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

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,
RESPONDENTS.

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL., PETITIONERS,
v.
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE, ET AL., RESPONDENTS.

KEVIN K. MCALEENAN, ACTING SECRETARY OF
HOMELAND SECURITY, ET AL., PETITIONERS,
v.
MARTIN JONATHAN BATALLA VIDAL, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth, D.C., and Second Circuits

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, NATURAL RESOURCES DEFENSE COUNCIL, AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amicus Curiae Public Citizen, Inc., is a nonprofit advocacy organization founded in 1971. Public Citizen appears on behalf of its nationwide membership before Congress, administrative agencies, and courts on a range of issues, including protection of consumers and workers and fostering open and fair governmental processes.

Amicus curiae Natural Resources Defense Council, Inc., (NRDC) is a nonprofit advocacy group that works to protect health and the environment. Since its founding in 1970, NRDC has pursued this goal through science, policy analysis, advocacy before agencies and legislatures, and litigation to enforce environmental laws.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU, through its Immigrants' Rights Project and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens.

Amici have litigated hundreds of cases seeking judicial review of government actions under the Administrative Procedure Act (APA), special review provisions applicable to particular statutes, and nonstatutory mechanisms for review of unlawful government

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae made a monetary contribution to preparation or submission of the brief. Counsel for all parties have filed blanket consents to the filing of amicus briefs.

action. It is critical to the mission of these organizations that courts adhere to the principle that agency action is presumptively subject to judicial review, with exceptions to reviewability narrowly construed. In their own litigation, amici confront arguments by governmental defendants that agency actions reflect unreviewable exercises of enforcement discretion or are otherwise committed to agency discretion by law. Amici therefore have a strong interest in confining to their proper sphere these exceptions to the availability of judicial review.

In this case, the government petitioners argue that their decision to rescind the Deferred Action for Childhood Arrivals (DACA) program was an exercise of enforcement discretion that is unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985). For a generation since *Chaney*, however, courts have recognized that that decision bars review of discretionary decisions not to commence particular enforcement actions, not of agencies' adoption of general policies affecting enforcement decisions. The government's brief, however, does not address this body of law. Amici therefore submit this brief to provide a more complete account of the boundaries of *Chaney*'s exception to the general presumption favoring judicial review.

SUMMARY OF ARGUMENT

The government's principal submission in this case is that its decision to rescind DACA "is a quintessential exercise of enforcement discretion" that is unreviewable under the APA because it is "'committed to agency discretion by law.'" U.S. Br. 17 (quoting 5 U.S.C. § 701(a)(2)). Invoking *Heckler v. Chaney*'s holding that section 701(a)(2) "precludes review … of an agency's decision not to institute enforcement

actions," *id.* (citing 470 U.S. at 831), the government contends that that holding also extends to agency actions adopting or rescinding a "policy of nonenforcement," *id.* at 17, 19. As respondents explain, section 701(a)(2) cannot apply here because, in rescinding DACA, the Secretary of Homeland Security did not purport to exercise any enforcement discretion, but instead bowed to the Attorney General's determination that DACA was unlawful. *See*, *e.g.*, D.C. Resp. Br. 22–30. Even leaving that point aside, however, the government's argument depends entirely on its assertion that *Heckler v. Chaney* is applicable to "a broad and categorical decision to rescind a nonenforcement policy." *Id.* at 21. The government's position that *Chaney* applies to actions promulgating enforcement policies is contrary to decades of case law in the federal courts recognizing that *Chaney*'s reasoning does not extend to such agency actions.

The APA embodies a broad presumption in favor of judicial review of agency action. Persons aggrieved by final agency action may generally obtain review in the courts unless the action falls within two narrow exceptions applicable when (1) other statutes "preclude judicial review," or (2) the action is "committed to agency discretion by law." 5 U.S.C. § 701(a). The second exception, at issue here, does not apply broadly to all exercises of agency discretion; indeed, the APA elsewhere explicitly provides for review of discretionary agency actions. *See* 5 U.S.C. § 706(2)(A). As this Court has repeatedly held, the "committed to agency discretion by law" exception applies only to narrow categories of agency actions that have traditionally been excluded from the scope of judicial review because courts have no meaningful standards against which to review them.

