SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DEPARTMENT OF HOMELAND SECURITY,   )
ET AL.,   )
            Petitioners,   )
            v.   ) No. 18-587
REGENTS OF THE UNIVERSITY OF   )
CALIFORNIA, ET AL.,   )
            Respondents.   )

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DONALD J. TRUMP, PRESIDENT OF THE   )
UNITED STATES, ET AL.,   )
            Petitioners,   )
            v.   ) No. 18-588
NATIONAL ASSOCIATION FOR THE   )
ADVANCEMENT OF COLORED PEOPLE, ET AL.,)
            Respondents,   )

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KEVIN K. McALEENAN, ACTING SECRETARY)
OF HOMELAND SECURITY, ET AL.,   )
            Petitioners,   )
            v.   ) No. 18-589
MARTIN JONATHAN BATALLA VIDAL, ET AL.,)
            Respondents,   )

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Pages: 1 through 93

Place: Washington, D.C.

Date: November 12, 2019

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1   Washington, D.C.

2   Tuesday, November 12, 2019

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4   The above-entitled matter came on for

5   oral argument before the Supreme Court of the

6   United States at 10:06 a.m.

7

8   APPEARANCES:

9

10   GEN. NOEL J. FRANCISCO, Solicitor General,

11   Department of Justice, Washington, D.C.;

12   on behalf of the Petitioners.

13   THEODORE B. OLSON, ESQ., Washington, D.C.;

14   on behalf of the private Respondents.

15   MICHAEL J. MONGAN, Solicitor General,

16   San Francisco, California;

17   on behalf of the state Respondents.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:06 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument first this morning in Case 18-587, the

5   Department of Homeland Security versus Regents

6   of the University of California, and the related

7   cases.

8   General Francisco.

9   ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO

10   ON BEHALF OF THE PETITIONERS

11   GENERAL FRANCISCO: Mr. Chief Justice,

12   and may it please the Court:

13   In 2017, the Fifth Circuit held that

14   DAPA and the expansion of DACA were likely

15   unlawful, a judgment this Court affirmed by an

16   equally divided Court. In the face of those

17   decisions, the Department of Homeland Security

18   reasonably determined that it no longer wished

19   to retain the DACA policy based on its belief

20   that the policy was illegal, its serious doubts

21   about its illegality, and its general opposition

22   to broad non-enforcement policies.

23   That decision did not violate the APA

24   for two reasons. First, it's not subject to

25   judicial review. The rescission simply ended a

1   previous non-enforcement policy whereby the

2   Department agreed to not enforce the INA against

3   hundreds of thousands of illegal aliens.

4   But the decision whether or not to

5   enforce the law is committed to the agency's

6   unreviewable discretion, unless a statute

7   restricts it. And nothing in the INA requires

8   the Department, a law enforcement agency, to not

9   enforce the law.

10   Second, the decision to end this

11   non-enforcement policy was eminently reasonable.

12   DACA was a temporary stopgap measure that, on

13   its face, could be rescinded at any time. And

14   the Department's reasonable concerns about its

15   legality and its general opposition to broad

16   non-enforcement policies provided more than a

17   reasonable basis for ending it.

18   After all, an agency isn't required to

19   push its legally dubious power to not enforce

20   the law to its logical extreme since it

21   undermines confidence in the rule of law itself

22   and it conflicts with the agency's law

23   enforcement mission.

24   I'd like to begin with the

25   reviewability question. If the Attorney General

1   were to say that he wasn't going to seek death

2   penalty prosecutions because he thought the

3   death penalty was unconstitutional, that would

4   be immune from judicial review. And if a new

5   attorney general came in and reversed that

6   policy because he believed that the death

7   penalty was constitutional, that would likewise

8   be immune from judicial review because --

9   JUSTICE GINSBURG: General Francisco,

10   there's a strange element to your argument

11   because you're arguing this is a discretionary

12   matter; it's not reviewable because it's

13   committed to agency discretion.

14   But, on the other hand, you say the

15   agency had no discretion because this program

16   was illegal. In other words, the law requires

17   you to drop DACA. So how can it be committed to

18   your discretion when you're saying we have no

19   discretion; this is an illegal program?

20   GENERAL FRANCISCO: For two reasons,

21   Your Honor. First, we've put forward both legal

22   and policy reasons for the rescission, so this

23   case is on all fours with Chaney, where the FDA

24   likewise put forth legal and policy reasons.

25   Its principal argument was that it lacked

1   jurisdiction to reg -- to regulate state use of

2   drugs in carrying out the death penalty. Its

3   alternative argument was that even if it had the

4   legal authority to do so, it wouldn't have

5   exercised it.

6   And this Court found that that

7   decision was committed to the agency's

8   unreviewable discretion. Here, we are likewise

9   making alternative legal and policy arguments.

10   CHIEF JUSTICE ROBERTS: What's your --

11   GENERAL FRANCISCO: But, secondly --

12   CHIEF JUSTICE ROBERTS: Oh, I'm sorry.

13   Go ahead.

14   GENERAL FRANCISCO: Secondly, even if

15   we were making purely a legal argument, and

16   we're not, but even if we were, review would be

17   foreclosed by this Court's decision in BLE.

18   What the BLE case held was that if an action is

19   committed to an agency's unreviewable

20   discretion, then it doesn't matter what reason

21   it gives for taking that action; it's still

22   unreviewable. And the specific example this

23   Court provided in BLE was a prosecutor who

24   decided not to indict for a purely legal reason.

25   And the Court indicated that that was still

1   unreviewable because the underlying action, the

2   enforcement discretion, was committed to the

3   agency's unreviewable discretion.

4   So, here, we think we win under

5   Chaney, and we also think we win under BLE.

6   CHIEF JUSTICE ROBERTS: What if the

7   Attorney General said he, in his exercise of

8   prosecutorial discretion, was not going to

9   enforce any of the immigration laws?

10   GENERAL FRANCISCO: Uh --

11   CHIEF JUSTICE ROBERTS: Would that

12   still be non-reviewable?

13   GENERAL FRANCISCO: Your Honor, then I

14   think that you might run into Chaney's exception

15   for a complete abdication of authority, but

16   there's a critical difference between that and

17   this. Here, we are enforcing the law. You can

18   understand why Congress or the courts might say

19   that you can review a -- a decision not to

20   enforce the law. Congress, in fact, passes laws

21   so they'll be enforced, and you can understand

22   why it might restrict the government's ability

23   to not enforce the law.

24   Here, we are enforcing the law. And

25   it's very difficult to see why the Congress

1   would ever pass a law, say that something is

2   illegal, and then try to hamstring the

3   government's ability to enforce it. That's why

4   we think we clearly fall within the Chaney

5   presumption, that it's an exercise of

6   enforcement discretion, and we don't fall within

7   the Chaney exception, which would apply where

8   Congress itself restricts the discretion or

9   where there's a potential complete abdication of

10   enforcement authority, as Chaney made clear

11   might also be an exception.

12   JUSTICE ALITO: Was DACA --

13   JUSTICE KAGAN: Just to -- just to

14   understand what you're saying, General, you --

15   that would suggest that the original DACA is

16   reviewable, but the rescission of DACA is not.

17   In other words, are you suggesting that there's

18   an asymmetry in what's reviewable?

19   GENERAL FRANCISCO: There --

20   JUSTICE KAGAN: That they don't stand

21   and fall together?

22   GENERAL FRANCISCO: Yeah, there is,

23   because there's a difference in the two

24   policies. Both of them -- to be clear, both of

25   them fall within Chaney's presumption. Both of

1   them reflect an exercise of enforcement

2   discretion that are presumptively unreviewable.

3   The question then is whether Congress has done

4   anything to restrict that discretion.

5   With respect to DAPA, the case that

6   this Court had before it a couple of years ago,

7   Texas argued that the INA actually restricted

8   the agency's ability not to enforce the law.

9   And you can certainly understand why Congress

10   might try to hamstring the government's ability

11   not to enforce the laws that it passes. And the

12   Fifth Circuit agreed. So that fell within the

13   Chaney exception to the presumption.

14   Here, though, nobody is arguing,

15   nobody on either side, is arguing that the INA

16   somehow restricts our ability to enforce the

17   law. And it would be quite surprising if

18   Congress were to pass a law that says something

19   is illegal and then tries to somehow restrict

20   the government's ability from enforcing the laws

21   that it passes.

22   So, again, I think we fall four square

23   within the Chaney presumption, and the Chaney

24   exception doesn't apply. And that exception

25   applies -- that exception covers both where the

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 1    statute itself restricts the discretion, and,

 2    Chief Justice, to your question, it could also

 3    apply where there was a complete abdication of

 4    law enforcement responsibilities.  That was one

 5    of the areas that Chaney reserved in that

 6    critical Footnote 4.

 7              But, here, we're not not enforcing the

 8    law.  We're enforcing the law.  And there is

 9    simply nothing in the INA that somehow says to

10    the Department of Homeland Security you are

11    restricted in any way or shape or form --

12              JUSTICE GINSBURG:  Can I go back --

13              GENERAL FRANCISCO:   -- from enforcing

14    the laws we pass.

15              JUSTICE GINSBURG:  The response that

16    you -- that you gave to me, I didn't see -- I

17    thought that what you call it, the Duke

18    Memorandum, Duke Memorandum said DACA is

19    illegal.  I didn't see where it said, whether

20    it's illegal or not, as a matter of

21    administration policy, we are withdrawing it.

22              GENERAL FRANCISCO:  Uh-huh.  So --

23              JUSTICE GINSBURG:  I didn't see that.

24              GENERAL FRANCISCO:  Yeah.

25              JUSTICE GINSBURG:  You said there were
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1   alternate arguments. I saw only the first, we

2   can't enforce DACA; we can't adhere to DACA

3   because it's illegal.

4   GENERAL FRANCISCO: So two responses,

5   Your Honor. First of all, Secretary Nielsen's

6   memoranda clearly encompasses all of the

7   different arguments. It sets them forth in

8   great detail. And we think that the Nielsen

9   memorandum is clearly properly before the Court.

10   The district court in Washington, D.C.,

11   specifically asked for it. We specifically

12   provided it. The district court reviewed it.

13   So the only question really is, what does it

14   mean?

15   And Secretary Nielsen in her

16   memorandum effectively ratified Secretary Duke's

17   decision for the reasons given, using precisely

18   the same mechanism that Secretary Duke used

19   herself to issue the memo in the first place,

20   the same mechanism that was issued -- used to

21   issue the DACA memo, and the same mechanism used

22   to issue the DAPA memo.

23   So this isn't a post hoc

24   rationalization of agency action. It is agency

25   action. The whole point of the post hoc

     1   rationalization rule is to prevent courts from

     2   invading into executive branch decision-making.

     3   JUSTICE BREYER: I thought the point

     4   -- I mean, this is an old argument.

     5   GENERAL FRANCISCO: Yeah.

     6   JUSTICE BREYER: And there have been

     7   two bases. The first base is a big argument

     8   between Ken Davis and Burger, you know, and is

     9   -- is it that you can't review an agency, does

    10   that little thing about you cannot -- commit it

    11   to agency discretion by law, does it mean that

    12   there's certain -- just mean that there are

    13   certain things an agency might do. Don't review

    14   them even if they're totally wrong, like Panama

    15   Canal tolls.

    16   GENERAL FRANCISCO: Right.

    17   JUSTICE BREYER: Okay? That isn't

    18   here, I don't think.

