Administrative Law

A Context and Practice Casebook

Second Edition

2020 Supplement

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Contents

Introduction to 2020 Supplement

This update covers the period July 2019, when the course book went to press, through August 2020, when this update went to press. To avoid book bloat, the update is tightly focused. It (1) adds some citations to the most recent decisions of the U.S. Supreme Court; (2) adds an excerpt of the Court's most important administrative law decision last term, *Department of Homeland Security v. Regents of the University of California*; and (3) to make room for that excerpt, includes a shortened excerpt of *Department of Commerce v. New York.* I welcome your feedback on this update or the course book. Please send it to me at richard@uidaho.edu. Thank you.

Chapter 1

Welcome to Administrative Law!

B. What Are Administrative Agencies?

1. Administrative Agencies in the Everyday Sense

p. 7:

At the end of the paragraph beginning "One set of non-cabinet-level federal agencies . . .," please insert this sentence:

While independent agencies enjoy some independence from the President, the U.S. Constitution's separation-of-powers doctrine limits Congress's ability to insulate the heads of those agencies from presidential control. *See Seila Law, LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183, 2195–2197 (2020) (invalidating, on separation of powers grounds, statutory restriction on President's power to remove the single Director who heads independent regulatory agency). Thus, their independence is relative, not absolute.

Chapter 29

Cause of Action

A. The Requirement of a Cause of Action

p. 648:

Please add this citation at the end of the paragraph that begins, "Recall that 80 years ago . . ."

Cf. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1739–1754 (2020) (holding that federal statute known as "Title VII" creates cause of action for claims of employment discrimination based on sexual orientation or transgender status).

Chapter 33

The "Arbitrary and Capricious" Standard

C. Leading Cases on the Arbitrary and Capricious Standard

p. 754:

The first paragraph of section C refers to "three leading" cases on the A&C standard. The Court in 2020 decided a fourth such case, which is excerpted below, following a shortened excerpt of *Department of Commerce v. New York*.

3. Department of Commerce v. New York

a. The *Department of Commerce* Opinion

pp. 775–784:

First, please forgive the major typo in subheading 33.C.3, and in the Exercise on p. 774, which misidentify the respondent: It should be New York, not the United States.

Second, please replace the excerpt on pp. 775–784 with the following excerpt, which I've shortened to make room for an excerpt of a 2020 decision by the U.S. Supreme Court on A&C standard.

Department of Commerce v. New York

139 S. Ct. 2551 (2019)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Secretary of Commerce decided to reinstate a question about citizenship on the 2020 census questionnaire. A group of plaintiffs challenged that decision. . . .

I

A

. . . [T]o apportion Members of the House of Representatives among the States, the Constitution requires an "Enumeration" of the population every 10 years, to be made "in such Manner" as Congress "shall by Law direct." Art. I, §2, cl. 3; Amdt. 14, §2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census

"in such form and content as he may determine." 13 U. S. C. §141(a). The Secretary is aided in that task by the Census Bureau, a statistical agency housed within the Department of Commerce. See §§2, 21.

The population count derived from the census is used not only to apportion representatives but also to allocate federal funds to the States and to draw electoral districts. . . . [The census has long been used also to gather demographic data on matters like people's age, education, citizenship, and income level.] . . .

There have been 23 decennial censuses from the first census in 1790 to the most recent in 2010. Every census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of birth. . . . [To encourage people to complete the census, the Census Bureau eventually developed two versions, a short form that everyone got and that didn't ask about citizenship, and a long form that only some households got and that had many demographic questions, including about citizenship. The 2010 census questionnaire omitted a question about citizenship and almost all other questions seeking demographic information, leaving them questions instead for a different form, the American Community Survey (ACS), which was sent to about 2.6% of households.] . . .

The Census Bureau and former Bureau officials have resisted occasional proposals to resume asking a citizenship question of everyone, on the ground that doing so would discourage noncitizens from responding to the census and lead to a less accurate count of the total population. . . .

B

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a question about citizenship on the 2020 decennial census questionnaire. The Secretary stated that he was acting at the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act (or VRA). . . . DOJ . . . formally requested reinstatement of the citizenship question on the census questionnaire. . . .

The Secretary's memo explained that the Census Bureau initially analyzed, and the Secretary considered, three possible courses of action. [The memo said that the Secretary eventually settled on an approach that blended (1) the Census Bureau's preferred approach, which was to use the ACS data and develop a model for determining citizenship on a census-block level, and (2) the Secretary's preferred approach, which included the citizenship question on the census itself.] . . .

