcement priorities"). Recognizing this state of affairs, Congress has explicitly charged the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). It is therefore no surprise that deferred action has been a feature of our immigration system, albeit one of executive invention, for decades; has been employed categorically on numerous occasions; and has been recognized as a practical reality by both Congress and the courts. *See, e.g.*, *Brewer II*, 855 F.3d at 967 ("[I]t is well settled that the Secretary [of Homeland Security] can exercise deferred action" as part of her statutory authority "to administer and enforce all laws relating to immigration and naturalization."). In a world where the government can remove only a small percentage of the undocumented noncitizens present in this country in any year, deferred action programs like DACA enable DHS to devote much-needed resources to enforcement priorities such as threats to national security, rather than to blameless and economically productive young people with clean criminal records.

Separately, the Nielsen Memo provides almost no meaningful elaboration on the Duke Memo's assertion that DACA is unlawful. The Nielsen Memo relies primarily on the one-page Sessions Letter and on the Fifth Circuit's ruling in the DAPA litigation. *See* Nielsen Memo at 3. But as this Court has already said, the Sessions Letter's conclusory legal assertions are themselves inadequately explained, and the Fifth Circuit's analysis in the DAPA case is inapposite here given the meaningful distinctions between DAPA and DACA, which include DAPA's open-ended nature, broad scope, and apparent conflict with express provisions of the INA. *See supra* p. 16.

In response, Secretary Nielsen states that "[a]ny arguable distinctions between the DAPA and DACA policies are not sufficiently material to convince me that the DACA policy is lawful." Nielsen Memo at 3. But she does not explain why. Secretary Nielsen also asserts that the Fifth Circuit's DAPA ruling was based not on any particular statutory conflict, but rather on DAPA's "incompatibility . . . with the INA's comprehensive scheme." *Id.* But as Plaintiffs correctly point out, even if this were an accurate characterization of the Fifth Circuit's opinion, the Nielsen Memo offers no clue as to how an agency official, a court, or anyone else would go about determining whether a particular non-enforcement policy meets Secretary Nielsen's test for "compatibility" with the overall statutory scheme. Thus, the Nielsen Memo

offers nothing even remotely approaching a considered legal assessment that this Court could subject to judicial review.

We therefore conclude that DACA was a permissible exercise of executive discretion, notwithstanding the Fifth Circuit's conclusion that the related DAPA program exceeded DHS's statutory authority. DACA is being implemented in a manner that reflects discretionary, case-by-case review, and at least one of the Fifth Circuit's key rationales in striking down DAPA is inapplicable with respect to DACA. With respect for our sister circuit, we find the analysis that seemingly compelled the result in *Texas* entirely inapposite, and because the Acting Secretary was incorrect in her belief that DACA was illegal and had to be rescinded, the rescission must be set aside.

B. The Rescission Violates The Equal Protection Clause.

To state an equal-protection claim, plaintiffs must show that the rescission was motivated by a discriminatory purpose. *Arce v. Douglas*, 793 F.3d 968, 977 (2015) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977)). The Clause embodies the principle that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985). Determining whether discrimination is a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. A plaintiff need not show that the discriminatory purpose was the sole purpose of the challenged action, but

only that it was a "motivating factor." *Id.* In analyzing whether a facially neutral policy was motivated by a discriminatory purpose, courts must consider factors such as whether the policy creates a disparate impact, the historical background and sequence of events leading up to the decision, and any relevant legislative or administrative history. *Id.* at 266-68. It implies that the governmental decisionmakers took action "because of, not merely in spite of, [their] adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 279 (1979) (internal quotation marks omitted).

First, Plaintiffs clearly allege that the rescission had a disproportionate impact on Latinos and Mexican nationals. Indeed, such individuals account for 93 percent of DACA recipients.

Second, Plaintiffs allege that President Trump has, on multiple occasions since he announced his presidential campaign, expressed racial animus towards Latinos and Mexicans. During his campaign, President Trump characterized Mexicans as criminals, rapists, drug dealers, and killers. Indeed, he referred to undocumented immigrants as "animals" who are responsible for "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, MS-13." Circumstantial evidence of intent, including statements by a decisionmaker, may be considered in evaluating whether government action was motivated by a discriminatory purpose. *Arlington Heights*, 429 U.S. at 26-68. These statements were not about the

rescission (which came later) but they still have relevance to show racial animus against people south of our border.[2]

Third, a final consideration is the unusual history behind the rescission. DACA received reaffirmation by the agency as recently as three months before the rescission, only to be hurriedly cast aside on what seems to have been a contrived excuse (its purported illegality). This strange about-face, done at lightning speed, suggests that the normal care and consideration within the agency was bypassed. That President Trump has at other times shown support for DACA recipients cannot wipe the slate clean as a matter of law at the pleading stage. Although the dissent argues that these allegations fail to suggest that the Acting Secretary (as the purported decisionmaker) terminated DACA due to racial animus, Plaintiffs have alleged that it was President Trump himself who, in line with his campaign rhetoric, directed the decision to end the program.