    19   The Chaney argument, I thought was the

    20   reason this is unreviewable, is because there's

    21   a long history and tradition of a prosecutor

    22   saying, I know that guy over there, or that

    23   woman here, and they may be guilty, but, in my

    24   discretion, no, I don't want to prosecute them.

    25   There's a long history of that.

1   GENERAL FRANCISCO: Uh-huh.

2   JUSTICE BREYER: And if that history,

3   an understandable power to give to a prosecutor,

4   is to be valid, courts, stay out of it. Now

5   that does not apply where what's at issue is not

6   a prosecutor making an individualized decision

7   but, rather, an agency's policies --

8   GENERAL FRANCISCO: Right.

9   JUSTICE BREYER: -- generalized,

10   written down, and I can't think of a reason why

11   in such a case you wouldn't review it in a

12   court.

13   GENERAL FRANCISCO: So, respectfully,

14   Your Honor, I strongly disagree because Chaney

15   itself involved not a prosecutor but an agency

16   and not a single shot enforcement action but a

17   general policy.

18   Here's what the FDA said in the letter

19   denying the petition brought by the inmates to

20   have it regulate the state exercise of the death

21   penalty. This is their principal conclusion.

22   JUSTICE BREYER: Yeah.

23   GENERAL FRANCISCO: "For the reasons

24   given below, we conclude that the use of lethal

25   injection by state penal systems is a practice

1   over which FDA has no jurisdiction and,

2   therefore, that FDA has no authority to take the

3   actions your petition requests. Accordingly,

4   your petition is denied."

5   It later provided as the alternative

6   rationale a policy rationale, and it says later:

7   "Thus, as a secondary and separate basis of

8   denial, we decline as a matter of enforcement

9   discretion to pursue supplies of drugs under

10   state control that will be used for execution by

11   lethal injection."

12   So, in Chaney, the FDA clearly was

13   announcing a categorical policy that it wasn't

14   going to regulate the state use of drugs in

15   carrying out the death penalty. And it wasn't a

16   criminal prosecution. So I think it's on all

17   fours in favor of us.

18   Here, we have an exercise of

19   enforcement discretion that is committed to the

20   agency's unreviewable discretion under Chaney.

21   It doesn't fall with any -- within any of the

22   exceptions to Chaney, where Congress either

23   restricts the exercise of that discretion,

24   because, here, we're talking about enforcement,

25   not non-enforcement, and it doesn't fall under

1   the complete abdication exception to Chaney

2   because, again, we're talking about enforcement

3   and not non-enforcement. And Judge --

4   JUSTICE KAVANAUGH: Wouldn't what --

5   wouldn't what you just read also have made DACA

6   itself unreviewable, to pick up on Justice

7   Kagan's question from earlier?

8   GENERAL FRANCISCO: No, Your Honor,

9   and, again, because, critically, it falls within

10   --

11   JUSTICE KAVANAUGH: What -- what's the

12   distinction between DACA and the FDA policy?

13   GENERAL FRANCISCO: Oh, the DACA and

14   the FDA policy?

15   JUSTICE KAVANAUGH: Yeah.

16   GENERAL FRANCISCO: Well, because, in

17   the FDA policy, nobody was claiming that somehow

18   a statute restricted the FDA's ability to not

19   enforce the law. Nobody made that argument.

20   In the DAPA litigation, I think is

21   maybe what you're referencing, Texas

22   specifically argued that the INA did, in fact,

23   restrict the agency's authority to exercise its

24   enforcement discretion to not enforce the law.

25   JUSTICE ALITO: Well, one of the --

1   GENERAL FRANCISCO: And, again --

2   JUSTICE ALITO: -- things that -- one

3   of the things that Texas argued in the DAPA case

4   was that the agency action in question there

5   conferred certain benefits on the individuals

6   who were affected.

7   And if that was sufficient to make

8   that reviewable, does the wind-down of DACA

9   remove certain benefits that individuals would

10   have?

11   GENERAL FRANCISCO: Right.

12   JUSTICE ALITO: And, if it does, would

13   that make this reviewable?

14   GENERAL FRANCISCO: I -- I -- I think

15   the answer is no and no. And the reason why is,

16   first of all, the rescission of DACA doesn't

17   rescind any benefits. Those benefits are

18   allowed to expire on their own terms.

19   But, even putting that to the side,

20   the work authorization and the other benefits

21   are simply a collateral consequence of the

22   exercise of prosecutorial discretion itself.

23   So they don't recognize -- they don't

24   make the prosecutorial discretion itself

25   reviewable; otherwise, every grant or denial of

1   deferred action would be subject to APA review

2   because every grant and denial of deferred

3   action has collateral consequences that impact

4   work authorization.

5   If I could give you a hypothetical

6   that I think makes it more concrete: Suppose a

7   prosecutor has a drug diversion program, and he

8   says that I'm not going to prosecute this

9   particular category of drug offenses if the

10   individuals agree to enter into drug treatment.

11   The drug treatment is a collateral

12   consequence of and a benefit that flows from the

13   prosecutorial decision, but it doesn't render

14   the prosecutorial decision itself subject to

15   review. And, likewise, if a new prosecutor

16   comes in and says, I don't like drug diversion

17   programs, I want to have a zero tolerance policy

18   for drug offenses, that isn't reviewable either.

19   But I do think that the challenge to

20   DAPA in the prior litigation was reviewable --

21   to be clear, it was reviewable because it fell

22   within the Chaney exception. Texas argued, the

23   Fifth Circuit agreed, that the INA, in fact,

24   restricted the Department of Homeland Security's

25   ability to not enforce the law. And, frankly,

1   we -- we -- we agree with that.

2   But the problem here is that there's

3   no argument by anybody or any possible argument

4   that could be made that somehow the INA

5   restricts the Department of Homeland Security's

6   authority to enforce the law. After all,

7   Congress typically wants the executive branch to

8   enforce the laws --

9   JUSTICE GORSUCH: General --

10   GENERAL FRANCISCO: -- that it passes.

11   JUSTICE GORSUCH: -- are you -- is

12   this an appropriate moment to move to, assuming

13   reviewability, the merits?

14   GENERAL FRANCISCO: Any time you want

15   to move there, Your Honor --

16   JUSTICE GORSUCH: All right.

17   GENERAL FRANCISCO: -- I'll move

18   there.

19   JUSTICE GORSUCH: One -- one -- one

20   argument that the other side makes along those

21   lines is similar to this one we've just been

22   considering, the reliance interests that have

23   grown up around DACA.

24   And what do -- what do you say to that

25   and whether they've been adequately considered

1   in this case?

2   GENERAL FRANCISCO: Sure. Two things,

3   Your Honor. First, I would say that to the

4   extent there are any reliance interests, they're

5   extremely limited. DACA was always meant to be

6   a temporary stopgap measure that could be

7   rescinded at any time, which is why it was only

8   granted in two-year increments. So I don't

9   think anybody could have reasonably assumed that

10   DACA was going to remain in effect in

11   perpetuity.

12   Even putting that to the side here,

13   the agency considered the reliance interests.

14   Secretary Nielsen did so quite clearly and

15   explicitly.

16   The agency mitigated the reliance

17   interests through the orderly wind-down, and it

18   simply concluded that beyond that it didn't

19   justify maintaining in perpetuity a program that

20   actively facilitated violations of the law by

21   hundreds of thousands of individuals.

22   JUSTICE SOTOMAYOR: May I ask --

23   JUSTICE GORSUCH: If I --

24   JUSTICE SOTOMAYOR: I'm sorry.

25   JUSTICE GORSUCH: I'm sorry.

1   JUSTICE SOTOMAYOR: No, no, continue.

2   JUSTICE GORSUCH: Thank you. If I

3   understand, though, your colleague's argument on

4   the other side, it's not that Secretary Nielsen

5   failed to consider reliance interests. There's

6   that paragraph, I believe, in the petition

7   appendix around 125, somewhere in there.

8   There's a -- there's a paragraph.

9   But that -- but that given the extent

10   of the reliance interests and the size of the

11   class, more needed to be said, more could be

12   said, and it wouldn't be a huge burden to

13   require the government on remand to -- to say

14   more.

15   What -- what -- what -- what do you

16   say to that?

17   GENERAL FRANCISCO: So --

18   JUSTICE GORSUCH: As I understand

19   that, that's the nature of the argument.

20   GENERAL FRANCISCO: Right. And I

21   guess I'd have a couple of responses to that.

22   The first is that I -- I don't think it reflects

23   an accurate understanding of APA review. As

24   this Court has repeatedly made clear, really,

25   the only thing that matters is whether the

1   agency -- and I think I'm quoting from the case

2   law -- completely failed to consider an

3   important aspect of the question.

4   And I don't think that you can even

5   remotely argue here, under State Farm, that we

6   completely failed to consider an important

7   aspect of the question.

8   Secondly, I think that Secretary

9   Duke's memorandum under the proper standard

10   clearly satisfies the APA standard for -- for

11   considering reliance interests. She does so

12   explicitly in -- in the portion of the

13   memorandum that you referenced.

14   And, in addition, what I'd point out

15   is that at the very beginning of her memorandum,

16   page 2, she specifically says that one of the

17   things that she considered were the judicial

18   opinions reviewing the Duke Memorandum, all of

19   the district court decisions.

20   And so then, when she gets to the

21   specific discussion of reliance interests, she

22   says that she is keenly aware that people have

23   ordered their lives in light of the DACA

24   decision. So I think it's quite clear that she

25   is fully taking into account the whole panoply

1   of reliance interests that were discussed ad

2   nauseam in the district court decisions and

3   simply concluding that they didn't just --

4   justify maintaining the policy.

5   JUSTICE BREYER: If I could continue

6   the same question because, look, the best

7   statement of the law in my mind -- this is a

8   very old principle -- again, was Justice

9   Scalia's writing for the Court in Fox.

10   He says, when an agency's "prior

11   policy has engendered serious reliance

12   interests, it must be taken into account." All

13   right. That's this case, I think.

14   GENERAL FRANCISCO: Uh-huh.

15   JUSTICE BREYER: All right. So I

16   counted -- I had my law clerks count, actually,

17   not just the people who came in, you know, the

18   700,000 --

19   GENERAL FRANCISCO: Right.

20   JUSTICE BREYER: -- they've never been

21   anywhere else. They -- they never have to. But

22   there are all kinds of reliance interests.

23   I counted briefs in this Court, as I'm

24   sure you have, which state different kinds of

25   reliance interests. There are 66 healthcare

1   organizations. There are three labor unions.

2   There are 210 educational associations. There

3   are six military organizations. There are three

4   home builders, five states plus those involved,

5   108, I think, municipalities and cities, 129

6   religious organizations, and 145 businesses.

7   GENERAL FRANCISCO: Uh-huh.

8   JUSTICE BREYER: And they all list

9   reliance interests, or most of them list

10   interest reliance --

11   GENERAL FRANCISCO: Right.

12   JUSTICE BREYER: -- interests

13   applicable to them, which are not quite the

14   same, they are not quite the same as those of

15   the 700,000 who have never seen any other

16   country. And so then I did read what you just

17   read to me.