The Secretary "carefully considered" the possibility that reinstating a citizenship question would depress the response rate. But after evaluating the Bureau's "limited empirical evidence" on the question—evidence drawn from estimated non-response rates to previous American Community Surveys and census questionnaires—the Secretary concluded that it was not possible to "determine definitively" whether inquiring about citizenship in the census would materially affect response rates. . . .

C

Shortly after the Secretary announced his decision, two groups of plaintiffs filed suit in Federal District Court in New York, challenging the decision on several grounds. The first group of plaintiffs included 18 States, the District of Columbia, various counties and cities, and the United States Conference of Mayors. . . . The second group of plaintiffs consisted of several non-governmental organizations that work with immigrant and minority communities. . . . [These

plaintiffs—who are respondents in the U.S. Supreme Court—alleged violations of the Enumeration Clause and the federal APA, among other claims.] . . .

In June 2018, the Government submitted to the District Court the Commerce Department's "administrative record": the materials that Secretary Ross considered in making his decision. That record included DOJ's December 2017 letter requesting reinstatement of the citizenship question, as well as several memos from the Census Bureau analyzing the predicted effects of reinstating the question. Shortly thereafter, at DOJ's urging, the Government supplemented the record with a new memo from the Secretary, "intended to provide further background and context regarding" his March 2018 memo. The supplemental memo stated that the Secretary had begun considering whether to add the citizenship question in early 2017, and had inquired whether DOJ "would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act." According to the Secretary, DOJ "formally" requested reinstatement of the citizenship question after that inquiry.

Respondents argued that the supplemental memo indicated that the Government had submitted an incomplete record of the materials considered by the Secretary. . . . [The district court granted respondents' motion to order the government to complete the record, and] the parties jointly stipulated to the inclusion of more than 12,000 pages of additional materials in the administrative record. Among those materials were emails and other records confirming that the Secretary and his staff began exploring the possibility of reinstating a citizenship question shortly after he was confirmed in early 2017, attempted to elicit requests for citizenship data from other agencies, and eventually persuaded DOJ to request reinstatement of the question for VRA enforcement purposes.

In addition, respondents asked the court to authorize discovery outside the administrative record. They claimed that such an unusual step was warranted because they had made a strong preliminary showing that the Secretary had acted in bad faith. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The court also granted that request, authorizing expert discovery and depositions of certain DOJ and Commerce Department officials.

In August and September 2018, the District Court issued orders compelling depositions of Secretary Ross and of the Acting Assistant Attorney General for DOJ's Civil Rights Division. We granted the Government's request to stay the Secretary's deposition pending further review, but we declined to stay the Acting AAG's deposition or the other extra-record discovery that the District Court had authorized.

The District Court held a bench trial and . . . ruled that the Secretary's action was arbitrary and capricious, based on a pretextual rationale, and violated certain provisions of the Census Act.. . . [The government appealed to the Second Circuit and also petitioned the U.S. Supreme Court to grant certiorari before the Second Circuit decided the appeal. The Court granted the petition and accordingly the case skipped over the Second Circuit and went directly to the Court.]

II

[The Court held that at least some of the plaintiffs had Article III standing.] Several States with a disproportionate share of noncitizens, for example, anticipate losing a seat in Congress or qualifying for less federal funding if their populations are undercounted. These are primarily future injuries, which "may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S.

149, 158 (2014) (internal quotation marks omitted). . . .

III

The Enumeration Clause of the Constitution does not provide a basis to set aside the Secretary's decision. The text of that clause "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" and Congress "has delegated its broad authority over the census to the Secretary." [Quoting *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996).] . . .

In light of the early understanding of and long practice under the Enumeration Clause, we conclude that it permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire. . . .

IV

A

. . . The Government . . . argues that the Secretary's decision was not judicially reviewable under the Administrative Procedure Act in the first place [because, under APA § 701(a)(2), it is "committed to agency discretion by law."] . . .

We disagree. . . .

B

At the heart of this suit is respondents' claim that the Secretary abused his discretion in deciding to reinstate a citizenship question. We review the Secretary's exercise of discretion under the deferential "arbitrary and capricious" standard. See 5 U. S. C. §706(2)(A). . . .

. . . As the Bureau acknowledged, each approach—using administrative records alone, or asking about citizenship and using records to fill in the gaps—entailed tradeoffs between accuracy and completeness. Without a citizenship question, the Bureau would need to estimate the citizenship of about 35 million people; with a citizenship question, it would need to estimate the citizenship of only 13.8 million. Under either approach, there would be some errors in both the administrative records and the Bureau's estimates. With a citizenship question, there would also be some erroneous self-responses (about 500,000) and some conflicts between responses and administrative record data (about 9.5 million).