The kind of action that was the subject of *Heckler v. Chaney*—an agency decision not to initiate an enforcement proceeding—is one of the few examples of agency action that this Court has determined falls within that exception. *Chaney*, however, does not broadly immunize from review all agency actions that arguably implicate an agency's enforcement discretion. *Chaney* focused narrowly on the longstanding judicial tradition of declining review of agency decisions not to undertake enforcement actions, and on reasons for denying review that are specific to such decisions and inapplicable when an agency adopts a general policy that governs its enforcement decisions. This Court has, therefore, consistently described *Chaney* as limited to agency decisions not to initiate enforcement proceedings.

Based on the limits of *Chaney*'s holding and reasoning, the lower federal courts, in the decades since that decision, have elaborated a workable and principled distinction between unreviewable actions declining to initiate particular enforcement proceedings, and reviewable actions promulgating general rules or policies affecting agency enforcement. This case law respects the judicial tradition of noninterference with agency nonenforcement decisions that lies at the heart of *Chaney*. At the same time, the courts have properly subjected agency actions that fall outside that tradition to review for conformity with law and the APA's prohibition of arbitrary and capricious agency action. As this body of case law reflects, the promulgation of general policies affecting agency enforcement is well-suited to such judicial review.

The government's arguments for expanding *Chaney*'s preclusion of review to encompass generally applicable agency policies are unconvincing. The

government points to no tradition against review of agency policies comparable to the one *Chaney* identified with respect to decisions not to initiate enforcement proceedings. And contrary to the government's characterization, *Chaney* did not purport to address general, "programmatic" actions. The nonenforcement decision in *Chaney* may have reflected the agency's general policy views, but the Court rejected review because of the *form* the agency's action took—a decision not to initiate enforcement proceedings—not because enforcement-related policies are inherently unreviewable. General rules or policies are amenable to review not only for conformity to statutory mandates, but also for their adherence to norms of reasoned explanation applicable to agency action generally. Far from infringing on separation-of-powers principles, as the government suggests, such review is a proper and important exercise of the courts' power to confine the executive branch to the lawful exercise of authority delegated by Congress.

ARGUMENT

I. This Court's decisions, including *Chaney*, have narrowly construed the APA's exceptions to judicial review.

The starting-point for consideration of the government's argument against judicial review is the long-established principle that the APA's provisions for judicial review, set forth at 5 U.S.C. §§ 701–706, "embod[y] a 'basic presumption of judicial review.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019) (citation omitted). That presumption is set forth in section 704, which generally makes "final agency action … subject to judicial review," and section 701(a), which creates narrow exceptions to the availability of

review only "to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

As this Court has repeatedly emphasized, these provisions reflect that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). The APA's language and structure manifest Congress's choice to provide remedies for the "legal lapses and violations" that are especially likely to occur "when they have no consequence." *Id.* at 1652–53. "For that reason, this Court applies a 'strong presumption' favoring judicial review of administrative action." *Id.* at 1651 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)). Consistent with that strong presumption, the Court has read the APA's exceptions to judicial review narrowly and imposed on agencies "a 'heavy burden' in attempting to show that Congress 'prohibit[ed] all judicial review'" of their actions. *Id.* (citation omitted).

In this case, the government suggests only glancingly that applicable statutes "preclude judicial review" within the meaning of section 701(a)(1), *see* U.S. Br. 20–21; it relies principally on section 701(a)(2)'s exception for "agency action … committed to agency discretion by law." This Court has explained, however, that section 701(a)(2) does not preclude review of all discretionary agency actions: If it did, it would contradict "the command in § 706(2)(A) that courts set aside any agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2019). "A court could never determine that an agency abused its discretion if all matters committed to agency discretion were

unreviewable." *Id*. Thus, "[t]o give effect to § 706(2)(A) and to honor the presumption of review, we have read the exception in § 701(a)(2) quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Id*. (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); *accord*, *Dep't of Commerce*, 139 S. Ct. at 2568.