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[2] Should campaign rhetoric be admissible to undermine later agency action by the victors? The Ninth Circuit recently confirmed that "evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims." *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017). *Washington* found that President Trump's statements regarding a "Muslim ban" raised "serious allegations and presented significant constitutional questions," although it ultimately reserved consideration of plaintiffs' equal protection claim. *Id.* at 1167-68. Citing to *Washington*, at least two district courts have since considered President Trump's campaign statements in finding a likelihood of success on Establishment Clause claims. *See, e.g.*, *Aziz v. Trump*, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017); *Hawai'i v. Trump*, 245 F. Supp. 3d 1227, 1236 (D. Haw. 2017). This opinion will follow these decisions and hold that, at least at the pleading stage, campaign rhetoric so closely tied to the challenged executive action is admissible to show racial animus.

Construed in the light most favorable to plaintiffs, as must be done at the pleading stage, these allegations raise a plausible inference that racial animus towards Mexicans and Latinos was a motivating factor in the decision to end DACA.

CONCLUSION

Although the Executive wields awesome power in the enforcement of our nation's immigration laws, it must exercise its power in a manner that is consistent with law. Because the Executive did not do so here, the district court's decision is AFFIRMED.

STARK, Circuit Judge, dissenting:

The district court erred in concluding that the Administration's decision to rescind DACA was arbitrary and capricious, and that the same decision violated the Equal Protection Clause. Because I cannot agree with the majority's decision to affirm, I dissent.

A. The Rescission Is Not Based On An Unlawful Premise.

Under the APA, an agency's decision must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of review under that standard is "narrow." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted). It requires only that the agency "examined 'the relevant data' and articulated 'a satisfactory explanation'" for its decision, "'including a rational connection between the facts found and the choice made.'" *Id.* (citation omitted). A court "may not substitute [its] judgment for that of the [agency]." *Id.* DHS's decision to rescind DACA here easily satisfies what the APA requires.

DACA is materially indistinguishable from DAPA. As our sister circuit held in *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015), DAPA is manifestly contrary to the INA, for four reasons: (1) "[i]n specific and detailed provisions, the INA [already] … confers eligibility for 'discretionary relief,'" including "narrow classes of aliens eligible for deferred action," *id.* at 179 (citation omitted); (2) the

INA's otherwise "broad grants of authority" could not reasonably be construed to assign to the Secretary the authority to create additional categories of aliens, *id.* at 183 (citation omitted); (3) DAPA and expanded DACA were inconsistent with historical "discretionary deferral" policies because they were not undertaken on a "country-specific basis . . . in response to war, civil unrest, or natural disasters," nor served as a "bridge from one legal status to another," *id.* at 184 (citation omitted); and (4) "Congress ha[d] repeatedly declined to enact the Development, Relief, and Education for Alien Minors Act ('DREAM Act'), features of which closely resemble DACA and DAPA," *id*. at 185 (footnote omitted).

The entirety of that reasoning applies equally to DACA. The original DACA policy, like its subsequent expansion and the related DAPA policy, grants deferred action to a vast category of aliens, not in response to any country specific emergency and despite repeated inaction by Congress. Indeed, the Southern District of Texas recently determined, "guided by [that] Fifth Circuit precedent," that the INA could not "reasonably be construed" to authorize the maintenance of DACA. *Texas v. United States*, 328 F. Supp. 3d 662, 715 (2018) (citation omitted). At a minimum, given these similarities, the agency acted reasonably in instituting an orderly wind down of the policy, rather than risking a court ordered shutdown, the terms and timing of which would be beyond the agency's control.

Even if DACA were distinguishable from DAPA, DACA remains unlawful because it is not grounded in any statutory authority and differs from the historical policies cited by the majority. The majority relies on the Secretary's general powers to "[e]stablish national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter," 8 U.S.C § 1103(a)(3). But neither the INA's general grants of authority in 6 U.S.C. § 202(5) and 8 U.S.C. § 1103(a)(3), nor references to deferred action throughout the U.S. Code, can be fairly interpreted as authorizing DHS to maintain a categorical deferred action policy of the nature and size of DACA.

In reaching a contrary conclusion, the majority does not dispute the magnitude of the policy or identify any specific statute on which DHS could rely. Rather, the majority rests on the vast disparity between the estimated number of aliens unlawfully within the United States and the resources available to DHS to enforce the immigration laws. *See supra* p. 22. But that disparity is no answer to the fact that DACA is unlike any past policies to forbear removal of a class of aliens.

The majority identified several prior class based deferred action policies that it deemed analogous to DACA. *See supra* p. 8-9. But DACA is not akin to these past policies. To begin, they all used deferred action to provide certain aliens

temporary relief while the aliens sought or awaited permanent status afforded by Congress (e.g., while the alien's bona fide visa application awaited approval or until a visa actually issued following approval).[3] They were also afforded to categories of aliens for whom Congress had expressed a special solicitude in the INA (e.g., victims of domestic violence or human trafficking). And, importantly, they were far more limited in scope, "affecting only a few thousand aliens for months or, at most, a few years." *Texas*, 809 F.3d at 184 n.197. For these reasons, they are categorically different from DACA.