. . . The Secretary opted . . . for the approach that would yield a more complete set of data at an acceptable rate of accuracy, and would require estimating the citizenship of fewer people.

. . . [T]he choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make. He considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision. In overriding that reasonable exercise of discretion, the [district] court improperly substituted its judgment for that of the agency. . . .

V

We now consider the District Court's determination that the Secretary's decision must be set aside because it rested on a pretextual basis, which the Government conceded below would warrant a remand to the agency.

We start with settled propositions. First, in order to permit meaningful judicial review, an agency must "disclose the basis" of its action. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–169 (1962); see also *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.").

Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978). That principle reflects the recognition that further judicial inquiry into "executive motivation" represents "a substantial intrusion" into the workings of another branch of Government and should normally be avoided. [S]ee *Overton Park*, 401 U.S. at 420.

Third, a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons. See *Jagers v. Federal Crop Ins. Corp.*, 758 F.3d 1179, 1185–1186 (CA10 2014). . . . Relatedly, a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. . . . Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).

Finally, we have recognized a narrow exception to the general rule against inquiring into "the mental processes of administrative decisionmakers." *Overton Park*, 401 U.S. at 420. On a "strong showing of bad faith or improper behavior," such an inquiry may be warranted and may justify extra-record discovery. *Ibid.*

The District Court invoked that exception in ordering extra-record discovery here. . . .

We agree with the Government that the District Court should not have ordered extra-record discovery when it did. At that time, the most that was warranted was the order to complete the administrative record. But the new material that the parties stipulated should have been part of the administrative record—which showed, among other things, that the VRA played an insignificant role in the decisionmaking process—largely justified such extra-record discovery as occurred (which did not include the deposition of the Secretary himself). We accordingly review the District Court's ruling on pretext in light of all the evidence in the record before the court, including the extra-record discovery.

That evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process. In the District Court's view, this evidence established that the Secretary had made up his mind to reinstate a citizenship question "well before" receiving DOJ's request, and did so for reasons unknown but unrelated to the VRA.

The Government, on the other hand, contends that there was nothing objectionable or even surprising in this. And we agree—to a point. It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. The record here reflects the sometimes involved nature of Executive Branch decisionmaking, but no particular step in the process stands out as inappropriate or defective.

And yet, viewing the evidence as a whole, we share the District Court's conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. . . .

. . . [U]nlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been

contrived.

. . . Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (CA2 1977) (Friendly, J.). The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

In these unusual circumstances, the District Court was warranted in remanding to the agency, and we affirm that disposition. . . . We do not hold that the agency decision here was substantively invalid. But . . . [r]easoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction. . . .

JUSTICE THOMAS, with whom JUSTICE GORSUCH and JUSTICE KAVANAUGH join, concurring in part and dissenting in part.

[Justice Thomas concurred in the majority's holding that the decision to include a citizenship question on the census questionnaire was not substantively invalid, but dissented from the majority's holding that the explanation for that decision was inadequate, stating:]

The Court's holding reflects an unprecedented departure from our deferential review of discretionary agency decisions. . . .

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and dissenting in part.

. . . I agree with the Court that the Secretary of Commerce provided a pretextual reason for placing a question about citizenship on the short-form census questionnaire and that a remand to the agency is appropriate on that ground. But I write separately because I also believe that the Secretary's decision to add the citizenship question was arbitrary and capricious and therefore violated the Administrative Procedure Act (APA). . . .

JUSTICE ALITO, concurring in part and dissenting in part.

[Justice Alito concluded that the Secretary's decision was unreviewable because it was "committed to agency discretion by law" under APA § 701(a)(2).]

Please add the following after the exercise on p. 786.

4. Department of Homeland Security v. Regents of the University of California

Department of Homeland Security v. Regents of the University of California

140 S. Ct. 1891 (2020)

[Editor's summary: In 2012, the Department of Homeland Security (DHS) announced an immigration program known as Deferred Action for Childhood Arrivals, or DACA. The program allowed certain aliens who entered the United States without lawful authorization while they were children to stay in the United States; this forbearance from being removed from the United States is known as deferred action. DHS encouraged people to apply for deferred action under DACA. For an application to be granted, the applicant had to meet certain criteria, such as having refrained from serious crime, that made him or her "low priority" for removal. Successful applicants got individualized determinations granting them deferred action for renewable periods of three years. They also qualified for work authorization and for Social Security and Medicare benefits. DHS announced DACA in a 2012 memo that was published without any prior public notice or opportunity to comment.