18   GENERAL FRANCISCO: Uh-huh.

19   JUSTICE BREYER: Now you want to say

20   anything about the statement you just read to me

21   being adequate to take into account that broad

22   range of interests?

23   GENERAL FRANCISCO: Yes, Your Honor, I

24   do, because the first thing I want to say is

25   that State Farm itself says, and, here, I've got

1   the quote, you violate the APA only where you

2   "entirely fail to consider an important aspect

3   of the problem." Here, Secretary Nielsen

4   explicitly considered the reliance interests,

5   including all of the things that you just listed

6   that were set forth in -- in excruciating detail

7   in the numerous district court decisions that

8   have ruled -- had ruled against us --

9   JUSTICE KAGAN: But -- but not --

10   GENERAL FRANCISCO: -- which she says

11   --

12   JUSTICE KAGAN: -- but not in her --

13   GENERAL FRANCISCO: -- she

14   specifically considered.

15   JUSTICE KAGAN: -- but not in her

16   memo.

17   GENERAL FRANCISCO: Well, Your Honor,

18   I, frankly, think that she does. But the other

19   thing that I would say is that under this

20   conception of APA review, DACA and DAPA likewise

21   would have failed arbitrary and capricious

22   review because there is not a single word in the

23   DACA memo itself or the DAPA memo itself

24   explaining any of the potential costs or

25   benefits or impacts on other people that the

1   implementation of the --

2   JUSTICE KAVANAUGH: Just -- just back

3   --

4   JUSTICE KAGAN: If --

5   GENERAL FRANCISCO: -- DACA program

6   would have had.

7   JUSTICE KAVANAUGH: Go ahead.

8   JUSTICE KAGAN: Go ahead.

9   (Laughter.)

10   GENERAL FRANCISCO: I'll take either

11   one, Your Honor.

12   (Laughter.)

13   JUSTICE KAGAN: If -- if I understand

14   Secretary Nielsen's memo correctly, Secretary

15   Nielsen said that she -- she did have a -- a

16   conclusory statement about weighing the reliance

17   interests, but she weighs them against what she

18   calls -- I think it's the questionable legality

19   of the program.

20   Now that assumes one of the things

21   that we're all here to discuss, which is that

22   the program was of questionable legality. If

23   the program turns out not to be of questionable

24   legality, in other words, if some or many of us

25   think that the original program was legal, how

1   does her memo suffice to do that balancing?

2   GENERAL FRANCISCO: Sure. For a

3   couple of reasons, Your Honor. First, because

4   she sets forth separate and independent bases

5   justifying the rescission: first, her belief

6   that it's illegal; second, her belief that there

7   are serious doubts about its illegality; and,

8   third, her conclusion that, as a matter of

9   enforcement policy, the Department of Homeland

10   Security is against these kinds of broad-based

11   non-enforcement decisions.

12   Any one of those, as her memo

13   explicitly says --

14   JUSTICE KAGAN: But in her --

15   GENERAL FRANCISCO: -- is a separate

16   and independent basis.

17   JUSTICE KAGAN: -- in her statement

18   about reliance, she particularly says it

19   outweighs this questionably legal program.

20   GENERAL FRANCISCO: I think what she

21   is saying here is that it outweighs -- is that,

22   given that there are extremely limited reliance

23   interests in the first place, any limited

24   reliance interests that exist are outweighed --

25   are -- are outweighed by all of the different

1   reasons that she has articulated as separate and

2   independent grounds for rescinding DACA.

3   I think that's the only fair way --

4   JUSTICE SOTOMAYOR: General --

5   GENERAL FRANCISCO: -- that you can

6   read that memorandum.

7   JUSTICE SOTOMAYOR: -- I'm -- I have

8   always had some difficulty in understanding the

9   illegality of DACA. DAPA I put aside because,

10   in DAPA --

11   GENERAL FRANCISCO: Right.

12   JUSTICE SOTOMAYOR: -- there was

13   actually a process for attaining a pathway to

14   residency. And I saw the argument that what

15   DAPA did was contrary, directly contrary, to

16   that path.

17   GENERAL FRANCISCO: Uh-huh.

18   JUSTICE SOTOMAYOR: But there -- I

19   don't see anything in the INA that takes away

20   the discretion of the agency in ordering its

21   enforcement policies.

22   GENERAL FRANCISCO: Right.

23   JUSTICE SOTOMAYOR: We all know it has

24   limited resources. It can't, even when it wants

25   to --

1   GENERAL FRANCISCO: Uh-huh.

2   JUSTICE SOTOMAYOR: -- remove the vast

3   majority of aliens we have here. And so I've

4   always had some difficulty in understanding

5   what's wrong with an agency saying, we're going

6   to prioritize our removals, and for those

7   people, like the DACA people --

8   GENERAL FRANCISCO: Right.

9   JUSTICE SOTOMAYOR: -- who haven't

10   committed crimes, who are lawfully employed, who

11   are paying taxes, who pose no threat to our

12   security, and there's a whole list of

13   prerequisites, we're not going to exercise our

14   limited resources --

15   GENERAL FRANCISCO: Yeah.

16   JUSTICE SOTOMAYOR: -- to try to get

17   rid of those people. I -- I still have an

18   impossible time. I know you're going to argue

19   contrary to what I just said.

20   GENERAL FRANCISCO: Sure. So I guess

21   I have three responses, Your Honor.

22   JUSTICE SOTOMAYOR: All right. But

23   let me just finish my question.

24   GENERAL FRANCISCO: Oh, sure.

25   JUSTICE SOTOMAYOR: Okay?

1   GENERAL FRANCISCO: Yeah.

2   JUSTICE SOTOMAYOR: So putting aside

3   that, the Secretary, in giving these extra

4   reasons, because none of this was in the Duke

5   memo, and I thought basic administrative law is

6   you look at what's first given to you, not what

7   this -- you add later, but assuming you ignore

8   that and even look at the Nielsen memo, I think

9   my colleagues have rightly pointed there's a

10   whole lot of reliance interests that weren't

11   looked at, including the very President of --

12   current President telling DACA-eligible people

13   that they were safe under him and that he would

14   find a way to keep them here.

15   And so he hasn't and, instead, he's

16   done this. And that, I think, has something to

17   be considered before you rescind the policy.

18   GENERAL FRANCISCO: Right.

19   JUSTICE SOTOMAYOR: Not just say I'll

20   give you six months to do it --

21   GENERAL FRANCISCO: Right. So --

22   so --

23   JUSTICE SOTOMAYOR: -- to destroy your

24   lives.

25   GENERAL FRANCISCO: So --

1   JUSTICE SOTOMAYOR: Putting all of

2   that aside -- and I'm going to get to my

3   question.

4   (Laughter.)

5   CHIEF JUSTICE ROBERTS: And maybe we'd

6   have an opportunity to hear the three answers.

7   JUSTICE SOTOMAYOR: Well, don't forget

8   the three. I know you won't.

9   But, really, where is all of this in

10   the memo?

11   GENERAL FRANCISCO: Sure, Your Honor.

12   JUSTICE SOTOMAYOR: Where -- where is

13   all of this really considered and weighed?

14   GENERAL FRANCISCO: So --

15   JUSTICE SOTOMAYOR: And where is the

16   political decision made clearly?

17   GENERAL FRANCISCO: So -- so I --

18   JUSTICE SOTOMAYOR: That this is not

19   about the law; this is about our choice to

20   destroy lives?

21   GENERAL FRANCISCO: Yeah. So, Your

22   Honor, four responses now. I think I've added

23   one.

24   (Laughter.)

25   GENERAL FRANCISCO: The first one is

1   that I -- I think that the prior President

2   didn't, couldn't, and hasn't made any kind of

3   promise that DACA would remain in effect in

4   perpetuity because it would have been impossible

5   to make that promise. In fact, every one of my

6   friends on the other side, I think, has agreed

7   that we could rescind DACA at any time if, at

8   least in their view, we did provide a little bit

9   more detailed of an explanation.

10   So I think that is four square against

11   the notion that there are some significant

12   reliance interests because all that they seem to

13   be saying is we have to write a few more words.

14   Putting that entirely to the side and

15   turning to the legality question, ultimately, I

16   don't think you -- my first point is I don't

17   think you have to decide ultimately whether DACA

18   is legal or illegal because I think the other

19   reasons we've given are more than sufficient to

20   justify the rescission, both our serious doubts

21   about its legality, as well as our general

22   opposition to broad-based non-enforcement

23   policies.

24   After all, the Department of Homeland

25   Security is a law enforcement agency, and a law

1   enforcement agency doesn't have to push its

2   dubious power to not enforce the law to its

3   logical extreme. So --

4   JUSTICE GINSBURG: But don't you have

5   to -- don't you have to set up some kind of

6   categories? I mean, everybody agrees, what is

7   that, how many, 11 million people?

8   GENERAL FRANCISCO: Right.

9   JUSTICE GINSBURG: They don't have the

10   resources, so you have to prioritize. Everybody

11   agrees you have to prioritize.

12   GENERAL FRANCISCO: Absolutely, Your

13   Honor.

14   JUSTICE GINSBURG: How do you -- how

15   do you do it other than categorically?

16   GENERAL FRANCISCO: Well, and that's

17   my second point, Your Honor. My second point is

18   that DACA goes far beyond simply diverting

19   resources to higher priority targets, which you

20   are absolutely right, every law enforcement

21   agency has to divert resources to higher

22   priority targets. DACA goes materially further

23   than that because it actively facilitates

24   violations of the law by providing advance

25   forbearance, coupling it with affirmative

1   benefits like work authorization and Social

2   Security benefits, doing it on a categorical

3   basis.

4   And, significantly -- and this was my

5   third point -- it has no limiting principle. On

6   the --

7   JUSTICE GINSBURG: So the -- the

8   forbearance would be okay if it -- there weren't

9   attendant benefits? This -- we're not going to

10   -- we're not going to immediately deport the

11   Dreamers, period?

12   GENERAL FRANCISCO: I think that would

13   be -- if -- if you provided just the advanced

14   forbearance, I think that would be a lot closer

15   of a question, but, here, it's a lot easier

16   because you're coupling that with work

17   authorization.

18   And my final and critical point is

19   that there's no limiting principle. The theory

20   on which DACA rests effectively allows the

21   government to create a shadow INA for any

22   category of aliens that it chooses to make

23   low-priority targets, a shadow second-tier INA.

24   And you, at the very least, need to

25   locate something in the INA that confers that

1   kind of broad and unfettered discretion. And

2   there is simply nothing there. But, again --

3   JUSTICE KAGAN: Well -- well, if --

4   GENERAL FRANCISCO: -- I don't think

5   you --

6   JUSTICE KAGAN: You know, the INA does

7   give quite a lot of discretion to administrative

8   officers, as you yourself admit and have argued

9   on previous occasions and, indeed, in part here.

10   GENERAL FRANCISCO: Right.

11   JUSTICE KAGAN: So are you saying that

12   -- are you saying that DACA was -- violated any

13   particular provision of the INA? What are you

14   saying it violated?

15   GENERAL FRANCISCO: Sure.

16   JUSTICE KAGAN: Because --

17   GENERAL FRANCISCO: So I'm saying --

18   JUSTICE KAGAN: -- because there's a

19   big delegation, right, that says you get to make

20   national policy. So what did DACA violate?