The same goes for the "Family Fairness" policy, which the majority deemed a "salient" precedent. *See supra* p. 9. Under that policy, INS exercised its discretion, in certain circumstances, to grant so-called "extended voluntary departure" to the spouses and children of aliens who had been granted a pathway to legal status by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. The Office of Legal Counsel has explained that extended voluntary departure

[3] *See* Memorandum from Paul W. Virtue, Acting Exec. Assoc. Comm'r, INS., to Reg'l Dirs. et al., INS, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* (May 6, 1997) (domestic violence victims whose visa applications had been approved, but were not immediately available); Memorandum from Stuart Anderson, Exec. Assoc. Comm'r, INS, to Johnny N. Williams, Exec. Assoc. Comm'r, INS, *Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* (May 8, 2002) (possible victims of human trafficking with bona fide pending visa applications); Press Release, USCIS, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* (Nov. 25, 2005) (aliens on nonimmigrant student visas temporarily displaced from their full course of study by Hurricane Katrina); Memorandum from Donald Neufeld, Acting Assoc. Dir., Office of Domestic Operations, USCIS, to Field Leadership, USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children* (Sept. 4, 2009) (widows and widowers of U.S. citizens previously eligible for visas, pending a statutory fix).

was "derived from the voluntary departure statute," which, at the time, "permitted the Attorney General to make a finding of removability if an alien agreed to voluntarily depart the United States, without imposing a time limit for the alien's departure." Office of Legal Counsel, *Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, at 21 n.5 (Nov. 19, 2014) ("OLC Memo") (citing 8 U.S.C. 1252(b) (1988 & Supp. II 1990)). When created, Family Fairness and similar policies thus had a plausible basis in the INA. Moreover, like the prior deferred action policies, the scale of Family Fairness did not match that of DACA. While some contemporaneous estimates stated that as many as 1.5 million aliens were eligible for relief under Family Fairness, other estimates by the INS suggested as few as 100,000 aliens would be affected. In the end, fewer than 50,000 applications were reportedly received. David Hancock, *Few Immigrants Use Family Aid Program*, Miami Herald, 1990 WLNR 2016525 (Oct. 1, 1990).

In sum, DACA cannot fairly be distinguished from DAPA. Even if it could be, DACA is a deferred action program that has no legal or historical basis.

B. The Rescission Does Not Violate the Equal Protection Clause

Having determined that DACA is unlawful and that the rescission need not be set aside on that basis, I now turn to the second issue of whether the rescission violates the Equal Protection Clause. It does not.

Plaintiffs contend that DHS's exercise of enforcement discretion was motivated by discriminatory animus. But under the *Arlington Heights* factors, Plaintiffs do not state a claim. The majority relied on the three categories of allegations: (1) the disparate impact of the rescission, noting that "93% of DACA recipients" are "Latinos and individuals of Mexican heritage"; (2) various statements made by President Trump almost entirely unrelated to the DACA policy or the decision to rescind; and (3) the "unusual history" behind the rescission. *See supra* p. 26.

None of those factors, either alone or together, supports Plaintiffs' equal protection claim. Given the United States' natural immigration patterns, the disparate impact of the rescission of DACA is neither surprising nor illuminating of the agency's motives. If it were enough to state a claim that a broad scale immigration decision disparately impacted individuals of any particular ethnicity, virtually any such decision could be challenged on that ground. Moreover, the cited statements by President Trump are irrelevant and possess little to no force given that President Trump made positive comments about DACA recipients. In any event,

the relevant decisionmakers were Secretaries Duke and Nielsen, and there is no evidence that either harbored any discriminatory animus towards anyone.

Lastly, there is nothing remotely "unusual" about the history of the rescission. Far from a "strange about-face," *see supra* p. 27, the rescission of DACA was the logical consequence of a general policy approach adopted at the beginning of this Administration. On February 20, 2017, Secretary Kelly announced a general policy against exercising immigration enforcement discretion "in a manner that exempts or excludes a specified class or category of aliens" but excluded DACA, expanded DACA, and DAPA. Kelly Memo I at 1, 7. Secretary Kelly announced later that year that he was rescinding DAPA and expanded DACA policies. Kelly Memo II at 3. Two weeks later, the Texas plaintiffs indicated their intent to challenge the original DACA policy, and the Attorney General informed the Acting Secretary that he had concluded that the policy was unlawful. Acting Secretary Duke then rescinded DACA, a position that Secretary Nielsen later adopted. Duke Memo at 1; *see also* Nielsen Memo at 1.

In short, Plaintiffs' allegations are wholly insufficient to show that Secretaries Duke and Nielsen were motivated by racial animus in deciding to rescind DACA.

For the foregoing reasons, I respectfully DISSENT.