In 2014, DHS issued another memo. It relaxed the eligibility requirements of DACA and created a deferred action program for aliens who were unlawfully present in the United States but whose children were U.S. citizens or lawful permanent residents. The new program was known as DA***P***A (Deferred Action for Parents of Americans and Lawful Permanent Residents).

Twenty-six States, led by Texas, got a nationwide preliminary injunction preventing implementation of the 2014 "DAPA Memorandum." The Fifth Circuit affirmed the preliminary injunction on two grounds. It held, first, that the plaintiffs were likely to succeed in their claim that the memo was a substantive, legislative rule that was procedurally invalid because of DHS's failure to follow the federal APA's notice-and-comment procedures. Second, the Fifth Circuit held that the APA required DAPA to be set aside as "contrary to law" because it was "manifestly contrary to" the Immigration and Nationality Act (INA). The Fifth Circuit's decision was affirmed by an equally divided Court. *United States v. Texas*, 136 S. Ct. 2271 (2016) (*per curiam*). The DAPA Memorandum was never implemented before DHS rescinded it in June 2017, after a change in presidential administration.

In September 2017, the U.S. Attorney General, Jeff Sessions, sent a letter to Acting DHS Secretary Elaine Duke advising her that DHS should rescind DACA as well. General Sessions' letter said that DACA had the "same legal . . . defects" as DAPA. Rather than outright rescission, however, General Sessions' letter urged DHS to "consider an orderly and efficient wind-down process." The day after getting the letter, Acting DHS Secretary Duke issued a memo stating that DACA "should be terminated" based on the decisions in the DAPA litigation and General Sessions' letter. The Duke memo provided for a winding down of the program rather than an immediate revocation of all grants of the deferred action status that, by then, gone to about 700,000 DACA recipients.

The rescission of DACA was challenged in lawsuits brought in three different federal district courts by, among other plaintiffs, the Regents of the University of California, the National Association for the Advancement of Colored People, and individual DACA recipients. The suits alleged, among other claims, that DACA's rescission violated the APA and the equal protection guarantee of the Fifth Amendment. In one of the suits, the district court granted partial summary judgment in favor of the plaintiffs (who are respondents in the U.S. Supreme Court), holding that Acting Secretary Duke's explanation for the rescission was inadequate. The district court stayed its order, however, to permit Duke's successor, Secretary Kirstjen Nielsen, to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority."

In response, Secretary Nielsen issued a memorandum giving three reasons why she believed "the decision to rescind the DACA policy was, and remains, sound." First, she agreed with the Attorney General that DACA was contrary to law. Second, she said that, in any event, DACA was "legally questionable" and on that ground along should be rescinded. Third, she cited several policy reasons for rescission, including that (1) class-based immigration relief should be granted by Congress, rather than through executive non-enforcement; (2) DHS should exercise prosecutorial discretion on "a truly individualized, case-by-case basis"; and (3) DHS should send a public message that the immigration laws would be enforced against all classes and categories of aliens. The Nielsen memo, unlike the Duke memo, acknowledged "asserted reliance interests" in DACA's continuation but determined that they did not "outweigh" the reasons supporting rescission.

The district court to which the Nielsen memo was addressed held that its explanation for rescission was inadequate. That court and the other two district courts ruled against DHS. DHS appealed to three separate federal circuits. After one of those circuits, the Ninth, affirmed the ruling against DHS, the Court granted certiorari in all three cases and consolidated them.]

. . . 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 Court explained the "reasoned decision making" requirement imposed by the APA's "arbitrary and capricious" standard of judicial review.]

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

[DHS argued that the decision to rescind DACA was unreviewable under the APA. Relying on *Heckler v. Chaney*, 470 U.S. 821 (1985), DHS likened DACA to an agency's decision not to undertake enforcement action, a decision that is presumptively "committed to agency discretion by law" and therefore unreviewable under APA § 701(a)(2). DHS reasoned that just as a policy of not taking enforcement action is unreviewable, so is the rescission of that policy. The Court rejected that argument, holding that "the DACA program is more than a non-enforcement policy." For one thing, under DACA, DHS adjudicated individual applications for DACA status and determined whether or not to take an "affirmative act" by approving DACA

status. This was more than just passive refusal to taken enforcement action. For another thing, "[t]he benefits attendant to deferred action [in the form of eligibility to work and to get government benefits] provide further confirmation" that DACA is not just a non-enforcement policy. The Court concluded that DACA's rescission "is subject to review under the APA."]