In keeping with this narrow reading of section 706(a)(2), the Court has restricted it to the types of decisions that courts "traditionally" recognized as unreviewable under the "common law" of judicial review that preceded the APA's enactment. *Chaney*, 470 U.S. at 832. Thus, "[t]he few cases in which [this Court] ha[s] applied the § 701(a)(2) exception involved agency decisions that courts have traditionally regarded as unreviewable," not types of actions "that federal courts regularly review." *Weyerhaeuser*, 139 S. Ct. at 370. *Chaney* is one of the rare instances in which the Court identified a narrow type of action—"a decision not to institute enforcement proceedings"—that is "traditionally committed to agency discretion." *Dep't of Commerce*, 139 S. Ct. at 2568. This Court has consistently refused to give *Chaney* a more expansive reading, *see*, *e.g.*, *id*.; *Weyerhaeuser*, 139 S. Ct. at 370; *Mach Mining*, 135 S. Ct. at 1652; *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007).

II. *Chaney*'s holding is limited to agency decisions not to initiate enforcement proceedings.

Chaney involved a challenge to the failure of the Food and Drug Administration (FDA) to take enforcement action against the use of unapproved drugs for

execution of prisoners facing death sentences. This Court framed the issue before it in accordingly narrow terms as one involving "the extent to which determinations by the FDA *not to exercise* its enforcement authority over the use of drugs in interstate commerce may be judicially reviewed." 470 U.S. at 828. While emphasizing the breadth of the presumption in favor of judicial review under the APA and the narrowness of the exception for actions "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the Court held that the presumption was inapplicable to "an agency's decision not to undertake certain enforcement actions," 470 U.S. at 831, because of the "general unsuitability for judicial review" of such decisions, *id*. The Court went on to explain that "general unsuitability" in terms that made plain that the decisions it deemed unsuitable for judicial review were decisions to forbear from taking particular enforcement actions:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether *a violation* has occurred, but whether agency resources are best spent on *this violation* or another, whether the agency is likely to succeed if it acts, whether *the particular enforcement action requested* best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake *the action* at all. An agency generally cannot act against *each technical violation* of the statute it is charged with enforcing.

Id. at 831–32 (emphasis added).

The Court accordingly held "agency refusals to institute investigative or enforcement proceedings" to be

presumptively unreviewable. *Id*. at 838. Justice Brennan, concurring, agreed that "[t]his general presumption is based on the view that, in the normal course of events, Congress intends to allow broad discretion for its administrative agencies to make particular enforcement decisions, and there often may not exist readily discernible 'law to apply' for courts to conduct judicial review of nonenforcement decisions." *Id*. at 838 (Brennan, J., concurring). The Court recognized, moreover, that situations in which an agency "consciously and expressly adopted a general policy" inconsistent with statutory responsibilities were not controlled by its holding. *Id*. at 833 n.4 (majority). Justice Brennan likewise distinguished such policies from the "[i]ndividual, isolated nonenforcement decisions" that the Court's holding addressed. *Id*. at 839 (Brennan, J., concurring).

Thus, this Court's subsequent decisions have consistently characterized *Chaney*'s holding as narrowly applicable to decisions to forgo enforcement actions, not as establishing a broad exemption from the APA for all agency actions that touch in any way on how an agency exercises enforcement authority. Last Term, for example, the Court described *Chaney* as making "a decision not to institute enforcement proceedings" presumptively unreviewable. *Dep't of Commerce*, 139 S. Ct. at 2568. Likewise, in *Massachusetts v. EPA*, the Court noted *Chaney*'s holding "that an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review." 549 U.S. at 527. The Court's decision in *Lincoln v. Vigil* used an almost identical characterization: "In *Heckler* itself, we held an agency's decision not to institute enforcement proceedings to be presumptively unreviewable under § 701(a)(2)." 508 U.S. at 191. Every other case in

which the Court has described *Chaney*'s holding uses equivalent terms. *See*, *e.g.*, *FEC v. Akins*, 524 U.S. 11, 26 (1998); *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992); *Webster v. Doe*, 486 U.S. 592, 599 (1988).

