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DEPARTMENT OF HOMELAND SECURITY v. REGENTS OF THE UNIVERSITY OF CALIFORNIA

140 S. Ct. 1891 * | 207 L. Ed. 2d 353 ** | 2020 U.S. LEXIS 3254 *** | 28 Fla. L. Weekly Fed. S 345

Chief Justice Roberts delivered the opinion of the Court, except as to Part IV.

In the summer of 2012, the Department of Homeland Security (DHS) announced an immigration program known as Deferred Action for Childhood Arrivals, or DACA. That program allows certain unauthorized aliens who entered the United States as children to apply for a two-year forbearance of removal. Those granted such relief are also eligible for work authorization [***11] and various federal benefits. Some 700,000 aliens have availed themselves of this opportunity.

Five years later, the Attorney General advised DHS to rescind DACA, based on his conclusion that it was unlawful. The Department's Acting Secretary issued a memorandum terminating the program on that basis. The termination was challenged by affected individuals and third parties who alleged, among other things, that the Acting Secretary had violated the Administrative Procedure Act (APA) by failing to adequately address important factors bearing on her decision. For the reasons that follow, we conclude that the Acting Secretary did violate the APA, and that the rescission must be vacated.

I

A

In June 2012, the Secretary of Homeland Security issued a memorandum announcing an immigration relief program for "certain young people who were brought to this country as children." App. to Pet. for Cert. in No. 18-587, p. 97a (App. to Pet. for Cert.). Known as DACA, the program applies to childhood arrivals who were under age 31 in 2012; have continuously resided here since 2007; are current students, have completed high school, or are honorably discharged veterans; have not been convicted of any serious [***12] crimes; and do not threaten national security or public safety. Id., at 98a. DHS concluded [**363] that individuals who meet these criteria warrant favorable treatment under the immigration laws because they "lacked the intent to violate the law," are "productive" contributors to our society, and "know only this country as home." Id., at 98a-99a.

"[T]o prevent [these] low priority individuals from being removed from the [*1902] United States," the DACA Memorandum instructs Immigration and Customs Enforcement to "exercise prosecutorial discretion[ ] on an individual basis . . . by deferring action for a period of two

years, subject to renewal." Id., at 100a. In addition, it directs U. S. Citizenship and Immigration Services (USCIS) to "accept applications to determine whether these individuals qualify for work authorization during this period of deferred action," id., at 101a, as permitted under regulations long predating DACA's creation, see 8 CFR §274a.12(c)(14) (2012) (permitting work authorization for deferred action recipients who establish "economic necessity"); 46 Fed. Reg. 25080-25081 (1981) (similar). Pursuant to other regulations, deferred action recipients are considered "lawfully present" for purposes of, and therefore eligible to receive, Social Security and Medicare [***13] benefits. See 8 CFR §1.3(a)(4)(vi); 42 CFR §417.422(h) (2012).

In November 2014, two years after DACA was promulgated, DHS issued a memorandum announcing that it would expand DACA eligibility by removing the age cap, shifting the date-of-entry requirement from 2007 to 2010, and extending the deferred action and work authorization period to three years. App. to Pet. for Cert. 106a-107a. In the same memorandum, DHS created a new, related program known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. That program would have authorized deferred action for up to 4.3 million parents whose children were U. S. citizens or lawful permanent residents. These parents were to enjoy the same forbearance, work eligibility, and other benefits as DACA recipients.

Before the DAPA Memorandum was implemented, 26 States, led by Texas, filed suit in the Southern District of Texas. The States contended that DAPA and the DACA expansion violated the APA's notice and comment requirement, the Immigration and Nationality Act (INA), and the Executive's duty under the Take Care Clause of the Constitution. The District Court found that the States were likely to succeed on the merits of at least one of their claims [***14] and entered a nationwide preliminary injunction barring implementation of both DAPA and the DACA expansion. See Texas v. United States, 86 F. Supp. 3d 591, 677-678 (2015).

A divided panel of the Court of Appeals for the Fifth Circuit affirmed the preliminary injunction. Texas v. United States, 809 F. 3d 134, 188 (2015). In opposing the injunction, the Government argued that the DAPA Memorandum reflected an unreviewable exercise of the Government's enforcement discretion. The Fifth Circuit majority disagreed. It reasoned that the deferred action described in the DAPA Memorandum was "much more than nonenforcement: It would affirmatively confer 'lawful presence' and associated benefits on a class of unlawfully present aliens." Id., at 166. From this, the majority concluded that the creation of the DAPA [**364] program was not an unreviewable action "committed to agency discretion by law." Id., at 169 (quoting 5 U. S. C. §701(a)(2)).

The majority then upheld the injunction on two grounds. It first concluded the States were likely to succeed on their procedural claim that the DAPA Memorandum was a substantive rule that was required to undergo notice and comment. It then held that the APA required DAPA to be set

aside because the program was "manifestly contrary" to the INA, which "expressly and carefully provides legal designations allowing defined [***15] classes" to "receive the benefits" associated with "lawful presence" and to qualify for work authorization, 809 F. 3d, at 179-181, 186 (internal [*1903] quotation marks omitted). Judge King dissented.

This Court affirmed the Fifth Circuit's judgment by an equally divided vote, which meant that no opinion was issued. United States v. Texas, 579 U.S. ___, 136 S. Ct. 2271, 195 L. Ed. 2d 638 (2016) (per curiam). For the next year, litigation over DAPA and the DACA expansion continued in the Southern District of Texas, while implementation of those policies remained enjoined.

Then, in June 2017, following a change in Presidential administrations, DHS rescinded the DAPA Memorandum. In explaining that decision, DHS cited the preliminary injunction and ongoing litigation in Texas, the fact that DAPA had never taken effect, and the new administration's immigration enforcement priorities.

Three months later, in September 2017, Attorney General Jefferson B. Sessions III sent a letter to Acting Secretary of Homeland Security Elaine C. Duke, "advis[ing]" that DHS "should rescind" DACA as well. App. 877. Citing the Fifth Circuit's opinion and this Court's equally divided affirmance, the Attorney General concluded that DACA shared the "same legal . . . defects that the courts recognized as to DAPA" and was "likely" [***16] to meet a similar fate. Id., at 878. "In light of the costs and burdens" that a rescission would "impose[ ] on DHS," the Attorney General urged DHS to "consider an orderly and efficient wind-down process." Ibid.

The next day, Duke acted on the Attorney General's advice. In her decision memorandum, Duke summarized the history of the DACA and DAPA programs, the Fifth Circuit opinion and ensuing affirmance, and the contents of the Attorney General's letter. App. to Pet. for Cert. 111a-117a. "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings" and the "letter from the Attorney General," she concluded that the "DACA program should be terminated." Id., at 117a.

Duke then detailed how the program would be wound down: No new applications would be accepted, but DHS would entertain applications for two-year renewals from DACA recipients whose benefits were set to expire within six months. For all other DACA recipients, previously issued grants of deferred action and work authorization would not be revoked but would expire on their own terms, with no prospect for renewal. Id., at 117a-118a.

B

Within days of Acting Secretary [**365] Duke's rescission announcement, multiple groups of plaintiffs ranging from individual [***17] DACA recipients and States to the Regents of the University of California and the National Association for the Advancement of Colored People

challenged her decision in the U. S. District Courts for the Northern District of California (Regents, No. 18-587), the Eastern District of New York (Batalla Vidal, No. 18-589), and the District of Columbia (NAACP, No. 18-588). The relevant claims are that the rescission was arbitrary and capricious in violation of the APA and that it infringed the equal protection guarantee of the Fifth Amendment's Due Process Clause.

All three District Courts ruled for the plaintiffs, albeit at different stages of the proceedings. In doing so, each court rejected [*1904] the Government's threshold arguments that the claims were unreviewable under the APA and that the INA deprived the court of jurisdiction. 298 F. Supp. 3d 209, 223-224, 234-235 (DC 2018); 279 F. Supp. 3d 1011, 1029-1033 (ND Cal. 2018); 295 F. Supp. 3d 127, 150, 153-154 (EDNY 2017).

In Regents and Batalla Vidal, the District Courts held that the equal protection claims were adequately alleged. 298 F. Supp. 3d 1304, 1315 (ND Cal. 2018); 291 F. Supp. 3d 260, 279 (EDNY 2018). Those courts also entered coextensive nationwide preliminary injunctions, based on the conclusion that the plaintiffs were likely to succeed on the merits of their claims that the rescission was arbitrary and capricious. These injunctions did not require DHS to accept new applications, [***18] but did order the agency to allow DACA recipients to "renew their enrollments." 279 F. Supp. 3d, at 1048; see 279 F. Supp. 3d 401, 437 (EDNY 2018).

In NAACP, the D. C. District Court took a different course. In April 2018, it deferred ruling on the equal protection challenge but granted partial summary judgment to the plaintiffs on their APA claim, holding that Acting Secretary Duke's "conclusory statements were insufficient to explain the change in [the agency's] view of DACA's lawfulness." 298 F. Supp. 3d, at 243. The District Court stayed its order for 90 days to permit DHS to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." Id., at 245.

Two months later, Duke's successor, Secretary Kirstjen M. Nielsen, responded via memorandum. App. to Pet. for Cert. 120a-126a. She explained that, "[h]aving considered the Duke memorandum," she "decline[d] to disturb" the rescission. Id., at 121a. Secretary Nielsen went on to articulate her "understanding" of Duke's [**366] memorandum, identifying three reasons why, in Nielsen's estimation, "the decision to rescind the DACA policy was, and remains, sound." Ibid. First, she reiterated that, "as the Attorney General concluded, the DACA policy was [***19] contrary to law." Id., at 122a. Second, she added that, regardless, the agency had "serious doubts about [DACA's] legality" and, for law enforcement reasons, wanted to avoid "legally questionable" policies. Id., at 123a. Third, she identified multiple policy reasons for rescinding DACA, including (1) the belief that any class-based immigration relief should come from Congress, not through executive non-enforcement; (2) DHS's preference for exercising prosecutorial discretion on "a truly individualized, case-by-case basis"; and (3) the importance of

"project[ing] a message" that immigration laws would be enforced against all classes and categories of aliens. Id., at 123a-124a. In her final paragraph, Secretary Nielsen acknowledged the "asserted reliance interests" in DACA's continuation but concluded that they did not "outweigh the questionable legality of the DACA policy and the other reasons" for the rescission discussed in her memorandum. Id., at 125a.

The Government asked the D. C. District Court to revise its prior order in light of the reasons provided by Secretary Nielsen, but the court declined. In the court's view, the new memorandum, which [*1905] "fail[ed] to elaborate meaningfully" on the agency's illegality rationale, still [***20] did not provide an adequate explanation for the September 2017 rescission. 315 F. Supp. 3d 457, 460, 473-474 (2018).

The Government appealed the various District Court decisions to the Second, Ninth, and D. C. Circuits, respectively. In November 2018, while those appeals were pending, the Government simultaneously filed three petitions for certiorari before judgment. After the Ninth Circuit affirmed the nationwide injunction in Regents, see 908 F. 3d 476 (2018), but before rulings from the other two Circuits, we granted the petitions and consolidated the cases for argument. 588 U.S. ___, 139 S. Ct. 2779, 204 L. Ed. 2d 1156 (2019). The issues raised here are (1) whether the APA claims are reviewable, (2) if so, whether the rescission was arbitrary and capricious in violation of the APA, and (3) whether the plaintiffs have stated an equal protection claim.

II

The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.

The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." Franklin v. Massachusetts, 505 U. S. 788, 796, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992). It requires agencies to engage in "reasoned decisionmaking," Michigan v. EPA, 576 U.S. 743, 750, 135 S. Ct. 2699, 192 L. Ed. 2d 674 (2015) (internal quotation marks omitted), and directs that agency [***21] actions be "set aside" if they are "arbitrary" or "capricious," 5 U. S. C. §706(2)(A). Under this "narrow standard of review, . . . a court is not to substitute its judgment for that of the agency," FCC v. Fox Television Stations, Inc., 556 U. S. 502, 513, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009) (internal quotation marks omitted), but instead to assess only whether the [**367] decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment," Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U. S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).

But before determining whether the rescission was arbitrary and capricious, we must first address the Government's contentions that DHS's decision is unreviewable under the APA and outside this Court's jurisdiction.

A

The APA establishes a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" Abbott Laboratories v. Gardner, 387 U. S. 136, 140, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) (quoting §702). That presumption can be rebutted by a showing that the relevant statute "preclude[s]" review, §701(a)(1), or that the "agency action is committed to agency discretion by law," §701(a)(2). The latter exception is at issue here.

To "honor the presumption of review, we have read the exception in §701(a)(2) quite narrowly," Weyerhaeuser Co. v. United States Fish and Wildlife Serv., 586 U. S. ___, ___, 139 S. Ct. 361, 370, 202 L. Ed. 2d 269 (2018)), confining it to those rare "administrative decision[s] traditionally left to agency discretion," Lincoln v. Vigil, 508 U. S. 182, 191, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993). This limited category of unreviewable actions includes an agency's decision not to institute [***22] enforcement proceedings, Heckler v. Chaney, 470 U. S. 821, 831-832, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985), and it is on that exception that the Government primarily relies.

[*1906] In Chaney, several death-row inmates petitioned the Food and Drug Administration (FDA) to take enforcement action against two States to prevent their use of certain drugs for lethal injection. The Court held that the FDA's denial of that petition was presumptively unreviewable in light of the well-established "tradition" that "an agency's decision not to prosecute or enforce" is "generally committed to an agency's absolute discretion." Id., at 831, 105 S. Ct. 1649, 84 L. Ed. 2d 714. We identified a constellation of reasons that underpin this tradition. To start, a non-enforcement decision "often involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," such as "whether the particular enforcement action requested best fits the agency's overall policies." Ibid. The decision also mirrors, "to some extent," a prosecutor's decision not to indict, which has "long been regarded as the special province of the Executive Branch." Id., at 832, 105 S. Ct. 1649, 84 L. Ed. 2d 714. And, as a practical matter, "when an agency refuses to act" there is no action to "provide[ ] a focus for judicial review." Ibid.

The Government contends that a general [***23] non-enforcement policy is equivalent to the individual non-enforcement decision at issue in Chaney. In each case, the Government argues, the agency must balance factors peculiarly within its expertise, and does so in a manner akin to a criminal prosecutor. Building on that premise, the Government argues that the rescission of a non-enforcement policy is no different—for purposes of reviewability—from the adoption of that policy. While the rescission may lead to increased enforcement, [**368] it does not, by itself,

constitute a particular enforcement action. Applying this logic to the facts here, the Government submits that DACA is a non-enforcement policy and that its rescission is therefore unreviewable.

But we need not test this chain of reasoning because DACA is not simply a non-enforcement policy. For starters, the DACA Memorandum did not merely "refus[e] to institute proceedings" against a particular entity or even a particular class. Ibid. Instead, it directed USCIS to "establish a clear and efficient process" for identifying individuals who met the enumerated criteria. App. to Pet. for Cert. 100a. Based on this directive, USCIS solicited applications from eligible aliens, instituted [***24] a standardized review process, and sent formal notices indicating whether the alien would receive the two-year forbearance. These proceedings are effectively "adjudicat[ions]." Id., at 117a. And the result of these adjudications—DHS's decision to "grant deferred action," Brief for Petitioners 45—is an "affirmative act of approval," the very opposite of a "refus[al] to act," Chaney, 470 U. S., at 831-832, 105 S. Ct. 1649, 84 L. Ed. 2d 714. In short, HN4 LEdHN[4] [4] the DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program—and its rescission—is an "action [that] provides a focus for judicial review." Id., at 832, 105 S. Ct. 1649, 84 L. Ed. 2d 714.

The benefits attendant to deferred action provide further confirmation that DACA is more than simply a non-enforcement policy. As described above, by virtue of receiving deferred action, the 700,000 DACA recipients may request work authorization and are eligible for Social Security and Medicare. See supra, at ___, 207 L. Ed. 2d, at 363. Unlike an agency's refusal to take requested enforcement action, access to these types of benefits is an interest "courts often are called upon to protect." Chaney, 470 U. S., at 832, 105 S. Ct. 1649, 84 L. Ed. 2d 714. See also Barnhart v. Thomas, 540 U. S. 20, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003) (reviewing [*1907] eligibility determination for Social Security benefits).

Because the DACA program is more than [***25] a non-enforcement policy, its rescission is subject to review under the APA.

B

The Government also invokes two jurisdictional provisions of the INA as independent bars to review. Neither applies.

Section 1252(b)(9) bars review of claims arising from "action[s]" or "proceeding[s] brought to remove an alien." 66 Stat. 209, as amended, 8 U. S. C. §1252(b)(9). That targeted language is not aimed at this sort of case. HN7 LEdHN[7] [7] As we have said before, §1252(b)(9) "does not present a jurisdictional bar" where those bringing suit "are not asking for review of an order of removal," "the decision . . . to seek removal," or "the process by which . . . removability will be determined." Jennings v. Rodriguez, 583 U. S. ___, ___-___, 138 S. Ct. 830, 841, 200 L. Ed. 2d

122 (2018) (plurality opinion; id., at ___, 138 S. Ct. 830, 859, 200 L. Ed. 2d 122 (Breyer, J., dissenting). And it is certainly not a bar where, as here, the parties are not challenging any removal proceedings.

Section 1252(g) is similarly narrow. [**369] That provision limits review of cases "arising from" decisions "to commence proceedings, adjudicate cases, or execute removal orders." §1252(g). We have previously rejected as "implausible" the Government's suggestion that §1252(g) covers "all claims arising from deportation proceedings" or imposes "a general jurisdictional limitation." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999). The rescission, which revokes a deferred action program with associated benefits, [***26] is not a decision to "commence proceedings," much less to "adjudicate" a case or "execute" a removal order.

With these preliminary arguments out of the way, we proceed to the merits.

III

A

Deciding whether agency action was adequately explained requires, first, knowing where to look for the agency's explanation. The natural starting point here is the explanation provided by Acting Secretary Duke when she announced the rescission in September 2017. But the Government urges us to go on and consider the June 2018 memorandum submitted by Secretary Nielsen as well. That memo was prepared after the D. C. District Court vacated the Duke rescission and gave DHS an opportunity to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." 298 F. Supp. 3d, at 245. According to the Government, the Nielsen Memorandum is properly before us because it was invited by the District Court and reflects the views of the Secretary of Homeland Security—the official responsible for immigration policy. Respondents disagree, arguing that the Nielsen Memorandum, issued nine months after the rescission, impermissibly asserts prudential [***27] and policy reasons not relied upon by Duke.

It is a "foundational principle of administrative law" that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action." Michigan, 576 U. S., at 758, 135 S. Ct. 2699, 192 L. Ed. 2d 674. If those grounds are inadequate, a court may remand for the agency to do one of two things: First, the agency can offer "a fuller explanation of the agency's reasoning at the time of the agency action." Pension Benefit Guaranty Corporation [*1908] v. LTV Corp., 496 U. S. 633, 654, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990) (emphasis added). See also Alpharma, Inc. v. Leavitt, 460 F. 3d 1, 5-6, 373 U.S. App. D.C. 65 (CADC 2006) (Garland, J.) (permitting an agency to provide an "amplified articulation" of a prior "conclusory" observation (internal quotation marks omitted)). This route has important

limitations. When an agency's initial explanation "indicate[s] the determinative reason for the final action taken," the agency may elaborate later on that reason (or reasons) but may not provide new ones. Camp v. Pitts, 411 U. S. 138, 143, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973) (per curiam). Alternatively, the agency can "deal with the problem afresh" by taking new agency action. SEC v. Chenery Corp., 332 U. S. 194, 201, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947) (Chenery II). An agency taking this route is not limited to its prior reasons [**370] but must comply with the procedural requirements for new agency action.

The District Court's remand thus presented DHS with a choice: rest on the Duke Memorandum while elaborating on its prior [***28] reasoning, or issue a new rescission bolstered by new reasons absent from the Duke Memorandum. Secretary Nielsen took the first path. Rather than making a new decision, she "decline[d] to disturb the Duke memorandum's rescission" and instead "provide[d] further explanation" for that action. App. to Pet. for Cert. 121a. Indeed, the Government's subsequent request for reconsideration described the Nielsen Memorandum as "additional explanation for [Duke's] decision" and asked the District Court to "leave in place [Duke's] September 5, 2017 decision to rescind the DACA policy." Motion to Revise Order in No. 17-cv-1907 etc. (D DC), pp. 2, 19. Contrary to the position of the Government before this Court, and of Justice Kavanaugh in dissent, post, at ___, 207 L. Ed. 2d, at 398 (opinion concurring in judgment in part and dissenting in part), the Nielsen Memorandum was by its own terms not a new rule implementing a new policy.