21   GENERAL FRANCISCO: I'm saying two

22   things, Your Honor. First, I'm saying you don't

23   really have to address this issue because we

24   think all of the other --

25   JUSTICE KAGAN: I got that.

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1                GENERAL FRANCISCO:   -- reasons are
2      more than sufficient.
3                But, secondly, we're not saying that
4      there's a specific provision that it conflicts
5      with.  But what we are saying is that when you
6      adopt this kind of broad and historically
7      unprecedented program, you need to at least
8      locate the authority to do so somewhere in the
9      INA.
10               JUSTICE KAGAN:  Well, they did --
11               GENERAL FRANCISCO:  And this goes --
12               JUSTICE KAGAN:   -- you know, they
13     located the authority in the INA's grant of
14     broad discretion over national immigration
15     enforcement policy.
16               GENERAL FRANCISCO:  Your Honor, I
17     think that the most that does is it gives you
18     the authority to set policies and priorities,
19     but there's a big leap between that and saying
20     that you can affirmatively facilitate violations
21     of the INA by hundreds of thousands of
22     individuals to whom Congress has repeatedly
23     declined a pathway to lawful status.
24               JUSTICE KAVANAUGH:  What about --
25               JUSTICE KAGAN:  I guess --
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1   GENERAL FRANCISCO: Again, though, I

2   -- I don't think this is an issue you need to

3   ultimately resolve because I think the other

4   reasons we've given for rescinding DACA are more

5   than sufficient to justify it, including our

6   serious doubts about its legality alone.

7   Simply as a matter of law enforcement

8   policy, it is eminently reasonable for a law

9   enforcement agency to say, I'm not going to push

10   this doubtful authority to its logical extreme

11   when it does three things: It undermines

12   confidence in the rule of law itself. It

13   conflicts with the agency's law enforcement

14   mission. And, in a case like this, it creates

15   the serious possibility of a court-ordered

16   shutdown of the program, rather than an orderly

17   wind-down within --

18   CHIEF JUSTICE ROBERTS: Counsel, you

19   --

20   GENERAL FRANCISCO: -- the agency's

21   control.

22   CHIEF JUSTICE ROBERTS: -- if -- if

23   DACA was illegal, that means that when the

24   government was giving out these benefits it was

25   acting illegally, right?

1   GENERAL FRANCISCO: Yes.

2   CHIEF JUSTICE ROBERTS: Now it's not

3   always the case when the government acts

4   illegally in a way that affects other people

5   that we go back and untangle all of the

6   consequences of that.

7   Did Secretary Nielsen, when she was

8   considering the reliance interests, was she

9   looking simply to the question of a wind-down,

10   or was she looking more generally, for example,

11   to the application of something like the de

12   facto officer doctrine --

13   GENERAL FRANCISCO: Right. I think --

14   CHIEF JUSTICE ROBERTS: -- when

15   officers acted illegally, but we don't go back

16   and invalidate their prior actions?

17   GENERAL FRANCISCO: I think both, Your

18   Honor, both. The orderly wind-down to a certain

19   extent takes into account reliance interests.

20   It doesn't fully account for everything. But

21   the whole idea was that you're giving people an

22   opportunity to -- to -- to order their lives in

23   -- in -- in a time period to allow them to do

24   that.

25   But she also specifically states in

1   the memorandum that, in addition, the notion of

2   ad hoc deferred action will be able to take care

3   of reliance interests in truly extraordinary

4   circumstances, the way that it has been used

5   sporadically in the past to address those types

6   of scenarios.

7   JUSTICE BREYER: So now the basic --

8   the basic hornbook rule -- we have three

9   hornbook rules in this case, is -- is -- was

10   mentioned, Chenery: "It is a foundational

11   principle of administrative law that a court may

12   uphold agency action only on the grounds that

13   the agency invoked when it took the action."

14   GENERAL FRANCISCO: Right.

15   JUSTICE BREYER: In which case we look

16   to Ms. Duke's memo, not to Ms. Nielsen's. Isn't

17   that when it took the action? And, if so -- I

18   want to hear you say no, it isn't so -- but --

19   but, if so, why don't we just affirm the

20   district court, which sends it back? And if you

21   have all these reasons and you really want to

22   consider the reliance and all those things

23   should be considered carefully, you can do it.

24   So -- so what's wrong?

25   GENERAL FRANCISCO: For two related --

1   JUSTICE BREYER: With very -- yeah, go

2   ahead.

3   GENERAL FRANCISCO: For two related

4   reasons, Your Honor.

5   JUSTICE BREYER: Yeah.

6   GENERAL FRANCISCO: First, sending it

7   back would make no sense because the agency has

8   already acted. Secretary Nielsen has already

9   ratified Secretary Duke's decision for the

10   reasons set forth in her memorandum. It's not a

11   post hoc rationalization. It's the official

12   position of the agency set forth by the agency

13   itself.

14   And, secondly, there is no reason why

15   Secretary Nielsen should have had to reinstate

16   DACA and then rescind it again.

17   JUSTICE BREYER: Not reinstate it.

18   GENERAL FRANCISCO: Well, but -- but

19   --

20   JUSTICE BREYER: What you do is, there

21   are 50 cases on this, if it's important, what

22   you do is you say it is good reason for holding

23   the status quo until we can go back, and courts

24   have affirmed that, we hold the status quo, and

25   we go back now and we look if there are reasons

1   beyond the contemporaneous reason, which is the

2   Duke memo.

3   GENERAL FRANCISCO: Well, that's --

4   JUSTICE BREYER: And we see if there

5   will --

6   GENERAL FRANCISCO: -- that's

7   precisely what Secretary Nielsen's memo did. It

8   did two things.

9   First, it explained the basis for

10   Secretary Nielsen -- Secretary Duke's decision,

11   but, secondly, it set forth her own independent

12   judgment. And if I could point you to --

13   JUSTICE BREYER: You mean we have all

14   these 100 and 350 briefs with all these

15   different reasons and she had that in front of

16   her?

17   GENERAL FRANCISCO: Your Honor, that

18   may go to whether you think her memo is

19   sufficient, but it doesn't go to whether you

20   think her memo is an operative document with

21   this -- in this litigation. I'd like to point

22   you to two places in her memorandum.

23   First, page 121A of the Regents

24   Petitioners' appendix. This is the second page

25   of her memorandum: The explanation reflects,

1   the first thing, my understanding of the Duke

2   Memorandum, and, second thing, why the decision

3   to rescind the DACA policy was and remains

4   sound.

5   If you look at the end of her

6   memorandum, she states in the very last

7   sentence: For the reasons in -- for these

8   reasons in setting -- in setting DHS enforcement

9   policies and priorities, I concur with and

10   decline to disturb Acting Secretary Duke's

11   decisions to rescind the DACA policy.

12   JUSTICE KAVANAUGH: Can I pick up on

13   Justice Kagan's question earlier? Does the

14   Nielsen memo ever say, even if DACA was lawful,

15   I would still exercise my policy discretion to

16   discontinue?

17   GENERAL FRANCISCO: Yes, Your Honor.

18   So, if you look at the memo --

19   JUSTICE KAVANAUGH: What -- what --

20   what sentence are you looking at?

21   GENERAL FRANCISCO: Okay. I'm looking

22   at two sentences. Page 123A -- this is after

23   she says it's illegal -- page 123A.

24   Second, regardless of whether the DACA

25   policy is ultimately illegal, it was

1   appropriately rescinded by the DHS because there

2   are at a minimum serious doubts about its

3   legality. May I make one more sentence?

4   And then, third, if you look further

5   down the page, it says: Regardless of whether

6   these concerns about the DACA policy render it

7   illegal or legally questionable, there are sound

8   reasons of enforcement policy to rescind the

9   DACA policy.

10   CHIEF JUSTICE ROBERTS: Thank you,

11   counsel.

12   Mr. Olson.

13   ORAL ARGUMENT OF THEODORE B. OLSON ON

14   BEHALF OF THE PRIVATE RESPONDENTS

15   MR. OLSON: Thank you, Mr. Chief

16   Justice, and may it please the Court:

17   The government's termination of DACA

18   triggered abrupt, tangible, adverse consequences

19   and substantial disruptions in the lives of

20   700,000 individuals, their families, employers,

21   communities, and Armed Forces.

22   That decision required the government

23   to provide an accurate, reasoned, rational, and

24   legally sound explanation.

25   It utterly failed to do so, asserting

1   only the Attorney General's unexplained

2   assertion that he had no discretion because DACA

3   was an unconstitutional exercise of authority by

4   the executive branch.

5   The decision overturned a five-year

6   enforcement policy of deferred action that had

7   enabled DACA recipients under other unchallenged

8   laws and regulations to apply for employment

9   authorization, seek driver's licenses, and other

10   benefits.

11   Its abrupt reversal removed a

12   condition precedent to these rights and exposed

13   DACA recipients and their employers to

14   immediate, potential, coercive government

15   measures.

16   It was impermissible to do so based on

17   an unexplained, unsupported, and erroneous legal

18   conclusion that the policy that two

19   administrations had enforced and implemented,

20   had supported and implemented for five years,

21   was unlawful and unconstitutional.

22   The decision to rescind DACA was

23   reviewable. This Court has said several times

24   in the -- just in the past few years that

25   there's -- we start with a strong presumption of

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1       reviewability of agency decisions.  This is the

2       strong presumption that the Court described in

3       the Weyerhaeuser case just one year ago.

4                 Unless agency discretion is limited by

5       law, and there's no citation to any limitation

6       in the law, limitations on administration --

7       reviewability by the courts are quite narrowly

8       construed, and there are rare circumstances.

9       These are the Mach Mining case and the Judulang

10      case.

11                These Weyerhaeuser, Mach Mining and

12      Judulang case are three cases within the past

13      eight years where this Court has talked about

14      the presumption of reviewability as a strong

15      presumption, narrowly -- exceptions narrowly

16      construed, and all three of those decisions were

17      unanimous decisions by this Court.

18                JUSTICE ALITO:  Would you say that

19      whenever a law enforcement agency has guidelines

20      for the exercise of prosecutorial discretion and

21      it then tightens those guidelines so that cases

22      that previously would not have been prosecuted

23      may now be prosecuted, that is agency action

24      that is subject to review under the APA?

25                MR. OLSON:  I would not say that,
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1   Justice Alito. But this is a very, very

2   different circumstance. This is an agency

3   decision initially, and -- and the Attorney

4   General refers to it as an illegal decision, but

5   it's an initial decision that is responsive to

6   explicit congressional direction to DHS to

7   establish enforcement priorities.

8   That's what DACA was all about. It

9   said it did not establish any status, it did not

10   provide any benefits, it articulated an

11   enforcement priority which Congress not only

12   directed DHS to make but, in fact, required it

13   to make because only 400,000 people --

14   JUSTICE ALITO: Well, I'm not sure --

15   MR. OLSON: -- out of 11 --

16   JUSTICE ALITO: -- I'm not sure that

17   really responds to my question, so I'll give you

18   an example. Let's say that a -- that there is a

19   policy that certain -- a certain category of

20   drug cases will not be prosecuted in federal

21   court. Let's say they are cases involving less

22   than five kilos of cocaine. So case -- cocaine

23   cases with lesser amounts of drugs will not be

24   prosecuted in federal court as a matter of

25   enforcement priority. And then that is changed.