Both in promulgating DACA, and in rescinding it, the government adopted policies concerning criteria determining whether a noncitizen will be permitted to remain in the United States. Those actions were not decisions to forgo specific enforcement actions. Neither *Chaney* nor any of this Court's decisions following it has held that the APA precludes review of actions promulgating general policies such as DACA's rescission. Indeed, as noted above, *Chaney* itself distinguished the adoption of general policies from decisions not to institute enforcement proceedings. Likewise, *Massachusetts v. EPA* explained why similar actions—denials of rulemaking petitions involving whether or not to promulgate policies governing an agency's enforcement of the statutes it administers—do not fall within *Chaney*'s ambit: Unlike "an agency's decision not to initiate an enforcement action," such actions "are less frequent, more apt to involve legal as opposed to factual analysis," and involve "a public explanation" of the agency's action. 549 U.S. at 527 (citation omitted). Those features enhance the amenability of such actions to review aimed at determining whether they are "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

III. Consistent with *Chaney*, lower federal courts have held that agency actions promulgating general enforcement-related policies are reviewable.

In accordance with the limits on this Court's rationale in *Chaney*, the lower courts have for decades developed a workable distinction between discretionary decisions declining to initiate enforcement proceedings, which are presumptively unreviewable under *Chaney*, and actions promulgating policies that guide an agency's enforcement or nonenforcement determinations, which fall outside *Chaney*'s narrow scope. This line of precedent fully respects exercises of discretion not to take enforcement action that are traditionally not subject to judicial review. Where that tradition is inapplicable, however, courts have given effect to the APA's broad presumption favoring review by allowing agency actions to be tested for abuse of discretion and compliance with law when meaningful standards for review are available.

Given its significant role in developing and applying principles of administrative law, the D.C. Circuit has played an active part in fleshing out this distinction. That court has repeatedly held that an agency's adoption of rules or general policies establishing criteria for enforcement *is* reviewable. *See*, *e.g.*, *Edison Elec. Inst. v. EPA*, 996 F.2d 326 (D.C. Cir. 1993); *Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765 (D.C. Cir. 1992). In *Crowley Caribbean Transport, Inc. v. Peña*, 37 F.3d 671 (1994), for example, the D.C. Circuit explained that, under *Chaney*, "an agency's statement of a *general enforcement policy* may be reviewable for legal sufficiency where the agency has expressed the policy as a formal regulation after the full rulemaking

process … or has otherwise articulated it in some form of universal policy statement." *Id*. at 676.

Crowley identified three reasons why *Chaney*'s presumption that a decision to forgo initiating an enforcement proceeding is unreviewable does not apply to an agency's promulgation of a general enforcement (or nonenforcement) policy. First, because enforcement policies are not tied to the particular facts of an individual enforcement action, "they are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Id*. at 677. Second, an agency's statement of a policy regarding enforcement "poses special risks" that the agency "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," *id.* (quoting *Chaney,* 470 U.S. at 833 n.4), rendering a presumption of nonreviewability "inappropriate." *Id.* "Finally, an agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy, whereas such statements in the context of individual decisions to forego enforcement tend to be cursory, ad hoc, or post hoc." *Id*.

Based on these considerations, *Crowley* articulated, and the D.C. Circuit has subsequently followed, a generally applicable corollary to *Chaney*: While "agencies' nonenforcement decisions are generally unreviewable under the Administrative Procedure Act, … an agency's adoption of a general enforcement policy is subject to review." *OSG Bulk Ships, Inc. v.*

United States, 132 F.3d 808, 812 (D.C. Cir. 1998) (holding that courts could review the federal Maritime Administration's policy of not enforcing restrictions on use of ships constructed with federal subsidies).

Other circuits have similarly held that *Chaney* does not extend to "permanent policies or standards." *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996) (rejecting Secretary of Agriculture's contention that a policy of not enforcing a zero-tolerance standard for contaminated poultry was unreviewable under *Chaney*); *see also Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 236 (5th Cir. 2015) (citing *Crowley* and holding that EPA's determination whether to promulgate a "broadly applicable … policy" was not an exercise of unreviewable enforcement discretion under *Chaney*); *cf. Texas v. United States*, 809 F.3d 134, 168 (5th Cir. 2015) (finding DHS's action creating the Deferred Action for Parents of Americans and Lawful Permanent Residents program to be reviewable under *Chaney*), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016).