Because Secretary Nielsen chose to elaborate on the reasons for the initial rescission rather than take new administrative action, she was limited to the agency's original reasons, and her explanation "must be viewed critically" to ensure that the rescission is not upheld on the basis of impermissible [***29] "post hoc rationalization." Overton Park, 401 U. S., at 420, 91 S. Ct. 814, 28 L. Ed. 2d 136. But despite purporting to explain the Duke Memorandum, Secretary Nielsen's reasoning bears little relationship to that of her predecessor. Acting Secretary Duke rested the rescission on the conclusion that DACA is unlawful. Period. See App. to Pet. for Cert. 117a. By contrast, Secretary Nielsen's new memorandum offered three "separate and independently sufficient reasons" for the rescission, id., at 122a, only the first of which is the conclusion that DACA is illegal.

Her second reason is that DACA is, at minimum, legally questionable and should be terminated to maintain public confidence in the rule of law and avoid burdensome litigation. No such justification can be found in the Duke Memorandum. Legal uncertainty is, of course, related to illegality. But the two justifications are meaningfully distinct, especially in this context. While an agency might, for one reason or another, choose to do nothing in the face of uncertainty, illegality presumably requires remedial action of some sort.

The policy reasons that Secretary Nielsen cites as a third basis for the rescission are also nowhere to be found in the Duke Memorandum. That document makes no mention of a preference [***30] for legislative fixes, the superiority of case-by-case decisionmaking, the importance of sending a message of robust enforcement, or any other policy consideration. Nor are these points [*1909] included in the legal analysis from the Fifth Circuit and the Attorney General. They can be viewed only as impermissible post hoc rationalizations and thus are not properly before us.

The Government, echoed by Justice Kavanaugh, protests that requiring a new decision before considering Nielsen's new justifications would be "an idle and useless formality." NLRB [**371] v. Wyman-Gordon Co., 394 U. S. 759, 766, n. 6, 89 S. Ct. 1426, 22 L. Ed. 2d 709 (1969) (plurality opinion). See also post, at ___, 207 L. Ed. 2d, at 399. Procedural requirements can often seem such. But here the rule serves important values of administrative law. HN12 LEdHN[12] [12] Requiring a new decision before considering new reasons promotes "agency accountability," Bowen v. American Hospital Asso., 476 U.S. 610, 643, 106 S. Ct. 2101, 90 L. Ed. 2d 584 (1986), by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority. Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply "convenient litigating position[s]." Christopher v. SmithKline Beecham Corp., 567 U. S. 142, 155, 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012) (internal quotation marks omitted). Permitting agencies to invoke belated justifications, on the other hand, can upset "the orderly [***31] functioning of the process of review," SEC v. Chenery Corp., 318 U. S. 80, 94, 63 S. Ct. 454, 87 L. Ed. 626 (1943), forcing both litigants and courts to chase a moving target. Each of these values would be markedly undermined were we to allow DHS to rely on reasons offered nine months after Duke announced the rescission and after three different courts had identified flaws in the original explanation.

Justice Kavanaugh asserts that this "foundational principle of administrative law," Michigan, 576 U. S., at 758, 135 S. Ct. 2699, 192 L. Ed. 2d 674, actually limits only what lawyers may argue, not what agencies may do. Post, at ___, 207 L. Ed. 2d, at 399. HN13 LEdHN[13] [13] While it is true that the Court has often rejected justifications belatedly advanced by advocates, we refer to this as a prohibition on post hoc rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether post hoc justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves. See American Textile Mfrs. Institute, Inc. v. Donovan, 452 U. S. 490, 539, 101 S. Ct. 2478, 69 L. Ed. 2d 185 (1981) ("[T]he post hoc rationalizations of the agency . . . cannot serve as a sufficient predicate for agency action."); Overton Park, 401 U. S., at 419, 91 S. Ct. 814, 28 L. Ed. 2d 136 (rejecting "litigation affidavits" from agency officials as "merely 'post hoc' rationalizations").

Justice Holmes famously [***32] wrote that "[m]en must turn square corners when they deal with the Government." Rock Island, A. & L. R. Co. v. United States, 254 U. S. 141, 143, 41 S.

Ct. 55, 65 L. Ed. 188, 56 Ct. Cl. 466, 1921-4 C.B. 342 (1920). But it is also true, particularly when so much is at stake, that "the Government should turn square corners in dealing with the people." St. Regis Paper Co. v. United States, 368 U. S. 208, 229, 82 S. Ct. 289, 7 L. Ed. 2d 240 (1961) (Black, J., dissenting). HN14 LEdHN[14] [14]The basic rule here is clear: An agency must defend its actions based on the reasons [**372] it gave when it acted. This [*1910] is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.

B

We turn, finally, to whether DHS's decision to rescind DACA was arbitrary and capricious. As noted earlier, Acting Secretary Duke's justification for the rescission was succinct: "Taking into consideration" the Fifth Circuit's conclusion that DAPA was unlawful because it conferred benefits in violation of the INA, and the Attorney General's conclusion that DACA was unlawful for the same reason, she concluded—without elaboration—that the "DACA program should be terminated." App. to Pet. for Cert. 117a.

Respondents maintain that this explanation is deficient for three reasons. Their first and second arguments work in tandem, claiming that the Duke Memorandum does not adequately explain the conclusion that DACA is unlawful, and that [***33] this conclusion is, in any event, wrong. While those arguments carried the day in the lower courts, in our view they overlook an important constraint on Acting Secretary Duke's decisionmaking authority—she was bound by the Attorney General's legal determination.

The same statutory provision that establishes the Secretary of Homeland Security's authority to administer and enforce immigration laws limits that authority, specifying that, with respect to "all questions of law," the determinations of the Attorney General "shall be controlling." 8 U. S. C. §1103(a)(1). Respondents are aware of this constraint. Indeed they emphasized the point in the reviewability sections of their briefs. But in their merits arguments, respondents never addressed whether or how this unique statutory provision might affect our review. They did not discuss whether Duke was required to explain a legal conclusion that was not hers to make. Nor did they discuss whether the current suits challenging Duke's rescission decision, which everyone agrees was within her legal authority under the INA, are proper vehicles for attacking the Attorney General's legal conclusion.

Because of these gaps in respondents' briefing, we do not evaluate [***34] the claims challenging the explanation and correctness of the illegality conclusion. Instead we focus our attention on respondents' third argument—that Acting Secretary Duke "failed to consider . . . important aspect[s] of the problem" before her. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

Whether DACA is illegal is, of course, a legal determination, and therefore a question for the Attorney General. But deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding [**373] concerns a program with the breadth of DACA. Those policy choices are for DHS.

Acting Secretary Duke plainly exercised such discretionary authority in winding down the program. See App. to Pet. for Cert. 117a-118a (listing the Acting Secretary's decisions on eight transition issues). [*1911] Among other things, she specified that those DACA recipients whose benefits were set to expire within six months were eligible for two-year renewals. Ibid.

But Duke did not appear to appreciate the full scope of her discretion, which picked up where the Attorney General's legal reasoning left off. The Attorney General concluded that "the DACA policy has the same legal . . . defects that the courts recognized as to [***35] DAPA." App. 878. So, to understand those defects, we look to the Fifth Circuit, the highest court to offer a reasoned opinion on the legality of DAPA. That court described the "core" issue before it as the "Secretary's decision" to grant "eligibility for benefits"—including work authorization, Social Security, and Medicare—to unauthorized aliens on "a class-wide basis." Texas, 809 F. 3d, at 170; see id., at 148, 184. The Fifth Circuit's focus on these benefits was central to every stage of its analysis. See id., at 155 (standing); id., at 163 (zone of interest); id., at 164 (applicability of §1252(g)); id., at 166 (reviewability); id., at 176-177 (notice and comment); id., at 184 (substantive APA). And the Court ultimately held that DAPA was "manifestly contrary to the INA" precisely because it "would make 4.3 million otherwise removable aliens" eligible for work authorization and public benefits. Id., at 181-182 (internal quotation marks omitted).

But there is more to DAPA (and DACA) than such benefits. The defining feature of deferred action is the decision to defer removal (and to notify the affected alien of that decision). See App. to Pet. for Cert. 99a. And the Fifth Circuit was careful to distinguish that forbearance component from eligibility for benefits. As it explained, the "challenged portion [***36] of DAPA's deferred-action program" was the decision to make DAPA recipients eligible for benefits. See Texas, 809 F. 3d, at 168, and n. 108. The other "[p]art of DAPA," the court noted, "involve[d] the Secretary's decision—at least temporarily—not to enforce the immigration laws as to a class of what he deem[ed] to be low-priority illegal aliens." Id., at 166. Borrowing from this Court's prior description of deferred action, the Fifth Circuit observed that "the states do not challenge the Secretary's decision to 'decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.'" Id., at 168 (quoting Reno, 525 U. S., at 484, 119 S. Ct. 936, 142 L. Ed. 2d 940). And the Fifth Circuit underscored that nothing in its decision or the preliminary injunction "requires the [**374] Secretary to remove any alien or to alter" the Secretary's class-based "enforcement priorities." Texas, 809 F. 3d, at 166, 169. In other words, the Secretary's forbearance authority was unimpaired.

Acting Secretary Duke recognized that the Fifth Circuit's holding addressed the benefits associated with DAPA. In her memorandum she explained that the Fifth Circuit concluded that DAPA "conflicted with the discretion authorized by Congress" because the INA "'flatly does not permit the reclassification of millions of [***37] illegal aliens as lawfully present and thereby [*1912] make them newly eligible for a host of federal and state benefits, including work authorization.'" App. to Pet. for Cert. 114a (quoting Texas, 809 F. 3d, at 184). Duke did not characterize the opinion as one about forbearance.

In short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for "[e]stablishing national immigration enforcement policies and priorities." 116 Stat. 2178, 6 U. S. C. §202(5). But Duke's memo offers no reason for terminating forbearance. She instead treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.

That reasoning repeated the error we identified in one of our leading modern administrative law cases, Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co. There, the National Highway Traffic Safety Administration (NHTSA) promulgated a requirement that motor vehicles produced after 1982 be equipped [***38] with one of two passive restraints: airbags or automatic seatbelts. 463 U. S., at 37-38, 46, 103 S. Ct. 2856, 77 L. Ed. 2d 443. Four years later, before the requirement went into effect, NHTSA concluded that automatic seatbelts, the restraint of choice for most manufacturers, would not provide effective protection. Based on that premise, NHTSA rescinded the passive restraint requirement in full. Id., at 38, 103 S. Ct. 2856, 77 L. Ed. 2d 443.

We concluded that the total rescission was arbitrary and capricious. As we explained, NHTSA's justification supported only "disallow[ing] compliance by means of " automatic seatbelts. Id., at 47, 103 S. Ct. 2856, 77 L. Ed. 2d 443. It did "not cast doubt" on the "efficacy of airbag technology" or upon "the need for a passive restraint standard." Ibid. Given NHTSA's prior judgment that "airbags are an effective and cost-beneficial lifesaving technology," we held that "the mandatory passive restraint rule [could] not be abandoned without any consideration whatsoever of an airbags-only requirement." Id., at 51, 103 S. Ct. 2856, 77 L. Ed. 2d 443.

While the factual setting is different here, the error is the same. Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients, that conclusion supported only "disallow[ing]" benefits. Id., at 47, 103 S. Ct. 2856, 77 L. Ed. 2d 443. It did "not cast doubt" on the legality of forbearance or upon DHS's original [***39] reasons for extending forbearance to childhood arrivals. Ibid. [**375] Thus, given DHS's earlier judgment that forbearance is "especially justified" for "productive young people" who were brought here as children and

"know only this country as home," App. to Pet. for Cert. 98a-99a, the DACA Memorandum could not be rescinded in full "without any consideration whatsoever" of a forbearance-only policy, State Farm, 463 U. S., at 51, 103 S. Ct. 2856, 77 L. Ed. 2d 443.

[*1913] The Government acknowledges that "[d]eferred action coupled with the associated benefits are the two legs upon which the DACA policy stands." Reply Brief 21. It insists, however, that "DHS was not required to consider whether DACA's illegality could be addressed by separating" the two. Ibid. According to the Government, "It was not arbitrary and capricious for DHS to view deferred action and its collateral benefits as importantly linked." Ibid. Perhaps. But that response misses the point. The fact that there may be a valid reason not to separate deferred action from benefits does not establish that DHS considered that option or that such consideration was unnecessary.

The lead dissent acknowledges that forbearance and benefits are legally distinct and can be decoupled. Post, at ___-___, n. 14, 207 L. Ed. 2d, at 393-394 (opinion of Thomas, J). [***40] It contends, however, that we should not "dissect" agency action "piece by piece." Post, at ___, 207 L. Ed. 2d, at 393. The dissent instead rests on the Attorney General's legal determination—which considered only benefits—"to supply the 'reasoned analysis'" to support rescission of both benefits and forbearance. Post, at ___, 207 L. Ed. 2d, at 393 (quoting State Farm, 463 U. S., at 42, 103 S. Ct. 2856, 77 L. Ed. 2d 443). HN18 LEdHN[18] [18] But State Farm teaches that when an agency rescinds a prior policy its reasoned analysis must consider the "alternative[s]" that are "within the ambit of the existing [policy]." Id., at 51, 103 S. Ct. 2856, 77 L. Ed. 2d 443. Here forbearance was not simply "within the ambit of the existing [policy]," it was the centerpiece of the policy: DACA, after all, stands for "Deferred Action for Childhood Arrivals." App. to Pet. for Cert. 111a (emphasis added). But the rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. Duke "entirely failed to consider [that] important aspect of the problem." State Farm, 463 U. S., at 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443.

That omission alone renders Acting Secretary Duke's decision arbitrary and capricious. But it is not the only defect. Duke also failed to address whether there was "legitimate reliance" on the DACA Memorandum. Smiley v. Citibank (South Dakota), N. A., 517 U. S. 735, 742, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996). HN19 LEdHN[19] [19] When an agency changes course, as DHS did here, it must "be cognizant that longstanding [***41] policies may have 'engendered [**376] serious reliance interests that must be taken into account.'" Encino Motorcars, LLC v. Navarro, 579 U. S. ___, ___, 136 S. Ct. 2117, 2120, 195 L. Ed. 2d 382 (2016) (quoting Fox Television, 556 U. S., at 515, 129 S. Ct. 1800, 173 L. Ed. 2d 738). "It would be arbitrary and capricious to ignore such matters." Id., at 515, 129 S. Ct. 1800, 173 L. Ed. 2d 738. Yet that is what the Duke Memorandum did.

For its part, the Government does not contend that Duke considered potential reliance interests; it counters that she did not need to. In the Government's view, shared by the lead dissent, DACA recipients have no "legally cognizable reliance interests" because the DACA Memorandum stated that the program "conferred no substantive rights" and provided benefits only in two-year increments. Reply Brief 16-17; App. to Pet. for Cert. 125a. See also post, at ___-___, 207 L. Ed. 2d, at 394-395 (opinion of Thomas, J). But neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. HN20 LEdHN[20] [20] These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to [*1914] normal APA review. There was no such consideration in the Duke Memorandum.

Respondents and their amici assert that there was much for DHS to [***42] consider. They stress that, since 2012, DACA recipients have "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance" on the DACA program. Brief for Respondent Regents of Univ. of California et al. in No. 18-587, p. 41 (Brief for Regents). The consequences of the rescission, respondents emphasize, would "radiate outward" to DACA recipients' families, including their 200,000 U. S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. See id., at 41-42; Brief for Respondent State of New York et al. in No. 18-589, p. 42 (Brief for New York). See also Brief for 143 Businesses as Amici Curiae 17 (estimating that hiring and training replacements would cost employers $6.3 billion). In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten years. Brief for Regents 6. Meanwhile, States and local governments could lose $1.25 billion in tax revenue each year. Ibid.

These are certainly [***43] noteworthy concerns, but they are not necessarily dispositive. To the Government and lead dissent's point, DHS could respond that reliance on forbearance and benefits was unjustified in light of the express limitations in the DACA Memorandum. Or it might conclude that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight. And, even if DHS ultimately concludes that the reliance interests rank as serious, they are but one factor to consider. DHS may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests. Making that difficult decision was the agency's job, but the agency failed to do it.

DHS has considerable flexibility in carrying out its responsibility. The [**377] wind-down here is a good example of the kind of options available. Acting Secretary Duke authorized DHS to process two-year renewals for those DACA recipients whose benefits were set to expire within six months. But Duke's consideration was solely for the purpose of assisting the agency in

dealing with "administrative complexities." App. to Pet. for Cert. 116a-118a. She should have considered whether she had similar flexibility [***44] in addressing any reliance interests of DACA recipients. The lead dissent contends that accommodating such interests would be "another exercise of unlawful power," post, at ___, 207 L. Ed. 2d, at 394 (opinion of Thomas, J.), but the Government does not make that argument and DHS has already extended benefits for purposes other than reliance, following consultation with the Office of the Attorney General. App. to Pet. for Cert. 116a.

Had Duke considered reliance interests, she might, for example, have considered a broader renewal period based on the need for DACA recipients to reorder their affairs. Alternatively, Duke might have considered more accommodating termination dates for recipients caught in the middle of a time-bounded commitment, to allow them to, say, graduate from their course of study, complete their military service, or finish a medical treatment regimen. Or she might have instructed immigration officials to give salient weight to any reliance interests engendered by DACA when exercising individualized enforcement discretion.

To be clear, DHS was not required to do any of this or to "consider all policy alternatives in reaching [its] decision." [*1915] State Farm, 463 U. S., at 51, 103 S. Ct. 2856, 77 L. Ed. 2d 443. HN21 LEdHN[21] [21]Agencies are not compelled to explore "every alternative [***45] device and thought conceivable by the mind of man." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U. S. 519, 551, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978). But, because DHS was "not writing on a blank slate," post, at ___, n. 14, 207 L. Ed. 2d, at 394 (opinion of Thomas, J.), it was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.

The lead dissent sees all the foregoing differently. In its view, DACA is illegal, so any actions under DACA are themselves illegal. Such actions, it argues, must cease immediately and the APA should not be construed to impede that result. See post, at ___-___, 207 L. Ed. 2d, at 392-394 (opinion of Thomas, J.).

The dissent is correct that DACA was rescinded because of the Attorney General's illegality determination. See ante, at ___, 207 L. Ed. 2d, at 373. But nothing about that determination foreclosed or even addressed the options of retaining forbearance or accommodating particular reliance interests. Acting Secretary Duke should have considered those matters but did not. That failure was arbitrary and capricious in violation of the APA.

IV

Lastly, we turn to respondents' claim that the rescission violates the equal protection guarantee of the Fifth Amendment.

The parties dispute the proper framing of this claim. The Government [**378] contends [***46] that the allegation that the Executive, motivated by animus, ended a program that disproportionately benefits certain ethnic groups is a selective enforcement claim. Such a claim, the Government asserts, is barred by our decision in Reno v. American-Arab Anti-Discrimination Committee. See 525 U. S., at 488, 119 S. Ct. 936, 142 L. Ed. 2d 940 (holding that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation"). Respondents counter that their claim falls outside the scope of that precedent because they are not challenging individual enforcement proceedings. We need not resolve this debate because, even if the claim is cognizable, the allegations here are insufficient.

To plead animus, a plaintiff must raise a plausible inference that an "invidious discriminatory purpose was a motivating factor" in the relevant decision. Arlington Heights v. Metropolitan Housing Development Corp., 429 U. S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). Possible evidence includes disparate impact on a particular group, "[d]epartures from the normal procedural sequence," and "contemporary statements by members of the decisionmaking body." Id., at 266-268, 97 S. Ct. 555, 50 L. Ed. 2d 450. Tracking these factors, respondents allege that animus is evidenced by (1) the disparate impact of the rescission on Latinos from Mexico, who represent [***47] 78% of DACA recipients; (2) the unusual history behind the rescission; and (3) pre- and post-election statements by President Trump. Brief for New York 54-55.

None of these points, either singly or in concert, establishes a plausible equal protection claim. First, because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program. See B. Baker, DHS, Office of Immigration Statistics, Population Estimates, Illegal Alien Population Residing in the United States: January 2015, Table 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf. [*1916] Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds.

Second, there is nothing irregular about the history leading up to the September 2017 rescission. The lower courts concluded that "DACA received reaffirmation by [DHS] as recently as three months before the rescission," 908 F. 3d, at 519 (quoting 298 F. Supp. 3d, at 1315), referring to the June 2017 DAPA rescission memo, which stated that DACA would "remain in effect," App. 870. But this [***48] reasoning confuses abstention with reaffirmation. The DAPA memo did not address the merits of the DACA policy or its legality. Thus, when the Attorney General later determined that DACA shared DAPA's legal defects, DHS's decision to reevaluate DACA was not a "strange about-face." 908 F. 3d, at 519. It was a natural response to a newly identified problem.