1   So the five kilos is reduced to three.

2   Would that be reviewable?

3   MR. OLSON: No, I don't think it would

4   be.

5   JUSTICE ALITO: What is -- well,

6   what's the difference?

7   MR. OLSON: Well, I think that the

8   Justice Department, through the attorney

9   general, every new attorney general establishes

10   new enforcement priorities with respect to

11   pornography or drug cases or things like that.

12   Those -- that's completely different

13   than this, which singled out a category of

14   persons and, pursuant to congressional

15   authorization, invited them into the program,

16   provided other statutes which have not been

17   challenged by the government, provided benefits

18   that were associated with that decision, and

19   other people -- and individuals relied upon that

20   for five years. The administration, when it

21   does that kind of a decision with respect to the

22   lives of hundreds of thousands of people, which

23   has engendered reliance, which reverses not only

24   a position of the -- of two administrations, but

25   the Office of Legal Counsel, changes policy,

1   then all we're saying is that there's a

2   presumption of reviewability of that decision.

3   JUSTICE ALITO: But you're -- you're

4   saying it's reviewable because DACA conferred

5   certain benefits.

6   MR. OLSON: DACA did not confer --

7   JUSTICE ALITO: Beyond deferred

8   prosecution.

9   MR. OLSON: DACA --

10   JUSTICE ALITO: Is that -- is that

11   what you just said?

12   MR. OLSON: DACA -- no, I said the

13   benefits were conferred -- were triggered by the

14   decision of enforcement policy in DACA, but

15   those benefits are triggered by other statutes

16   enacted by Congress, funded by Congress

17   throughout all this entire period of time, and

18   the government hasn't challenged those.

19   So those benefits, the driver's

20   license business and the -- and the work

21   authorization, if you apply for it, if you come

22   forward, identify yourself, put yourself into

23   the program, take risks --

24   CHIEF JUSTICE ROBERTS: But, Mr.

25   Olson, the whole thing was about work

1   authorization and these other benefits. Both

2   administrations have said they're not going to

3   deport people. So the deferred prosecution or

4   deferred deportation, that's not what the focus

5   of the policy was. Yes, the other statutes

6   provided that, but it was triggered by -- by the

7   memo.

8   MR. OLSON: Yeah.

9   CHIEF JUSTICE ROBERTS: So I don't

10   understand sort of putting what the policy

11   really was about, which is the work

12   authorization and the other things, off to one

13   side is very helpful.

14   MR. OLSON: Well, I think that it --

15   you -- one has to focus on the fact that this

16   was -- Congress authorized the IN -- the

17   Department of Homeland Security to identify

18   enforcement priorities. Once it did -- because

19   it -- it was required to do so and it had no

20   choice because of the funding. Once it did so,

21   and it identified the persons -- and this is

22   helpful to the agents in the field to identify

23   which individuals are going to be subject to

24   enforcement and which individuals are not.

25   Other statutes provided that benefit.

1   You're correct that it triggers that, but it's

2   triggered by other benefits and so forth. If

3   the government is opposed to those benefits

4   given to individuals who are not in an

5   enforcement priority category to support

6   themselves, to go to work, rather than put

7   themselves in the hands of the government to

8   support them, and to become a part -- since

9   they're not going to be deported, at least for

10   the short period of time, those are the things

11   that if the government wanted to get rid of, the

12   government should be challenging those.

13   It should not be challenging a

14   decision that's essentially required by

15   Congress. And let there be no mistake about why

16   this decision was made.

17   The Attorney General specifically said

18   that DACA was illegal and unconstitutional. I

19   don't know where the unconstitutional came from

20   because it didn't come from the Fifth Circuit.

21   But let's say it was an un- -- an illegal

22   enforcement priority.

23   And there's no doubt about why this

24   happened. In the cert petition or in the

25   government's brief that refers to the questions

1   presented, it specifically says the original

2   DACA policy was unlawful and then goes on to

3   say, thus, it had to be terminated.

4   There's no question about that. So

5   the Duke Memorandum, which was -- the Attorney

6   General's decision and opinion under statute is

7   enforceable and binding on the government

8   agencies. There's a statute that specifically

9   says that. So the Duke Memorandum had no

10   discretion, no choice. The Attorney General of

11   the United States --

12   JUSTICE GORSUCH: Mr. Olson, I -- I

13   think you've moved on to the merits, and I -- I

14   guess I'm still struggling with Justice Alito's

15   question on -- on reviewability. Can you help

16   me understand what is the limiting principle?

17   I -- I -- I hear a lot of facts,

18   sympathetic facts, you put out there, and -- and

19   they speak to all of us. But what's the

20   limiting principle between, you say,

21   reviewability here for an enforcement, a classic

22   kind of prosecutorial discretion that one might

23   have thought would have fallen under Heckler

24   versus Chaney, and the example Justice Alito

25   gave or Heckler versus Chaney itself? What's --

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 1            MR. OLSON:  Heckler --

 2            JUSTICE GORSUCH:  -- what's the --

 3    what's the limiting legal principle --

 4            MR. OLSON:  Well, there's a --

 5            JUSTICE GORSUCH:  -- you'd have this

 6    Court adopt?

 7            MR. OLSON:  -- it's a composite -- in

 8    this case, it's a composite of principles, a

 9    determination that -- a categorical

10    determination involving a substantial number of

11    people --

12            JUSTICE GORSUCH:  Okay.  But I -- I --

13            MR. OLSON:  -- to make decisions --

14            JUSTICE GORSUCH:  -- I think --

15            MR. OLSON:  -- based upon that.

16            JUSTICE GORSUCH:  All right.  Let --

17    let -- let me just stop you there, though,

18    because, if it's categorical and a large number

19    of people, I can think of a lot of prosecutorial

20    decisions involving drug cases, the treatment of

21    marijuana in -- in -- in our society today under

22    federal law, perhaps it would be cocaine, five

23    kilograms.  Whatever is in the attorney general

24    memo affects lots of people on a categorical

25    basis every day.
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1   And --

2   MR. OLSON: Yes.

3   JUSTICE GORSUCH: -- and you're not --

4   you -- you, I think, would not have us review

5   those decisions.

6   MR. OLSON: That's -- no, but may I

7   refer to --

8   JUSTICE GORSUCH: So, if it's not

9   categorical and it's not a large number of

10   people --

11   MR. OLSON: Well --

12   JUSTICE GORSUCH: -- what's the

13   limiting principle?

14   MR. OLSON: -- there -- as I said,

15   it's a combination of factors which include the

16   government inviting people to rely upon and make

17   decisions based upon that policy, the provision

18   of benefits connected with it, individuals

19   making choices, and -- and then -- and the

20   Heckler case --

21   JUSTICE GORSUCH: Don't -- don't other

22   --

23   MR. OlSON: -- specifically --

24   JUSTICE GORSUCH: -- people rely on

25   the attorney general guidance memos and

 1   documents? There's an entire industry in a lot

 2   of states involving marijuana that would argue

 3   they're relying on memos issued by the attorney

 4   general that we will not enforce marijuana laws,

 5   for example. Do they now have a right to --

 6   MR. OLSON: No, I think that is

 7   completely different. They are not invited to

 8   participate into a program, to reveal the

 9   business that they're in, to come forward, to

10   take advantage --

11   JUSTICE GORSUCH: Well, they --

12   MR. OLSON: -- of benefits --

13   JUSTICE GORSUCH: -- have a lot of

14   economic interests at stake that, I think, under

15   Fox and -- what we heard about earlier from

16   Justice Breyer, they would say our economic

17   interests are very real, billions of dollars are

18   at stake, we've relied on the attorney general's

19   guidance memos.

20   MR. OLSON: But there's -- but there

21   -- but -- and I just would like to quote this

22   one paragraph -- or one sentence from the

23   Heckler versus Chaney decision itself. "When an

24   agency does act to enforce, the action itself

25   provides a focus for judicial review because it

1   imposes the coercive power of the government

2   with respect to individual liberty and

3   property," and that is the kind of decision that

4   judicial review is intended to give.

5   JUSTICE GORSUCH: Doesn't every

6   prosecutorial decision affect individual liberty

7   or property?

8   MR. OLSON: Prosecution --

9   prosecutorial --

10   JUSTICE GORSUCH: I think the answer

11   is yes, isn't it?

12   MR. OLSON: Prosecutorial decisions,

13   yes, of course.

14   JUSTICE GORSUCH: Okay.

15   MR. OLSON: This is a -- an

16   announcement of a policy -- this is a reversal

17   of a policy that the government created that

18   triggered -- to use the words of this Court,

19   engendered reliance interests. And all we're

20   saying is that it should be subject to review in

21   the context of this big picture.

22   It isn't to say that every decision by

23   a prosecutor that I'm going to now enforce

24   murder cases or kidnapping cases or child porn

25   cases or serious drug cases. It doesn't cause

1   individuals to come forward to participate in a

2   program, to make decisions. Businesses, health,

3   educational institutions, the Armed Forces, all

4   are making decisions based upon this.

5   No one was saying that the policy

6   can't be changed. But when the policy does --

7   if the government wishes to change a broad

8   policy like this which affects so many people in

9   so many serious ways --

10   JUSTICE GORSUCH: Well, if I might ask

11   a question about that if we're talking about the

12   merits then, and then I -- I'll pass off the

13   baton. The reliance interests that we've --

14   we've talked about earlier, I -- I think your --

15   your friend on the other side would say we did

16   address reliance interests in a paragraph and we

17   could do it in 15 pages, but we'd say pretty

18   much the same thing at the end of the day, and

19   it would take another six years, and it would

20   leave this class of persons under a continuing

21   cloud of uncertainty and continue stasis in the

22   political branches because they would not have a

23   baseline rule of decision from this Court still

24   on this issue.

25   MR. OLSON: It's -- it's what this

1   Court has said --

2   JUSTICE GORSUCH: What do you say to

3   -- what do you say to that? And that's the line

4   of argument, as I understand it, from the

5   government.

6   MR. OLSON: Yes, I know it is. And

7   the government is saying all we needed was a few

8   more words. That is not what this Court has

9   said with respect to administrative review of --

10   of -- judicial review of administrative

11   decisions.

12   You must have a rational explanation.

13   It must make sense. It must be contemporaneous.

14   The -- I will get to the Nielsen memorandum

15   which was not contemporaneous. It was not a new

16   decision.

17   JUSTICE GORSUCH: I -- I understand

18   that. If you could just address it, though, on

19   the merits. Why was that insufficient, I think

20   is one of the questions, and the other is what

21   would -- what good would another five years of

22   litigation over the adequacy of that --

23   MR. OLSON: We don't --

24   JUSTICE GORSUCH: -- explanation

25   serve?

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1                MR. OLSON:  -- we don't know what the

2     administration would do.  The administration did

3     not want to own this decision.

4                When the Attorney General decided that

5     this -- I'm making this decision because the

6     DACA --

7                JUSTICE GORSUCH:  I guess I'm asking

8     about the reliance interests question.

9                MR. OLSON:  I -- I'm trying to get to

10    that.

11               JUSTICE GORSUCH:  I -- I wish -- I

12    wish you would.

13               MR. OLSON:  The reliance interests

14    were triggered, to use the words of this Court

15    in the Fox case, the LTV case, and various other

16    cases, those reliance interests were engendered

17    by the decision by the government that caused

18    people to come forward --

19               JUSTICE GORSUCH:  I understand that.

20    The question is:  What more would you have the

21    government say about those reliance interests?