The Second Circuit, in *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 167 (2004), also approvingly cited the distinction drawn by *Crowley* between reviewable enforcement policies and unreviewable individual non-enforcement decisions. *Riverkeeper* was a challenge to the failure of the Nuclear Regulatory Commission (NRC) to require certain security measures as conditions on its licensing of a nuclear power plant. The challenger argued that the NRC's inaction was reviewable because it reflected a general policy of failing to enforce adequate security requirements. The court endorsed *Crowley*'s explanation of why *Chaney* does not preclude review of an agency's explicit adoption of an enforcement policy, *see id.* (quoting *Crowley*, 37

F.3d at 677), but found that the NRC had not explicitly "express[ed]" a "broad enforcement polic[y]," *id.* The court then examined the record to see if it could discern a reviewable "policy not to protect adequately public health and safety with respect to nuclear plants," *id.* at 168, and, finding no such policy, held that *Chaney* precluded review of the agency's failure to take enforcement action in the case before it, *id.* at 170. *Riverkeeper* thus illustrates that the permissible review of general policies that guide enforcement does not encroach on the space occupied by *Chaney*.

Applying these principles, district courts, in the nearly quarter-century since *Crowley*, have reviewed agencies' adoption of express enforcement policies in the relatively infrequent cases where agencies take such actions and face APA challenges. For example, in *WildEarth Guardians v. DOJ*, 181 F. Supp. 3d 651, 665 (D. Ariz. 2015), the court cited *Crowley* in support of its holding that *Chaney* did not bar review of the Department of Justice's formally expressed "McKittrick policy" authorizing prosecutors to request specific intent rather than general intent instructions in certain cases.[2] In *Chiang v. Kempthorne*, 503 F. Supp. 2d 343, 351 (D.D.C. 2007), the court held that guidelines limiting the time periods for which the government could seek to recover royalties from mineral lessees constituted a reviewable general enforcement policy rather than an unreviewable decision not to take enforcement action under *Chaney*. And in *Center for Auto Safety, Inc. v. NHTSA*, 342 F. Supp. 2d 1

[2] The Ninth Circuit ultimately vacated the district court's later decision granting summary judgment to the plaintiffs, for lack of standing. *WildEarth Guardians v. DOJ*, 752 F. Appx. 421 (9th Cir. 2018). The court of appeals did not address *Chaney*.

(D.D.C. 2004), *aff'd on other grounds*, 452 F.3d 798 (D.C. Cir. 2006), the court held that *Chaney* was inapplicable to a challenge to an agency's practice of enforcing auto recalls on a regional but not national basis because it was not a "single-shot non-enforcement decision." *Id*. at 12 (quoting *Crowley*, 37 F.3d at 676). *See also*, *e.g.*, *Ringo v. Lombardi*, 706 F. Supp. 2d 952 (W.D. Mo. 2010) (holding that *Chaney* does not preclude review of a general policy of nonenforcement of the Controlled Substances Act with respect to lethal-injection drugs); *Roane v. Holder*, 607 F. Supp. 2d 216, 226–27 (D.D.C. 2009) (same). The cases illustrate that the appellate decisions have set forth a workable standard and that application of that standard has neither displaced *Chaney* from its proper sphere nor resulted in torrents of litigation.

The Department of Justice has also recognized the well-established distinction between exercises of discretion to forgo an enforcement action and general enforcement policies that fall outside *Chaney*'s holding. In its formal opinion concerning the lawfulness of deferred action programs for noncitizens unlawfully present in the United States, the Department's Office of Legal Counsel (OLC) extensively discussed *Chaney* and the limitations of its holding. *See* OLC, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014), 2014 WL 10788677.

OLC's opinion stressed two points significant here. First, OLC stated that agencies "ordinarily" may not "'consciously and expressly adopt[] a general policy'" that abdicates statutory responsibilities. *Id*., 2014 WL 10788677, at *6 (quoting *Chaney*, 470 U.S. at 833 n.4). Second, OLC recognized that "lower courts, following

Chaney, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis." *Id*. OLC cited both *Crowley* and *Kenney* for this proposition and endorsed *Crowley*'s distinction between unreviewable "single-shot non-enforcement decisions," *id*. (quoting *Crowley*, 37 F.3d at 676), and "general policies" that pose risks that the agency "has exceeded the bounds of its enforcement discretion," *id*.