Finally, the cited statements are unilluminating. The relevant actors were most directly Acting Secretary Duke and the Attorney General. As the Batalla Vidal court acknowledged, respondents did not "identif[y] statements by [either] that would give rise to an inference of discriminatory [**379] motive." 291 F. Supp. 3d, at 278. Instead, respondents contend that President Trump made critical statements about Latinos that evince discriminatory intent. But, even as interpreted by respondents, these statements—remote in time and made in unrelated contexts—do not qualify as "contemporary statements" probative of the decision at issue. Arlington Heights, 429 U. S., at 268, 97 S. Ct. 555, 50 L. Ed. 2d 450. Thus, like respondents' other points, the statements fail to raise a plausible inference that the rescission was motivated by animus.

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We do not decide whether DACA or its rescission are sound policies. "The wisdom" of those decisions "is none of our [***49] concern." Chenery II, 332 U. S., at 207, 67 S. Ct. 1575, 91 L. Ed. 1995. We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.

The judgment in NAACP, No. 18-588, is affirmed. The judgment in Regents, No. 18-587, is vacated in part and reversed in part. And in Batalla Vidal, No. 18-589, the February 13, 2018 order granting respondents' motion for a preliminary injunction is vacated, the November 9, 2017 order partially denying the Government's motion to dismiss is affirmed in part, and the March 29, 2018 order partially denying the balance of the Government's motion to dismiss is reversed in part. All three cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Dissent

Justice Sotomayor, concurring in part, concurring in [*50] the judgment in part, and dissenting in part.**

The majority rightly holds that the Department of Homeland Security (DHS) violated the Administrative Procedure Act in rescinding the Deferred Action for Childhood [*1917] Arrivals (DACA) program. But the Court forecloses any challenge to the rescission under the Equal Protection Clause. I believe that determination is unwarranted on the existing record and premature at this stage of the litigation. I would instead permit respondents to develop their equal protection claims on remand.

Respondents' equal protection challenges come to us in a preliminary posture. All that respondents needed to do at this stage of the litigation was state sufficient facts that would "allo[w a] court to draw the reasonable inference that [a] defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U. S. 662, 678, 129 S. Ct. 1937, [**380] 173 L. Ed. 2d 868 (2009). The three courts to evaluate respondents' pleadings below held that they cleared this modest threshold. 908 F. 3d 476, 518-520 (CA9 2018) (affirming the District Court's denial of the Government's motion to dismiss); see also Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260, 274 (EDNY 2018).

I too would permit respondents' claims to proceed on remand. The complaints each set forth particularized facts that plausibly allege discriminatory animus. The plurality disagrees, reasoning that "[n]one of these [***51] points, either singly or in concert, establishes a plausible equal protection claim." Ante, at ___, 207 L. Ed. 2d, at 378. But it reaches that conclusion by discounting some allegations altogether and by narrowly viewing the rest.

First, the plurality dismisses the statements that President Trump made both before and after he assumed office. The Batalla Vidal complaints catalog then-candidate Trump's declarations that Mexican immigrants are "people that have lots of problems," "the bad ones," and "criminals, drug dealers, [and] rapists." 291 F. Supp. 3d, at 276 (internal quotation marks omitted). The Regents complaints additionally quote President Trump's 2017 statement comparing undocumented immigrants to "animals" responsible for "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, [and] MS13." 298 F. Supp. 3d 1304, 1314 (ND Cal. 2018) (internal quotation marks omitted). The plurality brushes these aside as "unilluminating," "remote in time," and having been "made in unrelated contexts." Ante, at ___, 207 L. Ed. 2d, at 379.

But "nothing in our precedent supports [the] blinkered approach" of disregarding any of the campaign statements as remote in time from later-enacted policies. Trump v. Hawaii, 585 U.S. ___, ___, n. 3, 138 S. Ct. 2392, 2414, 201 L. Ed. 2d 775 (2018) (Sotomayor, J., dissenting). Nor did any of the statements arise in unrelated contexts. [***52] They bear on unlawful migration from Mexico—a keystone of President Trump's campaign and a policy priority of his administration—and, according to respondents, were an animating force behind the rescission of DACA. Cf. ibid. (noting that Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017), which barred entry of individuals from several Muslim-majority countries, was an outgrowth of the President's campaign statements about Muslims). Taken together, "the words of the President" help to "create the strong perception" that the rescission decision was "contaminated by impermissible discriminatory animus." 585 U. S., at ___, 138 S. Ct. 2392, 2440, 201 L. Ed. 2d 775 (opinion of Sotomayor, J.). This perception provides respondents with grounds to litigate their equal protection claims further.

Next, the plurality minimizes the disproportionate impact of the rescission decision on Latinos after considering this point in isolation. Ante, at ___, 207 L. Ed. 2d, at 378 ("Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection [*1918] grounds"). But the impact of the policy decision must be viewed in the context of the President's public statements on and off the campaign trail. At the motion-to-dismiss stage, I would not so readily dismiss the allegation [***53] that an executive decision disproportionately [**381] harms the same racial group that the President branded as less desirable mere months earlier.

Finally, the plurality finds nothing untoward in the "specific sequence of events leading up to the challenged decision." Arlington Heights v. Metropolitan Housing Development Corp., 429 U. S. 252, 267, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). I disagree. As late as June 2017, DHS insisted it remained committed to DACA, even while rescinding a related program, the Deferred Action for Parents of Americans and Lawful Permanent Residents. App. 718-720. But a mere three months later, DHS terminated DACA without, as the plurality acknowledges, considering important aspects of the termination. The abrupt change in position plausibly suggests that something other than questions about the legality of DACA motivated the rescission decision. Accordingly, it raises the possibility of a "significant mismatch between the decision . . . made and the rationale . . . provided." Department of Commerce v. New York, 588 U. S. ___, ___, 139 S. Ct. 2551, 2575, 204 L. Ed. 2d 978 (2019). Only by bypassing context does the plurality conclude otherwise.

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The facts in respondents' complaints create more than a "sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U. S., at 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868. Whether they ultimately amount to actionable discrimination should be determined only after factual development on remand. [***54] Because the Court prematurely disposes of respondents' equal protection claims by overlooking the strength of their complaints, I join all but Part IV of the opinion and do not concur in the corresponding part of the judgment.

Justice Thomas, with whom Justice Alito and Justice Gorsuch join, concurring in the judgment in part and dissenting in part.

Between 2001 and 2011, Congress considered over two dozen bills that would have granted lawful status to millions of aliens who were illegally brought to this country as children. Each of those legislative efforts failed. In the wake of this impasse, the Department of Homeland Security (DHS) under President Barack Obama took matters into its own hands. Without any purported delegation of authority from Congress and without undertaking a rulemaking, DHS unilaterally created a program known as Deferred Action for Childhood Arrivals (DACA). The three-page DACA memorandum made it possible for approximately 1.7 million illegal aliens to

qualify for temporary lawful presence and certain federal and state benefits. When President Donald Trump took office in 2017, his Acting Secretary of Homeland Security, acting through yet another memorandum, rescinded [***55] the DACA memorandum. To state it plainly, the Trump administration rescinded DACA the same way that the Obama administration created it: unilaterally, and through a mere memorandum.

Today the majority makes the mystifying determination that this rescission of DACA was unlawful. In reaching that conclusion, the majority acts as though it is engaging in the routine application of standard principles of administrative law. On the contrary, this is anything but a standard administrative law case.

[**382] DHS created DACA during the Obama administration without any statutory authorization and without going through the [*1919] requisite rulemaking process. As a result, the program was unlawful from its inception. The majority does not even attempt to explain why a court has the authority to scrutinize an agency's policy reasons for rescinding an unlawful program under the arbitrary and capricious microscope. The decision to countermand an unlawful agency action is clearly reasonable. So long as the agency's determination of illegality is sound, our review should be at an end.

Today's decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision. The [***56] Court could have made clear that the solution respondents seek must come from the Legislative Branch. Instead, the majority has decided to prolong DHS' initial overreach by providing a stopgap measure of its own. In doing so, it has given the green light for future political battles to be fought in this Court rather than where they rightfully belong—the political branches. Such timidity forsakes the Court's duty to apply the law according to neutral principles, and the ripple effects of the majority's error will be felt throughout our system of self-government.

Perhaps even more unfortunately, the majority's holding creates perverse incentives, particularly for outgoing administrations. Under the auspices of today's decision, administrations can bind their successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda. Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a successor administration unless the successor provides sufficient policy justifications to the satisfaction of this Court. In other words, the majority erroneously holds that the agency is not only permitted, but required, [***57] to continue administering unlawful programs that it inherited from a previous administration. I respectfully dissent in part.

I

A

In 2012, after more than two dozen attempts by Congress to grant lawful status to aliens who were brought to this country as children, the then-Secretary of Homeland Security Janet Napolitano announced, by memorandum, [**383] a new "prosecutorial discretion" policy known as DACA. App. to Pet. for Cert. in No. 18-587, p. 97a. The memorandum directed immigration enforcement officers not to remove "certain [*1920] young people who were brought to this country as children" that met delineated criteria. Id., at 97a-98a. In the Secretary's view, the program was consistent with "the framework of the existing law." Id., at 101a.

DACA granted a renewable 2-year period of "deferred action" that made approximately 1.7 million otherwise removable aliens eligible to remain in this country temporarily. By granting deferred action, the memorandum also made recipients eligible for certain state and federal benefits, including Medicare and Social Security. See 8 U. S. C. §§1611(b)(2)-(4); 8 CFR §1.3(a)(4)(vi) (2020); 45 CFR §152.2(4)(vi) (2019). In addition, deferred action enabled the recipients to seek work authorization. 8 U. S. C. §1324a(h)(3)(B); 8 CFR §274a.12(c)(14). Despite these changes, the memorandum contradictorily [***58] claimed that it "confer[red] no substantive right [or] immigration status," because "[o]nly the Congress, acting through its legislative authority, can confer these rights." App. to Pet. for Cert. in No. 18-587, at 101a.

In 2014, then-Secretary of Homeland Security Jeh Johnson broadened the deferred-action program in yet another brief memorandum. This 2014 memorandum expanded DACA eligibility by extending the deferred-action period to three years and by relaxing other criteria. It also implemented a related program, known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). DAPA allowed unlawfully present parents to obtain deferred action derivatively through their children who were either citizens or lawful permanent residents. Approximately 4.3 million aliens qualified for DAPA and, as with DACA, these individuals would have become eligible for certain federal and state benefits upon the approval of their DAPA applications. See Texas v. United States, 809 F. 3d 134, 181 (CA5 2015). Nevertheless, the 2014 memorandum repeated the incongruous assertion that these programs "d[id] not confer any form of legal status in this country" and added that deferred action "may be terminated at any time at the agency's [***59] discretion." App. to Pet. for Cert. in No. 18-587, at 104a.

B

Twenty-six States filed suit to enjoin the implementation of these new programs, DAPA and "expanded DACA," maintaining that they violated the Constitution, the Administrative Procedure Act (APA), and the Immigration and Naturalization Act (INA). The States contended that, because the 2014 memorandum allowed aliens to receive deferred action and other benefits, it amounted to a legislative rule that had to comply with the APA's notice and comment procedures. The States also argued that DHS' decision to recategorize an entire class of aliens from "unlawfully present" to "lawfully present" exceeded its statutory authority under [**384]

the federal immigration laws. According to the States, these defects rendered the 2014 memorandum arbitrary, capricious, or otherwise not in accordance with law.

The District Court preliminarily enjoined DAPA and expanded DACA. The Fifth Circuit affirmed, rejecting DHS' claim that the programs were an exercise of prosecutorial discretion. Texas, 809 F. 3d, at 167, 188. The court concluded that the States were likely to succeed on their claim that the 2014 memorandum was a legislative rule that had to be adopted through notice and comment [***60] rulemaking. [*1921] Id., at 171-178. The court further concluded that the 2014 memorandum was "substantively contrary to law" because the INA did not grant DHS the statutory authority to implement either program. Id., at 170, 178-186.

This Court affirmed the Fifth Circuit's judgment by an equally divided vote. United States v. Texas, 579 U.S. ___, 136 S. Ct. 2271, 195 L. Ed. 2d 638 (2016) (per curiam).

C

The 2014 memorandum was rescinded on June 15, 2017, before taking effect. Shortly after that rescission, several of the plaintiff States sent a letter to then-Attorney General Jefferson Sessions III. They contended that the 2012 DACA memorandum was also legally defective because, "just like DAPA, DACA unilaterally confers eligibility for . . . lawful presence without any statutory authorization from Congress." App. 873. The States wrote that they would amend their complaint to challenge DACA if the administration did not rescind the 2012 memorandum creating DACA by September 5, 2017.

On September 4, then-Attorney General Sessions wrote to then-Acting Secretary of Homeland Security Elaine Duke, advising her to rescind DACA. Sessions stated that, in his legal opinion, DACA took effect "through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection [***61] of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch." Id., at 877. The letter also stated that DACA was infected with the "same legal . . . defects that the courts recognized as to DAPA," id., at 878, and thus DACA would likely be enjoined as well.

Then-Acting Secretary Duke rescinded DACA the next day, also through a memorandum. Her memorandum began by noting that DACA "purported to use deferred action . . . to confer certain benefits to illegal aliens that Congress had not otherwise acted to provide by law." App. to Pet. for Cert. in No. 18-587, at 112a. It described the history of the Fifth Circuit litigation, noting that the court had concluded that DAPA "conflicted with the discretion authorized by Congress" because "the [INA] flatly does not permit the reclassification of millions of illegal aliens as lawfully present." Id., at 114a (internal quotation marks omitted). Finally, the memorandum accepted then-Attorney General Sessions' legal determination that DACA was unlawful for the

same reasons as DAPA. See §1103(a)(1). In light of the legal conclusions reached by the Fifth Circuit [***62] and the Attorney General, then-Acting [**385] Secretary Duke set forth the procedures for winding down DACA.

These three cases soon followed. In each, respondents claimed, among other things, that DACA's rescission was arbitrary and capricious under the APA. Two District Courts granted a preliminary nationwide injunction, while the third vacated the rescission.

II

"'[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.'" Arlington v. FCC, 569 U. S. 290, 317, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013) (Roberts, C. J., dissenting) (quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U. S. 355, 374, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986)). When an agency exercises power beyond the bounds of its authority, it acts unlawfully. See, e.g., SAS Institute Inc. v. Iancu, 584 U. S. ___, ___, n., 138 S. Ct. 1348, 1358 n., 200 L. Ed. 2d 695 (2018). The 2012 memorandum [*1922] creating DACA provides a poignant illustration of ultra vires agency action.

DACA alters how the immigration laws apply to a certain class of aliens. "DACA [recipients] primarily entered the country either by overstaying a visa or by entering without inspection, and the INA instructs that aliens in both classes are removable." Texas v. United States, 328 F. Supp. 3d 662, 713 (SD Tex. 2018) (footnote omitted). But DACA granted its recipients deferred action, i.e., a decision to "decline to institute [removal] proceedings, terminate [removal] proceedings, or decline to institute a final order of [removal]." [***63] Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 484, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999) (internal quotation marks omitted). Under other regulations, recipients of deferred action are deemed lawfully present for purposes of certain federal benefits. See supra, at ___207 L. Ed. 2d, at 383. Thus, DACA in effect created a new exception to the statutory provisions governing removability and, in the process, conferred lawful presence on an entire class of aliens.

To lawfully implement such changes, DHS needed a grant of authority from Congress to either reclassify removable DACA recipients as lawfully present, or to exempt the entire class of aliens covered by DACA from statutory removal procedures. No party disputes that the immigration statutes lack an express delegation to accomplish either result. And, an examination of the highly reticulated immigration regime makes clear that DHS has no implicit discretion to create new classes of lawful presence or to grant relief from removal out of whole cloth. Accordingly, DACA is substantively unlawful.

This conclusion should begin and end our review. The decision to rescind an unlawful agency action is per se lawful. No additional policy justifications or considerations are necessary. And,

the majority's contrary holding—that an agency is not only permitted, but [***64] required, to continue an ultra vires action—has no basis in law.

A

Congress has not authorized DHS to reclassify an entire class of removable aliens as lawfully present or to categorically exempt aliens from statutory removal provisions. [**386]

1

I begin with lawful presence. As just stated, nothing in the federal immigration laws expressly delegates to DHS the unfettered discretion to create new categories of lawfully present aliens. And, there is no basis for concluding that Congress implicitly delegated to DHS the power to reclassify categories of aliens as lawfully present. The immigration statutes provide numerous ways to obtain lawful presence, both temporary and permanent. The highly detailed nature of these provisions indicates that Congress has exhaustively provided for all of the ways that it thought lawful presence should be obtainable, leaving no discretion to DHS to add new pathways.

For example, federal immigration laws provide over 60 temporary nonimmigrant visa options, including visas for ambassadors, full-time students and their spouses and children, those engaged to marry a United States citizen within 90 days of arrival, athletes and performers, and aliens with specialized [***65] knowledge related to their employers. See §§1101(a)(15)(A)-(V), 1184; 8 CFR §214.1; see also Congressional Research Service, J. Wilson, Nonimmigrant and Immigrant Visa Categories: Data Brief 1-6 (2019) (Table 1). In addition, the statutes permit the Attorney General to grant temporary "parole" into the United States "for urgent humanitarian reasons or [a] significant public benefit," 8 U. S. C. §1182(d)(5)(A); [*1923] provide for temporary protected status when the Attorney General finds that removal to a country with an ongoing armed conflict "would pose a serious threat to [an alien's] personal safety," §1254a(b)(1)(A); and allow the Secretary of Homeland Security (in consultation with the Secretary of State) to waive visa requirements for certain aliens for up to 90 days, §§1187(a)-(d).

The immigration laws are equally complex and detailed when it comes to obtaining lawful permanent residence. Congress has expressly specified numerous avenues for obtaining an immigrant visa, which aliens may then use to become lawful permanent residents. §§1201, 1255(a). Among other categories, immigrant visas are available to specified family-sponsored aliens, aliens with advanced degrees or exceptional abilities, certain types of skilled and unskilled workers, "special immigrants," and those entering the [***66] country to "engag[e] in a new commercial enterprise." §§1153(a)-(b), 1154; see also Congressional Research Service, Nonimmigrant and Immigrant Visa Categories, at 6-7 (Table 2). Refugees and asylees also may receive lawful permanent residence under certain conditions, §1159; 8 CFR §§209.1, 209.2. As

with temporary lawful presence, each avenue to lawful permanent residence status has its own set of rules and exceptions.

As the Fifth Circuit held in the DAPA litigation, a conclusion with which then-Attorney General Sessions [**387] agreed, "specific and detailed provisions[of] the INA expressly and carefully provid[e] legal designations allowing defined classes of aliens to be lawfully present." Texas, 809 F. 3d, at 179. In light of this elaborate statutory scheme, the lack of any similar provision for DACA recipients convincingly establishes that Congress left DHS with no discretion to create an additional class of aliens eligible for lawful presence. Congress knows well how to provide broad discretion, and it has provided open-ended delegations of authority in statutes too numerous to name. But when it comes to lawful presence, Congress did something strikingly different. Instead of enacting a statute with "broad general directives" and leaving it to the agency to fill in the lion's share of the details, Mistretta v. United States, 488 U. S. 361, 372, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989), Congress put in place intricate specifications [***67] governing eligibility for lawful presence. This comprehensive scheme indicates that DHS has no discretion to supplement or amend the statutory provisions in any manner, least of all by memorandum. See FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 125, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (An agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted" (internal quotation marks omitted)); see also ETSI Pipeline Project v. Missouri, 484 U. S. 495, 509-510, 108 S. Ct. 805, 98 L. Ed. 2d 898 (1988).

2

The relief that Congress has extended to removable aliens likewise confirms that DACA exceeds DHS' delegated authority. [*1924] Through deferred action, DACA grants temporary relief to removable aliens on a programmatic scale. See Texas, 328 F. Supp. 3d, at 714. But as with lawful presence, Congress did not expressly grant DHS the authority to create categorical exceptions to the statute's removal requirements. And again, as with lawful presence, the intricate level of detail in the federal immigration laws regarding relief from removal indicates that DHS has no discretionary authority to supplement that relief with an entirely new programmatic exemption.