22    If it's a failure of adequacy of explaining,

23    what more is left to be said?

24               MR. OLSON:  What -- what they could

25    have said is that we understand all of these
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 1    people, working for all these people, we

 2    understand what people are going through,

 3    provide a reasoned, rational explanation, to use

 4    the words of this Court just a few months ago in

 5    the Census case, to explain those things, to

 6    explain why a policy is being changed and make a

 7    contemporaneous decision.

 8              The Nielsen memorandum came along nine

 9    months later, was based upon a different

10    individual -- by a different individual.

11              JUSTICE KAVANAUGH:  But --

12              MR. OLSON:  It didn't have an

13    administrative record.

14              JUSTICE KAVANAUGH:  Assuming -- well,

15    go ahead and finish.

16              MR. OLSON:  Well, well, it'll take

17    another sentence or two.  But there were a lot

18    of things wrong.

19              The -- the Nielsen memorandum was not

20    an independent decision.  She was bound just as

21    the earlier administrator, acting administrator,

22    was because the Attorney General said this is

23    illegal.

24              JUSTICE KAVANAUGH:  But the Nielsen

25    memo then goes on to say, as you heard Mr.
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1   Francisco say to my question, that regardless of

2   whether these concerns about the DACA policy

3   rendered it illegal or legally questionable,

4   there are sound reasons of enforcement policy to

5   rescind the DACA policy.

6   And it goes on to explain the policy

7   rationales to rescind it. So what is your --

8   MR. OLSON: Well --

9   JUSTICE KAVANAUGH: -- response to Mr.

10   Francisco?

11   MR. OLSON: -- in the first place,

12   they were not independent. They were not

13   contemporaneous. They were not accompanied by

14   an administrative record.

15   JUSTICE KAVANAUGH: She --

16   MR. OLSON: They were not --

17   JUSTICE KAVANAUGH: -- she says -- she

18   says they're independent in that sentence.

19   MR. OLSON: She says they're

20   independent.

21   JUSTICE KAVANAUGH: At least that's

22   what Mr. Francisco says to you.

23   MR. OLSON: Well, Mr. Francisco said

24   that and she said that, but they weren't

25   independent because she was bound by the

 1   Attorney General's decision. And the government

 2   itself in its brief, and I quoted a moment ago,

 3   said DACA was unlawful; thus, we had to

 4   terminate it.

 5   Now -- and it does -- and it's not

 6   contemporaneous. And then, basically, the

 7   policy decisions are saying we understand people

 8   may have relied on this, but that's just too

 9   bad.

10   JUSTICE SOTOMAYOR: Mr. Olson --

11   MR. OLSON: That's basically all it

12   was. There were not -- and then the litigation

13   risk issue --

14   JUSTICE KAVANAUGH: Right. I got

15   that.

16   MR. OLSON: -- is like a rubber stamp

17   that the agencies can put on anything. Every

18   decision an agency makes could involve --

19   JUSTICE KAVANAUGH: Do you -- do you

20   agree that the executive has the legal authority

21   to rescind DACA?

22   MR. OLSON: Yes.

23   JUSTICE KAVANAUGH: Okay. So the

24   question then comes down to the explanation.

25   And if it's the Nielsen memo paragraph on

1   reliance that it comes down to, so which is the

2   last --

3   MR. OLSON: Well, it wasn't -- it --

4   first of all, it was not explained --

5   JUSTICE KAVANAUGH: Just -- can I just

6   ask the question in this way, which is, assume

7   the Nielsen memo comes in and assume it comes

8   down to whether the Nielsen memo adequately

9   explained the reliance interests.

10   What was the shortfall in the Nielsen

11   memo in addressing reliance interests? Because

12   she does acknowledge that a lot of people have

13   relied. She does it --

14   MR. OLSON: And she --

15   JUSTICE KAVANAUGH: -- briefly.

16   MR. OLSON: Yeah, she says just too

17   bad. People relied, so too bad. Too bad about

18   that.

19   Camp versus Pitts specifically says,

20   when an explanation for an agency decision is

21   given, however curt, they must stand or fall on

22   that explanation.

23   JUSTICE KAVANAUGH: Do you -- do you

24   think --

25   MR. OLSON: This is a new --

 1   JUSTICE KAVANAUGH: -- do you think

 2   you could explain the reliance or the

 3   justifications for the policy in a way that

 4   would overcome the reliance interests?

 5   MR. OLSON: They would -- yes, I -- I

 6   believe that that's possible. They could have

 7   -- they -- the analysis of costs and benefits

 8   explaining why an OLC decision is being thrown

 9   out the window, why a policy is being changed

10   that the administration is -- that's exactly

11   what you have said.

12   JUSTICE SOTOMAYOR: Mr. Olson, can I

13   go back to something Justice Gorsuch asked,

14   which is what's the benefit of delaying this

15   further?

16   It has been -- at least looking at the

17   deferred action decisions, the dozens that have

18   gone on through the decades, Congress has

19   responded, sometimes changing the policy,

20   sometimes limiting it, sometimes expanding it.

21   It -- it has responded.

22   But the dynamic is very different,

23   isn't it, when an executive says, I don't have

24   the power, and when it says, even if I had the

25   power --

1   MR. OLSON: Hypothetical.

2   JUSTICE SOTOMAYOR: -- I choose not to

3   do this. Aren't the dynamics of what happens

4   between Congress and the President dramatically

5   different in those circumstances?

6   MR. OLSON: Exactly. This is what is

7   called virtual reality. One said, I can't do --

8   I don't have the power to do it, but, if I did

9   in the sky, I might have done it for this

10   reason.

11   The answer, the short answer to your

12   question, Justice Sotomayor, and it's a very

13   good one, someone say I might have done it if

14   I'd had the power to do it, but I have no

15   discretion, I have no power to do it, it -- we

16   don't know what the administration would do if

17   it had to make this decision and take ownership

18   and accountability of this decision.

19   JUSTICE SOTOMAYOR: That's your point

20   about given the Attorney General decision and

21   the law that says they have to change it.

22   That's a very different circumstance than

23   saying, even if I don't have to, I won't.

24   MR. OLSON: That's exactly right. The

25   administration would then have to explain we

1   want to take responsibility for throwing these

2   people out of work, removing people that came

3   here when they were maybe two years old, who

4   have not committed a crime, and who have -- and

5   volunteered for this program, have -- have --

6   have conducted themselves properly and so forth.

7   JUSTICE ALITO: Mr. Olson, I -- I

8   understand that litany. But do you seriously

9   want to argue that if this case were to go back

10   and the agency were to say, again, exactly what

11   General Francisco interprets the Nielsen memo as

12   saying, giving all of these reasons and saying

13   that each one is an alternatively -- is an

14   independently sufficient basis for the -- the

15   action, would -- would that be unlawful?

16   Let's say they -- they go into great

17   length in explaining every --

18   MR. OLSON: Well --

19   JUSTICE ALITO: -- every -- every

20   factor, every basis.

21   CHIEF JUSTICE ROBERTS: Certainly.

22   MR. OLSON: If they explained and

23   provided a rational explanation instead of just

24   pushing a button or putting a rubber stamp on

25   it, that's what judicial review is all about.

1   That means the agency would have taken

2   responsibility for making the consequences of

3   those decisions, explaining why it thought about

4   it and why it decided what to do.

5   That's what your decisions require by

6   judicial review.

7   CHIEF JUSTICE ROBERTS: Thank you,

8   counsel.

9   Mr. Mongan.

10   ORAL ARGUMENT OF MICHAEL J. MONGAN ON

11   BEHALF OF THE STATE RESPONDENTS

12   MR. MONGAN: Mr. Chief Justice, and

13   may it please the Court:

14   It was up to Petitioners to decide how

15   to frame their decision to terminate DACA. They

16   could have taken responsibility for a

17   discretionary decision, rescinding a policy that

18   affects hundreds of thousands of lives.

19   Instead, they chose to end the policy based on

20   the ground that DACA was unlawful. They told

21   the public that the law deprived them of any

22   discretion to continue it. And when Judge Bates

23   invited them to make a new decision, they stood

24   by the old one.

25   That's their prerogative, but it has

1   the consequence that they have to defend that

2   decision based on the legal rationale they

3   originally offered, and the decision is

4   reviewable and cannot be sustained on that

5   basis.

6   Now the problem with the rationale is,

7   yes, they don't take serious account of the

8   dramatic costs to DACA recipients and the

9   economy and their employers and families of

10   terminating this policy, and also that it is

11   founded on the incorrect legal premise that DACA

12   is unlawful.

13   This Court can review the lack of --

14   and affirm based on the lack of an adequate

15   explanation for that ground or the fact that it

16   is an incorrect conclusion and it is legal

17   error.

18   Now, if I can turn to the question of

19   reviewability, the APA says that it commits

20   agency actions that are committed to agency

21   discretion by law are unreviewable.

22   And the central point here is that

23   when a agency founds a decision on a public

24   announcement that it lacks any discretion to

25   continue a policy, that can't fairly be

1   described as committed to agency discretion in

2   any meaningful sense.

3   This is the concept that the Court

4   reserved in Footnote 4 of Chaney, because that

5   is not a discretionary choice that the law has

6   committed to agency discretion.

7   I think that it is critical for us to

8   consider on the merits what my friend's position

9   is with respect to DACA and deferred action. My

10   friend appears to agree that they can grant

11   deferred action to compelling individuals, that

12   they can grant work authorization to deferred

13   action recipients, and they seem to agree that

14   this is a very worthy class of individuals.

15   So their position boils down to the

16   assertion that the INA prohibits them from

17   adopting a transparent framework that guides the

18   exercise of individualized discretion with

19   respect to this very compelling population of

20   individuals.

21   And that's not consistent with the

22   broad authority that Congress has granted the

23   Secretary under the INA and under 6 U.S.C. 202,

24   and it's not consistent with historical

25   practice, where the agency, over the decades,

1   has frequently adopted class-based discretionary

2   relief policies that allow it to channel the

3   exercise of recognized forms of discretion with

4   respect to particular individuals in a defined

5   class.

6   CHIEF JUSTICE ROBERTS: Well, that --

7   that history is not close to the number of

8   people covered by DACA.

9   MR. MONGAN: Well, Your Honor, there's

10   a history of class-based deferred action

11   policies, and they are narrower, to be sure, but

12   there are other class-based policies that have

13   applied to hundreds of thousands of individuals.

14   The family fairness policy, when announced,

15   would have applied to up to 40 percent of --

16   CHIEF JUSTICE ROBERTS: Fifty --

17   50,000 people, right? That's the number that

18   availed themselves of that policy?

19   MR. MONGAN: That's right, because it

20   was short-lived. But, at the time it was

21   announced, it was not clear that Congress was

22   going to act, and the executive told Congress

23   that this would apply to up to 40 percent of the

24   undocumented population at the time.

25   When Congress did act in that statute,

1   they signaled their approval of the executive

2   policy. The statute didn't have an effective

3   date for another year. And Congress said that

4   this is not intended to express disapproval of

5   the existing executive policy.

6   And that's one example, but there are

7   more examples of --

8   JUSTICE SOTOMAYOR: That sounds --

9   that percentage was 1.5 million people, very

10   comparable to this decision.