The government's brief does not acknowledge the extensive body of lower-court case law fleshing out *Chaney*'s boundaries, or its own prior statements distinguishing reviewable general policies from unreviewable individual exercises of discretion not to take enforcement action. Adopting the government's current litigation position that its action rescinding DACA falls within the scope of *Chaney*'s preclusion of review of decisions not to initiate enforcement proceedings would eliminate this distinction, long recognized by courts and by the Justice Department itself.

IV. The government's arguments for extending *Chaney* are unconvincing.

The government's justification for disregarding the longstanding judicial view that *Chaney* does not extend to actions of the type at issue here rests largely on an *ipse dixit*: The government asserts that "DHS's decision to discontinue the DACA policy is exactly the type of agency decision that traditionally has been understood as unsuitable for judicial review and therefore 'committed to agency discretion' under Section 701(a)(2)." U.S. Br. 18–19. But the government cites absolutely nothing to support its assertion that there is a tradition that actions adopting general

enforcement policies are unreviewable. Neither *Chaney* nor any of this Court's other decisions invokes such a tradition, and the government offers no examples from other courts and no citations to other authorities suggesting that the "common law" of judicial review at the time of the APA's enactment embodied such a tradition. Instead, the government backs up its statement only with the observation that if "the decision to *adopt* a policy of nonenforcement" is unreviewable, "the decision whether to *retain* such a policy" should also be unreviewable. *Id.* at 19. That might be so; but because the premise that decisions to adopt nonenforcement policies are traditionally unreviewable is unsupported, the government's syllogism does nothing to advance its argument.

The government also insists that "*Chaney* itself concerned the programmatic determination whether to enforce the FDCA with respect to drugs used to administer the death penalty, not the particular circumstances of any individual case." U.S. Br. 21–22. That assertion, however, picks a quarrel with this Court's own description of the issue and holding in *Chaney* itself and in later opinions. As this Court explained in *Chaney*, the case arose from a request by individuals under sentences of death that the FDA initiate enforcement proceedings aimed at the manufacturers and end users of the specific drugs to be used in their executions. Those individuals then sought APA review of the agency's refusal to initiate the requested enforcement actions. *See* 470 U.S. at 823–25. Thus, the Court did not treat the case as involving reviewability of a general or "programmatic" action (a term not found in the opinion), but considered instead whether "an agency's decision not to prosecute or enforce," *id.* at 831, is committed to agency discretion under the

APA. And, as explained above, *see supra* pp. 9–10, the Court has consistently described *Chaney* as addressing decisions declining to initiate specific enforcement proceedings, not as applying to actions adopting policies concerning enforcement.

To be sure, the agency's decision in *Chaney* undoubtedly reflected broader legal and policy views, *see id*. at 824—views that might have served as the basis for a different type of action that would have been reviewable. But *Chaney* found that there were "good reasons" why one type of action—a decision not to initiate an enforcement proceeding—was presumptively unsuitable for review, *id*. at 832, even if that action rested in part on legal or policy grounds that could be reviewed in the context of a different type of action. As the government itself points out, this Court has "held that agency actions falling within a tradition of nonreviewability do not become reviewable just because the agency gives a reviewable reason" for those actions. U.S. Br. 23 (internal quotation marks and brackets omitted; citing *ICC v. B'hood of Locomotive Eng'rs*, 482 U.S. 270, 282–83 (1987)). By the same token, reviewable action, such as the promulgation of a generally applicable policy, does not become unreviewable merely because an individual decision to forgo enforcement might also be based on the same "programmatic" reasons.