At the outset, Congress clearly knows how to provide for classwide deferred action when it wishes to do so. On multiple occasions, Congress has used express language to make certain classes of [***68] individuals eligible for deferred action. See 8 U. S. C. §§1154(a)(1)(D)(i)(II), (IV) (certain individuals covered under the Violence Against Women Act are "eligible for deferred action"); Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1522 ("'Any individual described in subclause (I) is eligible for deferred action'"); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (§USA PATRIOT ACT) Act of 2001, 423(b), 115 Stat. 361 ("Such spouse, child, son, or daughter may be eligible for deferred action"); National Defense Authorization Act for Fiscal

Year 2004, §§1703(c)(1)(A), (2), 117 Stat. 1694-1695 ("Such spouse or child shall be eligible for deferred [**388] action"). Congress has failed to provide similar explicit provisions for DACA recipients, and the immigration laws contain no indication that DHS can, at will, create its own categorical policies for deferred action.

Other provisions pertaining to relief from removal further demonstrate that DHS lacked the delegated authority to create DACA. As with lawful presence, Congress has provided a plethora of methods by which aliens may seek relief from removal. For instance, both permanent and temporary residents can seek cancellation of removal if they meet certain [***69] residency requirements and have not committed certain crimes. §§1229b(a)-(b). And certain nonpermanent residents may have their status adjusted to permanent residence during these proceedings. §1229b(b)(2). Aliens can apply for asylum or withholding of removal during removal proceedings unless they have committed certain crimes. §§1158, 1231(b)(3). Applicants for certain nonimmigrant visas may be granted a stay of removal until the visa application is adjudicated. §1227(d). And, aliens may voluntarily depart rather than be subject to an order of removal. §1229c.

In sum, like lawful presence, Congress has provided for relief from removal in specific and complex ways. This nuanced detail indicates that Congress has provided the full panoply of methods it thinks should be available for an alien to seek relief from removal, leaving no discretion [*1925] to DHS to provide additional programmatic forms of relief.

3

Finally, DHS could not appeal to general grants of authority, such as the Secretary's ability to "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter," §1103(a)(3), or to "[e]stablis[h] national immigration enforcement policies and priorities," 6 U. S. C. §202(5). See also 8 U. S. C. §1103(g)(2). Because we must interpret the statutes [***70] "as a symmetrical and coherent regulatory scheme," Gustafson v. Alloyd Co., 513 U. S. 561, 569, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995), these grants of authority must be read alongside the express limits contained within the statute. Basing the Secretary's ability to completely overhaul immigration law on these general grants of authority would eviscerate [**389] that deliberate statutory scheme by "allow[ing the Secretary of DHS] to grant lawful presence . . . to any illegal alien in the United States." Texas, 809 F. 3d, at 184. Not only is this "an untenable position in light of the INA's intricate system," ibid., but it would also render many of those provisions wholly superfluous due to DHS' authority to disregard them at will, Duncan v. Walker, 533 U. S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001). And in addition to these fatal problems, adopting a broad interpretation of these general grants of authority would run afoul of the presumption that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." Whitman v. American Trucking Assns., Inc., 531 U. S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). And it would

also conflict with the major questions doctrine, which is based on the expectation that Congress speaks clearly when it delegates the power to make "decisions of vast economic and political significance." Utility Air Regulatory Group v. EPA, 573 U. S. 302, 324, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014) (UARG) (internal quotation marks omitted); see also Texas, 787 F. 3d, at 760-761.

Read together, the detailed [***71] statutory provisions governing temporary and lawful permanent resident status, relief from removal, and classwide deferred-action programs lead ineluctably to the conclusion that DACA is "inconsisten[t] with the design and structure of the statute as a whole." University of Tex. Southwestern Medical Center v. Nassar, 570 U. S. 338, 353, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013). As the District Court stated in the DAPA litigation and as then-Attorney General Sessions agreed, "[i]nstead of merely refusing to enforce the INA's removal laws against an individual, the DHS has enacted a wide-reaching program that awards legal presence . . . to individuals Congress has deemed deportable or removable." Texas v. United States, 86 F. Supp. 3d 591, 654 (SD Tex. 2015). The immigration statutes contain a level of granular specificity that is exceedingly rare in the modern administrative state. It defies all logic and common sense to conclude that a statutory scheme detailed enough to provide conditional lawful presence to groups as narrowly defined as "alien entrepreneurs," §1186b, is simultaneously capacious enough for DHS to [*1926] grant lawful presence to almost two million illegal aliens with the stroke of a Cabinet secretary's pen.

B

Then-Attorney General Sessions concluded that the initial DACA program suffered from the "same legal . . . defects" as DAPA and expanded DACA, finding [***72] that, like those programs, DACA was implemented without statutory authority. App. 877-878. Not only was this determination correct, but it is also dispositive for purposes of our review. "It is axiomatic that an administrative agency's power . . . is limited to the authority granted by Congress." Bowen v. Georgetown Univ. Hospital, 488 U. S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988). DHS had no authority here to create DACA, and the unlawfulness of that program is a sufficient justification for its rescission.

The majority opts for a different path, all but ignoring DACA's substantive legal defect. See ante, at [**390] ___-___, 207 L. Ed. 2d, at 372-373. On the majority's understanding of APA review, DHS was required to provide additional policy justifications in order to rescind an action that it had no authority to take. This rule "has no basis in our jurisprudence, and support for [it] is conspicuously absent from the Court's opinion." Massachusetts v. EPA, 549 U. S. 497, 536, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) (Roberts, C. J., dissenting).

The lack of support for the majority's position is hardly surprising in light of our Constitution's separation of powers. No court can compel Executive Branch officials to exceed their

congressionally delegated powers by continuing a program that was void ab initio. Cf. Clinton v. City of New York, 524 U. S. 417, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998); INS v. Chadha, 462 U. S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983); see also EPA v. EME Homer City Generation, L. P., 572 U. S. 489, 542, n. 5, 134 S. Ct. 1584, 188 L. Ed. 2d 775 (2014) (Scalia, J., dissenting); Public Citizen v. Department of Justice, 491 U. S. 440, 487, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (Kennedy, J., concurring in judgment). [***73] In reviewing agency action, our role is to ensure that Executive Branch officials do not transgress the proper bounds of their authority, Arlington, 569 U. S., at 327, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (Roberts, C. J., dissenting), not to perpetuate a decision to unlawfully wield power in direct contravention of the enabling statute's clear limits, see UARG, 573 U. S., at 327-328, 134 S. Ct. 2427, 189 L. Ed. 2d 372; Barnhart v. Sigmon Coal Co., 534 U. S. 438, 462, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002).

Under our precedents, DHS can only exercise the authority that Congress has chosen to delegate to it. See UARG, 573 U. S., at 327, 134 S. Ct. 2427, 189 L. Ed. 2d 372. In implementing DACA, DHS under the Obama administration arrogated to itself power it was not given by Congress. Thus, every action taken by DHS under DACA is the unlawful exercise of power. Now, under the Trump administration, DHS has provided the most compelling reason to rescind DACA: The program was unlawful and would force DHS to continue acting unlawfully if it carried the program forward.

III

The majority's demanding review of DHS' decisionmaking process is especially perverse given that the 2012 memorandum flouted the APA's procedural requirements—the very requirements designed to prevent arbitrary decisionmaking. Even if DHS were authorized to create DACA, it could not do so without undertaking an administrative rulemaking. The fact that DHS did not engage in this process likely [***74] provides an independent basis for rescinding DACA. But at the very least, this procedural [*1927] defect compounds the absurdity of the majority's position in these cases.

As described above, DACA fundamentally altered the immigration laws. It created a new category of aliens who, as a class, became exempt from statutory removal procedures, [**391] and it gave those aliens temporary lawful presence. Both changes contravened statutory limits. DACA is thus what is commonly called a substantive or legislative rule. As the name implies, our precedents state that legislative rules are those that "have the force and effect of law." Chrysler Corp. v. Brown, 441 U. S. 281, 295, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979) (internal quotation marks omitted).

Our precedents allow the vast majority of legislative rules to proceed through so-called "informal" notice and comment rulemaking. See United States v. Florida East Coast R. Co., 410 U. S. 224, 237-238, 93 S. Ct. 810, 35 L. Ed. 2d 223 (1973). But under our precedents, an agency

must engage in certain procedures mandated by the APA before its rule carries legal force. Kisor v. Wilkie, 588 U.S. ___, ___, 139 S. Ct. 2400, 2407, 204 L. Ed. 2d 841 (2019) (plurality opinion) ("[A] legislative rule, . . . to be valid[,] must go through notice and comment"); id., at ___, 139 S. Ct. 2400, 2424, 204 L. Ed. 2d 841 (Gorsuch, J., concurring in judgment) (same); Perez v. Mortgage Bankers Assn., 575 U. S. 92, 96, 135 S. Ct. 1199, 191 L. Ed. 2d 186 (2015); cf. Azar v. Allina Health Services, 587 U. S. ___, ___, 139 S. Ct. 1804, 1806 204 L. Ed. 2d 139 (2019)) (same with respect to materially identical procedures under the Medicare Act). These procedures specify [***75] that the agency "shall" publish a notice of proposed rulemaking in the Federal Register, justify the rule by reference to legal authority, describe "the subjects and issues involved" in the rule, and allow interested parties to submit comments. 5 U. S. C. §§553(b)-(c); see also Kisor, 588 U. S., at ___, 139 S. Ct. 2400, 2418, 204 L. Ed. 2d 841 (opinion of Gorsuch, J.). As we have recognized recently, use of the word "shall" indicates that these procedures impose mandatory obligations on the agency before it can adopt a valid binding regulation. See Maine Community Health Options v. United States, 590 U. S. ___, ___, 140 S. Ct. 1308, 1327, 206 L. Ed. 2d 764 (2020). After undergoing notice and comment, the agency then publishes the final rule, which must "articulate a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (internal quotation marks omitted). Only after completing this process is the legislative rule a valid law. See Kisor, 588 U. S., at ___, 139 S. Ct. 2400, 2432, 204 L. Ed. 2d 841 (opinion of Gorsuch, J.).

Because DACA has the force and effect of law, DHS was required to observe the [*1928] procedures set out in the APA if it wanted to promulgate a [**392] legislative rule. It is undisputed, however, that DHS did not do so. It provided no opportunity for interested parties to submit comments regarding the effect that the program's dramatic and very significant change in immigration [***76] law would have on various aspects of society. It provided no discussion of economic considerations or national security interests. Nor did it provide any substantial policy justifications for treating young people brought to this country differently from other classes of aliens who have lived in the country without incident for many years. And, it did not invoke any law authorizing DHS to create such a program beyond its inexplicable assertion that DACA was consistent with existing law. Because DHS failed to engage in the statutorily mandated process, DACA never gained status as a legally binding regulation that could impose duties or obligations on third parties. See id., at ___, 139 S. Ct. 2400, 2432, 204 L. Ed. 2d 841 (plurality opinion); id., at ___, 139 S. Ct. 2400, 2432, 204 L. Ed. 2d 841 (opinion of Gorsuch, J.).

Given this state of affairs, it is unclear to me why DHS needed to provide any explanation whatsoever when it decided to rescind DACA. Nothing in the APA suggests that DHS was required to spill any ink justifying the rescission of an invalid legislative rule, let alone that it was required to provide policy justifications beyond acknowledging that the program was simply

unlawful from the beginning. And, it is well established that we do not remand [***77] for an agency to correct its reasoning when it was required by law to take or abstain from an action. See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 544-545, 128 S. Ct. 2733, 171 L. Ed. 2d 607 (2008). Here, remand would be futile, because no amount of policy explanation could cure the fact that DHS lacked statutory authority to enact DACA in the first place.

Instead of recognizing this, the majority now requires the rescinding Department to treat the invalid rule as though it were legitimate. As just explained, such a requirement is not supported by the APA. It is also absurd, as evidenced by its application to DACA in these cases. The majority insists that DHS was obligated to discuss its choices regarding benefits and forbearance in great detail, even though no such detailed discussion accompanied DACA's issuance. And, the majority also requires DHS to discuss reliance interests at length, even though deferred action traditionally does not take reliance interests into account and DHS was not forced to explain its treatment of reliance interests in the first instance by going through notice and comment. See infra, at ___-___, 207 L. Ed. 2d, at 394-395. The majority's demand for such an explanation here simply makes little sense.

At bottom, of course, [***78] none of this matters, because DHS did provide a sufficient explanation for its action. DHS' statement that DACA was ultra vires was more than sufficient to justify [**393] its rescission. By requiring more, the majority has distorted the APA review process beyond recognition, further burdening all future attempts to rescind unlawful programs. Plaintiffs frequently bring successful challenges to agency actions by arguing that the agency has impermissibly dressed up a legislative rule as a policy statement and must comply [*1929] with the relevant procedures before functionally binding regulated parties. See, e.g., Mendoza v. Perez, 754 F. 3d 1002, 410 U.S. App. D.C. 210 (CADC 2014); NRDC v. EPA, 643 F.3d 311, 395 U.S. App. D.C. 397 (CADC 2011); National Family Planning & Reproductive Health Assn., Inc. v. Sullivan, 979 F.2d 227, 298 U.S. App. D.C. 288 (CADC 1992). But going forward, when a rescinding agency inherits an invalid legislative rule that ignored virtually every rulemaking requirement of the APA, it will be obliged to overlook that reality. Instead of simply terminating the program because it did not go through the requisite process, the agency will be compelled to treat an invalid legislative rule as though it were legitimate.

IV

Even if I were to accept the majority's premise that DACA's rescission required additional policy justifications, the majority's reasons for setting aside the agency's decision still fail.

A

First, the majority [***79] claims that the Fifth Circuit discussed only the legality of the 2014 memorandum's conferral of benefits, not its "forbearance component"—i.e., the decision not to

place DACA recipients into removal proceedings. Ante, at ___, 207 L. Ed. 2d, at 373. The majority, therefore, claims that, notwithstanding the then-Attorney General's legal conclusion, then-Acting Secretary Duke was required to consider revoking DACA recipients' lawful presence and other attendant benefits while continuing to defer their removal. Ante, at ___-___, 207 L. Ed. 2d, at 374-376. Even assuming the majority correctly characterizes the Fifth Circuit's opinion, it cites no authority for the proposition that arbitrary and capricious review requires an agency to dissect an unlawful program piece by piece, scrutinizing each separate element to determine whether it would independently violate the law, rather than just to rescind the entire program.

[*1930] The then-Attorney General reviewed [**394] the thorough decisions of the District Court and the Fifth Circuit. Those courts exhaustively examined the INA's text and structure, the relevant provisions of other federal immigration statutes, the historical practice of deferred action, and the general grants of statutory authority [***80] to set immigration policy. Both decisions concluded that DAPA and expanded DACA violated the carefully crafted federal immigration scheme, that such violations could not be justified through reference to past exercises of deferred action, and that the general grants of statutory authority did not give DHS the power to enact such a sweeping nonenforcement program. Based on the reasoning of those decisions, then-Attorney General Sessions concluded that DACA was likewise implemented without statutory authority. He directed DHS to restore the rule of law. DHS followed the then-Attorney General's legal analysis and rescinded the program. This legal conclusion more than suffices to supply the "reasoned analysis" necessary to rescind an unlawful program. State Farm, 463 U. S., at 42, 103 S. Ct. 2856, 77 L. Ed. 2d 443.

The majority has no answer except to suggest that this approach is inconsistent with State Farm. See ante, at ___-___, 207 L. Ed. 2d, at 374-375. But in doing so, the majority ignores the fact that, unlike the typical "prior policy" contemplated by the Court in State Farm, DACA is unlawful. Neither State Farm nor any other decision cited by the majority addresses what an agency must do when it has inherited an unlawful program. It is perhaps for this reason that, rather [***81] than responding with authority of its own, the majority simply opts to excise the "unlawful policy" aspect from its discussion.

B

Second, the majority claims that DHS erred by failing to take into account the reliance interests of DACA recipients. Ante, at ___-___, 207 L. Ed. 2d, at 375-377. But reliance interests are irrelevant when assessing whether to rescind an action that the agency lacked statutory authority to take. No amount of reliance could ever justify continuing a program that allows DHS to wield power that neither Congress nor the Constitution gave it. Any such decision would be "not in accordance with law" or "in excess of statutory . . . authority." 5 U. S. C. §§706(2)(A), (C). Accordingly, DHS would simply be engaging in yet another exercise of unlawful power if it used

reliance interests to justify continuing the initially [**395] unlawful program, and a court would be obligated to set aside that action.

Even if reliance interests were sometimes relevant when rescinding an ultra vires action, the rescission still would not be arbitrary and capricious here. Rather, as the majority does not dispute, the rescission is consistent with how deferred action has always worked. As a general matter, deferred action creates no rights—it exists [***82] at the Government's discretion and can be revoked at any time. See App. to Pet. for Cert. in No. 18-587, at 104a (DACA and expanded DACA); 8 CFR §214.11(j)(3) (T visas); §214.14(d)(2) (U visas); 62 Fed. Reg. 63249, 63253 (1997) (discussing Exec. Order No. 12711 for certain citizens of the People's Republic of China). The Government has made clear time and again that, because "deferred action is not an immigration status, no alien has the right to deferred action. It is [*1931] used solely in the discretion of the [Government] and confers no protection or benefit upon an alien." DHS Immigration and Customs Enforcement Office of Detention and Removal, Detention and Deportation Officers' Field Manual §20.8 (Mar. 27, 2006); see also Memorandum from D. Meissner, Comm'r, INS, to Regional Directors et al., pp. 11-12 (Nov. 17, 2000); Memorandum from W. Yates, Assoc. Director of Operations, DHS, Citizenship and Immigration Servs., to Director, Vt. Serv. Center, p. 5 (2003). Thus, contrary to the majority's unsupported assertion, ante, at ___, 207 L. Ed. 2d, at 375, this longstanding administrative treatment of deferred action provides strong evidence and authority for the proposition that an agency need not consider reliance interests in this context.

Finally, it is inconceivable to require DHS to study reliance [***83] interests before rescinding DACA considering how the program was previously defended. DHS has made clear since DACA's inception that it would not consider such reliance interests. Contemporaneous with the DACA memo, DHS stated that "DHS can terminate or renew deferred action at any time at the agency's discretion." Consideration of Deferred Action for Childhood Arrivals Process, 89 Interpreter Releases 1557, App. 4, p. 2 (Aug. 20, 2012). In fact, DHS repeatedly argued in court that the 2014 memorandum was a valid exercise of prosecutorial discretion in part because deferred action created no rights on which recipients could rely. Before the Fifth Circuit, DHS stated that "DHS may revoke or terminate deferred action and begin removal proceedings at any time at its discretion." Brief for Appellants in Texas v. United States, No. 15-40238, p. 7; see also id., at 45-46. And before this Court, in that same litigation, DHS reiterated that "DHS has absolute discretion to revoke deferred [**396] action unilaterally, without notice or process." Brief for United States in United States v. Texas, O. T. 2015, No. 15-674, p. 5; see also id., at 37. If that treatment of reliance interests was incorrect, it provides yet one more [***84] example of a deficiency in DACA's issuance, not its rescission.

***

President Trump's Acting Secretary of Homeland Security inherited a program created by President Obama's Secretary that was implemented without statutory authority and without

following the APA's required procedures. Then-Attorney General Sessions correctly concluded that this ultra vires program should be rescinded. These cases could—and should—have ended with a determination that his legal conclusion was correct.

Instead, the majority today concludes that DHS was required to do far more. Without grounding its position in either the APA or precedent, the majority declares that DHS was required to overlook DACA's obvious legal deficiencies and provide additional policy reasons and justifications before restoring the rule of law. This holding is incorrect, and it will hamstring all future agency attempts to undo actions that exceed statutory authority. I would therefore reverse the judgments below and remand with instructions to dissolve the nationwide injunctions. [*1932]

Justice Alito, concurring in the judgment in part and dissenting in part.

Anyone interested in the role that the Federal Judiciary now plays in our constitutional [***85] system should consider what has happened in these cases. Early in the term of the current President, his administration took the controversial step of attempting to rescind the Deferred Action for Childhood Arrivals (DACA) program. Shortly thereafter, one of the nearly 700 federal district court judges blocked this rescission, and since then, this issue has been mired in litigation. In November 2018, the Solicitor General filed petitions for certiorari, and today, the Court still does not resolve the question of DACA's rescission. Instead, it tells the Department of Homeland Security to go back and try again. What this means is that the Federal Judiciary, without holding that DACA cannot be rescinded, has prevented that from occurring during an entire Presidential term. Our constitutional system is not supposed to work that way.