11   MR. MONGAN: Yes, and at a time when

12   the total undocumented population was much

13   smaller than it is today.

14   Now it -- it is critical for the

15   executive, in an area where it has broad

16   discretionary authority, to be able to set

17   policies that channel the exercise of that

18   authority, and this is a transparent framework

19   that has the benefit of allowing for some

20   measure of consistency and an even-handed

21   approach in the exercise of deferred action.

22   JUSTICE KAGAN: General, suppose that

23   this administration had not relied on legal

24   grounds to rescind the policy, which is very

25   different from what they did, but let's just

1 suppose otherwise, that they had immediately and

2 only relied on policy considerations.

3   Are you saying even then it would --

4 the -- the rescission would be reviewable? And

5 why would that be?

6   MR. MONGAN: So, if it were a pure

7 policy rationale, it would fall outside of

8 Chaney. It would be presumptively reviewable,

9 as most agency actions are. I think it would be

10 challenged, and the challengers would likely

11 argue that there's sufficient general standards

12 in this area to allow for a minimal level of

13 rationality review.

14   JUSTICE KAGAN: Why would it fall

15 outside of Chaney, do you think?

16   MR. MONGAN: I think that Chaney was

17 very specific about the type of agency action

18 that it addressed. It was a concrete decision

19 by the agency not to enforce a statute with

20 respect to particular actors.

21   Now that is different from a broad

22 policy that guides the exercise of deferred

23 action decisions prospectively. And Chaney was

24 founded on a recognized tradition of non-review.

25 It pointed to cases going back to the 19th

1   Century.

2   JUSTICE ALITO: Well, when you say

3   "particular actors," did it not apply to anybody

4   who was facing execution using -- using -- by --

5   by lethal injection?

6   MR. MONGAN: Well, as General

7   Francisco has noted, there were broad policy

8   considerations underlying the decision, but, as

9   it was described by the Court, it was a decision

10   not to enforce with respect to particular prison

11   administrators and drug companies.

12   And I think a -- a different point

13   here is that --

14   JUSTICE ALITO: Well, hasn't that been

15   FDA policy for all of the years since Chaney?

16   MR. MONGAN: Sure, Your Honor, but

17   that's a --

18   JUSTICE ALITO: Well, that's a big

19   class of people.

20   MR. MONGAN: But that's a flat

21   determination not to enforce, as opposed to a

22   policy guiding future decisions about whether to

23   grant deferred action, which itself is not a

24   flat or final non-enforcement decision. They

25   have argued that deferred action is revocable at

1   any time and could be -- and is not a defense to

2   removal.

3   So we're dealing with a different type

4   of policy here than the one that the agency

5   dealt with in Chaney.

6   JUSTICE BREYER: Well, what is it

7   exactly? I mean, look, I -- I -- I've always

8   thought, well, it means the individualized kind

9   of decision, but, quite rightly, the -- the

10   solicitor general reads me the language, which

11   is programmatic. But agency -- the United

12   States has hundreds, thousands of agencies which

13   do enforce all kinds of things, which make

14   programmatic rules all the time.

15   And so what -- it can't mean that

16   Heckler is interpreting this, committed to

17   agency discretion, to make serious inroads in

18   the principle of judicial review, but

19   everybody's struggling, including me, what's the

20   line? And what's the line generally?

21   It can't be so broad of all programs.

22   It can't be so narrow as an individualized

23   decision. Just what is it?

24   MR. MONGAN: Well, I think we can look

25   to the language of the Chaney decision. It

1   describes a decision not to take enforcement

2   action. So perhaps if there is a broad policy

3   that is a flat categorical decision that we will

4   not take enforcement action, that would be one

5   thing. But the --

6   JUSTICE BREYER: Imagine an SEC rule

7   or imagine an HHS rule and what it says is we

8   are not going to take action to give a certain

9   category of people their benefits. Not

10   reviewable? I mean, nobody would think that.

11   MR. MONGAN: Well --

12   JUSTICE BREYER: So -- so -- so we're

13   struggling still.

14   MR. MONGAN: Yes.

15   JUSTICE BREYER: And I'm saying

16   honestly I am struggling to get the right rule.

17   MR. MONGAN: I -- I understand and

18   there may be ambiguities at the margins here,

19   but I do want to focus it on this case because,

20   here, Acting Secretary Duke identified one

21   ground for terminating this policy. She said

22   that she was -- she pointed to the Attorney

23   General's letter, which concluded that the

24   policy was unconstitutional and beyond statutory

25   authority.

1   And whether or not this might

2   conceivably fall under Chaney, if it does, it

3   still is subject to review.

4   JUSTICE BREYER: So you're saying at

5   the minimum, one, an action to enforce is

6   different from an action not to enforce. Here,

7   we have one to enforce. And you're saying as

8   well that the ground being purely legal, it is

9   not a discretionary ground. He said it was

10   illegal, and, therefore, it is not within

11   discretion. Okay, have I got those two right?

12   MR. MONGAN: That's right, Your Honor.

13   JUSTICE BREYER: Anything else?

14   MR. MONGAN: I think those are what we

15   have focused on in this case and that --

16   JUSTICE GORSUCH: Well, counsel, I --

17   I'm sorry to interrupt there, but I actually had

18   understood your answer on the second one to be

19   different when you were posed that question by

20   Justice Kagan. And I thought you had indicated

21   that whether it was based on policy grounds or

22   on an illegal assessment wouldn't alter the

23   reviewability analysis in your view.

24   So I guess I'm just curious, which is

25   it?

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1              MR. MONGAN:  So, to be more precise,

2     if we're operating in a world where we assume

3     that Chaney applies, our point is, regardless,

4     this is reviewable because this is within a

5     sub-category where the agency has disclaimed any

6     discretionary choice.  It has said we have no

7     authority over the matter.  And that can't --

8              JUSTICE GORSUCH:  That wasn't my --

9     I'm sorry, that wasn't my question.

10             So -- so if -- if -- assuming we're

11    living in a world in which the agency had

12    alternative grounds and one of which was policy

13    grounds, I had thought you told Justice Kagan

14    that this would be reviewable.

15             And now I thought I understood you to

16    say something slightly different to -- to -- to

17    Justice Breyer.  Perhap -- perhaps I'm missing

18    something.

19             MR. MONGAN:  Well, let me try and --

20    and clarify.  We believe that a broad policy is

21    not the type of action that's referred to by

22    Chaney, consistent with some of the D.C. Circuit

23    authority that's been cited in the -- in the

24    briefs that General --

25             JUSTICE GORSUCH:  Well, I think
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         1   Justice Breyer -- that just takes us back to the

         2   beginning of the discussion with Justice Breyer,

         3   which is that can't be so necessarily because

         4   every prosecutorial discretion affects a lot of

         5   people. You had that discussion with Justice

         6   Alito as well. So I -- I -- I guess I -- I'll

         7   let you go, but I'm still struggling with this

         8   line that you're asking us to draw.

         9   MR. MONGAN: Well, it may be a

        10   difficult line to draw in the general case, but,

        11   in this case, with respect, it is an easy line

        12   to draw because we know that this decision was

        13   founded on a binding legal determination by the

        14   Attorney General that they could not continue

        15   this policy.

        16   CHIEF JUSTICE ROBERTS: What if it --

        17   MR. MONGAN: And that's the --

        18   CHIEF JUSTICE ROBERTS: -- what if it

        19   were less, as you view, in categorical terms?

        20   What if the Attorney General said, I've looked

        21   at this, it's -- it's -- it's a close case, but,

        22   on balance, I don't think we have the authority?

        23   Or if he said, I'm pretty sure we don't have the

        24   authority, but a court might come out

        25   differently? Does your analysis change, or is

1   it only when he says this is -- as far as I'm

2   concerned, this is definite; it's illegal?

3   MR. MONGAN: No, Your Honor, we would

4   argue that it's a type of action that's

5   presumptively reviewable, and if the agency

6   decides to base a decision on some discretionary

7   choice but with an explanation or rationale

8   that's founded on litigation risk or legal

9   doubt, that that would be a rationale that

10   courts --

11   CHIEF JUSTICE ROBERTS: Is it enough

12   --

13   MR. MONGAN: -- would be equipped to

14   review.

15   CHIEF JUSTICE ROBERTS: -- for him to

16   say, look, I've got a decision from the Fifth

17   Circuit that tells me this is illegal, it's been

18   affirmed by the Supreme Court by an equally

19   divided vote? That's enough for me to say we're

20   not going to do it?

21   MR. MONGAN: It's not enough to

22   sustain the decision, Your Honor. I think that,

23   under these circumstances, given the nature of

24   this program and the interests at stake, we

25   don't think that any genuine statement of legal

1   doubt or litigation risk would be adequate.

2   But that's not what we have here.

3   JUSTICE KAGAN: Well, even if you went

4   through a legitimate balancing exercise, in

5   other words, you talked about the law and what

6   you were worried about, and then you talked

7   about the reliance interests, and -- and then

8   you said here's is what we're weighing and

9   here's our judgment, do you think that that

10   would be sufficient?

11   MR. MONGAN: I think, as a general

12   matter, an agency could base a discretionary

13   decision on a -- a reasoned analysis like that.

14   I suspect that if we saw that decision, we would

15   challenge it under the particular circumstances

16   here.

17   But a court might agree that if there

18   were some substantial and detailed consideration

19   of the actual costs of this and the reasoned

20   legal analysis, then maybe that would be, in a

21   court's eyes, sufficient, but that's absolutely

22   not what we have here.

23   CHIEF JUSTICE ROBERTS: So --

24   MR. MONGAN: We have a --

25   CHIEF JUSTICE ROBERTS: -- so if this

1   -- if you prevail and the case goes back, is it

2   enough to say, look, we've read the amicus

3   briefs that Justice Breyer pointed out about the

4   reliance interests; we've read, you know, the

5   Fifth Circuit's opinion in -- in the Texas

6   litigation, presumably, they would cite that as

7   well, would that be enough?

8   MR. MONGAN: I think that it would

9   have to begin with the deficiencies that Judge

10   Bates identified, which is that the agency has

11   not actually identified with any particularity

12   the legal grounds that it's concerned with. It

13   does cite --

14   CHIEF JUSTICE ROBERTS: Well, it's

15   not --

16   MR. MONGAN: -- the DAPA case.

17   CHIEF JUSTICE ROBERTS: Yeah, I mean,

18   what -- do you need more than that? You've got

19   a court of appeals decision affirmed by an

20   equally divided Supreme Court. Can't he just

21   say that's the basis on which I'm making this

22   decision?

23   MR. MONGAN: Your Honor, no, and I

24   think Judge Bates is exactly right on this. The

25   reasoned explanation requirement is meant to

1   facilitate judicial review and inform the

2   public.

3   And, yes, they point to the DAPA case,

4   but there's four or five theories of illegality

5   floating around there ranging from the notice

6   and comment to the Take Care Clause claim. And

7   we don't know which ground the agency based its

8   decision on.

9   So that is a lack of a reasoned

10   explanation, in addition to the fact that --

11   JUSTICE KAGAN: Well, what would an

12   adequate explanation look like? I mean, what do

13   you think they would have to do to be in the

14   clear on this?