The government's observations that enforcement priorities "are, if anything, more susceptible to implementation though broad guidance than through case-by-case enforcement decisions," and that such guidance helps "avoid arbitrariness and ensure consistency," U.S. Br. 22 (citations omitted), do nothing to support its contention that *Chaney* should be extended to shield such actions from review. That there are

advantages for agencies to proceeding through general policies rather than case-by-case decisionmaking is hardly a reason to forgo review of the lawfulness and rationality of such policies. Indeed, the very features of general enforcement policies that render them effective as a means of ordering agency priorities and conforming them to statutory commands and purposes also make them suitable for judicial review, which in turn serves to further the desired goal of avoiding arbitrary agency action.

The government suggests that review is unwarranted here because actions promulgating general enforcement policies can only be reviewable if they involve a specific "statutory directive" that circumscribes agency enforcement discretion, U.S. Br. 19, or an "interpretation of particular substantive provisions" of a statute, *id.* at 25. As explained above, this argument is unsupported by the Court's opinion in *Chaney*. Moreover, questions of statutory authorization *are* directly implicated by the action rescinding DACA, which is based on the assertion that DACA violated substantive commands of federal immigration statutes. Indeed, the government's current claim that its action was justified by a litigation risk that DACA could be held unlawful as a violation of statutory commands assumes that the promulgation of DACA was a reviewable action rather than an unreviewable exercise of discretion not to initiate a particular enforcement proceeding. If that is so, DACA's rescission is likewise reviewable.

In addition, as the D.C. Circuit explained in *Crowley*, the fact that actions promulgating general enforcement policies often involve direct interpretations of statutes is only one of the reasons that such actions are reviewable. Thus, *Crowley* observed that actions

promulgating enforcement policies are "more likely" than individual enforcement decisions to involve interpretation of express statutory commands, not that they *necessarily* involve such interpretation. 37 F.3d at 676–77. Such a statement about the generic characteristics of general policies that help make them suitable for review by no means suggests that a policy must share each such characteristic to render it reviewable.

Crowley also pointed to other features of general policies that distinguish them from decisions not to initiate specific enforcement actions and make them suitable for judicial review—in particular, that the promulgation of general rules and policies, unlike an individual nonenforcement decision, typically involves formal explanation of the agency's reasons for acting. *Crowley*, 37 F.3d at 677. That consideration is present here and confirms the reviewability of the action rescinding DACA against the standards of reasoned explanation that apply under the APA when an agency abruptly changes its course. *See*, *e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

Finally, the government's passing suggestion that APA review of actions promulgating enforcement policies implicates separation-of-powers concerns, U.S. Br. 19, is baseless. Exempting an agency's exercise of authority delegated by Congress from judicial review is not a matter of constitutional imperative, but of congressional choice—which is itself constrained by constitutional principles that in some cases *require* review. *See Webster*, 486 U.S. at 603; *INS v. St. Cyr*, 533 U.S. 289, 308–08 (2001). Thus, *Chaney* recognized that even the actions it found to be presumptively

unreviewable—agency decisions not to initiate enforcement actions—are reviewable when Congress so commands. 470 U.S. at 832–33. "Congress may limit an agency's exercise of enforcement power if it wishes." *Id.* at 833. Likewise, in *FEC v. Akins*, this Court brushed aside any suggestion that agency enforcement discretion must remain unreviewable even when Congress has authorized review. *See* 524 U.S. at 26. Indeed, statutorily authorized judicial review of the lawfulness of agency action serves rather than undermines separation-of-powers values. *See Bowen*, 476 U.S. at 670. Here, where the action at issue falls outside the APA's limited exception to the presumptive availability of review, separation-of-powers concerns provide no basis for denying review.[3]

In sum, accepting the government's view that its adoption or rescission of broad policies governing its administration of the immigration laws is unreviewable would substantially expand the reach of *Chaney*, conflict with its reasoning and that of other decisions of this Court, and upend decades of case law applying *Chaney*. The Court accordingly should reject the government's contention that its rescission of DACA is unreviewable.

CONCLUSION

This Court should affirm the decisions of the courts below.

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[3] The government's suggestions in the lower courts (not repeated in its brief in this Court) that its *Chaney* arguments are about "justiciability" are also baseless. Section 702(a)(1)'s preclusion of review of actions "committed to agency discretion by law" is a limit on the APA right of action, not on the jurisdiction of the federal courts. *See Air Courier Conf. of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991).

Respectfully submitted,

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