B

[DHS also argued that judicial review was barred by two jurisdictional provisions in the INA. The Court rejected that argument as well.]

III

A

Deciding whether agency action was adequately explained requires, first, knowing where to look for the agency's explanation. [DHS argued that the Court should consider not only Acting Secretary Duke's memo announcing the rescission in September 2017 but also the memo submitted by Secretary Neilsen nine months later in response to the district court's invitation to provide a fuller explanation. The Court rejected that argument.]

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." [Citation omitted.] 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." [Citations 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 (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 (1947). . . . An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

[The Court determined that DHS took the first route by purporting to elaborate on Acting Secretary Duke's original rationale for rescission. The problem was, Secretary Neilsen's memorandum cited reasons that weren't in Acting Secretary Duke's memo. So it was more than merely an elaboration, yet it was not "deal[ing] with the problem afresh" by taking new action. It was therefore illegitimate, and the Court accordingly considered only Acting Secretary Duke's original explanation for rescinding DACA.] . . . The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. . . .

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."

[Respondents renew the argument that prevailed in the lower courts: namely, that "the Duke Memorandum does not adequately explain the conclusion that DACA is unlawful, and that this conclusion is, in any event, wrong." The Court declined to address that argument because the legality of DACA was, by statute, a matter for the Attorney General, *not* the DHS Secretary, to decide, and the present cases challenged only the DHS Secretary's decision. Accordingly, the

Court was not convinced that the cases before it were "proper vehicles for" addressing whether or not DACA was lawful. In short, the Court ducked that question.]

. . . Instead we focus our attention on respondents' . . . argument . . . that Acting Secretary Duke "failed to consider ... important aspect[s] of the problem" before her. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (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 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. . . .

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 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." [Citations omitted.] The Fifth Circuit's focus on these benefits was central to every stage of its analysis. . . .

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). And the Fifth Circuit was careful to distinguish that forbearance component from eligibility for benefits. As it explained, the "challenged portion of DAPA's deferred-action program" was the decision to make DAPA recipients eligible for benefits. [Citation omitted.] . . . [T]he 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.'" [Citations omitted.] And the Fifth Circuit underscored that nothing in its decision or the preliminary injunction "requires the Secretary to remove any alien or to alter" the Secretary's class-based "enforcement priorities." [Citation omitted.] In other words, the Secretary's forbearance authority was unimpaired.

. . . 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. . . .

. . . [T]he 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.

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 (1996). When an agency changes course, as DHS did here, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, . . . 136 S. Ct. 2117, 2126 (2016) (quoting [*FCC v.*] *Fox*

Television, 556 U.S. [502, 515 (2009)]). "It would be arbitrary and capricious to ignore such matters." *Id.*, at 515. Yet that is what the Duke Memorandum did.

. . . 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. . . .

IV

[The Court held that respondents failed to state a viable claim of an equal protection violation, because their allegations did not "raise a plausible inference that an invidious discriminatory purpose"—namely, hostility toward Hispanics—"was a motivating factor."]

* * *

. . . The appropriate recourse is . . . to remand to DHS so that it may consider the problem anew.

[There were four separate opinions concurring in part and dissenting in part. Justice Sotomayor agreed that DACA's rescission violated the APA but would have allowed respondents a chance on remand to develop their equal protection claim. Justice Thomas, joined by Justices Alito and Gorsuch, agreed that respondents failed to state a viable equal protection claim but disagreed that the rescission violated the APA. Justice Alito wrote to emphasize his view that the federal courts had delayed the implementation of DACA's rescission for almost an entire presidential term "without holding that DACA cannot be rescinded." Justice Kavanaugh's separate opinion argued that the majority should have considered the Nielsen memo.]

Exercise: *Department of Homeland Security* Revisited

The majority cites the following cases that were cited or discussed (or both) earlier in the course book:

- *Heckler v. Chaney*, 470 U.S. 821 (1985)
- *Camp v. Pitts*, 411 U.S. 138 (1973)
- *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)
- *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983)
- *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016)
- *FCC v. Fox Television Stations*, 556 U.S. 502 (2009)

Please review these cases and explain in your own words how their principles affected the analysis in this case. The objective of this exercise is to have you use the Court's decision as a chance to review several fundamental principles of federal administrative law.