I join Justice Thomas's opinion. DACA presents a delicate political issue, but that is not our business. As Justice Thomas explains, DACA was unlawful from the start, and that alone is sufficient to justify its termination. But even if DACA were lawful, we would still have no basis for overturning its rescission. First, to the extent DACA represented a lawful [***86] exercise of prosecutorial discretion, its rescission represented an exercise of that same discretion, and it would therefore be unreviewable under the Administrative Procedure Act. 5 U. S. C. §701(a)(2); see Heckler v. Chaney, 470 U. S. 821, 831-832, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). Second, to the extent we could review the rescission, it was not arbitrary and capricious for essentially the reasons explained by Justice Kavanaugh. See post, at ___-___, 207 L. Ed. 2d, [**397] at 398-400 (opinion concurring in the judgment in part and dissenting in part).

Justice Kavanaugh, concurring in the judgment in part and dissenting in part.

For the last 20 years, the country has engaged in consequential policy, religious, and moral debates about the legal status of millions of young immigrants who, as children, were brought to the United States and have lived here ever since. Those young immigrants do not have legal

status in the United States under current statutory law. They live, go to school, and work here with uncertainty about their futures. Despite many attempts over the last two decades, Congress has not yet enacted legislation to afford legal status to those immigrants.

In 2012, exercising its view of the Executive's prosecutorial discretion under Article II and the immigration laws, President Obama's administration unilaterally [***87] instituted a program known as Deferred Action for Childhood Arrivals, or DACA. Under DACA, eligible young immigrants may apply for and receive deferred action. They must renew their DACA status every two years. Under the program, the Executive Branch broadly forbears from enforcing certain immigration removal laws against DACA recipients. And by virtue of the forbearance, DACA recipients also become eligible for work authorization and other benefits.

Since 2017, President Trump's administration has sought to rescind DACA based on its different and narrower understanding of the Executive's prosecutorial discretion under Article II and the immigration laws. In its view, the Executive Branch legally may not, and as a policy matter should not, unilaterally forbear from enforcing the immigration laws against such a large class of individuals. The current administration [*1933] has stated that it instead wants to work with Congress to enact comprehensive legislation that would address the legal status of those immigrants together with other significant immigration issues.

The question before the Court is whether the Executive Branch acted lawfully in ordering rescission of the ongoing DACA program. [***88] To begin with, all nine Members of the Court accept, as do the DACA plaintiffs themselves, that the Executive Branch possesses the legal authority to rescind DACA and to resume pre-DACA enforcement of the immigration laws enacted by Congress. Having previously adopted a policy of prosecutorial discretion and nonenforcement with respect to a particular class of offenses or individuals, the Executive Branch has the legal authority to rescind such a policy and resume enforcing the law enacted by Congress. The Executive Branch's exercise of that rescission authority is subject to constitutional constraints and may also be subject to statutory constraints. The narrow legal dispute here concerns a statutory constraint—namely, whether the Executive Branch's action to rescind DACA satisfied the general arbitrary-and-capricious standard of the Administrative Procedure Act, or APA.

The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. As the Court has long stated, judicial review under that standard is [**398] deferential to the agency. The Court may not substitute its policy judgment for that of the agency. The Court simply ensures that the agency [***89] has acted within a broad zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision. See FCC v. Fox Television Stations, Inc., 556 U. S. 502, 129 S. Ct. 1800,

173 L. Ed. 2d 738 (2009); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

The Executive Branch explained its decision to rescind DACA in two sequential memorandums by successive Secretaries of Homeland Security: the 2017 Duke Memorandum and the 2018 Nielsen Memorandum. The Duke Memorandum focused on DACA's perceived legal flaws. The Court today finds the Duke Memorandum insufficient under the APA's arbitrary-and-capricious standard.

But regardless of whether the Court is correct about the Duke Memorandum, the Nielsen Memorandum more fully explained the Department's legal reasons for rescinding DACA, and clarified that even if DACA were lawful, the Department would still rescind DACA for a variety of policy reasons. The Nielsen Memorandum also expressly addressed the reliance interests of DACA recipients. The question under the APA's deferential arbitrary-and-capricious standard is not whether we agree with the Department's decision to rescind DACA. The question is whether the Nielsen Memorandum reasonably explained the decision to rescind DACA. Under ordinary application of the arbitrary-and-capricious [***90] standard, the Nielsen Memorandum—with its alternative and independent rationales and its discussion of reliance—would pass muster as an explanation for the Executive Branch's action.

The Nielsen Memorandum was issued nine months after the Duke Memorandum. Under the Administrative Procedure Act, the Nielsen Memorandum is itself a "rule" setting forth "an agency statement of general . . . applicability and future effect designed to implement . . . policy." 5 U. S. C. §551(4). Because it is a rule, the Nielsen Memorandum constitutes "agency action." §551(13). As the Secretary of Homeland [*1934] Security, Secretary Nielsen had the authority to decide whether to stick with Secretary Duke's decision to rescind DACA, or to make a different decision. Like Secretary Duke, Secretary Nielsen chose to rescind DACA, and she provided additional explanation. Her memorandum was akin to common forms of agency action that follow earlier agency action on the same subject—for example, a supplemental or new agency statement of policy, or an agency order with respect to a motion for rehearing or reconsideration. Courts often consider an agency's additional explanations of policy or additional explanations made, for example, on agency rehearing [***91] or reconsideration, or on remand from a court, even if the agency's bottom-line decision itself does not change.

Yet the Court today jettisons the Nielsen Memorandum by classifying it as a post hoc justification for rescinding DACA. Ante, at ___-___, 207 L. Ed. 2d, at 370-371. Under our precedents, however, the post hoc justification doctrine merely requires that courts assess agency action based on the official explanations of the agency decisionmakers, and not [**399] based on after-the-fact explanations advanced by agency lawyers during litigation (or by judges). See, e.g., State Farm, 463 U. S., at 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 ("courts may not accept

appellate counsel's post hoc rationalizations for agency action"); FPC v. Texaco Inc., 417 U. S. 380, 397, 94 S. Ct. 2315, 41 L. Ed. 2d 141 (1974) (same); NLRB v. Metropolitan Life Ins. Co., 380 U. S. 438, 443-444, 85 S. Ct. 1061, 13 L. Ed. 2d 951 (1965) (same); Burlington Truck Lines, Inc. v. United States, 371 U. S. 156, 168-169, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962) (same). As the D. C. Circuit has explained, the post hoc justification doctrine "is not a time barrier which freezes an agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning. It is a rule directed at reviewing courts which forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper decisionmakers." Alpharma, Inc. v. Leavitt, 460 F. 3d 1, 6, 373 U.S. App. D.C. 65 (2006) (Garland, J.) (internal quotation marks omitted).

Indeed, the ordinary judicial remedy for an agency's insufficient explanation [***92] is to remand for further explanation by the relevant agency personnel. It would make little sense for a court to exclude official explanations by agency personnel such as a Cabinet Secretary simply because the explanations are purportedly post hoc, and then to turn around and remand for further explanation by those same agency personnel. Yet that is the upshot of the Court's application of the post hoc justification doctrine today. The Court's refusal to look at the Nielsen Memorandum seems particularly mistaken, moreover, because the Nielsen Memorandum shows that the Department, back in 2018, considered the policy issues that the Court today says the Department did not consider. Ante, at ___-___, 207 L. Ed. 2d, at 373-377.

To be sure, cases such as Overton Park and Camp v. Pitts suggest that courts reviewing certain agency adjudications may in some circumstances decline to examine an after-the-fact agency explanation. See Camp v. Pitts, 411 U. S. 138, 142-143, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973) (per curiam); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U. S. 402, 419-421, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). But agency adjudications are "concerned with the determination of past and present rights and liabilities," Attorney General's Manual on the Administrative Procedure Act 14 (1947), and implicate the due process interests of the individual parties to the adjudication. Judicial [***93] review of an adjudication therefore ordinarily focuses on what happened during the agency's adjudication [*1935] process of deciding that individual case.

Even if certain agency adjudications have a slightly more stringent restriction on post hoc explanations, the APA is "based upon a dichotomy between rule making and adjudication," ibid., and this case involves an ongoing agency rule that has future effect—the rescission of DACA. The Nielsen Memorandum implements and explains the rescission of DACA. I am aware of no case from this Court, and the Court today cites none, that has employed the post hoc justification doctrine to exclude an agency's official explanation of an agency rule. For purposes of arbitrary-and-capricious review, it does not matter whether the latest official explanation [**400] was two years ago or three years ago. What matters is whether the explanation was reasonable and followed the requisite procedures. In my view, the Court should consider the

Nielsen Memorandum in deciding whether the Department's rescission of DACA satisfies the APA's arbitrary-and-capricious standard.

Because the Court excludes the Nielsen Memorandum, the Court sends the case back to the Department of Homeland [***94] Security for further explanation. Although I disagree with the Court's decision to remand, the only practical consequence of the Court's decision to remand appears to be some delay. The Court's decision seems to allow the Department on remand to relabel and reiterate the substance of the Nielsen Memorandum, perhaps with some elaboration as suggested in the Court's opinion. Ante, at ___-___, 207 L. Ed. 2d, at 375-377.

***

The Court's resolution of this narrow APA issue of course cannot eliminate the broader uncertainty over the status of the DACA recipients. That uncertainty is a result of Congress's inability thus far to agree on legislation, which in turn has forced successive administrations to improvise, thereby triggering many rounds of relentless litigation with the prospect of more litigation to come. In contrast to those necessarily short-lived and stopgap administrative measures, the Article I legislative process could produce a sturdy and enduring solution to this issue, one way or the other, and thereby remove the uncertainty that has persisted for years for these young immigrants and the Nation's immigration system. In the meantime, as to the narrow APA question presented here, I appreciate the Court's [***95] careful analysis, [*1936] but I ultimately disagree with its treatment of the Nielsen Memorandum. I therefore respectfully dissent from the Court's judgment on plaintiffs' APA claim, and I concur in the judgment insofar as the Court rejects plaintiffs' equal protection claim.

PEDRO PABLO GUERRERO-LASPRILLA, Petitioner (No. 18-776) v. WILLIAM P. BARR, ATTORNEY GENERAL

140 S. Ct. 1062 * | 206 L. Ed. 2d 271 ** | 2020 U.S. LEXIS 1907 *** | 28 Fla. L. Weekly Fed. S 81 [*1067]

Justice Breyer delivered the opinion of the Court.

Section 242(a) of the Immigration and Nationality Act, codified as 8 U. S. C. §1252(a), [**276] provides for judicial review of a final Government order directing the removal of an alien from this country. See 66 Stat. 163, as amended, 8 U. S. C. §1101 et seq. A subdivision of that section limits the scope of that review where the removal rests upon the fact that the alien has committed certain crimes, including aggravated felonies and controlled substance offenses. §1252(a)(2)(C). Another subdivision, §1252(a)(2)(D), which we shall call the Limited Review Provision, says that in such instances courts may consider only "constitutional claims or questions of law." The question that these two consolidated cases present is whether the phrase "questions of law" in the Provision includes the application of a legal standard to undisputed or established facts. We believe that it does.

I

The two petitioners before us, Pedro Pablo Guerrero-Lasprilla [***8] and Ruben Ovalles, are aliens who lived in the United States. Each committed a drug crime and consequently became removable. App. 33; Record in No. 18-1015, p. 66. In 1998, an Immigration Judge ordered Guerrero-Lasprilla removed. Record in No. 18-776, p. 137. In 2004, the Board of Immigration Appeals ordered Ovalles removed, reversing a decision by an Immigration Judge. App. to Pet. for Cert. in No. 18-1015, pp. 32a-35a. Both removal orders became administratively final, and both petitioners left the country.

Several months after their removal orders became final, each petitioner's window for filing a timely motion to reopen his removal proceedings closed. That is because the Immigration and Nationality Act permits a person one motion to reopen, "a form of procedural relief that asks the Board to change its decision in light of newly discovered evidence or a change in circumstances." Dada v. Mukasey, 554 U. S. 1, 12, 14, 128 S. Ct. 2307, 171 L. Ed. 2d 178 (2008) (internal quotation marks omitted). But the motion must usually be filed "within 90 days of the date of entry of a final administrative order of removal." 8 U. S. C. §1229a(c)(7)(C)(i).

Nonetheless, Guerrero-Lasprilla (in 2016) and Ovalles (in 2017) asked the Board to reopen their removal proceedings. Recognizing that the 90-day time [***9] limit had long since passed, both petitioners argued that the time limit should be equitably tolled. Both petitioners, who had become eligible for discretionary relief due to various judicial and Board decisions years after their removal, rested their claim for equitable tolling on Lugo-Resendez v. Lynch, 831 F. 3d 337 (CA5 2016). In that case, the Fifth Circuit had held that the 90-day time limit could be "equitably tolled." Id., at 344. Guerrero-Lasprilla filed his motion to reopen a month after Lugo-Resendez was decided. App. 5. Ovalles filed his motion to reopen eight months after the decision. Id., at 35. The Board denied both petitioners' requests for equitable tolling, concluding, inter alia, that

they had failed to demonstrate the requisite due diligence. App. to Pet. for Cert. in No. 18-1015, at 6a; App. to Pet. for Cert. in No. 18-776, p. 12a. [*1068]

Guerrero-Lasprilla and Ovalles each asked the Fifth Circuit to review the Board's decision. See 8 U. S. C. §1252(a)(1); 28 U. S. C. §2342; Reyes Mata v. Lynch, 576 U.S. 143, 147, 135 S. Ct. 2150, 192 L. Ed. 2d 225, 231 (2015) [**277] ("[C]ircuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal proceeding"). The Fifth Circuit denied their requests for review, concluding in both cases that "whether an alien acted diligently in attempting to reopen removal proceedings for purposes [***10] of equitable tolling is a factual question." Guerrero-Lasprilla v. Sessions, 737 Fed. Appx. 230, 231 (2018) (per curiam); Ovalles v. Sessions, 741 Fed. Appx. 259, 261 (2018) (per curiam). And, given the Limited Review Provision, it "lack[ed] jurisdiction" to review those "factual" claims. 737 Fed. Appx., at 231; 741 Fed. Appx., at 261.

Both petitioners claim that the underlying facts were not in dispute, and they asked us to grant certiorari in order to determine whether their claims that the Board incorrectly applied the equitable tolling due diligence standard to the "undisputed" (or established) facts is a "question of law," which the Limited Review Provision authorizes courts of appeals to consider. We agreed to do so.

II

The Limited Review Provision provides that, in this kind of immigration case (involving aliens who are removable for having committed certain crimes), a court of appeals may consider only "constitutional claims or questions of law." 8 U. S. C. §1252(a)(2)(D). The issue before us is, as we have said, whether the statutory phrase "questions of law" includes the application of a legal standard to undisputed or established facts. If so, the Fifth Circuit erred in holding that it "lack[ed] jurisdiction" to consider the petitioners' claims of due diligence for equitable tolling purposes. We conclude that the phrase "questions of law" does include [***11] this type of review, and the Court of Appeals was wrong to hold the contrary.

A

Consider the statute's language. Nothing in that language precludes the conclusion that Congress used the term "questions of law" to refer to the application of a legal standard to settled facts. Indeed, we have at times referred to the question whether a given set of facts meets a particular legal standard as presenting a legal inquiry. Do the facts alleged in a complaint, taken as true, state a claim for relief under the applicable legal standard? See Fed. Rule Civ. Proc. 12(b)(6); Neitzke v. Williams, 490 U. S. 319, 326, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law"). Did a Government official's alleged conduct violate clearly established law? See Mitchell v. Forsyth, 472 U. S. 511, 528, n. 9, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) ("[T]he appealable issue is a

purely legal one: whether the facts alleged . . . support a claim of violation of clearly established law"); cf. Nelson v. Montgomery Ward & Co., 312 U. S. 373, 376, 61 S. Ct. 593, 85 L. Ed. 897 (1941) ("The effect of admitted facts is a question of law"). Even the dissent concedes that we have sometimes referred to mixed questions as raising a legal inquiry. See post, at ___ - ___, 206 L. Ed. 2d, at 284-285 (opinion of Thomas, J.). While that judicial usage alone does not tell us what Congress meant by the statutory term "questions of law," it does indicate that the term can [***12] reasonably encompass questions about whether settled facts satisfy a legal standard.

[**278] [*1069] We have sometimes referred to such a question, which has both factual and legal elements, as a "mixed question of law and fact." See, e.g., U.S. Bank N. A. v. Village at Lakeridge, LLC, 583 U. S. ___, ___, 138 S. Ct. 960, 200 L. Ed. 2d 218, 226 (2018) ("[W]hether the historical facts found satisfy the legal test chosen" is a "so-called 'mixed question' of law and fact" (citing Pullman-Standard v. Swint, 456 U. S. 273, 289, n. 19, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982))). And we have often used the phrase "mixed questions" in determining the proper standard for appellate review of a district, bankruptcy, or agency decision that applies a legal standard to underlying facts. The answer to the "proper standard" question may turn on practical considerations, such as whether the question primarily "require[s] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard" (often calling for review de novo), or rather "immerse[s] courts in case-specific factual issues" (often calling for deferential review). Village at Lakeridge, 583 U. S., at ___, 138 S. Ct. 960, 200 L. Ed. 2d 218, at 227. But these cases present no such question involving the standard of review. And, in any event, nothing in those cases forecloses the conclusion that the application of law to settled facts can be encompassed within the statutory phrase "questions of law." Nor is there [***13] anything in the language of the statute that suggests that "questions of law" excludes the application of law to settled facts.

B

The Government, respondent here, argues to the contrary. Namely, the Government claims that Congress intended to exclude from judicial review all mixed questions. We do not agree. Rather, a longstanding presumption, the statutory context, and the statute's history all support the conclusion that the application of law to undisputed or established facts is a "questio[n] of law" within the meaning of §1252(a)(2)(D).

1

Consider first "a familiar principle of statutory construction: the presumption favoring judicial review of administrative action." Kucana v. Holder, 558 U. S. 233, 251, 130 S. Ct. 827, 175 L. Ed. 2d 694 (2010). Under that "well-settled" and "strong presumption," McNary v. Haitian Refugee Center, Inc., 498 U. S. 479, 496, 498, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991), when a

statutory provision "is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." Kucana, 558 U. S., at 251, 130 S. Ct. 827, 175 L. Ed. 2d 694 (quoting Gutierrez de Martinez v. Lamagno, 515 U. S. 417, 434, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995); internal quotation marks omitted); see McNary, 498 U. S., at 496, 111 S. Ct. 888, 112 L. Ed. 2d 1005 ("[G]iven [that] presumption . . ., it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review"). The presumption can only be overcome by "clear and [***14] convincing evidence" of congressional intent to preclude judicial review. Reno v. Catholic Social Services, Inc., 509 U. S. 43, 64, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993) (quoting Abbott Laboratories v. Gardner, 387 U. S. 136, 141, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); internal quotation marks omitted); see Cuozzo [**279] Speed Technologies, LLC v. Lee, 579 U. S. ___, ___-___, 136 S. Ct. 2131, 195 L. Ed. 2d 423, 441 (2016).

We have "consistently applied" the presumption of reviewability to immigration statutes. Kucana, 558 U. S., at 251, 130 S. Ct. 827, 175 L. Ed. 2d 694. And we see no reason to make [*1070] an exception here. The dissent's "doubts" about the presumption, see post, at ___ - ___, 206 L. Ed. 2d, at 286-288, do not undermine our recognition that it is a "well-settled" principle of statutory construction, McNary, 498 U. S., at 496, 111 S. Ct. 888, 112 L. Ed. 2d 1005. Notably, even the Government does not dispute the soundness of the presumption or its applicability here. See Brief for Respondent 47-48 (arguing only that the presumption is overcome).

As discussed above, we can reasonably interpret the statutory term "questions of law" to encompass the application of law to undisputed facts. See supra, at ___ - ___, 206 L. Ed. 2d, at 277-278. And as we explain further below, infra, at ___, 206 L. Ed. 2d, at 282, interpreting the Limited Review Provision to exclude mixed questions would effectively foreclose judicial review of the Board's determinations so long as it announced the correct legal standard. The resulting barrier to meaningful judicial review is thus a strong indication, given the presumption, that "questions of law" does indeed include the application of law to established facts. That is particularly [***15] so given that the statutory context and history point to the same result.

2

Consider next the Limited Review Provision's immediate statutory context. That context belies the Government and the dissent's claim that "questions of law" refers only to "pure" questions and necessarily excludes the application of law to settled facts. See Brief for Respondent 19-26; post, at ___ - ___, 206 L. Ed. 2d, at 284-286. The Limited Review Provision forms part of §1252, namely, §1252(a)(2)(D). The same statutory section contains a provision, §1252(b)(9), which we have called a "'zipper clause.'" INS v. St. Cyr, 533 U. S. 289, 313, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001). We have explained that Congress intended the zipper clause to

"consolidate judicial review of immigration proceedings into one action in the court of appeals." Ibid. (internal quotation marks omitted). The zipper clause reads in part as follows:

"Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken . . . to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." §1252(b)(9) (emphasis added).