15   MR. MONGAN: Well, I think that they

16   would at least have to identify the particular

17   grounds that they're relying on to facilitate

18   further judicial review of their underlying

19   legal conclusion and explain why they believe it

20   applies to the DACA policy when they pointed to

21   a case about a different policy, and then have

22   some serious, and more serious than what we see

23   in the Nielsen memo, accounting of the very

24   substantial --

25   JUSTICE BREYER: But suppose they say,

 1   yeah, we'll do that, we'll do that. And now the

 2   authorities are legion on -- that -- that you --

 3   we should decide on the basis of that Duke memo.

 4   That was the decision, rested on that. And

 5   we've heard that, okay.

 6   There's another case where Justice

 7   Fortas wrote, you shouldn't play ping pong with

 8   the agency, okay? So they're saying that's what

 9   the -- a lot of their argument was.

10   What's the point? What's the point?

11   I mean, you'll send it back, and they'll say,

12   okay, right, DAPA was different; in DAPA, the

13   court said that, here, the DAPA program makes

14   4.2 million people citizens with a run-around of

15   the normal way to become citizens when you have

16   a child who's a citizen. And, here, that has

17   nothing to do with this case.

18   They're not -- no run-around. Okay,

19   you point that out, they point -- okay, we're

20   going to come out the same way. It's close

21   enough.

22   So should -- what's the argument

23   against playing -- as there is a sentence for,

24   against you, playing ping pong with the agency?

25   MR. MONGAN: I think that there is a

 1   very substantial meaning to a remand in this

 2   case, Your Honor. We don't truly know what the

 3   agency would do if confronted with a

 4   discretionary choice.

 5   If they knew that DACA were lawful,

 6   there's a new Secretary, and the administration

 7   has expressed broad sympathy for this

 8   population, and they very well might continue

 9   the policy or stop short of wholesale

10   termination.

11   And if we are remanding in light of

12   the lack of a reasoned explanation, my friend

13   has --

14   JUSTICE KAVANAUGH: But it --

15   MR. MONGAN: -- said --

16   JUSTICE KAVANAUGH: -- it was remanded

17   by Judge Bates or -- or given time, and

18   Secretary Nielsen did what you just said and

19   said, even if DACA was legal, you heard Mr.

20   Francisco on that, I would exercise my

21   discretion to rescind, and then explained her

22   consideration of the reliance interests.

23   So why is -- there's already been, in

24   effect, a remand.

25   MR. MONGAN: There -- there is a

 1   boilerplate assertion in that memo of

 2   independence, I will grant you that. I think if

 3   we look at the circumstances --

 4   JUSTICE KAVANAUGH: Well, can I just

 5   stop you on boilerplate?

 6   MR. MONGAN: Yeah.

 7   JUSTICE KAVANAUGH: I mean, this is a

 8   serious decision. We all agree with that. And

 9   -- and it was for the Secretary, presumably.

10   And to say in writing, even if it's

11   lawful, I nonetheless am going to exercise my

12   discretion, I assume that was a very considered

13   decision. Now we can agree with it or disagree

14   with the -- the merits of it, but it seems --

15   MR. MONGAN: Yes, and I think it's

16   important to look to the penultimate paragraph

17   in that memorandum, where she conducts her

18   collective weighing and she considers those

19   policy rationales along with the legal

20   rationales and say that, together, they outweigh

21   the purported costs of terminating DACA.

22   I also think it's critical to

23   understand the context of this in that --

24   JUSTICE KAVANAUGH: So your point,

25   just so I understand, I think this is your

1   point, is that the legal considerations, while

2   she said that, end up being intertwined in the

3   subsequent paragraphs with the policy

4   considerations?

5   MR. MONGAN: That -- that's absolutely

6   right. And this was, after all, in a context of

7   a memo that they submitted to the district court

8   in ongoing litigation intended to defend and

9   explain the prior decision.

10   And I do want to note here that to the

11   extent that my friend has suggested this is a

12   new decision or a new action and has been

13   presented as such, that's not consistent with

14   what they told the district court.

15   The district court said quite plainly,

16   please notify me if there's a new decision.

17   They submitted this memo and said, this is a

18   motion to revise your order with respect to the

19   original Duke decision; we want you to sustain

20   the Duke decision. And the district court took

21   them at their word and treated it accordingly.

22   So I don't think that they can come to

23   this Court and suggest that it is a fresh

24   decision and every rationale is before the

25   Court. Under Camp --

1   JUSTICE KAVANAUGH: In that

2   penultimate paragraph, what is the shortfall in

3   the discussion of reliance interests, in your

4   view?

5   MR. MONGAN: Well, I'm not sure that

6   there are -- there is much of a discussion. She

7   expresses some sympathy and then ultimately says

8   that it is up to Congress to consider and weigh

9   the -- the reliance interests and the costs.

10   It's not a detailed discussion of the

11   dramatic harm to hundreds of thousands of young

12   people, to their families, to their employers,

13   to the states, to the economy that would arise

14   from this decision.

15   JUSTICE KAVANAUGH: Well, she does say

16   that in a sentence. If we remanded and it were

17   detailed more fully, would it still fall short?

18   MR. MONGAN: I think the great value

19   of a remand is that --

20   CHIEF JUSTICE ROBERTS: Please.

21   MR. MONGAN: -- to date, they have not

22   made a decision that actually takes ownership of

23   a discretionary choice to end this policy. And

24   if they had a remand, if that is their intent,

25   they could issue a new decision that actually

1   does that so the public could hold them

2   accountable for the choice they've made.

3   CHIEF JUSTICE ROBERTS: Thank you,

4   counsel.

5   Five minutes, Mr. -- oh, I'm sorry,

6   General Francisco.

7   REBUTTAL ARGUMENT OF GEN. NOEL J. FRANCISCO

8   ON BEHALF OF THE PETITIONERS

9   GENERAL FRANCISCO: Thank you,

10   Mr. Chief Justice.

11   I think I want to focus on three basic

12   points. First, Justice Kavanaugh, I want to

13   make sure you have all of the relevant portions

14   in the Nielsen Memorandum that I think make this

15   all quite clear. Page 122a, and I'm at the

16   Regents Petitioners' appendix. "In considering

17   how DHS's discretion to establish enforcement

18   policies and priorities should be exercised, the

19   DACA policy properly was and should be rescinded

20   for several separate and independently

21   sufficient reasons." She then gives the first

22   reason, the legality question.

23   Then if you go to page 123a. Second,

24   "regardless of whether the DACA policy is

25   ultimately illegal, it was appropriately

1   rescinded by DHS because there are at a minimum

2   serious doubts about its legality."

3   Further down the page, third,

4   "regardless of whether these concerns about the

5   DACA policy render it illegal or legally

6   questionable, there are sound reasons of

7   enforcement policy to rescind the DACA policy."

8   And then she sets out the enforcement policy.

9   If you move to page 121 -- 125a, where

10   she's discussing reliance, "I do not believe

11   that the asserted reliance interests outweigh

12   the questionable legality of the DACA policy and

13   the other reasons for ending the policy

14   discussed above."

15   And, finally, when you get to the

16   conclusion on page 126a, "for these reasons, in

17   setting DHS enforcement policies and priorities,

18   I concur with and decline to disturb Acting

19   Secretary Duke's decisions to rescind the DACA

20   policies."

21   So, frankly --

22   JUSTICE GINSBURG: But we don't know

23   from --

24   GENERAL FRANCISCO: -- I don't

25   understand --

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1              JUSTICE GINSBURG:  -- from all of

2     that, we don't know how she would respond if

3     there were a clear recognition that there was

4     nothing illegal about DACA.

5              Her whole memo is infected by the idea

6     that this is, one, illegal.  It leaves

7     substantial doubt about its illegality.

8              If we take that out, then -- the

9     independent ground that you're asserting, then

10    she would be saying, we stand up and say this is

11    the policy of our administration.  We don't like

12    DACA and we're taking responsibility for that,

13    instead of trying to put the blame on the law.

14             GENERAL FRANCISCO:  Respectfully, Your

15    Honor, I very much disagree.  She sets forth

16    explicitly on page 121a several separate and

17    independently sufficient reasons.

18             We own this.  We both own the policy

19    rationale set forth in Secretary Nielsen's

20    memorandum.  Also, because we think this is not

21    subject to judicial review at all, we own the

22    legal judgment set forth in Secretary Nielsen's

23    memoranda.

24             So simply stated, the fact that we've

25    got alternative and legal policy grounds for
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1   making this decision make two things clear.

2   First, it is four square within Chaney

3   under the reviewability issue because Chaney,

4   likewise, was -- rested on alternative legal

5   grounds. The FDA believed it lacked

6   jurisdiction and policy grounds.

7   And, secondly, it shows how this was

8   plainly and eminently reasonable rescission,

9   even if you disagree with us on the legal issue,

10   because we've set forth separate and independent

11   policy issues for the decision.

12   So that was basically my first point.

13   JUSTICE KAGAN: But even what you just

14   read, General, in that key paragraph where the

15   Secretary weighs the -- the -- the -- the

16   reliance interests against the reasons in her

17   memo, everything's wrapped up. And we really

18   don't know how she would have conducted that

19   balance, how she would have weighed those two,

20   if the legal had been taken away from it.

21   GENERAL FRANCISCO: I -- I simply

22   disagree with that. When she specifically says

23   that she's setting forth separate -- separate

24   and independent grounds justifying the

25   rescission, I don't think that there's any fair

1   way to read that but by saying that she would

2   have rescinded it based on any of the

3   independent grounds, which brings me --

4   JUSTICE BREYER: Look at the

5   independent grounds. Number one -- number one,

6   "we should not adopt a policy of non-enforcement

7   of those laws for broad classes and categories."

8   Okay. And Congress she thinks agrees with us.

9   Well, I don't know. Maybe they do;

10   maybe they don't. But, aside from that, that --

11   that's a conclusion.

12   Look at the second one: "We should do

13   it on a truly individualized case-by-case

14   basis." That's a conclusion. That isn't a

15   reason.

16   And the third one is a reason. The

17   third one: "It is important to project the

18   message that leaves no doubt regarding the

19   clear," et cetera, "enforcement of immigration

20   against all class" -- that's an independent

21   reason.

22   GENERAL FRANCISCO: With respect, may

23   I finish? May I finish?

24   CHIEF JUSTICE ROBERTS: Yes.

25   GENERAL FRANCISCO: I'm going to try

1   to squeeze in two points in a single sentence.

2   JUSTICE BREYER: That's all right.

3   Good luck. I'm sorry.

4   GENERAL FRANCISCO: The first -- the

5   -- the first point is that I very much disagree.

6   All of those articulate the basic same policy

7   rationale that this is a law enforcement agency.

8   They are against general policies that actively

9   facilitate violations of the law.

10   And the last point I will make is,

11   while we don't think you need to address the

12   legality question if you agree with us on any of

13   our other arguments, if you disagree with us on

14   any of our other arguments, you absolutely must

15   address the ultimate legality question because

16   we simply cannot be forced to maintain a policy

17   that this Court concludes that is illegal.

18   So, if you decide to get there, then

19   we do think that DACA is illegal and was

20   justifiably -- was justifiably rescinded on that

21   basis as well.

22   Thank you, Your Honor.

23   CHIEF JUSTICE ROBERTS: Thank you,

24   counsel. The case is submitted.

25

1   (Whereupon, at 11:30 a.m., the case

2   was submitted.)

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