Because it is meant to consolidate judicial review, the zipper clause must encompass mixed questions. [***16] Indeed, the clause by its very language includes the "application of [a] statutory provisio[n]." Ibid.

The zipper clause accordingly makes clear that Congress understood the statutory term "questions of law and fact" to include the application of law to facts. Reread the zipper clause: It uses the terms "[(1)] questions of law and [(2)] fact, including" the "application of " statutes, i.e., the [**280] application of law to fact. Ibid. (emphasis added). Thus, there are three possibilities: Congress either used (1) "questions of law," (2) "fact," or (3) the combination of both terms to encompass mixed questions. Even the Government does not argue that Congress used "questions of fact" alone to cover mixed questions. Congress thus either meant the term "questions of law" alone to include mixed questions, or it used both "questions of law" and questions of "fact" to encompass mixed questions. The latter interpretation at the very least disproves the Government's argument that Congress consistently uses a three-part typology, referring to mixed questions separately from questions of law or questions of fact (such that "questions of law" cannot include mixed questions). See Brief for Respondent [***17] 21; see also post, at ___, 206 L. Ed. 2d, at 284 (arguing that this Court has often used that three-part [*1071] typology and thus "questions of law" must exclude mixed questions). And the former interpretation directly supports the conclusion that "questions of law" includes mixed questions. That interpretation gives "questions of law" the same meaning across both provisions. Notably, when Congress enacted the Limited Review Provision, it added language to the end of the zipper clause (following the language quoted above) to clarify that, except as provided elsewhere in §1252, "'no court shall have jurisdiction'" to "'review . . . such questions of law or fact.'" §106, 119 Stat. 311. There is thus every reason to think that Congress used the phrase "questions of law" to have the same meaning in both provisions.

3

Consider also the Limited Review Provision's statutory history and the relevant precedent. The parties agree that Congress enacted the Limited Review Provision in response to this Court's decision in St. Cyr. See Brief for Respondent 16, 27-31; Brief for Petitioners 31-33. In that case,

the Court evaluated the effect of various allegedly jurisdiction-stripping provisions, including the predecessor to §1252(a)(2)(C). That predecessor (which today [***18] is modified by the Limited Review Provision) essentially barred judicial review of removal orders based on an alien's commission of certain crimes. See St. Cyr, 533 U. S., at 298, 311, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (citing §1252(a)(2)(C) (1994 ed., Supp. V)). This Court interpreted that predecessor and the other purportedly jurisdiction-stripping provisions as not barring (i.e., as permitting) review in habeas corpus proceedings, to avoid the serious constitutional questions that would be raised by a contrary interpretation. See St. Cyr, 533 U. S., at 299-305, 314, 121 S. Ct. 2271, 150 L. Ed. 2d 347.

In doing so, the Court suggested that the Constitution, at a minimum, protected the writ of habeas corpus "'as it existed in 1789.'" Id., at 300-301, 121 S. Ct. 2271, 150 L. Ed. 2d 347. The Court then noted the kinds of review that were traditionally available in a habeas proceeding, which included "detentions based on errors of law, including the erroneous application or interpretation of statutes." Id., at 302, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (emphasis added). And it supported this view by citing cases from the 18th and early 19th centuries. See id., at 302-303, and nn. 18-23, 121 S. Ct. 2271, 150 L. Ed. 2d 347. English cases consistently demonstrate that the "erroneous application . . . [**281] of statutes" includes the misapplication of a legal standard to the facts of a particular case. See, e.g., Hollingshead's Case, 1 Salk. 351, 91 Eng. Rep. 307 (K. B. 1702); King v. Nathan, 2 Str. 880, 93 Eng. Rep. 914 (K. B. 1724); King v. Rudd, 1 Cowp. 331, 334-337, 98 Eng. Rep. 1114, 1116-1117 (K. B. 1775); [***19] King v. Pedley, 1 Leach 325, 326, 168 Eng. Rep. 265, 266 (1784). The Court ultimately made clear that "Congress could, without raising any constitutional questions, provide an adequate substitute [for habeas review] through the courts of appeals." St. Cyr., 533 U. S., at 314, n. 38, 121 S. Ct. 2271, 150 L. Ed. 2d 347.

Congress took up this suggestion. It made clear that the limits on judicial review in various provisions of §1252 included habeas review, and it consolidated virtually all review of removal orders in one proceeding in the courts of appeals. See §106(a), 119 Stat. 310-311 (inserting specific references to 28 U. S. C. §2241 and "'any other habeas corpus provision'"). At the same time, Congress added the Limited Review Provision, which permits judicial review of "'constitutional claims or questions of law,'" the words directly before us now. 119 Stat. 310.

This statutory history strongly suggests that Congress added the words before us [*1072] because it sought an "adequate substitute" for habeas in view of St. Cyr's guidance. See supra, at ___, 206 L. Ed. 2d, at 280. If so, then the words "questions of law" in the Limited Review Provision must include the misapplication of a legal standard to undisputed facts, for otherwise review would not include an element that St. Cyr said was traditionally reviewable in habeas.

We reach the same conclusion through reference to lower court precedent. [***20] After we decided St. Cyr, numerous Courts of Appeals held that habeas review included review of the application of law to undisputed facts. See Cadet v. Bulger, 377 F. 3d 1173, 1184 (CA11 2004) ("[W]e hold that the scope of habeas review available in [28 U. S. C.] §2241 petitions by aliens challenging removal orders . . . includes . . . errors of law, including both statutory interpretations and application of law to undisputed facts or adjudicated facts"); Ogbudimkpa v. Ashcroft, 342 F. 3d 207, 222 (CA3 2003) (same); Mu-Xing Wang v. Ashcroft, 320 F. 3d 130, 143 (CA2 2003) (same); Singh v. Ashcroft, 351 F. 3d 435, 441-442 (CA9 2003) ("[O]ther courts have rejected the Government's argument that only 'purely legal questions of statutory interpretation' permit the exercise of habeas jurisdiction. . . . We agree with those rulings"). HN4 LEdHN[4] [4]We normally assume that Congress is "aware of relevant judicial precedent" when it enacts a new statute. Merck & Co. v. Reynolds, 559 U. S. 633, 648, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010). Thus, we should assume that Congress, aware of this precedent (and wishing to substitute review in the courts of appeals for habeas review), would have intended the phrase "questions of law" to include the application of a legal standard to established or undisputed facts.

Those who deem legislative history a useful interpretive tool will find that the congressional history of the Limited Review Provision supports this analysis. The House Conference Report refers to St. Cyr [***21] and adds that Congress' amendments are designed to "provide an 'adequate and effective' alternative to habeas corpus" in the [**282] courts of appeals. H. R. Conf. Rep. No. 109-72, p. 175 (2005) (citing St. Cyr, 533 U. S., at 314, n. 38, 121 S. Ct. 2271, 150 L. Ed. 2d 347). The Report adds that the amendments "would not change the scope of review that criminal aliens currently receive." H. R. Conf. Rep. No. 109-72, at 175. And as we know, that "scope of review" included review of decisions applying a legal standard to undisputed or established facts. That is what this Court, in St. Cyr, had said was traditionally available in habeas; and it was how courts of appeals then determined the scope of habeas review. Notably, the legislative history indicates that Congress was well aware of the state of the law in the courts of appeals in light of St. Cyr. See H. R. Conf. Rep. No. 109-72, at 174 (discussing issues on which the Courts of Appeals agreed and those on which they had split after St. Cyr). The statutory history and precedent, as well as the legislative history, thus support the conclusion that the statutory term "questions of law" includes the application of a legal standard to established facts.

III

The Government makes two significant arguments that we have not yet discussed. First, it points out that §1252(a)(2)(C) forbids (subject to the Limited Review Provision) review of a removal order based on an alien's commission of certain crimes. If the words "questions of law" include "mixed questions," then for such aliens, the Limited Review Provision excludes only (or primarily) agency fact-finding from review. But if Congress intended no more than that, then

why, the Government asks, did it not just say so directly rather [*1073] than eliminate judicial review and then restore it for "constitutional claims or questions of law?" Brief for Respondent 49-50.

One answer to this question is that the Limited Review Provision applies to more of the statute than the immediately preceding [***22] subparagraph. See §1252(a)(2)(D) (applying notwithstanding "subparagraph (B) or (C), or in any other provision of this chapter (other than this section)"). Another answer is that Congress did not write the Limited Review Provision on a blank slate. Rather, subparagraph (C) initially forbade judicial review, and Congress then simply wrote another subparagraph reflecting our description in St. Cyr of the review traditionally available in habeas (or a substitute for habeas in the courts of appeals). See supra, at ___ - ___, 206 L. Ed. 2d, at 277-281. That statutory history also illustrates why the dissent errs in relying so significantly on language in subparagraph (C) proscribing judicial review. See post, at ___, ___ - ___, 206 L. Ed. 2d, at 285-286, 288 (referring to the "sweeping" and "broad" language of subparagraph (C)). A broad and sweeping reading of subparagraph (C) was precisely what this Court rejected in St. Cyr, and Congress enacted subparagraph (D) in response to that opinion. Subparagraph (C)—constrained as it is by subparagraph (D)—must thus be read in that context.

Second, the Government argues that our interpretation will undercut Congress' efforts to severely limit and streamline judicial review of an order removing aliens convicted of certain crimes. See Brief for [***23] Respondent 29-30; see also post, at ___, n. 5, 206 L. Ed. 2d, at 289 (noting that the legislative history indicates that Congress intended to streamline removal proceedings [**283] by limiting judicial review). The Limited Review Provision, however, will still forbid appeals of factual determinations—an important category in the removal context. And that Provision, taken together with other contemporaneous amendments to §1252, does streamline judicial review relative to the post-St. Cyr regime, by significantly curtailing habeas proceedings in district courts.

More than that, the Government's interpretation is itself difficult to reconcile with the Provision's basic purpose of providing an adequate substitute for habeas review. That interpretation would forbid review of any Board decision applying a properly stated legal standard, irrespective of how mistaken that application might be. By reciting the standard correctly, the Board would be free to apply it in a manner directly contrary to well-established law. The Government, recognizing the extreme results of its interpretation, suggested at oral argument that the courts of appeals might still be able to review certain "categori[es]" of applications, such as whether someone [***24] being in a coma always, sometimes, or never requires equitable tolling. See Tr. of Oral Arg. 38. The Government, however, left the nature and rationale of this approach unclear. The approach does not overcome the problem we have just raised, and seems difficult to reconcile with the language and purposes of the statute.

***

For these reasons, we reverse the Fifth Circuit's "jurisdictional" decisions, vacate its judgments, and remand these cases for further proceedings consistent with this opinion.

It is so ordered.

Justice Thomas, with whom Justice Alito joins as to all but Part II-A-1, dissenting.

We granted certiorari to decide whether a denial of equitable tolling for lack of due diligence is reviewable as a "question of law" under 8 U. S. C. §1252(a)(2)(D). Not [*1074] content with resolving that narrow question, the Court categorically proclaims that federal courts may review immigration judges' applications of any legal standard to established facts in criminal aliens' removal proceedings. Ante, at ___ - ___, 206 L. Ed. 2d, at 275-276. In doing so, the majority effectively nullifies a jurisdiction-stripping statute, expanding the scope of judicial review well past the boundaries set by Congress. Because this arrogation of authority flouts [***25] both the text and structure of the statute, I respectfully dissent.

I

Under §1252(a)(2)(C), "[n]otwithstanding any other provision of law (statutory or nonstatutory), . . . no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [certain] criminal offense[s]." This broad jurisdiction-stripping provision is known as the "criminal-alien bar." The only exceptions to the provision's otherwise all-encompassing language are found in §1252(a)(2)(D), which states that "[n]othing in subparagraph . . . (C) . . . shall be construed as precluding review of constitutional claims or questions [**284] of law." Thus, under the criminal-alien bar, any claim that neither is constitutional nor raises a question of law is unreviewable. Because petitioners raise no constitutional claim and due diligence in the equitable-tolling context is not a "question of law," their claims are unreviewable.

A

Equitable tolling's due-diligence requirement presents a mixed question of law and fact. A litigant will qualify for equitable tolling only if he "has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." Lozano v. Montoya Alvarez, 572 U. S. 1, 10, 134 S. Ct. 1224, 188 L. Ed. 2d 200 (2014). To determine [***26] whether a litigant has exercised due diligence, judges must conduct what this Court has characterized as an "'equitable, often fact-intensive'" inquiry, considering "in detail" the unique facts of each case to decide whether a litigant's efforts were reasonable in light of his circumstances. Holland v. Florida, 560 U. S. 631, 653-654, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (Breyer, J., for the Court). In other words, courts ask "whether the historical facts found satisfy the legal test," which, as this Court recently (and unanimously) recognized, is a

quintessential "'mixed question' of law and fact." U. S. Bank N. A. v. Village at Lakeridge, LLC, 583 U. S. ___, ___, 138 S. Ct. 960, 200 L. Ed. 2d 218, 226 (2018) (quoting Pullman-Standard v. Swint, 456 U. S. 273, 289, n. 19, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)); but see ante, at ___ - ___, 206 L. Ed. 2d, at 277.

B

The text of §1252(a)(2)(D) authorizes courts to review only "constitutional claims or questions of law." It does not refer to mixed questions of law and fact, and cannot be divined to do so. As the statute's plain language and structure demonstrate, "questions of law" cannot reasonably be read to include mixed questions.

Although the statute does not define "questions of law," longstanding historical practice indicates that the phrase does not encompass mixed questions of law and fact. For well over a century, this Court has recognized questions of law, questions of fact, and mixed questions of law and fact as three discrete categories. See, e.g. [***27] , Pullman-Standard, supra, at 288, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (distinguishing between a "question of law," a "mixed question of law and fact," and a "pure question of fact"); Ross v. Day, 232 U. S. 110, 116, 34 S. Ct. 233, 58 L. Ed. 528 (1914) (distinguishing between "a mere question of law" and "a mixed [*1075] question of law and fact"); Bates & Guild Co. v. Payne, 194 U. S. 106, 109, 24 S. Ct. 595, 48 L. Ed. 894 (1904) (distinguishing between "mixed questions of law and fact" and questions "of law alone"); Jewell v. Knight, 123 U. S. 426, 432, 8 S. Ct. 193, 31 L. Ed. 190 (1887) (distinguishing between "questions of law only," "questions of fact," and questions "of mixed law and fact"); Republican River Bridge Co. v. Kansas Pacific R. Co., 92 U. S. 315, 318-319, 23 L. Ed. 515 (1876) (distinguishing between a "mixed question of law and fact," a "law question," and a "fact [question]"). A leading civil procedure treatise at the time of §1252(a)(2)(D)'s enactment confirms this understanding. See 9A C. Wright & A. Miller, Federal Practice and Procedure §§2588-2589 (2d ed. 1995) (distinguishing [**285] between conclusions and questions of law, and "mixed questions of law and fact").

The majority resists this conclusion by pointing to cases in which the Court has characterized mixed questions as either legal or factual. But this occasional emphasis on either law or fact does not change the reality that many questions include both. This Court sometimes uses these two categories because "[m]ixed questions are not all alike" and, in certain contexts, this Court must distinguish between them by determining [***28] whether they present primarily legal or primarily factual inquiries. Village at Lakeridge, supra, at ___-___, 138 S. Ct. 960, 200 L. Ed. 2d 218, at 225 (whether a creditor is a nonstatutory insider presents a factual inquiry); see also Neitzke v. Williams, 490 U. S. 319, 326, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) (whether a complaint fails to state a claim presents a legal inquiry).

The Court often uses these labels in contexts that lend themselves to a fact/law dichotomy. For example, it asks whether a question is primarily legal or primarily factual when it needs to determine the appropriate standard of appellate review. See, e.g., Village at Lakeridge, supra, at ___, 138 S. Ct. 960, 200 L. Ed. 2d 218, at 225.A similar dichotomy arises when the Court considers whether an issue is one for the judge or jury. See, e.g., United States v. Gaudin, 515 U. S. 506, 512, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) ("the application-of-legal-standard-to-fact sort of question . . ., commonly called a 'mixed question of law and fact,' has typically been resolved by juries" as a fact issue).

But these considerations are irrelevant in the context of a statutory judicial-review provision such as §1252(a)(2), which contains text that refers only to "questions of law." The federal appellate judges who review claims under this provision are competent to review legal, factual, and mixed questions alike; their authority is constrained only by the statutory text. Our task, therefore, is simply to interpret the words of the [***29] statute, which invoke no forced dichotomy because Congress could have easily included mixed questions in the text if it wanted to do so. See, e.g., 38 U. S. C. §7292(d) (referring to a "challenge to a law . . . as applied to the facts of a particular case" as distinct from "questions of law"). Accordingly, there is no need to place the due-diligence inquiry into either category here.

[*1076] Moreover, conflating "questions of law" with mixed questions would lead to absurd results in light of the statute's structure. The criminal-alien bar, which directly precedes 8 U. S. C. §1252(a)(2)(D), is an unequivocally [**286] broad jurisdiction-stripping provision, barring review "[n]otwithstanding any other provision of law (statutory or nonstatutory)." §1252(a)(2)(C). That is the default rule. Section 1252(a)(2)(D) merely delineates two narrow exceptions to this criminal-alien bar—"constitutional claims" and "questions of law."

Reading "questions of law" to include all mixed questions would turn §1252(a)(2)'s structure on its head. It would transform §1252(a)(2)(D)'s narrow exception into a broad provision permitting judicial review of all criminal aliens' challenges to their removal proceedings except the precious few that raise only pure questions of fact. Because those questions are already effectively unreviewable [***30] under the Immigration and Nationality Act's (INA's) extremely deferential standard, §1252(b)(4)(B) (Board's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"), this interpretation would reduce the jurisdiction-stripping provision to a near nullity. Put another way, the exception would all but swallow the rule. The logical reading of §1252(a)(2) is that the exception is narrower than the rule and covers only what is stated in the text: constitutional claims and questions of law.

II

Undeterred by the statute's text and structure, the majority concludes that criminal aliens are entitled to judicial review of any question involving the application of established facts to a legal standard. Ante, at ___ - ___, 206 L. Ed. 2d, at 275-276. Even a fact-intensive mixed question like due diligence, which requires "[p]recious little" "legal work," Village at Lakeridge, 583 U. S., at ___, 138 S. Ct. 960, 200 L. Ed. 2d 218, at 228, is a "question of law" according to the majority. To justify its erroneous reading of the text, the majority resorts to the presumption favoring judicial review and to legislative intent. Neither interpretive tool is appropriate for, or helpful to, the majority's analysis.

A

The majority relies heavily on the presumption favoring judicial [***31] review of agency action as set out in our modern cases. Ante, at ___ - ___, 206 L. Ed. 2d, at 278-279. Even accepting those precedents, which no party asks us to reconsider, the presumption does no work here because the statute's text and structure plainly preclude review of mixed questions. [*1077]

1

As an initial matter, I have come to have doubts about our modern cases [**287] applying the presumption of reviewability. Courts have long understood that they "generally have jurisdiction to grant relief " when individuals are injured by unlawful administrative action. American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 108, 23 S. Ct. 33, 47 L. Ed. 90 (1902). Applying this well-settled principle, we have refused to read a statute's "silence . . . as to judicial review" to preclude such review. Stark v. Wickard, 321 U. S. 288, 309, 64 S. Ct. 559, 88 L. Ed. 733 (1944); see also Board of Governors, FRS v. Agnew, 329 U. S. 441, 444, 67 S. Ct. 411, 91 L. Ed. 408 (1947). But the modern presumption of reviewability relied on by the majority today goes far beyond this traditional approach.

The modern presumption developed against the backdrop of the Administrative Procedure Act (APA). See Abbott Laboratories v. Gardner, 387 U. S. 136, 140-141, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); see also Weyerhaeuser Co. v. United States Fish and Wildlife Serv., 586 U.S. ___, ___, 139 S. Ct. 361, 202 L. Ed. 2d 269, 274 (2018)). In that statute, Congress created a general right of judicial review for individuals injured by agency action. 5 U. S. C. §702. Notably, however, Congress also specified that this right did not apply when "statutes preclude judicial review." §701(a)(1).

Rather than recognize that courts should give the words of both [***32] the APA and agencies' organic statutes their natural meaning, the Court relied on "[t]he spirit of [legislators'] statements" in Committee Reports and the "broadly remedial purposes of the [APA]" to craft a strong presumption of reviewability. Heikkila v. Barber, 345 U. S. 229, 232, 73 S. Ct. 603, 97 L. Ed. 972 (1953). The Court ultimately concluded that statutory text alone, even that which "appears to bar [judicial review]," is "not conclusive." Id., at 233, 73 S. Ct. 603, 97 L. Ed. 972.

Under this approach, a court will yield its jurisdiction "only upon a showing of 'clear and convincing evidence,'" drawn from a statute's purpose and legislative history, that Congress "intended" as much. Abbott Laboratories, supra, at 139, 141, 87 S. Ct. 1507, 18 L. Ed. 2d 681; see also ante, at ___, 206 L. Ed. 2d, at 278.

There are at least three reasons to doubt the soundness of this modern presumption. First, it elevates the supposed purpose or "spirit" of the APA over the statute's text. The "spirit" of a law is nothing more than "the unhappy interpretive conception of a supposedly better policy than can be found in the words of [the] authoritative text." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 344 (2012). Its invocation represents a "bald assertion of an unspecified and hence unbounded judicial power to ignore what the law says." Id., at 343. And it is especially problematic to rely [***33] on the "spirit" of the APA in actions arising under a separate substantive statute with a judicial-review provision that is entirely distinct from the APA, such as the INA.

Second, the Court's test for rebutting the presumption relies heavily on legislative intent, inviting courts to discern the mental processes of legislators through legislative history. But "[e]ven assuming a majority of Congress read the [legislative history], agreed with it, and voted for [the statute] with the same intent, 'we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.'" [**288] Digital Realty Trust, Inc. v. Somers, 583 U. S. ___, ___, 138 S. Ct. 767, 200 L. Ed. 2d 15 (2018) (Thomas, J., concurring in part and concurring in judgment) (quoting Lawson v. FMR LLC, 571 U.S. 429, 459-460, 134 S. Ct. 1158, 188 L. Ed. 2d 158 (2014) (Scalia [*1078] , J., concurring in principal part and concurring in judgment)).

Finally, the clear-and-convincing-evidence requirement appears to conflict with the text of the Constitution. Under Articles I and III, Congress has the authority to establish the jurisdiction of inferior federal courts and to regulate the appellate jurisdiction of this Court. See Art. I, §8, cl. 9; Art. III, §2, cl. 2; see also Patchak v. Zinke, 583 U. S. ___, ___-___, 138 S. Ct. 897, 200 L. Ed. 2d 92, 103 (2018)). It occasionally wields this power to prevent federal courts from reviewing certain actions through jurisdiction-stripping [***34] statutes. See, e.g., 12 U. S. C. §§1818(i)(1), 4208; 15 U. S. C. §719h(c)(3); 31 U. S. C. §3730(e)(4)(A). Using this modern presumption, however, the Court has reached the opposite result, despite a statute's plain text. See, e.g., INS v. St. Cyr, 533 U. S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001); see also ante, at ___ - ___, 206 L. Ed. 2d, at 278-279. By placing heightened requirements on statutes promulgated under Congress' exclusive authority rather than simply giving effect to their ordinary meaning, courts upset the delicate balance of power reflected in the Constitution's text.

2

Even assuming that the modern presumption is justified and can properly be applied to actions outside the APA context, it does no work in these cases. First, as explained above, "questions of law" cannot reasonably be read to include mixed questions. See supra, at ___ - ___, 206 L. Ed. 2d, at 284-286; cf. Kucana v. Holder, 558 U.S. 233, 251, 130 S. Ct. 827, 175 L. Ed. 2d 694 (2010). But even if it could, the sweeping language of §1252(a)(2)(C) provides clear and convincing evidence that judicial review of mixed questions is barred. The broad language of that provision leaves no room for ambiguity as to Congress' design. In erecting the criminal-alien bar, Congress unequivocally precluded judicial review of wide swaths of claims. The presumption, to the extent it should apply here at all, is thus firmly rebutted.

The Court nevertheless concludes that the presumption of reviewability dictates today's result. It [***35] bases this conclusion on the observation that "interpreting [§1252(a)(2)(D)] to exclude mixed questions would effectively foreclose judicial review of the Board's determinations so long as it announced the correct legal standard." Ante, at ___ - ___, 206 L. Ed. 2d, at 278-279. But "[t]he resulting barrier to meaningful judicial review" is not a problem in need of a judicial solution, ante, at ___, 206 L. Ed. 2d, at 279—it is evidence of Congress' design, which is precisely the sort of "clear and convincing evidence" that should "dislodge the presumption," Kucana, supra, at 252, 130 S. Ct. 827, 175 L. Ed. 2d 694 (internal quotation marks omitted). By using Congress' preclusive design to justify rather than dislodge the presumption, the majority dramatically expands the presumption, rendering it effectively irrebuttable.

B

The majority next relies on the purported purpose of §1252(a)(2)(D) to [**289] justify its reading of the text. It claims that Congress intended to provide an "'adequate substitute' for habeas in view of St. Cyr's guidance" regarding the scope of the Suspension Clause. Ante, at ___, 206 L. Ed. 2d, at 281. As explained above, legislative intent, to the extent it exists independent of the words in the statute, is unhelpful to the proper interpretation of a statute's text. See supra, at ___, 206 L. Ed. 2d, at 287. But its invocation is especially unhelpful to the majority here. Even assuming Congress [***36] looked to St. Cyr when drafting §1252(a)(2)(D), the limited "guidance" provided in that opinion supports [*1079] my reading of the statute, not the majority's.

As an initial matter, the Court in St. Cyr expressly declined to resolve "the difficult question of what the Suspension Clause protects." St. Cyr, 533 U. S., at 301, n. 13, 121 S. Ct. 2271, 150 L. Ed. 2d 347. Respondent in that case argued that §1252(a)(2)(C) would violate the Suspension Clause if it were read to preclude review of all questions of law in habeas proceedings. But rather than affirm that position, the Court concluded that it was enough to merely identify that "substantial constitutional questio[n]" to warrant rejection of the Government's interpretation. Id., at 300, 121 S. Ct. 2271, 150 L. Ed. 2d 347. Indeed, the meaning of the Suspension Clause and its applicability to removal proceedings remain open questions. See Department of

Homeland Security v. Thuraissigiam, post, 140 S. Ct. 427, 205 L. Ed. 2d 244 (2019) (granting certiorari). In explaining its decision, the Court in St. Cyr merely asserted that the Suspension Clause "protects the writ as it existed in 1789" and noted that "there is substantial evidence . . . that pure questions of law" were generally covered by the common-law writ. 533 U. S., at 301, 304-305, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (emphasis added; internal quotation marks omitted). The decision said nothing about mixed questions or the application of settled facts to a legal standard.

The majority [***37] relies on one sentence of dicta in St. Cyr, which states that the common-law writ addressed "the erroneous application or interpretation of statutes." Id., at 302, 121 S. Ct. 2271, 150 L. Ed. 2d 347; see ante, at ___, 206 L. Ed. 2d, at 280. But the application of a statute does not always involve applying facts to a legal standard, nor is it necessarily analogous to the equitable and fact-intensive due-diligence inquiry.

The majority next suggests that Congress was familiar with the underlying details of common-law cases cited in St. Cyr, ante, at ___, 206 L. Ed. 2d, at 280, or the lower court decisions expanding on St. Cyr's dicta, ante, at ___, 206 L. Ed. 2d, at 281. But such a "fanciful presumption of legislative knowledge" cannot justify the majority's position. Scalia, Reading Law, at 324. And if Congress were presumed to have such a robust [**290] knowledge of our precedents, one would certainly expect it to be familiar with our historical practice of using "questions of law" and "mixed questions" as distinct terms. See supra, at ——, 206 L. Ed. 2d, at 284.

The only guidance provided by St. Cyr's dicta concerned "pure questions of law." 533 U. S., at 305, 121 S. Ct. 2271, 150 L. Ed. 2d 347; see also id., at 314, n. 38, 121 S. Ct. 2271, 150 L. Ed. 2d 347 ("this case raises only a pure question of law . . ., not . . . an objection to the manner in which discretion was exercised"). So even if it were appropriate to assume that Congress enacted §1252(a)(2)(D) with the collective intention [***38] of following St. Cyr's guidance [*1080] (which it is not), that statutory purpose supports reading "questions of law" to mean just that: "questions of law."

***

Ironically, the majority refers to §1252(a)(2)(D) as the "Limited Review Provision." Ante, at ___, 206 L. Ed. 2d, at 275. But according to the majority's interpretation, it is anything but "limited"—nearly all claims are reviewable. That reading contradicts the plain text and structure of §1252(a)(2), which was enacted to strip federal courts of their jurisdiction to review most criminal aliens' claims challenging removal proceedings. The Constitution gives the Legislative Branch the authority to curtail that jurisdiction. We cannot simply invoke this presumption of reviewability to circumvent Congress' decision. Doing so upsets, not preserves, the separation of powers reflected in the Constitution's text. I respectfully dissent.

NIDAL KHALID NASRALLAH, Petitioner v. WILLIAM P. BARR, ATTORNEY GENERAL

Justice Kavanaugh delivered the opinion of the Court.

Under federal immigration law, noncitizens who commit certain crimes are removable from the United States. During removal proceedings, a noncitizen may raise claims under the international Convention Against Torture, known as CAT. If the noncitizen demonstrates that he likely would be tortured if removed to the designated country of removal, then he is entitled to CAT relief and may not be removed to that country (although he still may be removed to other countries).

If the immigration judge orders removal and denies CAT relief, the noncitizen may appeal to the Board of Immigration Appeals. If the Board of Immigration Appeals orders removal and denies CAT relief, the noncitizen may obtain judicial review in a federal court of appeals of both the final order of removal and the CAT order.

In the court of appeals, for cases involving noncitizens who have [***6] committed any crime specified in 8 U. S. C. §1252(a)(2)(C), federal law limits the scope of judicial review. Those noncitizens may obtain judicial [*1688] review of constitutional and legal challenges to the final order of removal, but not of factual challenges to the final order of removal.

Everyone agrees on all of the above. The dispute here concerns the scope of judicial review of CAT orders for those noncitizens who have committed crimes specified in §1252(a)(2)(C). The Government argues that judicial review of a CAT order is analogous to judicial review of a final order of removal. The Government contends, in other words, that the court of appeals may review the noncitizen's constitutional and legal challenges to a CAT order, but not the noncitizen's factual challenges to the CAT order. Nasrallah responds that the court of appeals may review the noncitizen's constitutional, legal, and factual challenges to the CAT order, although Nasrallah acknowledges that judicial review of factual challenges to CAT orders must be highly deferential.

So the narrow question before the Court is whether, in a case involving a noncitizen who committed a crime specified in §1252(a)(2)(C), the court [**120] of appeals should review the noncitizen's factual challenges [***7] to the CAT order (i) not at all or (ii) deferentially. HN4 LEdHN[4] [4] Based on the text of the statute, we conclude that the court of appeals should review factual challenges to the CAT order deferentially. We therefore reverse the judgment of the U. S. Court of Appeals for the Eleventh Circuit.

I

Nidal Khalid Nasrallah is a native and citizen of Lebanon. In 2006, when he was 17 years old, Nasrallah came to the United States on a tourist visa. In 2007, he became a lawful permanent resident. In 2013, Nasrallah pled guilty to two counts of receiving stolen property. The U. S. District Court for the Western District of North Carolina sentenced Nasrallah to 364 days in prison.

Based on Nasrallah's conviction, the Government initiated deportation proceedings. See 8 U. S. C. §1227(a)(2)(A)(i). In those proceedings, Nasrallah applied for CAT relief to prevent his removal to Lebanon. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, p. 20, 1465 U. N. T. S. 114. Nasrallah alleged that he was a member of the Druze religion, and that he had been tortured by Hezbollah before he came to the United States. Nasrallah argued that he would be tortured [***8] again if returned to Lebanon.

The Immigration Judge determined that Nasrallah was removable. As to the CAT claim, the Immigration Judge found that Nasrallah had previously suffered torture at the hands of Hezbollah. Based on Nasrallah's past experience and the current political conditions in Lebanon, the Immigration Judge concluded that Nasrallah likely would be tortured again if returned to Lebanon. The Immigration Judge ordered Nasrallah removed, but also granted CAT relief and thereby blocked Nasrallah's removal to Lebanon.

On appeal, the Board of Immigration Appeals disagreed that Nasrallah likely would be tortured in Lebanon. The Board therefore vacated the order granting CAT relief and ordered Nasrallah removed to Lebanon.

Nasrallah filed a petition for review in the U. S. Court of Appeals for the Eleventh Circuit, claiming (among other [*1689] things) that the Board of Immigration Appeals erred in finding that he would not likely be tortured in Lebanon. Nasrallah raised factual challenges to the Board's CAT order. Applying Circuit precedent, the Eleventh Circuit declined to review Nasrallah's factual challenges. Nasrallah v. United States Attorney General, 762 Fed. Appx. 638 (2019). The court explained that Nasrallah had been convicted of a crime [***9] specified in 8 U. S. C. §1252(a)(2)(C). HN6 LEdHN[6] [6] Noncitizens convicted of §1252(a)(2)(C) crimes may not obtain judicial review of factual challenges to a "final order of removal." §§1252(a)(2)(C)-(D). Under Eleventh Circuit precedent, that statute [**121] also precludes judicial review of factual challenges to the CAT order.

Nasrallah contends that the Eleventh Circuit should have reviewed his factual challenges to the CAT order because the statute bars review only of factual challenges to a "final order of removal." According to Nasrallah, a CAT order is not a "final order of removal" and does not

affect the validity of a final order of removal. Therefore, Nasrallah argues, the statute by its terms does not bar judicial review of factual challenges to a CAT order.

The Courts of Appeals are divided over whether §§1252(a)(2)(C) and (D) preclude judicial review of factual challenges to a CAT order. Most Courts of Appeals have sided with the Government; the Seventh and Ninth Circuits have gone the other way. Compare Gourdet v. Holder, 587 F. 3d 1, 5 (CA1 2009); Ortiz-Franco v. Holder, 782 F. 3d 81, 88 (CA2 2015); Pieschacon-Villegas v. AG of the United States, 671 F.3d 303, 309-310 (CA3 2011); Oxygene v. Lynch, 813 F. 3d 541, 545 (CA4 2016); Escudero-Arciniega v. Holder, 702 F. 3d 781, 785 (CA5 2012); Tran v. Gonzales, 447 F. 3d 937, 943 (CA6 2006); Lovan v. Holder, 574 F. 3d 990, 998 (CA8 2009); Cole v. United States Attorney General, 712 F. 3d 517, 532 (CA11 2013), with Wanjiru v. Holder, 705 F. 3d 258, 264 (CA7 2013); Vinh Tan Nguyen v. Holder, 763 F. 3d 1022, 1029 (CA9 2014).

In light of the Circuit split on this important question of federal law, we granted certiorari. 589 U. S. ___, 140 S. Ct. 1062, 206 L. Ed. 2d 271 (2019).

II

When a noncitizen is removable because he committed a crime specified in §1252(a)(2)(C), immigration law bars judicial review of the noncitizen's factual challenges [***10] to his final order of removal. In the Government's view, the law also bars judicial review of the noncitizen's factual challenges to a CAT order. Nasrallah disagrees. We conclude that Nasrallah has the better of the statutory argument.

A

We begin by describing the three interlocking statutes that provide for judicial review of final orders of removal and CAT orders.

The first relevant statute is the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. [*1690] That Act authorizes noncitizens to obtain direct "review of a final order of removal" in a court of appeals. 110 Stat. 3009-607, 8 U. S. C. §1252(a)(1). As the parties agree, in the deportation context, a "final order of removal" is a final order "concluding that the [**122] alien is deportable or ordering deportation." §1101(a)(47)(A); see §309(d)(2), 110 Stat. 3009-627; Calcano-Martinez v. INS, 533 U. S. 348, 350, n. 1, 121 S. Ct. 2268, 150 L. Ed. 2d 392 (2001). The Act also states that judicial review "of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U. S. C. §1252(b)(9); see 110 Stat. 3009-610. In other words, a noncitizen's various challenges arising from the removal proceeding must be "consolidated in a petition for review and considered by the courts [***11] of appeals." INS v. St. Cyr, 533 U. S. 289, 313, 121 S. Ct. 2271, 150 L. Ed.

2d 347, and n. 37 (2001). By consolidating the issues arising from a final order of removal, eliminating review in the district courts, and supplying direct review in the courts of appeals, the Act expedites judicial review of final orders of removal.

The second relevant statute is the Foreign Affairs Reform and Restructuring Act of 1998, known as FARRA. FARRA implements Article 3 of the international Convention Against Torture, known as CAT. As relevant here, CAT prohibits removal of a noncitizen to a country where the noncitizen likely would be tortured. Importantly for present purposes, §2242(d) of FARRA provides for judicial review of CAT claims "as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U. S. C. 1252)." 112 Stat. 2681-822, note following 8 U. S. C. §1231.

The third relevant statute is the REAL ID Act of 2005. As relevant here, that Act responded to this Court's 2001 decision in St. Cyr. HN10 LEdHN[10] [10] In St. Cyr, this Court ruled that the 1996 Act, although purporting to eliminate district court review of final orders of removal, did not eliminate district court review via habeas corpus of constitutional or legal challenges to final orders of removal. 533 U. S., at 312-313. The REAL ID Act clarified that final orders of removal may not be reviewed in district [***12] courts, even via habeas corpus, and may be reviewed only in the courts of appeals. See 119 Stat. 310, 8 U. S. C. §1252(a)(5). The REAL ID Act also provided that CAT orders likewise may not be reviewed in district courts, even via habeas corpus, and may be reviewed only in the courts of appeals. See 119 Stat. 310, 8 U. S. C. §1252(a)(4).

B

Those three Acts establish that CAT orders may be reviewed together with final orders of removal in a court of appeals. But judicial review of final orders of removal is somewhat limited in cases (such as Nasrallah's) involving noncitizens convicted of crimes specified in §1252(a)(2)(C). In those cases, a court of appeals may review constitutional or legal challenges to a final order of removal, but the court of appeals may not review factual challenges to a final order of removal. §§1252(a)(2)(C)-(D); see Guerrero-Lasprilla v. Barr, 589 U. S. ___, ___-___, 140 S. Ct. 1062, 206 L. Ed. 2d 271, 277-279 (2020)).

The question in this case is the following: By precluding judicial review of factual challenges to final orders [**123] of removal, does the law also preclude judicial review of factual challenges to CAT orders? We conclude that it does not.

[*1691] The relevant statutory text precludes judicial review of factual challenges to final orders of removal—and only to final orders of removal. In the deportation context, a final "order of removal" is a final order "concluding [***13] that the alien is deportable or ordering deportation." §1101(a)(47)(A).

A CAT order is not itself a final order of removal because it is not an order "concluding that the alien is deportable or ordering deportation." As the Government acknowledges, a CAT order does not disturb the final order of removal. Brief for Respondent 26. An order granting CAT relief means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country. But the noncitizen still "may be removed at any time to another country where he or she is not likely to be tortured." 8 CFR §§1208.17(b)(2), 1208.16(f).

Even though CAT orders are not the same as final orders of removal, a question remains: Do CAT orders merge into final orders of removal in the same way as, say, an immigration judge's evidentiary rulings merge into final orders of removal? The answer is no. HN14 LEdHN[14] [14] For purposes of this statute, final orders of removal encompass only the rulings made by the immigration judge or Board of Immigration Appeals that affect the validity of the final order [***14] of removal. As this Court phrased it in INS v. Chadha, review of a final order of removal "includes all matters on which the validity of the final order is contingent." 462 U. S. 919, 938, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) (internal quotation marks omitted). The rulings that affect the validity of the final order of removal merge into the final order of removal for purposes of judicial review. But the immigration judge's or the Board's ruling on a CAT claim does not affect the validity of the final order of removal and therefore does not merge into the final order of removal.

To be sure, as noted above, FARRA provides that a CAT order is reviewable "as part of the review of a final order of removal" under 8 U. S. C. §1252. §2242(d), 112 Stat. 2681-822; see also 8 U. S. C. §1252(a)(4). Likewise, §1252(b)(9) provides that "[j]udicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States [**124] under this subchapter shall be available only in judicial review of a final order under this section." §1252(b)(9). But FARRA and §1252(b)(9) simply establish that a CAT order may be reviewed together with the final order of removal, not that a CAT order is the same as, or affects the validity of, a final order of removal.

[*1692] Consider an analogy. Suppose a statute furnishes [***15] appellate review of convictions and sentences in a single appellate proceeding. Suppose that the statute also precludes appellate review of certain factual challenges to the sentence. Would that statute bar appellate review of factual challenges to the conviction, just because the conviction and sentence are reviewed together? No. The same is true here. HN16 LEdHN[16] [16] A CAT order may be reviewed together with the final order of removal. But a CAT order is distinct from a final order of removal and does not affect the validity of the final order of removal. The CAT order therefore does not merge into the final order of removal for purposes of §§1252(a)(2)(C)-(D)'s limitation on the scope of judicial review. HN17 LEdHN[17] [17] In short, as a matter of straightforward

statutory interpretation, Congress's decision to bar judicial review of factual challenges to final orders of removal does not bar judicial review of factual challenges to CAT orders.

It would be easy enough for Congress to preclude judicial review of factual challenges to CAT orders, just as Congress has precluded judicial review of factual challenges to certain final orders of removal. But Congress has not done so, and it is not the proper role of the courts to rewrite the [***16] laws passed by Congress and signed by the President.

C

Although a noncitizen may obtain judicial review of factual challenges to CAT orders, that review is highly deferential, as Nasrallah acknowledges. See Reply Brief 19-20; Tr. of Oral Arg. 5. HN20 LEdHN[20] [20] The standard of review is the substantial-evidence standard: The agency's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." §1252(b)(4)(B); see Kenyeres v. Ashcroft, 538 U. S. 1301, 1306, 123 S. Ct. 1386, 155 L. Ed. 2d 301 (2003) (Kennedy, J., in chambers); INS v. Elias-Zacarias, 502 U. S. 478, 481, n. 1, 483-484, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992).

But the Government still insists that the statute supplies no judicial review of factual challenges to CAT orders. The Government advances a slew of arguments, but none persuades us.

First, the Government raises an argument based on precedent. In Foti v. Immigration & Naturalization Service, 375 U.S. 217, 84 S. Ct. 306, 11 L. Ed. 2d 281 (1963), this Court interpreted the statutory term "final orders of deportation" in the Immigration and Nationality Act of 1952, as amended in 1961, to encompass "all determinations made during and incident to the administrative proceeding" on removability. Id., at 229. The Government points out (correctly) that the Fotidefinition of a final order—if it still applied here—would cover CAT orders and therefore would bar judicial review of factual challenges to CAT orders. But Foti's interpretation [***17] of the INA as it existed as of 1963 no longer applies. HN21 LEdHN[21] [21] Since 1996, the INA has defined final "order of deportation [**125] " more narrowly than this Court interpreted the term in Foti. A final order of deportation is now defined as a final order "concluding that the alien is deportable or ordering deportation." 8 U. S. C. §1101(a)(47)(A); Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1277; see §309(d)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-627. And as we have explained, an order denying CAT relief does not fall within the statutory definition of an "order of deportation" because it is not an order "concluding that the alien is deportable or ordering deportation." Therefore, Fotidoes not control here.

[*1693] Second, the Government puts forward a structural argument. As the Government sees it, if a CAT order is not merged into a final order of removal, then no statute would authorize a court of appeals to review a CAT order in the first place. That is because, in the Government's

view, the only statute that supplies judicial review of CAT claims is the statute that provides for judicial review of final orders of removal. See §1252(a)(1). The premise of that argument is incorrect. HN22 LEdHN[22] [22] Section 2242(d) of FARRA, enacted in 1998, [***18] expressly provides for judicial review of CAT claims together with the review of final orders of removal. Moreover, as a result of the 2005 REAL ID Act, §1252(a)(4) now provides for direct review of CAT orders in the courts of appeals. See also 8 U. S. C. §1252(b)(9). In short, our decision does not affect the authority of the courts of appeals to review CAT orders.

Third, the Government asserts a congressional intent argument: Why would Congress bar review of factual challenges to a removal order, but allow factual challenges to a CAT order? HN23 LEdHN[23] [23] To begin with, we must adhere to the statutory text, which differentiates between the two kinds of orders for those purposes. In any event, Congress had good reason to distinguish the two. For noncitizens who have committed crimes that subject them to removal, the facts that rendered the noncitizen removable are often not in serious dispute. The relevant facts will usually just be the existence of the noncitizen's prior criminal convictions. By barring review of factual challenges to final orders of removal, Congress prevented further relitigation of the underlying factual bases for those criminal convictions—a point that Senator Abraham, a key proponent of the statutory bar to [***19] judicial review, stressed back in 1996. See 142 Cong. Rec. 7348-7350 (1996).

By contrast, the issues related to a CAT order will not typically have been litigated prior to the alien's removal proceedings. Those factual issues may range from the noncitizen's past experiences in the designated country of removal, to the noncitizen's credibility, to the political or other current conditions in that country. Because the factual components of CAT orders will not previously have been litigated in court and because those factual issues may be critical to determining whether the noncitizen is likely to be tortured if returned, it makes some sense that Congress would provide an opportunity for judicial review, albeit deferential judicial review, of the factual components of a CAT order.

Fourth, the Government advances a policy argument—that judicial review of the factual components of a CAT [**126] order would unduly delay removal proceedings. But today's decision does not affect whether the noncitizen is entitled to judicial review of a CAT order and does not add a new layer of judicial review. HN24 LEdHN[24] [24] All agree that a noncitizen facing removal under these provisions may already seek judicial review in a court [***20] of appeals of constitutional and legal claims relating to both the final order of removal and the CAT order. Our holding today means only that, in that same case in the court of appeals, the court may also review the noncitizen's factual challenges to the CAT order under the deferential substantial-evidence standard. For many years, the Seventh and Ninth Circuits have allowed factual challenges to CAT orders, and the Government has not informed this Court of any significant problems stemming from review in those Circuits.

Fifth, what about the slippery slope? If factual challenges to CAT orders may be reviewed, what other orders will now be subject to factual challenges in the courts of appeals? HN25 LEdHN[25] [25] Importantly, another jurisdiction-stripping [*1694] provision, §1252(a)(2)(B), states that a noncitizen may not bring a factual challenge to orders denying discretionary relief, including cancellation of removal, voluntary departure, adjustment of status, certain inadmissibility waivers, and other determinations "made discretionary by statute." Kucana v. Holder, 558 U. S. 233, 248, 130 S. Ct. 827, 175 L. Ed. 2d 694 (2010). Our decision today therefore has no effect on judicial review of those discretionary determinations.

The Government suggests that our decision here might lead to [***21] judicial review of factual challenges to statutory withholding orders. A statutory withholding order prevents the removal of a noncitizen to a country where the noncitizen's "life or freedom would be threatened" because of the noncitizen's "race, religion, nationality, membership in a particular social group, or political opinion." 8 U. S. C. §1231(b)(3)(A). That question is not presented in this case, and we therefore leave its resolution for another day.

***

In cases where a noncitizen has committed a crime specified in 8 U. S. C. §1252(a)(2)(C), §§1252(a)(2)(C) and (D) preclude judicial review of the noncitizen's factual challenges to a final order of removal. A CAT order is distinct from a final order of removal and does not affect the validity of a final order of removal. Therefore, §§1252(a)(2)(C) and (D) do not preclude judicial review of a noncitizen's factual challenges to a CAT order. We reverse the judgment of the U. S. Court of Appeals for the Eleventh Circuit.

It is so ordered.

Dissent

Justice Thomas, with whom Justice Alito joins, dissenting.

The majority holds that the federal courts of appeals have jurisdiction to review factual challenges to orders resolving claims brought under the [**127] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment [***22] or Punishment. Because I disagree with this interpretation of the relevant immigration laws, I respectfully dissent.

I

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT or Convention) is an international human rights treaty that, as its name

implies, obligates signatories to work to eradicate torture. The Convention was sent to the Senate for its advice and consent in 1990. Although the Senate ultimately ratified the treaty, it also determined that the first 16 articles of the Convention were not self-executing. See S. Exec. Rep. No. 101-30, p. 31 (1990). As such, those articles required implementing legislation before their obligations could become effective as domestic law. See Medellin v. Texas, 552 U.S. 491, 505, n. 2, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

After the treaty was ratified, Congress enacted legislation implementing Article III of the Convention by means of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA). See §2242, 112 Stat. 2681-822, note following 8 U. S. C. §1231. Article III of the Convention prohibits its signatories from "expel[ling], return[ing] or extradit[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." S. Treaty Doc. No. 100-20, p. 20, 1465 U. N. T. S. 114 [*1695] [***23] . Rather than providing detailed guidance on the United States' Article III obligations, FARRA merely restated the treaty's language and perfunctorily declared that "the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3." §2242(b). Congress also provided that no court would have "jurisdiction to consider or review claims raised under the Convention . . . except as part of the review of a final order of removal pursuant to . . . (8 U. S. C. §1252)." §2242(d).

Section 1252, in turn, grants federal courts of appeals jurisdiction to review final orders of removal. 8 U. S. C. §1252(a)(1). It also specifies that "the sole and exclusive means for judicial review of an order of removal" is through "a petition for review filed . . . in accordance with this section." §1252(a)(5). Section 1252 also contains a "zipper clause," which states that "all questions of law or fact . . . arising from any action taken or proceeding brought to remove an alien" shall be consolidated and "available only in judicial review of a final order under this section." §1252(b)(9).

At the same time, petitions for review are subject to a number of limitations, one of which is in §1252(a)(2)(C). That provision—often [***24] referred to as the "criminal-alien bar"—states that "no court shall have jurisdiction to review any final order of removal against an alien who is [**128] removable by reason of having committed" certain criminal offenses.

II

A

This case concerns whether CAT claims brought during a criminal alien's removal proceeding are covered by the criminal-alien bar in §1252(a)(2)(C). The most important provision for determining whether these CAT orders are subject to §1252(a)(2)(C) is the zipper clause. If orders deeming a criminal alien ineligible for CAT relief fall within that clause, then the bar in §1252(a)(2)(C) prevents review; if they do not, then the courts have jurisdiction to review factual challenges related to these orders. I would conclude that CAT orders fall within the zipper clause.

The zipper clause states that "all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien . . . shall be available only in judicial review of a final order under this section." §1252(b)(9) (emphasis added). To "arise" means "to originate from a specified source" or "to come into being." Webster's Third New International Dictionary 117 (1976). And "from" most naturally refers here to the "ground, reason, or basis" [***25] for something. Id., at 913. Thus, §1252(b)(9) covers all "questions of law and fact" that an immigration judge must decide as a result of the Government's decision to initiate removal proceedings against an alien. See also Reno v. American-Arab Anti-Discrimination Comm., 525 U. S. 471, 482, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999) (stating that the zipper clause applies to the "many . . . decisions [*1696] or actions that may be part of the [removal] process").

The plain text clearly covers CAT claims such as the one petitioner raised. The Government initiated removal proceedings, alleging that petitioner had been convicted of a "crime involving moral turpitude." See §1227(a)(2)(A)(i). As a direct result, petitioner applied for CAT relief to prevent his removal. He was denied CAT withholding because the Immigration Judge, during the removal proceeding, determined that petitioner had been convicted of a "particularly serious crime." §1158(b)(2)(A)(ii). On appeal, the Board of Immigration Appeals likewise denied CAT deferral in that selfsame removal proceeding. It is beyond dispute that petitioner's eligibility for CAT relief involved "questions of law and fact" that directly "ar[ose] from" the Government's initiation of removal proceedings against him. §1252(b)(9). The very forms of relief for which petitioner applied—withholding of removal and deferral of removal—confirm [***26] that this relief arose directly from the Government-initiated removal proceeding.

Because the CAT claim falls within the zipper clause, all of §1252's other limitations and procedural requirements imposed on final orders of removal, including §1252(a)(2)(C)'s criminal-alien bar, also apply. Accordingly, courts have no jurisdiction to review factual challenges to CAT claims brought in the course of a criminal alien's removal proceeding.
[**129]

B

My analysis would begin and end with the plain meaning of the zipper clause. Rather than focusing on that clause, however, the majority bases its textual analysis almost exclusively on the

fact that Congress has defined an "'order of [removal]'" as an order "concluding that the alien is deportable or ordering deportation." §1101(a)(47)(A). The majority correctly notes that a CAT order does not fall within this definition. See ante, at ——, 207 L. Ed. 2d, at 122. But it uses that definition to alter the scope of the zipper clause, asserting that the provision only consolidates "[t]he rulings that affect the validity of the final order of removal." Ante, at ——, 207 L. Ed. 2d, at 123.

As just explained, this conclusion contradicts the statute's plain text. The zipper clause does not consolidate all questions of law and fact that "affect [***27] the validity of the final order of removal." Ibid. It instead consolidates "all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien." §1252(b)(9) (emphasis added). "Arising from" covers a broader category of claims than those that simply impact the validity of the order, including petitioner's claim. Thus, the majority's overreliance on the definition of final order of removal is misplaced.

The majority nevertheless contends that its reading is supported by §1252(a)(4). That provision states that CAT claims may be reviewed through a petition for review. According to the majority, this paragraph "provides for direct review of CAT orders in the courts of appeals." Ante, ——, 207 L. Ed. 2d, at 125. That is, the majority views §1252(a)(4) as a specific grant of jurisdiction over CAT claims. Working from that interpretation, the majority contends that the zipper clause and FARRA merely confirm that CAT orders "may be reviewed together with the final order of removal." Ante, ——, 207 L. Ed. 2d, at 123.

[*1697] This is incorrect. Jurisdiction over CAT claims comes from FARRA §2242(d), which states that courts cannot review CAT claims "except as part of the review of a final order of removal pursuant to . . . (8 U. S. C. §1252)." In other words, a [***28] final order of removal is required if a court is to review a CAT order at all. The CAT order then becomes reviewable "as part of " that final order of removal through the zipper clause. And, because FARRA funnels exclusive review of CAT orders through §1252, all of that section's limitations on final orders of removal apply equally to CAT orders, including §1252(a)(2)(C).

Section 1252(a)(2)(4), on the other hand, serves a far simpler function. That provision simply confirms that, because CAT claims can be reviewed only as part of a final order of removal, and final orders of removal can be reviewed only if a petitioner files a petition for review, a CAT claim likewise can be reviewed only if petitioner files a petition for review. See Ortiz-Franco v. Holder, 782 F. 3d 81, 88-89 (CA2 2015); Lovan v. Holder, 574 F. 3d 990, 998 (CA8 2009). My reading of the statute makes sense of [**130] §1252(a)(4), while still giving the zipper clause its ordinary meaning.

C

The majority's interpretation will bring about a sea change in immigration law. Though today's case involves CAT claims, there is good reason to think that the majority's rule will apply equally to statutory withholding of removal. Statutory withholding, a frequently sought form of relief, is available if "the alien's life or freedom would be threatened . . . because of the alien's race, [***29] religion, nationality, membership in a particular social group, or political opinion." §1231(b)(3)(A); see also 8 CFR §208.16(b) (2020). Like CAT withholding, statutory withholding is unavailable to aliens who have committed certain crimes. §1231(b)(3)(B)(ii). And like CAT relief, statutory withholding seeks to prevent removability and is considered after the alien has been deemed removable. See, e.g., Kouambo v. Barr, 943 F. 3d 205, 210 (CA4 2019). Thus, statutory withholding claims also do not affect the validity of the underlying removal order and, in the majority's view, would not be subject to §1252(a)(2)(C).

The Government persuasively argues that adopting petitioner's rule will disturb the courts of appeals' longstanding practice of subjecting criminal aliens' statutory withholding claims to §1252(a)(2)(C). See, e.g., Rendon v. Barr, 952 F. 3d 963, 970 (CA8 2020); Pierre-Paul v. Barr, 930 F. 3d 684, 693-694 (CA5 2019); Gutierrez v. Lynch, 834 F. 3d 800, 804 (CA7 2016); Jeune v. United States Atty. Gen., 810 F. 3d 792, 806, nn. 3, 12 (CA11 2016); Pechenkov v. Holder, 705 F. 3d 444, 448 (CA9 2012). And at oral argument, petitioner all but conceded that the Government is correct on that score. See Tr. of Oral Arg. 20-21. Whistling past the graveyard, the majority attempts to avoid confronting this result by simply stating that the question is not currently before us. Ante, at ——, 207 L. Ed. 2d, at 126. But the Court cannot evade the implications of its decision so easily. We have been presented with two competing statutory interpretations—one of which makes sense of all [***30] relevant provisions without upending settled practice, and one of which significantly undermines §1252(a)(2)(C) by removing a vast swath of claims from [*1698] its reach. If the majority insists on choosing the latter interpretation, it should justify that choice and candidly confront its implications.

III

At bottom, petitioner's argument is largely driven by policy considerations. He contends that the United States has obligated itself not to return any alien, even a criminal alien, to a country where he may be tortured or killed. According to petitioner, if CAT claims cannot be reviewed by courts of appeals, then a vital check on erroneous refoulement will be lost. Petitioner's arguments are not without rhetorical and emotional force. But, like so many other questions related to CAT obligations, Congress chose not to address them through the legislation involved here.

[**131] What Congress has done is enact §1252(a)(2)(C), which strips jurisdiction over certain claims of criminal aliens. That is what is before us, not the broader policy considerations. As has been the case for decades now, the decisions of this Court continue to systematically chip away at this statute and other jurisdictional limitations on immigration claims, [***31] thus thwarting

Congress' intent. See Guerrero-Lasprilla v. Barr, 589 U. S. ___, ___, 140 S. Ct. 1062, 206 L. Ed. 2d 271, 279(2020) (Thomas, J., dissenting); INS v. St. Cyr, 533 U. S. 289, 328-330, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001) (Scalia, J., dissenting). Because today's erroneous result further weakens a duly enacted statute, I respectfully dissent.

United States Immigration and Customs Enforcement Recent Policy Changes

SUBJECT: COVID-19 Vaccination Requirement for Immigration Medical Examination Purpose

September 14, 2021 PA-2021-19

U.S. Citizenship and Immigration Services (USCIS) is updating guidance in the USCIS Policy Manual regarding health-related grounds of inadmissibility in accordance with recently updated requirements issued by the Centers for Disease Control and Prevention (CDC). The updated guidance, which is effective October 1, 2021, requires applicants subject to the immigration medical examination to submit COVID-19 vaccination records before completion of immigration medical examinations conducted in the United States and overseas.

Background

In general, those applying to become a lawful permanent resident, and other applicants as required, must undergo an immigration medical examination to show they are free from any conditions that would render them inadmissible under health-related grounds. USCIS designates eligible physicians as civil surgeons to perform this immigration medical examination for those applying within the United States using the Report of Medical Examination and Vaccination Record (Form I-693).

On August 17, 2021, the CDC released an update to the Vaccination Technical Instructions for Civil Surgeons, requiring applicants subject to the immigration medical examination to complete the COVID-19 vaccine series (currently one or two doses, depending on formulation) and provide documentation of vaccination to the civil surgeon before completion of the immigration medical examination.

This update, contained in Volumes 8 and 9 of the Policy Manual, is effective October 1, 2021, and applies prospectively to all Forms I-693 signed by a civil surgeon on or after that date. The guidance contained in the Policy Manual is controlling and supersedes any related prior guidance.

Policy Highlights

- Explains that, beginning October 1, 2021, applicants who are required to undergo the immigration medical examination must complete the COVID-19 vaccine series before the civil surgeon can complete the immigration medical examination and sign Form I-693.
- Explains that the civil surgeon may indicate that a blanket waiver could apply in cases where the COVID-19 vaccine is not age appropriate, where it is contraindicated, or where it is not routinely available in the state where the civil surgeon practices or where it is limited in supply and would cause significant delay for the applicant to receive the vaccination.

Full Policy available at:
https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210914-COVIDVaccinationRequirement.pdf

DHS Continues Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua and Sudan

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WASHINGTON—The Department of Homeland Security has announced the automatic extension of TPS designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan. TPS beneficiaries from these six countries will retain their status, provided they continue to meet all the individual requirements for TPS eligibility. The automatic extension of TPS-related documentation includes Employment Authorization Documents (EADs) through Dec. 31, 2022.

Eligible individuals whose TPS under the Haiti designation is presently continued by court orders and this notice are strongly encouraged to apply for Haiti TPS under the recently announced new designation. This will ensure their TPS will continue if the courts end their injunctions. In addition, eligible individuals who do not apply for the new Haiti TPS designation during the initial registration period may be prohibited from filing a late initial registration during any subsequent extension of the designation if they do not meet certain conditions.

This extension ensures continued compliance with various court orders issued by federal district courts in the Ramos, Bhattarai, and Saget lawsuits. Current beneficiaries under the TPS designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan do not need to pay a fee or file any application to maintain their TPS and have their TPS-related documentation automatically extended through Dec. 31, 2022.

Beneficiaries with interest in a new EAD with the expiration date of Dec. 31, 2022, displayed on the EAD must file Form I-765, Application for Employment Authorization. A Federal Register notice explaining how TPS beneficiaries, their employers, and benefit-granting agencies may determine which EADs are automatically extended for those beneficiaries, will be published soon.

Full policy available at:
https://www.uscis.gov/news/news-releases/dhs-continues-temporary-protected-status-designations-for-el-salvador-haiti-honduras-nepal-nicaragua